OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 14 November 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 14 November 2017

CONTENTS

JUSTICE COMMITTEE
33rd Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Paul Brown (Legal Services Agency)
George Clark (Quantum Claims)
Thomas Docherty (Which?)
Martin Haggarty (Accident Claims Scotland)
Dr John Kelly (University of Edinburgh)
James Kelly (Glasgow) (Lab)
Michael Matheson (Cabinet Secretary for Justice)
Professor Alan Paterson (University of Strathclyde)
Andrew Tickell (Glasgow Caledonian University)
Dr Stuart Waiton (Abertay University)
Dr Joseph Webster (Queen's University, Belfast)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 14 November 2017

[The Convener opened the meeting at 10:00]

Subordinate Legislation

Telecommunications Restriction Orders (Custodial Institutions) (Scotland) Regulations 2017 [Draft]

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 33rd meeting in 2017. Apologies have been received from Liam McArthur.

Before we move to the first agenda item, we have declarations of interests.

Liam Kerr (North East Scotland) (Con): I declare my interest as a solicitor with a current practising certificate with the Law Society of England and Wales and the Law Society of Scotland. I am also a landlord in Edinburgh's private rented sector and a member of the Scottish Association of Landlords.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I remind members that I am registered on the roll of Scottish solicitors.

The Convener: Those declarations are not necessarily pertinent to item 1, but they will be pertinent to later items on the agenda.

Agenda item 1 is consideration of the draft Telecommunications Restriction Orders (Custodial Institutions) (Scotland) Regulations 2017, which is an affirmative instrument. I welcome Michael Matheson, Cabinet Secretary for Justice, and his officials. Ann Davies is senior principal legal officer in the Scottish Government's directorate for legal services, and Jim O'Neill is senior legal services manager in the Scottish Prison Service.

I refer members to paper 1, which is a note by the clerk, and I ask the cabinet secretary to make a short opening statement.

Michael Matheson (Cabinet Secretary for Justice): Thank you, convener. Members may recall that, through a legislative consent motion in 2015, the Scottish Parliament agreed to two amendments to the United Kingdom's Serious Crime Bill, allowing us to bring forward these regulations. The regulations build on the steps that we have already taken to tackle illicit mobile phone use in prisons. Parliament has already agreed changes to prison rules and made changes to the law to create offences relating to the introduction and possession of mobile phones or their component parts in prison without authorisation, and to allow us to interfere with the wireless spectrum and to pilot interference technology in two prisons to disrupt mobile phone use. I understand that members took the opportunity to learn more about the technology and its capabilities in private, and I am grateful to those who participated in that briefing.

I am clear that the unauthorised use of mobile phones in prison presents a range of serious risks to the security of prisons and to the safety of the public. They can be used to plan escape or indiscipline or to conduct serious organised crime, including drug imports and serious violence, from behind bars. The regulations will support our commitment to reducing the harm caused by serious organised crime, as part of Scotland's serious organised crime strategy.

The challenges posed by unauthorised mobile phones and their component parts in prisons and young offenders institutions are not insignificant. Component parts, such as SIM cards, are easily concealed; we have been able to recover more than 1,500 mobile phones or component parts since 2013, but more will escape detection. We remain committed to minimising the number of mobile phones that enter prisons, to finding phones and, for users who have them, to blocking phones to make sure that they are not able to access networks. With the regulations, the courts will be able to set in place a process to remove particular phones from the networks. That will render them worthless and permanently stop prisoners using them to engage in criminal activity from prison. It will also help the police and prison authorities to maintain the security of our prisons and the safety of our communities.

The regulations will not prevent the introduction of illicit mobile phones or their component parts in prison. However, the successful disabling of a mobile phone will put it beyond use and will seriously disrupt the activities of individuals, including those who are involved in serious and organised crime who would seek to extend their criminal activities, threats or presence beyond the walls of our prisons.

I know that some members will be concerned about the potential impact of the regulations outside prisons, but I trust that members have been given the reassurances that they needed by the opportunities provided to them by my officials to understand the evidence that will be obtained in order to satisfy the courts that the mobile phones are in a prison.

The committee might also find it useful to know that the communication service providers have told us that they would welcome a clear legal instrument that establishes a route by which they

would be compelled to act on these matters. The regulations will provide that clarity.

I am happy to take questions from members.

John Finnie (Highlands and Islands) (Green): Thank you for your statement, cabinet secretary. I availed myself of the briefing last week, but took no reassurance from it. Simple questions that I asked when we discussed the issue previously and which I thought could have been addressed were not, and still have not been, addressed.

I will read from the explanatory note on regulation 3, which is a bit easier for the layperson to understand. It says:

"This is to cater for the situation whereby a communication device is disconnected in error and obviates the need for an individual or the applicant to apply to the sheriff for the order to be varied or discharged."

In what circumstance would that happen?

Michael Matheson: If it was brought to the Prison Service's attention that a phone that had been blocked was not a mobile phone that was in a prison establishment, it could be reconnected to the network. An order issued by the court for the communication service provider to block a mobile phone will contain a provision to allow the phone to be reconnected if an error is identified. Experience to date suggests that the likelihood of such an error happening is extremely rare, but there is provision to allow for reconnection to the network.

John Finnie: I am neither a lawyer nor a telecommunications expert; my job is to understand the legislation and to provide reassurance where that is required. No consultation is taking place on the regulations, and no equality, children's or privacy impact assessments are being done. Why is that the case?

Michael Matheson: The reason for not requiring any further assessment is that the regulations relate to communication devices in the prison estate that are already illegal. In relation to privacy impact assessments, this is not about allowing access to communication between two individuals; rather, it is about communication traffic and the number of phones and SIM cards. Different processes are involved, as I am sure the member is aware. If it would be helpful, perhaps Ann Davies could say a wee bit more about the process that will happen when the orders go before a court and the provision that will be made in such an order to allow the order to be varied should further information become available subsequently.

John Finnie: My concern is about collateral intrusion and the potential impact of interference with health apps in particular. For instance, a Crohn's disease health app that can help people remotely is being trialled. I did a quick search before the meeting and found a press release from the national health service entitled "Using mobile technology for safe and effective care of patients taking multiple medicines". I am talking about things that are done remotely and polypharmacy issues. I asked the official at the briefing whether there had been discussions with the NHS about any potential impact. All I want is for someone to say that there is no impact or, if there is an impact, that it is understood and will be taken into consideration.

I want robust procedures to ensure that there is no abuse of mobile phones and that the law is enforced, but I do not want any suggestion of anyone being made vulnerable. In the past, I have given the example of Inverness prison where, as you know, cabinet secretary, dwelling houses are closer to the prison than you are to me just now. Can you provide any reassurance?

Michael Matheson: I can provide assurances from the experience that we have to date from pilots that we have been operating, which is that no issues have been identified of the nature that you have raised, and some of the establishments involved have residential properties very close by.

The experience that we have to date has been shared with our counterparts in England and Wales, who have been using similar technology, and they have not identified problems or concerns of the type that you have expressed. Further, the Scottish Prison Service has already engaged with the Scottish centre for telecare and telehealth on the issues, and will continue to do so.

Given the way in which the technology operates, it is worth keeping in mind that the vast majority of telecare is provided through landline-based systems, although I suspect that, as time goes by, a greater amount of it will be provided through mobile phone technology.

The data that is collected as part of the process of identifying a phone that is being used within the prison estate and the further measures that are then taken by the Prison Service along with Police Scotland and the service provider will allow a line that is being used to access telecare or telehealth services to be identified. I am confident that the process will allow such uses of a mobile network in close proximity to the prison estate to be identified.

It is also worth keeping in mind that the Prison Service deploys the technology in a way that minimises the risk of its reach going beyond the boundary of the prison walls. I do not want to go into too much detail because it is operationally sensitive—the way in which the data is gathered and verified is obviously sensitive. However, I

assure you that those matters have been thought through. We will continue to engage with stakeholders such as the Scottish centre for telecare and telehealth to make sure that, in operating the technology, the Prison Service will be mindful of the needs of individuals who may live in close proximity to prisons and who wish to make use of telecare and telehealth provisions.

John Finnie: Thank you—that is very reassuring. It would have been more reassuring to have had that information last week, which would have saved me asking those questions.

Mary Fee (West Scotland) (Lab): Good morning, cabinet secretary. I have a similar concern to that raised by John Finnie. At the briefing last week I raised the issue of emergency calls being made outside prison grounds. I have no issue at all with the need for the regulations, but I was quite concerned to hear that, if a call is made to the emergency services because of a threat to life or a health problem immediately outside the perimeter of the prison, that call could be barred. I want a similar reassurance to that given to John Finnie: that you will continue to monitor such issues and work with network providers and the emergency services to make sure that, if such calls are barred, they are reconnected as quickly as possible.

Michael Matheson: I cannot guarantee that the calls will be reconnected as quickly as possible because I am not a communication service provider. However, I can assure you that the process that the regulations provide for allows the Scottish Prison Service to apply for a court order for a mobile phone device to be blocked from the system, which renders it useless. There are a number of steps to go through in that process, so any blocking would not happen immediately.

The interference technology is already used at some of our prison establishments and we have not experienced the issue that you raise to date. There are ways in which we can continue to monitor the situation. The Prison Service is taking a precautionary approach to addressing such issues, if they arise. If such an incident came to the Prison Service's attention, the service would need to look at the other measures that it could take to minimise any recurrence.

This is partly to do with how the technology is deployed. Again, these are operationally sensitive issues and I do not want to give too much detail, because that could be useful to people who wish to circumvent the system. The technology is continually developing, which will allow the Prison Service to continue to adapt its approach and to make sure that it is not causing undue risk to individuals who live in close proximity to our prison estate.

Mary Fee: Thank you. That is helpful.

Liam Kerr: I support the measure, but I did not have the benefit of attending the briefing session the other week so I want you to help me to understand a bit more about it. Am I right that it does not require the finding of a unit and that if a signal is discovered the telecoms provider will then lock down that specific signal? If I am right about that, who monitors for the signal, and who has the task of taking the steps to shut it down—phoning the telecoms provider to say, "There's the signal; lock it down"?

Michael Matheson: The Scottish Prison Service will use the interference technology that allows it to identify whether a mobile is being used in the prison estate and then to capture that data. The Prison Service will then work in partnership with Police Scotland to carry out some checks on that data before going to the communication service provider, which will carry out further checks. Once that process has been completed, the Prison Service can bring the information together and put it to a sheriff, who will determine whether an order should be issued. Once the order has been issued, the communication service provider has a legal responsibility to block that device, which will render it useless. There is a process that has to be gone through.

10:15

I do not want to go into any more detail around the information that the agencies get or take forward to identify a particular phone, but once the court has received that data, it will be in a position to make an informed decision about whether an order should be issued for the communication service provider to take action.

I should say that a memorandum of understanding has been agreed between the Scottish Government, Ofcom and the communication service providers on the implementation and operation of such technology. That has been in place since 2014. We have continued to refresh and develop that as the technology has developed.

Ofcom is responsible for the overall testing of how the Scottish Prison Service utilises the technology. Ofcom needs to be satisfied that the Prison Service is using it appropriately, with the proper safeguards in place. A number of mechanisms are involved, but the process involves several different parties before it gets to court, and it is for the court to consider the evidence before issuing an order.

Liam Kerr: Thank you for that answer.

The Convener: We move to the formal consideration of motion S5M-08386 on the

regulations. The Delegated Powers and Law Reform Committee has considered the regulations and has no comment to make. There will be an opportunity for formal debate, if necessary.

Motion moved,

That the Justice Committee recommends that the Telecommunications Restriction Orders (Custodial Institutions) (Scotland) Regulations 2017 [draft] be approved.—[*Michael Matheson*]

Motion agreed to.

The Convener: That concludes consideration of regulations. The committee's report will note and confirm the outcome of the debate. Are members content to delegate authority to me as convener to clear the final report?

Members *indicated agreement.*

The Convener: I thank the cabinet secretary and Ms Davies, as well as Mr O'Neill from the SPS, for attending the committee. The committee appreciated the full and helpful briefing that we received at Shotts prison and the private briefing that we had last week.

10:18

Meeting suspended.

10:18

On resuming—

Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017 (SSI 2017/329)

The Convener: Agenda item 4 is consideration of three negative instruments. I refer members to the note by the clerk. The first instrument is the Housing (Scotland) Act 2014 (Consequential Provisions) Order 2017. If members have no comments, is the committee agreed that it does not wish to make any recommendations in relation to the order?

Members *indicated agreement.*

Rent Regulation and Assured Tenancies (Forms) (Scotland) Regulations 2017 (SSI 2017/349)

The Convener: The second instrument is the Rent Regulation and Assured Tenancies (Forms) (Scotland) Regulations 2017. If members have no comments, is the committee agreed that it does not wish to make any recommendations in relation to the regulations?

Members *indicated agreement.*

Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2017 (SSI 2017/367)

The Convener: The third instrument is the Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2017 (SSI 2017/367). If members have no comments, is the committee agreed that it does not wish to make any recommendations in relation to the instrument?

Members *indicated agreement.*

10:20

Meeting suspended.

10:21

On resuming—

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

The Convener: Item 4 is our fifth evidence session on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. I welcome Martin Haggarty, managing director of Accident Claims Scotland; Paul Brown, chief executive and principal solicitor of the Legal Services Agency; John Symon, director of Quantum Claims; Professor Alan Paterson of the school of law at the University of Strathclyde; and Thomas Docherty, the parliamentary affairs manager for Which? [*Interruption*.] I beg your pardon; I have misnamed the director of Quantum Claims, who is George Clark. It is nice to have you with us.

I thank Thomas Docherty in particular for providing a written submission. We will move straight to questions, starting with Fulton Mackay.

Fulton MacGregor (Coatbridge and Chryston) (SNP): MacGregor.

The Convener: MacGregor. [*Laughter*.]

Fulton MacGregor: I can let you off for misnaming Mr Clark, but I have been on the committee for a while now, convener. I have also been called Fulton Mackay before.

I have a general question to kick us off. We obviously know that the objective of the bill is to increase access to justice. We have heard evidence from various people on that very issue, but what are the views of the panel? Will the bill increase access to justice? Is there an issue around access to justice in the first place?

Paul Brown (Legal Services Agency): We vigorously support the introduction of class actions or group proceedings. Indeed, it is an idea that has been floating around for my entire career. I can claim to have been involved with two forms of group proceedings. One was the now defunct procedure under the Public Health (Scotland) Act 1897, which was a group procedure. The other was as one of hundreds of pursuers in a class action in New York. Both sets of proceedings were infinitely more straightforward and supportive than the equivalent individual actions.

In the case of the Public Health (Scotland) Act 1897, it was to do with abatement of a nuisance. There were 18 pursuers and only one writ, and the complexity and the costs to the defender were undoubtedly less than they would have been otherwise. The only complexity was the 18 legal aid applications and some people falling off legal aid, but that was my responsibility and not an access-to-justice issue as such. A remedy—the abatement of a nuisance—was obtained fairly speedily and I was impressed by that. That procedure has now been abolished, but the opportunity to take similar actions seems to me to be a good idea.

The New York action was a small claim that would have been unpursuable without a class action. It was an opt-out class action. You get a letter saying, "You are in this claim whether you like it or not, or you can sign a document to get out if you want." I had no reason not to pursue the claim and I was impressed by the procedure. It was far more straightforward than claiming most benefits.

I therefore have no doubt that the introduction of a group procedure would increase access to justice. The main issues would be legal aid and publicity, but problems in that regard can be overcome. I think that the ordinary person who reads the national press or watches the television news and hears about class actions will come to an understanding of them fairly speedily. As I said, my experience is that class actions are hugely less stressful and more straightforward for the pursuers involved.

Professor Alan Paterson (University of Strathclyde): I, too, have been a member of a class action in America. I think that it was for overcharging for gas services and applied to a whole area. Instead of hundreds of thousands of people in the area each having to raise an individual action against the gas company, a collective action was raised. We did not have to opt in, because it was an opt-out process and was very straightforward. That is how to deal with small or medium-level cases involving defective washing machines, for example, where everybody has a common interest and thousands of people are involved. It is not cost effective for thousands of people to have to raise the same action against a washing machine company, a gas company and so on.

As Paul Brown has indicated, though, the problem is how we fund such class actions. We have known for 30 years that class or group actions are a good thing. We have had three reports in Scotland that have all said that we should have class actions, but the problem has been how we fund them. We will no doubt come back to that.

Thomas Docherty (Which?): We echo the view that it is important to have the principle of group proceedings. I think that the key point that you are hearing already, convener, is that opting out is the crucial aspect rather than having an opt-in mechanism. As we indicated in our written

submission to the committee, our concern is that, although we believe that the bill is a glass half full and better than nothing, it will not deal with the cases to which Professor Paterson referred. There might be a relatively small amount of damage for an individual if there was an opt-in mechanism rather than an opt-out one, but the cumulative damage to a group would be significant in that case.

George Clark (Quantum Claims): I am here just to air a couple of concerns about the bill. I have two brief points on part 1, section 4 and part 2, section 10.

First, I will give you some background information about Quantum Claims. The company was formed in 1988 and was one of the first no-win, no-fee organisations in the UK. We have a very mature funding product that has evolved over time as the law has changed and evolved. Our pricing structure has evolved carefully to match the requirements of the public and meet its expectations, and to market ourselves in the best way.

The bill as it stands gives me two concerns, which are about access to justice and a potential funding gap for individual cases. My concern is not about group litigation, which is a subject that I will pass on to those who have looked at it in more detail. I will deal first with part 1, section 4 of the bill, on "Power to cap success fees". That obviously comes from Sheriff Principal Taylor's report, which made various recommendations about capping the degree of the success fee, generally at about 20 per cent. I should say that that figure is roughly in line with Quantum Claims's product. We gave evidence to Sheriff Principal Taylor, so perhaps he derived the idea of a 20 per cent cap from our experience of it.

However, I have a word of warning about that proposed cap. The law is evolving, but it seems to me that Sheriff Principal Taylor seeks to apply a cap across all categories of cases. From our experience, we believe that that would be extremely dangerous, particularly with regard to areas such as medical negligence, breach of contract and professional negligence. Cases in those areas are extraordinarily complex and, by definition, long running, and they are expensive to fund. The capping of the success fee at a level that might not be sustainable would discourage funding organisations from participating in the process and therefore, in my view, deny access to justice to a certain category of pursuer.

10:30

I have a similar point about part 2, section 10, on "Third party funding of civil litigation". It proposes the introduction of one-way cost shifting—which I think is a good thing and is generally approved—but with an exception whereby third-party funders can be made liable for expenses in an action. It would clearly be difficult for a company such as ours to provide funding if we were looking at a risk that we did not know before we entered into a funding arrangement. It would also be difficult for pursuers, as they could suddenly find themselves in a position where there was a funding aspect to their case that they had not been aware of when they started.

I will give an example of my concern—

The Convener: We will cover the issue in more detail, but at present we would just like rough guidance on the areas of the bill that you have concerns with. There will be an opportunity to come back with more detail when we go into the line of questioning on third-party funding.

George Clark: Just to cover it very briefly and to finish, my final point is that, in the funding of a small case—such as the £5,000 to £10,000 category of case—the funder is exposed to the coverage of outlays, which average about £2,000 minimum for even the smallest of cases. If, in the event of the case not being won, they are also exposed to civil expenses of, for example, £30,000 to £40,000, that would discourage the funding of any action. There is a large category of parties who would be discouraged from pursuing an action for which they have to find £2,000 to £3,000 of funding.

My only point is that such provisions have to be looked at extremely carefully to see whether they defeat the point of the bill, which is to improve access to justice. That is my submission, if you like.

The Convener: Thank you. Are there any other comments?

Martin Haggarty (Accident Claims Scotland): Basically I echo what Mr Clark has said. In general, the principle of a cap on damages or success fees is fair thinking, but there has to be a distinct reassessment of the amount at which it is set because of the type of cases that are involved and to reflect the complexity of the case. Otherwise, anything that improves access to justice for innocent victims has to be a good thing.

Apart from that, I think that Mr Clark has covered the funding side of things in brief, and I understand that we will talk about that in more detail.

Rona Mackay (Strathkelvin and Bearsden) (SNP): The panellists have talked a bit about what I was going to ask. Will damages-based agreements and qualified one-way cost shifting improve access to justice for the customer?

George Clark: Yes, I think so. They are the way forward, and we have in effect been operating that way for 30 years. To bring the rest of the law in line with that approach must be sensible and a step forward in terms of access to justice—with the qualifications that I have put in place about some of the details in the bill.

Professor Paterson: I should declare an interest in that I was on the reference group for Sheriff Principal Taylor. I agreed that there was an argument for damages-based awards, but I very much agreed also with Sheriff Principal Taylor that it has to be subject to appropriate protections. Perhaps we will discuss the protections later.

Rona Mackay: Can I ask whether, hypothetically, it is possible for two fees to be paid under a success fee agreement—one to the claims management company and one to the solicitor? Does the system allow for that, or does a loophole exist that allows it?

Martin Haggarty: Are you talking specifically about success fees?

Rona Mackay: Yes.

Martin Haggarty: From my experience and from my company's point of view, no. We charge success fees only in the instance of cases that we settle without the need for court proceedings. We have a mechanism whereby the solicitor can thereafter take over the litigation aspect of the case, and in recognition of the additional work that the solicitor will have to put in, they take the success fee rather than our keeping it.

Rona Mackay: I see. That has clarified things. Thank you.

Are there any other measures that you would like to see in the bill that would improve access to justice? Do you feel that anything has been missed?

Paul Brown: You will have seen the submission concerning environmental law, which did not come from me. The proposal that the restriction on a pursuer's liability for expenses should be expanded to include environmental issues sounds like a reform that would improve access to justice. Even in cases where there is not much likelihood of a pursuer paying a defender's expenses, that control is a big disincentive to litigation. I support the proposal that the disqualification be applied to cases involving environmental issues.

Rona Mackay: Can you give us an example of that?

Paul Brown: The example that I would give is the almost complete absence of people taking up these issues. We have seen a large amount of publicity about air quality and so forth. In some circumstances air quality would be a nuisance, but that issue does not seem to have been taken up. The traditional controls over litigation that derive from other ages provide a barrier and there is a need to remove them. That is simply to do with the rule of law; it is not just about access to justice generally. The Unison case made it clear that providing access to justice is a way of ensuring that Parliament's decisions are applied. That needs to be taken seriously—I know that the committee does so.

Thomas Docherty: As the committee has discussed with the Scottish Government, claims management companies need to be regulated. I suspect that that is part of the reason why some of the witnesses are here today. It is absolutely crucial, particularly given that the Financial Guidance and Claims Bill is just about at the stage of getting its third reading in the House of Lords—it is at the half-way point. It would be odd if there was a gap in regulation between Scotland and England and Wales.

Rona Mackay: Does anyone else have a view on that?

Paul Brown: I support that, based on my experience. I do a fair amount of criminal injuries compensation claims and sometimes people phone up and say that they have someone else dealing with it; they are getting purely telephone-based advice, based on a percentage fee. I share the concern that people do not understand what they are getting involved with. There is a hard sell, which is not necessarily remotely in the best interests of the applicant. Sometimes, it defeats the objective of the arrangement, which is that people get compensation. If they are paying 20 per cent of that compensation to someone else for very little work, that does not seem to achieve the objective that the arrangement was set up to achieve.

The Convener: We will pursue that line of questioning in more depth.

Liam Kerr: Rona Mackay talked about fees. I think that Mr Haggarty said that when a matter is escalated to a solicitor, the solicitor takes the success fee. Your firm needs to get paid, so do you get a referral fee from the solicitor?

Martin Haggarty: Yes, in principle, there is a referral fee. However, I qualify that by saying that we do a substantial amount of work in preparing the case and getting background information. Unlike many claims management firms, particularly down south, we engage with the client and offer them other services, such as getting replacement vehicles or finding vehicle repairers after a car accident. After the case is under way we are involved in such aspects as taking statements from witnesses and preparing locus reports. We provide a value-for-money service,

which is distinct from my colleague Mr Brown's statement that in many instances claims management companies are purely a telephone-based marketing device. We receive some payment from solicitors, partly for finding the case and partly for the work that we do.

Liam Kerr: Paul Brown talks about acting in the best interests of the client, but if your firm gets a fee from the solicitor, who is your firm's client? Is not it the solicitor?

Martin Haggarty: That is not necessarily the case, because we do not act purely for or deal with one firm of solicitors; we might deal with several firms. It depends on the type of case. For example, for a road traffic accident, we might deal with one or two firms. We might deal with other firms that specialise in industrial disease, accidents at work or medical negligence. We act for the client in the first instance and we offer to find them a range of services, including expert legal advice from people who specialise in the relevant area of law.

Professor Paterson: I will pick up on that last issue. My comment does not relate directly to claims management companies, although there are companies that are encouraging payment protection insurance claims, and when solicitors have been involved, questions have arisen about for whom the solicitors are acting. Is it the claims company or the claims company and the client? That makes a big difference: it affects fiduciary duty and remedies, depending on whether the lawyer is acting for the client or only for the claims company. It is therefore very important that, in such contracts, there is a clear explanation. That extends to claims management companies.

There is not only a duty on solicitors to act in the best interests of their client; there is also an ethical duty on them to communicate effectively and to get the client's informed consent to certain contracts. That means that the solicitor has to tell the client everything material that they are aware of that relates to the case.

All those things have to be carried through. I am sure that Quantum Claims carries them through, but we are talking about all kinds of other claims management companies coming through, and those issues have to be addressed. The Law Society of Scotland is aware of that and a working party is being set up to consider the ethical issues that might arise. We have to be aware of them.

John Finnie: The bill will enable solicitors to enter damages-based agreements. Will you outline the pros and cons of that form of payment? Is there a need for additional protections for consumers? Is there the perception of a conflict of interests for solicitors?

Professor Paterson: I will just follow on from what I just said. Yes, there is. If the solicitor enters into a contract with a client, that contract has to be fair and reasonable, has to have informed consent and must be something that an independent person would advise. As a matter of ethics, in addition to the fiduciary duties, independent advice is required.

That is impractical when it comes to the contract of retainer between lawyers and clients—the general contracts of borrowing and lending between a client and a solicitor or getting gifts and wills. However, when we get into unusual retainers—suppose that the fee was an equity fee or a publicity fee—there is a need for informed consent and proper communication and, I would argue, there is in some cases a need for independent advice. Some of the claims management fees and speculative fee agreements that we have heard about could be viewed as being quite unusual.

For example, Sheriff Principal Taylor is of the view that 2.5 per cent of future loss is not, in the grand scheme of things, a problem. However, in some cases, it might be a problem so people need to be advised about that. That is why section 6(6) mentions the need for advice from an independent actuary. In some cases—not all cases—there may be need for advice from an independent lawyer.

John Finnie: Do any other panel members care to comment on that point?

10:45

George Clark: I cannot comment on solicitors' duties to advise their clients. I welcome regulation: it is absolutely essential. There are what one might call cowboy organisations out there that would take advantage of situations. That has been prevalent; it is less so now, but it still exists.

Quantum Claims has never engaged in telephone marketing and sales or anything like that; we have advertised traditionally, and we have written contracts in which clients have cooling-off periods, and they have advice available to them. I endorse what Professor Paterson said: it is entirely right and should be brought in for every contract that a client enters into.

John Finnie: I would like clarification from Professor Paterson. Do you see that independent advice as a protection not only for the client but for the solicitor as well?

Professor Paterson: Yes. Underlying all this is the potential for conflict. Independent advice protects both clients and solicitors. I do not suggest that it is needed for every speculative fee agreement and every damages-based award, but

there may be an argument for it for some situations.

Martin Haggarty: In principle, I agree. My company removes itself from the process at the stage of litigation and, for impartiality, hands over to the solicitor control of the case and any success fee thereafter. We do not engage in any activity other than accident claims: we do not get involved in the less reputable—in my opinion—side of the business, such as PPI or holiday sickness claims.

Until recently, I would have said that Scotland did not need regulation because there are very few claims management companies here. The problem stems from the amount of England-based companies that advertise nationwide and proffer advice to people here without any regard for the laws of Scotland or our system of damages. They perhaps sell that case on to the highest bidder—sometimes even England-based solicitors firms ostensibly take cases forward and try to resolve them without any need for litigation. With the recent increase that we have seen in such cases, I now welcome some form of regulation here.

Mairi Gougeon (Angus North and Mearns) (SNP): In previous evidence concern has been raised, in particular by defender representatives, that the bill, as drafted, will lead to a compensation culture in Scotland, such that additional measures would be needed, such as fixed fees and strengthened pre-action protocols, to militate against that. What are your thoughts on that concern? Do you believe that the bill will give rise to a compensation culture?

Martin Haggarty: I have been involved in claims since 1979. Accident Claims Scotland was formed in 2003, and we have, over the years, done a lot of research into the behaviour of claimants and potential claimants. Over the past 10 or 15 years, I have not seen a particularly large uptake in claims or a rise in compensation culture in Scotland, despite the rise in advertising through the press, TV and radio for accident claims companies or lawyers. We have always been fairly conservative with a small "c", if I may say so. Roughly one in three claims has sought compensation for minor injuries—most claims are for minor injuries.

I do not think that the bill will fuel a sudden rise in compensation claims. All that it will really do is offer to members of the public a fair means by which to seek recompense to which they are legally entitled. The majority of people who are entitled to make a claim for personal injury do not do so—the reasons for that are varied—and the claims are mostly for minor injuries. I do not think that we will have a huge rush towards the whiplash culture that has been experienced in particular parts of the south of Great Britain.

Mairi Gougeon: Would anybody else like to comment on that?

Professor Paterson: There is a lot of press publicity about compensation cultures. However, the research evidence does not bear out its existence in England and Wales, apart from in the pockets of the whiplash culture to which Martin Haggarty referred. There is a beautiful article that was produced by an academic that shows a direct correlation between the number of claims going down and the number of media stories about compensation going up.

In Scotland, the evidence is that civil litigation rates have been gradually falling over the past five or six years. I know that there was a spike in personal injury claims, but I do not think that there is evidence that there is huge interest in raising personal injury claims. I would be quite interested if there were, because when I was doing the original research for "Paths to Justice Scotland: What people in Scotland do and think about going to law" with Hazel Genn, which was the start of the needs assessment literature that has gone around the world, we found large areas where people either did nothing when faced with a significant possible claim, or tried to help themselves and failed. One might think that people know to go to a solicitor or claims management company with personal injury cases, but we found that people are likely to do nothing about personal injury claims. Admittedly, that research was done 15 years ago.

There is room for the claims management companies to help us to take cases, provided that we have appropriate safeguards and that we monitor what is happening. I do not think that a compensation culture is likely to take off in Scotland.

Paul Brown: My experience is that, in some areas, there has been a big decline in claims. People hear publicity about cutbacks in legal aid that do not apply to Scotland, and they think that that is the end of legal aid for them. They hear about cutbacks in, say, criminal injuries compensation, and think that compensation will not apply for them, but do not realise that compensation for their particular injury has not been abolished. People hear that wage loss has been removed from criminal injuries compensation claims, although it still exists for some situations. They hear about time limits, but do not realise that, in some situations, time limits are for guidance—they are not absolute and can be argued around. There are all sorts of impediments.

There is a need for greater publicity. Some publicity results in overshooting, but there are some areas—such as Equality Act 2010 claims and rafts of employment-related matters—that are

rarely pursued, so I do not see a compensation culture becoming a problem.

However, we have to look at the form of words that is used: in our world, compensation is a way of achieving accountability, so appropriate compensation needs to be encouraged. Lying and exaggerating need to be discouraged, if that is what the problem is, rather than saying that people who claim are lying, exaggerating and making fraudulent claims. The bill has sanctions built into it for lying and exaggerating and people need to know about them, too.

Mairi Gougeon: You said that the bill will tackle some of that, but will it be effective in preventing fraudulent claims? We have also heard evidence on spurious claims from representatives of pursuers and from Sheriff Principal Taylor. They seem to think that there would not necessarily be a rise in spurious claims because it would not be in a solicitor's interest to take on a claim that will not go anywhere and has nothing behind it. Do you think that there would be a rise in spurious claims as a result of the bill?

Paul Brown: Solicitors have to appropriately and clearly analyse cases and tell people when they do not have a claim. Sometimes they have difficulty doing that because they want to help people, but that is a professional issue, because misleading someone and being overoptimistic is just as bad as telling someone that they do not have a claim when they do.

At one level, that is about ensuring that publicity is clear so that people understand what they are getting compensation for—people need to know the basics of the law. We also need to keep on telling people about those basics because it is not something that they are necessarily fascinated by. The other thing is to encourage the right sort of soaps on telly to explain such things, because people pick up a lot through those. As I said, I do not see spurious claims as a major problem: I have not come across that.

Martin Haggarty: As a representative of the claims management side, I add that we have not seen a great increase in spurious claims over the last few years. However—I am sure that Mr Clark will concur—as a responsible company, we discover and weed out the less desirable or more spurious cases. We prevent many such cases from getting as far as a solicitor. It is not in our interests to deal with spurious claims because if such a claim were to find its way to a solicitor and potentially to litigation, any work that we have done or any referral fee that we charge the solicitor would be clawed back in the event that the case turned out to be fraudulent or the client was misrepresenting the situation unreasonably. There is an onus on us to ensure that we perform our part and weed out undesirable claims.

Professor Paterson: The bill contains protections such that a legal representative who raises a spurious action may be found personally liable for expenses. I happen to think that that is already the law anyway, but I am glad to see it being reinforced in statute. Now, no one can say that they do not agree with that bit of case law—it is clear in statute.

On qualified one-way costs shifting, the benefit of that is lost if the claim proves to be fraudulent, as with legal aid. One of the protections of legal aid is that if you lose, you can get your liability to pay the other side's expenses modified to nothing, but that applies only if the court takes the view that you have behaved reasonably. The bill also requires that. There are protections against spurious claims.

Thomas Docherty: This goes back to the question that Mr MacGregor asked about access to justice. We see claims management companies as being a symptom of the problem that companies and institutions too often do not pay back to consumers money that they owe them. A simple statistic that the National Audit Office estimated is that, between 2011 and 2015, claims management companies received £4 billion to £5 billion in management fees for PPI claims. That is because the financial institutions did not in the first place come forward to say to customers that they had got it wrong and therefore owed them money, even though they knew who their customers were.

I will give you an example that we use a lot. Which? runs on our website a free service for PPI claims, and we have engaged with a lot of the financial institutions. One Which? member got £15,000 just by going on to our website and putting in his details. I will not say which financial institution was involved. That cut out the CMCs and was a great result. However, it can be argued that if not for those CMCs chipping away and raising the issue in the first place, the financial institutions would not have paid out £18 billion to £20 billion over the last few years. I hope that that answers your question.

Mairi Gougeon: Yes, it does. I look forward to the TV dramatisation of civil litigation. [*Laughter*.]

The Convener: I want to ask about ambulance chasers. You are talking about legitimate claims from consumers that have not been followed, but there is also the other side of the coin. The three representatives of the claims companies have explained that they would behave with absolute propriety, but is ambulance chasing still an issue?

11:00

George Clark: I return to Martin Haggarty's point that there is still an issue in England. There is a telemarketing culture. We will all have

received anonymous telephone calls or texts asking whether we have had an accident in the past three years, for example. That is still an issue, but it is a country-wide issue and not just a Scottish one. However, I genuinely think that the issue is not generated in Scotland and that it comes from afar. I am not aware of anyone in our industry in Scotland who actively practises that approach, and I certainly do not. Nevertheless, it is an issue and it needs to be looked at. As I said, there is still a danger in that field.

Martin Haggarty: I agree that the issue is very much driven from afar. In my day-to-day work, I am constantly bombarded by data marketing companies from other parts of not just the United Kingdom but the world, offering data on people who have had accidents, PPI or whatever. I deal only with accident claims, but I do not engage in buying data and nor do my colleagues who I know of in the industry. That approach is a very shoddy way to do business. Something should be done to protect the public from those mass data-gathering exercises and the constant exchange of details. In many cases, the data that I am offered, whether or not it is genuine, is said to originate from insurance companies, which are the very people who cry wolf at the first sign of a potential personal injury claim. However companies are getting the data, there is no doubt that some less than savoury practices are involved.

Thomas Docherty: We completely disagree that Scotland does not have a problem; indeed, Scotland has more of a problem with nuisance calls than any other part of the United Kingdom. We have done research on that. In September, there was a debate on the issue in the Scottish Parliament, which some members of the committee took part in. As we say in our written submission, our studies show that 80 per cent of Scots reported receiving nuisance calls on their land lines in the month of August alone and that almost half of people—44 per cent—receive accident and PPI calls. It is not true that Scotland does not have a problem; Scotland has more of a problem than anywhere else.

I will give you one more statistic. In the past year, 16 claims management companies based in Scotland have registered with Companies House. The problem is not getting smaller; it is getting bigger.

Martin Haggarty: As I said, I do not deny that members of the public are receiving unsolicited communications by text or telephone on issues such as PPI and personal injury. My point is that, in my experience, the vast majority of those calls or texts originate from outwith Scotland. The opportunities to buy that data or to acquire those potential customers or clients generally do not originate in Scotland. It may be that several claims companies have registered at Companies House, and I understand that there might be many PPI-based companies of that nature, but I have not seen any great increase in relation to the personal injury side of the business in Scotland.

I take Thomas Docherty's point that we are plagued by such communications, but I do not think that there is a big problem with the data originating here. The issue is with national companies marketing to the country as a whole and trying to pass clients on to us up here in some way, shape or form.

The Convener: Mr Docherty's written submission certainly contains useful information about the number of calls, even just in the Glasgow area. We might cover that later.

Maurice Corry (West Scotland) (Con): I have a general question for the panel. There is a feeling of reticence among people who genuinely believe that they have a claim but are put off by the fact that they might incur a black mark against their name on the industry's notepad when they come to ask for insurance cover for a house, for example. Can you comment on that general trend?

Martin Haggarty: That is very much the case for motor accidents, which the majority of personal injury claims will emanate from. People think that, if they make a claim for their vehicle or their person, that will somehow affect their insurance premium, which it very often does. As a result, people often seek the assistance of a claims management company or just decide that the matter is more bother than it is worth, swallow their policy excess for the damage to their car and get on with their daily lives.

In the past, we have tried, through our advertising, to educate members of the public who have genuinely suffered an injury through no fault of their own that they have rights and that there is something that they can do. Unfortunately, however, there is a perception that they will end up on a database somewhere and that the issue will end up costing them more money. It is worth pointing out that, if insurance companies acted honourably, the claims management industry for personal injuries or vehicle damage would not exist. I say that as someone with an insurance company background who has seen that industry rise from nowhere. People used to be left without any assistance.

There is another useful observation to make. Even now, as we approach 2018, a great many members of the public are reticent about directly approaching solicitors about a claim, because they think that that will cost them money, and that is off-putting. They will go to a claims management company or an accident management company

that advertises a no-win, no-fee approach, because they realise that the process will not cost them money if the case is unsuccessful and, at the end of the day, we are in some way more approachable than solicitors.

There is still a perception that, in many areas of the law, solicitors are somehow slightly otherworldly or intimidating. Obviously, that is not the case, but to many ordinary members of the public there is still a bit of reticence about approaching them. I still have clients who put on a shirt and tie when they go to see a solicitor. That is possibly the only time that they do so other than when they go to weddings and funerals. Over the years, clients have been worried about the process and reticent about dealing directly with solicitors for a variety of reasons.

Paul Brown: I agree. That is why there is a need for law centres and, indeed, trade unions to help to provide a bridge. Solicitors could do a lot, as well. We continually hear stories—I know that some of them are accurate—about people who have been told that, if they want to see a solicitor, it will cost them £250 an hour and they will have to pay in advance. There is a real need for a better interface between the legal profession and people in need.

The situation has improved in some areas, and some people make a really big effort. Nonetheless, that has put us back. I have been in a solicitor's waiting room when a client has been asked to put in his card to pay £250 before he could see his solicitor for just a one-hour interview about a complex employment law matter. I am sure that the advice was very good, but such costs are completely impossible to meet for 95 per cent of the population. If people think that that is the level of costs, they will make a sensible calculation and realise that the money is irrecoverable, even though there are ways around such things. I share the concern about that.

The Convener: We will move on and develop the issue a bit.

Liam Kerr: Maurice Corry's question and the answers to it have asserted various things about perceptions and reticence. Mr Brown said that 95 per cent of the population would find meeting such costs impossible, but there is a danger that we are drawing universal conclusions from anecdotal evidence. Is there any objective evidence for any of the points that Martin Haggarty or Paul Brown have just made?

George Clark: If you mean statistical surveys, I am sure that those exist. This is probably Alan Paterson's field rather than mine, but we have considerable experience of people being hesitant. I take your point, though, that that is anecdotal. Those fields were reviewed in "Paths to Justice Scotland". Alan Paterson probably remembers more about that than I do.

Professor Paterson: "Paths to Justice Scotland" was based on a large-scale national random sample of people's experience of what we called justiciable problems. We gave people a list of 60-plus possible problems, none of which mentioned the word "law". We asked them, for instance, whether they had had a problem with sick pay or holiday pay after they had fallen down stairs or had some other accident—a driving accident, for example—and what they had done about it. Who, if anybody, had they turned to? Why had they done this rather than that? You will not be surprised to hear that we received evidence that people were being put off by the fear of costs. Although such a fear is not necessarily realistic, sometimes it is. The fact is that litigation is very expensive for an ordinary person. Most lawyers would not advise individuals to embark on it, because the outcome is not always predictable and the process can be very expensive. People are therefore right to have that fear.

The research in "Paths to Justice Scotland" has been followed by 35 studies in 26 countries around the world, all of which have produced similar results. The "Paths to Justice" work in England has been developed to show the distribution of justiciable problems, we have done a little more work in Scotland and there is some evidence to be had in the crime and justice survey. We have no reason to believe that people are not put off by a fear of costs, and they should be.

Thomas Docherty: We are regularly asked whether we have done research on the legal experience of consumers in Scotland. Indeed, I have had that conversation as part of Esther Roberton's review, and we would very strongly suggest that research on the consumer experience be commissioned for that review. Frankly, I find it a bit odd that the review's starting point has not been the undertaking of proper, thorough research. The committee might take up that issue with Ms Roberton.

Liam Kerr: Time is short, so I am going to fire a number of questions at you about regulation, which I am interested in, and I would appreciate it if you could keep your answers short. Do the claims management companies that are represented on the panel have to meet any regulatory standards? If so, what is the regulating body?

Martin Haggarty: The answer is no. England and Wales have had claims management regulation for some time now; indeed, my own company registered under it even though we did not necessarily have to. We had had the odd English case, so we thought that we should stay well inside the areas of law that had been touched

on, even though the volumes were not sufficient to meet the requirements. At the time, I figured that that was morally right and that it gave the client some reassurance about the professionalism and integrity of the company that they were dealing with. Other than that, there is, at present, no regulation of claims management activities in Scotland.

Liam Kerr: If no one else has anything to add, I will move on.

Sheriff Principal Taylor said that most claims management companies are "fictions", as they are actually subsidiaries of law firms. Do you share that view? Are most claims management companies in Scotland subsidiaries of law firms, or do they often stand alone?

Martin Haggarty: I do not think that that is the case in numerical terms, but it might well be the case if you are talking about the number of claims that are being processed. A couple of higher-profile law firms have their own claims management activities instead of being, in effect, independent of the process. I might be wrong about that, but that is my understanding.

Thomas Docherty: That is not our view, and I know that it is not the view of the Association of British Insurers. We think that Sheriff Principal Taylor misspoke the week before last. As I said, 16 CMCs have registered with Companies House in the past year alone.

The key point is that, regardless of whether a CMC is attached to a law firm, the regulation should apply in exactly the same way. That is why we strongly support the correspondence that the committee has been having with the Scottish Government about whether the Financial Guidance and Claims Bill should be extended to Scotland to ensure not only that the same rules operate for claims management companies that are attached to law firms and those that are not but that the same rules operate in England, Scotland and Wales. To be frank, that would go a huge way towards solving the problem.

11:15

Liam Kerr: I want to explore that. I think that you are telling me that, in the past year, 16 claims management companies have registered at Companies House but they are not required to be regulated in any way.

Thomas Docherty: That is correct.

Liam Kerr: If I reflect your opinion correctly, Mr Docherty, you would say that claims management companies should be regulated in Scotland.

Thomas Docherty: Absolutely.

Liam Kerr: Do the rest of the witnesses agree with that view?

Witnesses *indicated agreement.*

Liam Kerr: For the record, the panel uniformly nodded.

Professor Paterson: So does Sheriff Principal Taylor.

Liam Kerr: Sheriff Principal Taylor also talked about only regulated bodies being able to charge referral fees. Mr Haggarty spoke about such fees earlier. I presume that he agrees that only regulated bodies should charge them and, therefore, that his company should be a regulated body.

Martin Haggarty: Yes. I would not have a problem with that at all.

Liam Kerr: Will you become a regulated body?

Martin Haggarty: Yes, absolutely. If the decision is made that claims management activities should be regulated in Scotland, we will be up at the front of the queue.

Liam Kerr: What if that decision is not made?

Martin Haggarty: With whom would we register? If there is no regulation, there is nothing to sign up to.

Liam Kerr: That relates to my final question, which I put to Mr Docherty but which you should all feel free to answer. If I engage a claims management company and something goes wrong in whatever way, to whom do I have recourse for my complaints at the moment? Where can I go?

Thomas Docherty: I am the one member of the panel who is not a lawyer, so I defer to the lawyers on that.

George Clark: We recognise that we are unregulated, but our firm was formed by a solicitor on the same basis as all law firms, with the same accounting process and professional indemnity requirements. We mirrored those. In 30 years, we have had, I think, two complaints, which we agreed to let the Law Society adjudicate, and we were found to be not guilty of anything of which we were accused.

We let the Law Society regulate us. It has a regulatory body that resolves conflicts and disputes. From giving evidence to Sheriff Principal Taylor, I know that he did not think that that was a suitable way forward, but it is legal services by another name, so why not let the Law Society regulate claims management activity?

Liam Kerr: I know Quantum Claims pretty well from my previous career, so I know that it runs itself reputably and well. However, there are 16 other firms that we do not know and, if I have a

problem with them, I have no recourse. Your suggestion, Mr Clark, is that the Law Society should be named as a regulatory body for claims management companies.

George Clark: I see no reason why not. Claims management companies should adopt the same professional standards as solicitors. I am not afraid of that. There is a body already constituted to deal with that. Okay, it is a self-regulatory body; nonetheless, it is and has been the custodian of legal services in Scotland for many years, so why not let it do that? It is not a huge arena. If there are 16 companies, that is not a huge number. There are hundreds of solicitors firms, so it would be a relatively small part of the Law Society's remit.

Paul Brown: If the same regulatory environment were to be introduced for claims management companies as for solicitors, the Scottish Legal Complaints Commission, which was set up by statute, would have to be brought in as well. I presume that that process would be fairly complicated, although I am sure that it could be done. However, we need to remember that solicitors are regulated for different purposes by two bodies. The Scottish Legal Complaints Commission has fairly substantial teeth to deal with inadequate professional service.

Thomas Docherty: There is a reason why the Financial Guidance and Claims Bill is moving the regulation of claims management companies in England and Wales from the Ministry of Justice to the Treasury. We just touched on some of it.

We are not opposed to claims management companies being regulated through legal regulation, but we are a bit sceptical about how close the relationship is between some of them and the law firms of which they purport to be part. The key principle is that, regardless of the regulator, every claims management company should operate to the same standard. If some are regulated by the Law Society and some are regulated by the Financial Conduct Authority, we will not die in a ditch over that. The principles of regulation are more important.

Martin Haggarty: I agree with that. To touch on Mr Kerr's initial point, at the moment, claims management activity is a service industry and, as for any other service industry, there is a means to complain about service. In the case of my company and others that I know of, if somebody makes a complaint, it is dealt with by a director of the company. If they still cannot receive satisfaction, customers will find a way of going to a solicitor—ironically—the Legal Services Agency or a citizens advice bureau to take advice on it.

In all the years that we have been operating, I have seen very few genuine complaints. We have had a couple of instances in which people have even gone to the papers and their complaints have been found to be groundless. Nevertheless, people find ways of making their voices heard.

It does not make a great deal of difference whether regulation becomes a Law Society matter or sits with the Ministry of Justice, as was the case when we registered with the English side of regulation. As long as we are all judged by the same standards, anybody who operates properly and reputably has nothing to fear.

Professor Paterson: The short answer to Liam Kerr's question—who regulates claims management companies at the moment?—is that it is trading standards services, if anybody. I will not comment on whether the Law Society should do it.

If you are going to regulate claims management companies, which you should—I agree with Sheriff Principal Taylor about that—there is an argument that it should be done on a UK-wide basis because the problem that we have now is companies moving up to Scotland. We do not want a situation in which one lot of companies is regulated by one set of regulators and rules and the other lot is regulated by another. The argument for UK-wide regulation sounds quite strong. You should remember that the reason why claims management companies were set up in the first place is that there were problems in the regulatory environment, from their perspective, in that damages-based awards were not allowed.

Referral fees are also a problem. On the Taylor review, there was a huge fight about them. England has swapped. There were places where it allowed referral fees and then it banned them. In the end, Sheriff Principal Taylor came to the conclusion that there would be ways around referral fees. That is, ultimately, why we came to the situation that we arrived at. A solicitor has to do something if they are going to get a referral fee. It is not a reward for giving something away; they must have prepared and done some real administrative work. The client must also fully understand what the referral fee is about and why it is being paid. Referral fees remained contested in Sheriff Principal Taylor's report.

Mary Fee: Good morning. Much of what I was going to ask about regulation has been covered. It is clear that the witnesses agree that claims management companies need some form of regulation. Is the bill a missed opportunity to explicitly name claims management companies?

Thomas Docherty *indicated agreement.*

Mary Fee: Mr Docherty is nodding. Does the rest of the panel agree? The witnesses will be aware of the Scottish Government's view that it could piggyback on the Westminster regulation.

Do they agree that the bill is a missed opportunity that could have been taken here?

Thomas Docherty: We are not wedded to that being done through the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill or the bill that is currently going through Westminster—although the clock is ticking, and I think that that bill is about to have its third reading in the House of Lords; I suspect that it will go to the House of Commons in the new year. We are not saying that it has to be done that way, but it would be astonishing if, in the new year, we found that we did not have a mechanism in process to regulate.

Mary Fee: Do any other panel members have a view on that, or is everyone in agreement?

Martin Haggarty: We have mentioned that, during the past year, 16 claims management companies have registered at Companies House. When my firm was registered with the Ministry of Justice for English and Welsh-related activities, we were one of roughly 2,800 registered UK claims management companies at that time. Bear in mind that few Scottish firms bothered registering, as there was no requirement to do so. To keep a sense of proportion, 16 claims management companies in Scotland is a very small number.

I agree that we should be regulated, but I do not think that that is anything to panic about. I do not know the current number of claims management companies in England and Wales—I do not receive the memos any more—but, as I said, there were approaching 2,800 registered UK claims management companies when we registered. If we assume that Scotland has roughly 10 per cent of the UK population, we could expect there to be around 280 such firms in Scotland. We are talking about 16 newly registered firms, and there were very few existing firms before that, so a sense of perspective should be retained.

Mary Fee: The Scottish Government has argued that claims management companies are covered by the definition of a provider of "relevant legal services" in the bill. If all of you agree that claims management companies should be regulated, am I to suppose that you do not agree with the Scottish Government's view?

Martin Haggarty: I do not think that you can say that we provide legal services per se. We provide access to legal services. We provide assistance in finding the right path to justice, but we do not provide legal services, so that catch-all does not really apply.

Mary Fee: If there is a delay in the regulation of claims management companies, however long that might be, is there the potential for problems to occur for people who are looking for services and do not know where to go? Earlier, we spoke about cowboy companies. Is there the potential for cowboy companies to slip into a gap that is provided before regulation happens? I see that Mr Docherty is furiously nodding.

Thomas Docherty: Absolutely. That is why both Which? and the ABI are in exactly the same place on that issue. It is common sense that, if England and Wales have a tighter regulatory framework, less scrupulous firms will see that Scotland does not have the same regulatory framework. If we wait for Esther Roberton's review to be published and then for a bill to come forward and be enacted, there could be a significant period of time in which there is a vacuum in regulation. That is why that needs to be done through either the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill or the Financial Guidance and Claims Bill.

Mary Fee: Thank you. That is helpful.

The Convener: A couple of panel members have referred to Esther Roberton's review of the regulation of legal services, which will certainly touch on aspects of the bill that have been of concern to us. Given that there seems to be a lack of progress with that review, I think that the committee should write to ask for an update of exactly where things stand, and perhaps make specific reference to the aspects of the review that are pertinent to the bill.

Ben Macpherson: I want to return to an issue that was raised at the beginning of the evidence session by Paul Brown and Thomas Docherty and in the written submission from Which? It concerns part 4 of the bill, on group proceedings. There was some discussion about this earlier, but I would like to probe further the alternatives of an opt-in system and an opt-out system. Mr Docherty, I know that you argued in your written evidence and your earlier contribution that you would prefer an opt-out system. Will you explain why you see that as more advantageous?

11:30

Thomas Docherty: We are talking specifically about claims in which the detriment to an individual is relatively small but there is a large number of claimants. If we have an opt-in mechanism, Which?, a law firm or anyone else who wishes to act on behalf of the claimants would have to bear all the up-front costs and resource commitment in reaching out and trying to find everybody who might be affected by the class action. They would have to advertise widely and then demonstrate to the courts that they were suitable to represent those people. That would be fine if the individual claim was worth a huge amount of redress or compensation but, if it was a relatively small amount of money, with the best will

in the world, Which?, law firms or anybody else would really struggle to justify that.

We have had some interaction with the Scottish Government on the issue, and we are puzzled by its argument that it is too difficult to come up with an opt-out system. We have such a system under the Consumer Rights Act 2015. It operates effectively for two reasons: because people understand the mechanisms that they have to go through to demonstrate that they are acting on behalf of a class of people and because the bar has not been set at a point that means that vexatious claims have been made.

We will not see "Boston Legal" or "LA Law"-style mass class actions; we are talking about a relatively small number of cases. As we said in our written submission, we have brought cases, such as the JJB Sports football shirts case, in which we were not able to represent everybody who was affected because they were under the old opt-in system. In the past couple of years, we have had the opt-out system, under which there have been only two cases so far at UK level—the MasterCard case and the mobility scooter case—both of which are currently not being proceeded with because the judge involved said that the threshold had not been met.

An opt-in system will not do anything to help the consumer on individual small amounts of money. Therefore, we have to have an opt-out system, and that approach works at UK level under the Consumer Rights Act 2015.

Ben Macpherson: It is interesting to hear that from the consumer perspective.

Mr Brown, you touched earlier on the community perspective on the difference between an opt-in system and an opt-out system. That interests me as a constituency MSP as well as a member of the committee. Will you elaborate on that?

Paul Brown: The petition procedure under the Public Health (Scotland) Act 1897 was definitely an opt-in procedure, and it worked well for a group of people concerned about disrepair in a block of housing. However, I take the point that, in any case that is more diffuse, the people who are leading it will have big expenses. In a community situation in which people know one another and possibly know the social media to look at, things will take off but, if a case has a national basis or small amounts of money are involved, I can certainly see that there would be problems. The New York case of which I was a beneficiary was an opt-out case. That worked well.

It has taken an inordinate amount of time to get to where we are, and it is a significant step that we are discussing group proceedings. It would be a pity if one went for the most ambitious arrangement and that resulted in further delay. Therefore, although I am entirely in favour of an opt-out system, I am principally in favour of there being some form of group proceedings, which I am sure will help some people. I can envisage people taking up quite major issues.

The other issue is that the Court of Session will have exclusive jurisdiction. That might be an impediment. I am not sure that anybody has ever suggested that group proceedings should be available in the sheriff court as well. I cannot see any reason why. However, that Court of Session jurisdiction will be an impediment. The need to have Edinburgh agents and counsel or a solicitor advocate will mean that the costs will be a lot higher. That is another issue that could be considered but, as I said, my principal concern is that the system happens.

Ben Macpherson: So the opt-in system could be of benefit to communities.

Paul Brown: Yes, I think so.

Ben Macpherson: However, you are principally in favour of an opt-out system.

Paul Brown: I could see communities taking up group actions almost immediately. Communications are cheaper than they were but, nonetheless, there is an issue. Therefore, if someone were to ask me, I would be in favour of going for the most ambitious arrangement but not if it took five years for the rules to be produced.

Ben Macpherson: I am glad that you said that, because my next point concerns the fact that it is envisaged that the detailed court rules will be developed in consultation with stakeholders. Are you happy with that approach?

Paul Brown: In principle, I suppose that the more that is in the bill, the better. However, that is okay as long as there is consultation. One possibly needs to encourage as open consultation as possible. It will be fairly complex. There also needs to be consultation on asking the Lord President to say which charities get pro bono legal expenses.

It is not part of the Scottish legal tradition to consult widely about rules but, with encouragement, I do not see why it should not be done. People will think, "Ah, rules. Just technical stuff," but there will be substantive and major issues to do with implementing such remedies that need to be discussed in as open a way as possible.

Ben Macpherson: So you are generally satisfied with that approach and that an opt-in system would make a difference.

Paul Brown: Yes, it would make a difference.

Thomas Docherty: It is interesting that, in the policy memorandum, the Scottish Government admits that all that the consumer stakeholders argued for an opt-out system and they have been ignored. If you asked me whether I had a great deal of confidence in the Scottish Government's promise on stakeholder consultation, I would say that, latterly, I am slightly sceptical. We have talked to the Scottish Government, and it has said that it would be surprised if we were not asked for our views as part of the working group. That is not the same as a cast-iron guarantee that consumers will be listened to.

Do not get me wrong: we do not oppose an opt-in system. It is better than nothing, but it will do nothing for your constituents, Mr Macpherson, if they are in a big case with a low individual value, such as the dairy case or the JJB Sports case. My glass is about one third full on the matter, to be honest.

Ben Macpherson: Thanks very much for both of your answers. That was really helpful. It is important that we focus on that part of the bill as well as the other parts of it because that is a major step forward in Scots law.

Professor Paterson: I endorse what Mr Docherty said. An opt-in system would be helpful, but an opt-out system has much more impact, as the Americans have shown. In the pre-Uber days, it was found that New York yellow taxi cabs were overcharging across the board. The Americans did not decide to get everybody who had ever used a New York taxi in the past five years to opt into an action; they included them all and brought the action. Damages could not be paid to 5 million people, so they forced the New York taxi companies to lower their fees for the next two years or something. Going for an opt-out system has a much bigger impact for consumers.

The Convener: At the beginning of our evidence-taking session, a number of witnesses referred to class actions, but the bill refers to "group proceedings". Is there a difference?

Professor Paterson: No.

The Convener: We take on board the point that, in looking at the regulation, the referral fee issue is a little grey. I again highlight Mr Docherty's written submission, which has some pretty eye-watering figures for some of the fees charged by CMCs—£3 billion to £5 billion between April 2011 and November 2015. The point was made that that money

"could have gone directly to consumers".

That is another aspect that is in the written evidence, but we do not necessarily have to take any oral evidence on it now.

Professor Paterson: I apologise if we are going to come on to this, but one of the key points about group actions is how they are funded. Paul Brown and I would like to say something about that.

Group actions are important, but they will work only if we can find a way of funding them. Legal aid might be one way, but it is set up for individuals. There are examples in England and Wales, where there is a kind of group action procedure. There was a big litigation on behalf of old-age pensioners after it was alleged that a drug had gone wrong. Half of the thousands of people who were affected were eligible for legal aid and half were not. For a while, it looked as though the half who were eligible were going to get their claim dealt with because legal aid would cover them and the half who were not eligible were going to lose out and would have to be excluded from the action. In the end, a millionaire came out of wherever and paid for the fees of the ones who were not eligible for legal aid.

That is no way to run a system. We have to allow legal aid to operate in group proceedings, but that will require the regulations to be changed to allow groups to be assessed.

The Convener: Thank you for that clarification. We have overshot our estimated time, but I will allow a final comment.

Paul Brown: Group legal aid has always been a major problem. That is not only to do with civil litigation; it is also to do with environmental matters. There is a problem with one person representing a group of people and the Scottish Legal Aid Board saying that the circumstances of the group need to be assessed, as well. There is a need to think outside the box on that issue.

The Convener: That concludes our line of questioning. I thank the panel of witnesses for a worthwhile evidence-taking session.

I suspend the meeting briefly to allow for the changeover of witnesses and a comfort break.

11:42

Meeting suspended.

11:47

On resuming—

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill: Stage 1

The Convener: Item 5 is our fourth evidence session on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill. I refer members to paper 5, which is a note by the clerk, and paper 6, which is a private paper.

I welcome the member in charge of the bill, James Kelly, who is a regular visitor to the committee; Andrew Tickell, lecturer in law, Glasgow Caledonian University; Dr Joseph Webster, lecturer in anthropology, Queen's University, Belfast; Dr Stuart Waiton, senior lecturer, division of sociology, school of social and health sciences, Abertay University; and Dr John Kelly, lecturer in sport policy, management and international development, University of Edinburgh.

I thank all the witnesses for providing written submissions. It is really helpful to have written submissions when we are preparing to take evidence.

We will move straight to questions. Without going into too much detail, do you wish to comment on the general terms of the proposal? Do you see any merit in the legislation?

Who would like to kick off? Do not all rush at once.

Dr Joseph Webster (Queen's University, Belfast): Just to clarify, are you asking us to comment on whether we support the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and, if so, why?

The Convener: Yes.

Dr Webster: Okay. There are three compelling reasons why that act should be repealed. As I outlined in my submission, the first is that the legislation is currently unworkable in practical terms. Having reviewed the transcripts of the earlier oral evidence, I was very interested to see Assistant Chief Constable Higgins's response to a question that Liam Kerr asked. Essentially, the question was: what would happen if an entire stand broke into chanting? The response was that closed-circuit television is used to identify the main protagonists and arrest only them. The point is that the police have given evidence suggesting that such behaviour is a mass phenomenon but that it is only possible to arrest individuals. If the legislation were followed to its fullest extent, there would need to be mass arrests, and that is simply not happening because it cannot happen. Practically, the act is unworkable.

The second point, which is briefer, is that the act is not justified on free speech grounds. In essence, it says that it makes acts of hatred illegal but does not restrict

"antipathy, dislike, ridicule, insult or abuse".

However, section 6(5) does restrict those behaviours, which are set out in section 7(1)(b). The key problem is that there is insufficient ability to parse the behaviours. That has been evidenced in earlier oral submissions in which the committee has heard that police officers need to be trained on how to interpret different behaviours and on how to classify any given behaviour as hateful or perhaps abusive and where to draw the line.

My third point, which is slightly finer but absolutely essential, is that not only does the 2012 act fail to understand that the behaviours that it attempts to make illegal are a type of performance, which is an important point and which the Scottish Parliament information centre briefing on the repeal bill outlines on page 10, but—crucially from my perspective, which is based on my five years of ethnographic research on the topic—it does not take into account who the audience of the performance is. As I said in my written submission, the 2012 act fails to understand that the types of chanting, banners and behaviours that it seeks to criminalise are, in essence, offered by fans to fans of their own side. The behaviours are not primarily an attempt to enrage an imposing side; they are an attempt to build intra-group solidarity. It is about members of single fan bases communicating things to each other to affirm their collective belonging, rather than an attempt to enrage an opposite fan base.

The empirical evidence for that is pretty clear. The vast majority of that type of behaviour occurs in single stands where fans are strictly segregated or in pubs and social clubs where the opposing fan base is simply absent. The behaviour is about single fan bases building collective identity among themselves and is not primarily an attempt to enrage the opposite side who, in most cases, are simply absent from the situation.

Dr John Kelly (University of Edinburgh): I, too, support the repeal of the 2012 act, because I think that some of the issues that were warned about when the original bill was considered have come to fruition. In Scotland, there is still a misunderstanding of what we are trying to police or legislate for when the word "sectarian" rears its head. The act does not mention the word "sectarian" but, nevertheless, much of the public

commentary on it frames it as anti-sectarian legislation.

There are problems with the way that the issue is being policed and legislated for. In reality, the act potentially does the opposite of what it sought to do. It sought to protect ethnic and national identities as well as a variety of other identities around sexual orientation, gender and disability. When certain people from both of the major groups on either side of the sectarian divide in Scotland exhibit elements of what they believe are their national identities and diaspora group attachments and identities—I would argue that they do so quite correctly in many respects and that those are legitimate identities for diaspora groups—rather than being protected, which the act sought to do, some of them are being accused of inciting hatred and intolerance and performing offensive behaviour.

That is not to suggest that some of those national identities cannot have intolerance attached to them, but this is the key for me. We do not seek to protect gay, homosexual and lesbian communities with this bill—or any other bill—by stopping people from expressing elements of their gay identity. That is a subtle but crucial distinction.

In Scotland, when we seek to police and legislate to stop what some people perceive to be negative sectarian behaviour, we confuse sectarianism, intolerance and hatred towards the other based on people's belief about the other person's religious or national identity. That is different from policing someone who is exhibiting elements of a national identity, which is what has been happening in Scotland, particularly with some of the fans who are being arrested for singing two or three particular songs, which do not in fact mention any intolerance or hatred of any protected characteristics that are in the 2012 act.

That is a key element for me: offensiveness and the nature of racism, bigotry, homophobia and the other isms, if you like, with regard to the other protected groups are open to interpretation. The nature of those problems is that some of the prejudices are very subtle, to such an extent that it is difficult for even the police and the law courts to agree on what is or is not offensive. I support the repeal of the act for those reasons, and some others, but those are the main ones.

The Convener: Professor Tickell.

Andrew Tickell (Glasgow Caledonian University): I am not a professor. You have promoted me and I am grateful for it.

The Convener: Did I? I knew I would get your name wrong somehow or other.

Andrew Tickell: Well, thank you very much—I appreciate the effort.

Thank you for inviting me again. My attitude towards this legislation is probably unpopular with more or less all of you. I think that it is a bad piece of legislation; in parts it reads like magic realism. The legal criticisms of great parts of the 2012 act are very well founded. I think that Parliament should respond to those failures in the bill by amending it and fixing the problems, rather than repealing it.

It is actually quite straightforward to transform what is in the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012—particularly section 1 of the legislation, which has been the focus of the session thus far—into a pretty mainstream public order offence. Parliament has the opportunity to do that. If you choose not to, that is obviously your choice, but I think that there are big problems with that.

I would argue that striking this act completely aside is like using a sledgehammer for a task for which a scalpel is better devised, particularly in the context of something that a number of the witnesses from whom you have heard have mentioned, which is Lord Bracadale's on-going review of hate crime legislation. In that context, it seems to me that it would be more sensible to make amendments to parts of the 2012 act that are bad, to listen to what Lord Bracadale has to say about the future of hate crime in Scotland and then to revisit the issues. That, in a nutshell, is my attitude, more or less.

Dr Stuart Waiton (Abertay University): As the committee knows, I oppose the act. It has to be put more generally in terms of the political culture, because a key element of the act could be described as part of creating what we could call a safe space society—a society in which people learn that, if they say certain words, they will be shunned, possibly sacked or, in the case of football fans, arrested. That is essentially what the 2012 act does. We hide behind the public order issue, but essentially it is about the criminalisation of words and thoughts, and the arresting and imprisoning of people because we do not like their words.

I listened to a Radio 4 programme in which they were talking about the Profumo affair and Christine Keeler in the early 1960s, and about obscenity and the use of the idea of obscenity. I find it quite difficult to explain what we are looking at with acts such as the 2012 act. They seem to be political, because they talk about things such as racism and sectarianism, but at the same time it seems much more to be a form of etiquette and the training of correct behaviours.

I watched the previous discussion, in which you were constantly talking about behaviour—the behaviour of fans. We do not usually talk about the behaviour of murderers or rapists—a crime is a

crime and we talk about people's crimes. However, you are talking about educating their behaviours in quite a school-marmish and, arguably, patronising way, saying, "We need to make these people aware of how they should behave."

12:00

One element of the argument seems to be around etiquette and what is seen as correct and civic behaviour. When you talk about racism and sectarianism, you are really saying that you find racism and homophobia obscene. It smacks of the 1950s to me and a type of conformism and conservatism that is being forced on society. The bill is probably the best example, possibly in Europe or even the world, of a new type of politically correct form of policing of civility and society.

The Convener: Is your question very brief, Fulton?

Fulton MacGregor: Yes. I thank the panel for their comments so far. I want to pick up on a comment that Dr Webster made. It is the first time that we have heard the angle that people who are engaging in songs and behaviour are doing so for the benefit of their own fans and supporters. That goes against much of the evidence that we heard about people saying that they were put off from going to games because of that. In other words, they may be a fan or supporter of that club, but they choose not to go to the games because of the offensive behaviour.

I know Rangers and Celtic fans—and we will all have heard this—who are saying quite clearly that they would not go to Parkhead or Ibrox because of that offensive behaviour. It is interesting that when those fans become fathers or mothers, they say that they are not going to take their son or daughter to those places either. How does that fit with your overall analysis that people are not offending anyone because they are talking to each other?

Dr Webster: Can I clarify that I am not saying in any way that the people singing are not offending anyone. The point that I am making is that we need to understand the motive behind the behaviour. We are assuming that such songs, chants and displays of banners and other symbols are specifically designed to bring about maximum offence. If you spend time conducting the type of ethnographic research that I do among people who engage in such behaviour, you quickly realise that their primary motivation is not to offend the other but to build bonds of sociality between each other.

I take your point that that does not then preclude the possibility that other people listening might find some of those things to be offensive. My point is that we often attribute false motivation—that is what the act does—to those who engage in such behaviour. That is an important point, because if we reconfigure our understanding of what motivates such behaviour, it might assist the committee in trying to figure out the best way forward, whether that is amending the legislation or bringing in something else.

I am not convinced that any of us fully understands what is going on in the social world of the people who engage in these behaviours. Without really understanding what is happening, we cannot act to correct it, deal with it, police it or politely ignore it—whatever course of action is deemed to be most useful. We do not understand the type of behaviour that the act attempts to address.

Fulton MacGregor: I thought that your point was well made and in a way that we had not heard before. However, my understanding of the act—before and since becoming an MSP—was that it was intended to address offensive behaviour for everyone. I did not think that the offensive behaviour had to be addressed to an opposing group of fans; rather I thought that it was mainly to protect folk who supported the same team. That was why I was interested to hear your angle.

Dr Webster: That is not my understanding of how the people who I have spent time researching among would understand the act. They see themselves as the victims of the legislation because they see themselves as the ones being policed. From my perspective as an ethnographer, whether that is accurate is beside the point. The point is how the 2012 act is interpreted by people who think of themselves as the victims of the legislation. It has all sorts of unintended consequences for how they relate to the police and to one another. I am sure that we will come on to talk about that later. It is essential to understand the internal social life of the groups that the legislation targets to figure out how it will or will not work and what unintended consequences it is bound to have.

Dr Waiton: It is worth bearing in mind the fact that, if you want to get a ticket for an old firm game, you have to bite somebody's hand off for it. People are queueing up to get to the games and the viewing figures when they are on television are bigger than those for any other games. There might be some people who are offended by the behaviour at those games but there seem to be an awful lot of people who are desperate to watch them, as I would be if Rangers were any good and they were worth watching.

It is also worth bearing in mind the fact that you do not have to go to a Celtic Rangers type game to find people who find football offensive. I grew up

in Newcastle. I knew lots of people who would not touch football with a bargepole. They generally saw themselves as more respectable than that. Football was seen as uncouth and, to some extent it is. That is what a lot of people love about it. It is an offensive, in-your-face, sweary, shouty atmosphere. Some people do not like that. You do not have to go to an old firm game to find people who are offended by football.

There has also been a lot of snobbery about this. *The Times* had a nice article in the 1980s that said that football was a "slum game" watched in "slum stadiums" by "slum people". There remains a snobbery about football fans except that, today, it takes a more politically correct form. If we are looking at people who are offended by football fans, we can look at prejudice and bigotry towards fans rather than just take it on good faith.

The Convener: I have allowed quite a lot of latitude. That was a supplementary question and we have a lot of questions to get through in a limited time.

Rona Mackay: My initial question is for Dr Waiton. We have heard evidence from the Scottish Women's Convention, disability groups and equality groups, which all say that they feel protected by the 2012 act and fear its repeal. Do their views matter to you?

Dr Waiton: I am sorry, it was women, disability and what was the other group?

Rona Mackay: The Scottish Women's Convention and the Scottish Disabled Supporters Association.

Dr Waiton: Was there not another one? I thought that there were three.

Rona Mackay: Sorry—lesbian, gay, bisexual and transgender groups.

Dr Waiton: I have lots of problems with this, actually, because I do not think that those groups are representative. They are not elected. They seem to be special interest groups. There seems to be a problem at the minute, especially in the framework of identity politics, that such groups need to be represented and represent themselves in a prism of victimhood. It is very rare to find one of them—in fact, I suspect that we would almost never find one—that does not demand that there be more awareness, legislation or regulation because, in the framework of identity politics, there is a tendency for groups to represent themselves as victims.

That is a good example of the new type of politically correct conformity and prejudice about football fans. There is a presumption that football fans are bigots, racists, sexists and homophobes and do not like disabled people. Then we get groups such as those that you mentioned, which are represented by tiny numbers of people, who say that they find that a problem. That is grotesquely patronising to football fans.

In my experience and as social attitude surveys have shown, society in Britain and Scotland in general is far more tolerant, far less racist and far less homophobic than it has ever been. However, football fans are represented in a way that, in essence, says that there is a seething bigotry just waiting to get out and, if we do not have more and more laws, there will be a problem. I find it interesting that we did not apply that approach to rugby fans, opera goers or anybody else. It seems to be football fans, who are mainly the white working class.

The big prejudice that we, as sociologists, should explore is your prejudice that represents football fans as potentially violent bigots.

Rona Mackay: I do not identify with anything that you have said. You are essentially disregarding the evidence that we have heard from those groups—they are not protest groups; they are made up of members of the community who like to enjoy football like everyone else. Equality matters, so I fundamentally disagree with you.

My main question is for the whole panel. Andrew Tickell mentioned Lord Bracadale's review of hate crime legislation. Mr Tickell has given us his view on that. Do the rest of you agree that it would be sensible to wait until that has completed next spring before repealing the act?

Dr Kelly: No. The act has shown that it is not fit for purpose. However, I agree to some extent with the Scottish Women's Convention and the disability and LGBT groups on the point about rights. I agree that those rights need to be protected but I wonder what the figures are for arrests, convictions and non-convictions for offences against those groups at football since the act came in. Like my colleagues here, I have done and still do ethnographic research with these groups and I am not aware of any such case. However, that is not to say that we should not protect those people.

If it is agreed that the act is flawed and faulty—I know that there is not complete agreement about that—the fact that some minority groups feel that it has protected them is not a good enough reason to hold on to it. We could come up with something better. As I said, I am not entirely sure that people have been arrested for attacking people from those groups.

Rona Mackay: We are not necessarily talking about people being arrested. It is about people feeling comfortable and able to go and watch and enjoy football.

Dr Kelly: Yes, but my point is that I do not know why people from those groups are more comfortable going to watch football under the act. As Stuart Waiton and Fulton MacGregor have said, some people are not comfortable going to the football for a variety of reasons. Perhaps people can enlighten us, but I do not know why the act is giving this women's group comfort or encouraging them to feel safe and secure at football.

Rona Mackay: I am not sure that it is for you to question how they feel.

Dr Waiton: Let me just chip in here. If someone came in here and said, "I feel really uncomfortable when I sit among a group of black people," we would think that they were a bigot and would question their fear. Other groups say that they feel scared when they sit among a group of football fans and you just take that as good coin. You do not question whether their fear is legitimate. It has certainly not been legitimised by any of the statistics that I have seen about attacks on gay people, black people or women at football games. It is zero, as far as I can tell—actually, that is not true. As far as I am aware, there have been two arrests for homophobic incidents.

You take that fear as good coin instead of saying that we should not just accept fear of other people as legitimate. Perhaps that fits into our own prejudices and then it goes unquestioned.

The Convener: I think that the original question was on the Bracadale review.

Rona Mackay: Yes, and I think that we got the answers. Mr Tickell, do you have a view on the equality aspects?

Andrew Tickell: There has been an awful lot of discussion around the act and messages. As a lawyer, that disturbs me, because the act has content that we need to address, whether we are for or against getting rid of it.

Lord Bracadale is likely to come up with a comprehensive report or proposals on hate crime that the Parliament will be invited to consider. As an area of law, it is a mess. No tidy-minded lawyer would look at the current law and not think that the solution would be legislation that comprehensively deals with incitement to hatred of various kinds. As the law stands south of the border, incitement to racial hatred, LGBT hatred and religious hatred are recognised and covered by English legislation. Those last two categories do not apply in Scotland, and I think that the Scottish Parliament will come under considerable pressure on that from Lord Bracadale.

This is prejudging his report, but I would be very surprised if he did not propose extensive hate crime legislation, and I would be surprised if most of the MSPs who will vote to abolish the 2012 act do not broadly back what he suggests. As things stand, I find that logically difficult to reconcile. We will see; maybe the judge will surprise us and offer a different perspective on that.

12:15

The Convener: I invite Mairi Gougeon to ask a brief supplementary question—it will probably be the last one, given that we are way behind with our questioning.

Mairi Gougeon: I will try to be as brief as possible.

We have to sort out some of the terminology that has been used in the meeting so far. I take great exception to some of the assertions that Dr Waiton made. I do not think that anybody sitting round this table would say that all football fans are bigots, homophobic or racist, but pockets and elements of that sort of behaviour exist. For example, a couple of weeks ago there was an incident on a train in which fans were singing homophobic songs, so it does happen.

However, we cannot dismiss the other evidence that we have heard—I think that Dr Kelly dismissed one of the groups that we heard from as "this women's group". We have heard talk about how grossly patronising those groups are. I think it is grossly patronising to refer in that way to the evidence that such groups have given us. It seems to me that the evidence that those groups have given has been analysed in a way that evidence on other legislation has not—it has been completely picked apart. We are being made to think that, because those groups do not represent 100 per cent of people, their opinion does not matter.

When we considered the Domestic Abuse (Scotland) Bill, we heard from organisations such as Women's Aid and Children 1st, which represent the views of the people with whom they come into contact. Of course they do not represent 100 per cent of people, but that does not mean that their views do not matter, and that is the basis on which evidence on legislation is considered. It is grossly unfair to say that the concerns of the organisations from which we have heard do not matter at all.

All those groups are concerned about the message that repealing the act will send out about what is acceptable and what kind of behaviour we could be condoning. What is your response to that concern? I take great exception to some of the assertions that have been made this morning.

Dr Waiton: As a criminologist, I always try to consider whether fears are real. In the 1970s, there was a panic about black muggers. Sociologists considered whether that fear was real

or whether it was prejudice. We should do the same thing when some groups say that they have fears about other groups in society, but we do not, because there is a certain etiquette and a political framework whereby some groups are seen as being on the side of good and others are seen as being on the side of bad. There is a genuine prejudice there.

For example, "old firm domestic violence" became an established term. I worked out the number of cases to which that referred and found that there were more newspaper articles than cases. I then tried to make a conservative estimate of how many football fans in Strathclyde were involved in a domestic violence incident that led to an arrest and I found that it was 0.0003 per cent of fans, which meant that 99.9997 per cent of fans had nothing to do with domestic violence that led to an arrest on those days. If, on the basis of similar statistics, terms were bandied around about any other group in society in the way that they are bandied around in associating fans with such things as domestic violence, it would be seen as moral panic.

Dr Webster: I will respond directly to the question about what message is sent if the act is repealed, which is an excellent and important question for the committee to consider. My understanding is that the message that it would send is that the act is not fit for purpose. The wider point is that, just because the faulty legislation—I think that the witnesses generally agree that it has significant problems—is repealed, that does not mean that we are affirming the validity of the types of behaviour that the act tries to restrict and criminalise.

The way in which repeal is perceived is all of our collective responsibility to deal with. To say that the legislation should not be repealed because it might send a problematic message to potential offenders is not a good enough reason not to repeal it. I am not saying that that message might not be taken into account—I think that it should be taken into account. We need to think about what will happen if and when the legislation is repealed but, to say that it should not be repealed largely because it might send a negative message to some potential offenders is a dangerous line to go down. We need to grasp the nettle and either repeal or dramatically alter the legislation, and simultaneously have a plan to deal with the type of message that public society should receive as a result of those actions.

George Adam (Paisley) (SNP): I want to ask for the witnesses' perspective on why we ended up with the legislation. In 2011, we had the so-called game of shame, which has been cited by a lot of the supporters groups as the reason for the legislation, but we all know that there was an on-going issue that was building up in the three or four games before that when things were getting out of control. There were 34 arrests at that game alone, of which 16 were on sectarian grounds, and there were 229 arrests in the Strathclyde area. During the old firm cup tie, domestic abuse rates were driven up by 43 per cent, according to the police, and there were 210 reported incidents, as opposed to 146 incidents on a normal day. Given all of that, and given that we have the Jewish community, Stonewall and the Scottish Disabled Supporters Association saying that they feel protected by the act, is it not the case that the Government was probably right to legislate?

Andrew Tickell: I am happy to address that. Some people would say that they support the principles behind the act. It is undeniable that the bill was extremely badly handled by the Scottish Government, which raced it through Parliament with limited scrutiny and added provisions late on that are frequently the most problematic provisions of the legislation. Indeed, the act specifically highlights, in section 5, the areas that are particularly problematic, as it gives the Government the power to knock out those sections.

The question is whether it is important that we have the criminalisation of offence, as opposed to the kind of criminalisation that occurred under classic breach of the peace provisions. Along with a number of other people, I am not sure that I am persuaded that we need to criminalise offence, but people will disagree about that. For the reasons that a number of fellow panelists have given, I am not sure that the legislation has succeeded comprehensively in addressing the issues. Perhaps that suggests that criminal law may not be the best tool to change society in that way.

I am not sure that that act of Parliament is an unvarnished success from the Scottish Government's perspective. It has turned a difficult area—talking about sectarianism in Scotland—into an even more hot-house environment and, heaven knows, it was a particularly hot issue for starters. I am not sure that the act has been a great triumph but, despite all my reservations, I believe that we can fix it. It is easy for the Scottish Government to do that if it chooses to do so, but thus far there is no evidence that the Scottish Government wants to amend the act, which I find somewhat disappointing.

Dr Kelly: George Adam referred to the so-called shame game. There were other issues around that time, of course, with Neil Lennon and other sectarian-related issues, so it was not simply that game, as colleagues probably know.

The answer to the question of what can be done about sectarianism is to make an act that deals with sectarianism, not one that deals with

offensiveness and which is open to question and does not actually specify for any of us round this table, or for the police or the courts, what this country thinks is sectarian and what is sectarianism.

I keep coming back to the point—because it is crucial—that it should not be illegal for people to have a sectarian identity, and there is confusion and misunderstanding about that in this country. The issue is when one's identity, whether that is sectarian or not, is about exhibiting intolerance or hatred towards someone else's identity, based on religion or any of the other protected characteristics. As I said, I support the protection of those other characteristics in a properly worded bill.

I say to Rona Mackay and Mairi Gougeon that I am very conscious that we are sitting here pontificating on the issue as a bunch of white males. I certainly do not mean to cause any offence to the women's groups and I am actually on record as supporting the protection of women's rights, gay rights and all sorts of disability and minority rights at football. I just do not think that the 2012 act does that.

George Adam: Dr Waiton, your written evidence says:

"people should be able to express their hatred of whoever they like",

and you have also contributed to a book, "Football hooliganism, fan behaviour and crime: contemporary issues", in which you said that, in many respects, being offensive is football. Are you saying that anybody can say whatever they like, whenever they like, no matter how offensive someone finds that?

Dr Waiton: I am a bit of an extremist on this, but I do not think that we should arrest people for speaking words. That is crazy in a liberal free society, but there we have it. If someone sings a song, I do not think that we should call the police and put them in prison for it.

George Adam: Dr Waiton, can I just—

The Convener: Let Dr Waiton finish and then you can come back in.

Dr Waiton: Unlike most of you, I was actively involved in anti-racist politics. The first newspaper that I sold was in defence of gay rights. I think it is strange to talk about protecting people. I think that it was Iain Macwhirter—that extremist—who said that the Scottish Government should realise that the right to offend is the most basic right in a free society. That is true. In a liberal free society, different ideas and views should be expressed. If someone disagrees with those views, they should challenge them with politics, campaigns and articles. When was the last time that you were out in the street handing out a leaflet? Perhaps you should do that and talk to ordinary people. I do not think that we should put people in prison for—shock, horror!—the words that they speak.

George Adam: As a football fan—a St Mirren fan, for my sins—I remember a time back in the 1980s when St Mirren were playing in European football and Ruud Gullit came to Love Street with Feyenoord. He still mentions the fact that that day in Love Street was the worst racism he experienced in his whole career. I knew then, as a young man in primary school, that it was wrong to do that. Is it not the case that there has to be some way of making sure that people have to control themselves and that they cannot just say whatever they like at any point, particularly when there are in groups at football games?

Dr Waiton: Why do we assume that it is a problem in football now? In 2001, I think, the statistics from England showed that there were 17 cases out of 13 million people, which amounted to something like 0.003 per cent. You seem to be suggesting that, if we did not have the police hanging around people's necks they would all be racist animals. I do not think that that is true.

George Adam: What I am concerned about is what you have said, Dr Waiton—that people should be able to express their hatred of whoever they like.

Dr Waiton: Yes.

George Adam: I find that quite offensive.

Dr Waiton: That is the nature of free societies—people express things. The way to deal with that is not to put people in prison for the views that they hold or the words that they say. It is how a free society is meant to operate. If the clubs want to do something about it, that is different. They are private institutions and they could do something, but the state and the police should not be involved in the policing of language and thought. That is the most basic aspect of a free society; unfortunately, it seems that we have completely lost it.

The Convener: We must move on now. I am sorry, but there is no time for supplementaries.

Liam Kerr: I will be brief. I was fascinated by the analysis in the panel's submissions of the underlying legislation and the assumptions that are inherent in what we have done. I want to draw that to the practical level.

The committee has heard a deal of evidence that suggests that there has been a reduction in the singing of songs in the stands. Does any of the panel have a view on whether the underlying values or societal beliefs have changed? If they have, is that a result of the 2012 act? In any event, does that imply that if we take the legislation away,

the underlying belief and mischief will still be there, waiting to spring back?

12:30

Dr Webster: Having done extensive ethnographic work on exactly that question, I would dispute that there has been a dramatic decline in the singing of certain songs. What fans have done is change their behaviour by holding their hands in front of their mouths while singing certain songs in order to prevent CCTV from capturing them singing them. In addition, as we are all aware, they have replaced certain songs and chants with other words in order to try to skirt the law.

My sense is therefore that one of the major problems with the 2012 act is exactly the type of phenomenon that you are putting your finger on. The question therefore is what behavioural change the 2012 act has brought about. Has the 2012 act brought about behavioural change? Yes, it has, but it has not changed or discouraged the expression of the types of behaviours that the 2012 act sought to do away with and it has not made people less offensive; it has made them engage in a different way in behaviour that the 2012 act regards as offensive. The 2012 act redirects those types of behaviours rather than prevents them from happening. That is a feature of the legislation because of the way that it was drafted.

More fundamental, though, is that we are coming up against something that all of us have already discussed, which is that maybe legislation is not the best way to deal with the types of behaviour that the 2012 act tries to prohibit. Laws might be less effective than, for instance, early years education, which I would imagine is a fairly uncontroversial suggestion. Has the singing decreased? No, it has been redirected. Is the law working? No, we need to replace it with other methods of behavioural change, with the most sensible probably being early years education.

Dr Waiton: I believe that the 2012 act has had an impact, but that is difficult to quantify because of the climate in which it exists. For example, my student association passed a no-platform motion a few years ago, the opening sentence of which said "This union notes that racism is illegal." The people who drafted that thought that racism was illegal. In case anyone is confused: racism is not illegal. We are allowed to be racists, but we are not allowed to speak in relation to that.

My concern about the 2012 act is that it creates a climate in which people are frightened or are a little bit nervous about talking about certain things. There is also a problem with the 2012 act in terms of protected characteristics. It reminds me of a kind of zoo where different groups are walled off from one another. The 2012 act seems to be helping to create a more fragmented and slightly more distant society. I remember that Scotland used to have the one Scotland, many cultures campaign, but the "many cultures" part was got rid of at a time when there were concerns about whether multiculturalism was creating separate communities, especially among the Muslim community. The "many cultures" part disappeared because there was a nervousness about the concept.

The 2012 act and similar legislation are having an impact on society, but it is a kind of etiquette or censorious impact on what can be discussed. Unfortunately, that turns things like anti-racism into a mantra, as a result of which people just say no to racism but never discuss racism or have arguments about it and we are never in a position where people feel free to have a proper debate and develop proper anti-racist ideas and understandings.

Dr Kelly: I agree completely with Stuart Waiton's last point.

I would take issue a bit with the assertion that there have been fewer problematic songs at football games. As someone who has been to quite a number of Celtic games over the past few years, in a personal capacity and as an ethnographic observer, I would argue—I think that most Celtic fans would agree—that since the 2012 act came in there have actually been more of what the Scottish Government might define as problematic songs. At Celtic park and indeed away from it where Celtic has been playing, there have been more songs of an Irish nationalist and Irish republican nature than was the case before the introduction of the 2012 act.

In fact, for a number of years at Celtic park, you would struggle to hear some of the old Irish nationalist songs such as "The Boys of the Old Brigade" that were sung throughout the 1960s, 1970s and 1980s and that mention the Irish Republican Army or are about various versions of the IRA or Irish nationalists or republicans. Those songs were disappearing from the mainstream Celtic support, but then the 2012 act came in and, in many ways, the songs have become more popular, almost as an act of defiance in some respects.

I agree with Stuart Waiton that some of the fans who sing those songs think that the state should not tell them what to sing and should not control people's songs. The situation is possibly the same with Rangers, although I am not sure that the point applies as much to Rangers or to other clubs that might be affected, such as Hearts or Hibernian. I suspect that part of people's motivation for singing those songs after the act was introduced was to

show that they thought that it was unfair and was prohibiting them from expressing elements of their national identity.

People in this room might not understand or sympathise with that national identity, but the people singing the songs identify with it. That is one of the key points that we completely fail to understand and grasp across the official structures in this country. That requires more dialogue with the fans and the people who go to the games. I cannot speak for colleagues at the table, but I am not only a researcher—I know about football and I am a football fan. Too many people who try to implement rules and laws do not actually understand football culture.

The Convener: We are less than halfway through our questions, so I ask the questioners and those who respond to be as succinct as possible, please.

Liam Kerr: Mr Tickell, the committee heard evidence from the Crown Office and Procurator Fiscal Service that repeal would leave a gap in the law. Do you agree?

Andrew Tickell: Talk of a gap in the law frequently rather begs the question. For example, in this country, it is illegal for a judge to sentence somebody to death if they are found guilty of murder. To someone who is in favour of the death penalty, that is a gap in the law but, for a squishy liberal person like me, it is a feature and not a bug. Often, when we talk about gaps in the law, we are begging the question and presupposing that the underlying behaviour should be criminalised.

Setting aside that suspicion of the question, I suppose that, whatever you think of the merits of section 6 of the 2012 act, it is very difficult to argue that there is a specific criminalisation in Scotland of incitement to religious hatred. Such a provision applies in England but not in Scotland, in part because it was resisted by Scottish MPs when Tony Blair's Government brought in the measure several years ago. So the repeal would create a gap in the law, although it might well be that individuals could be prosecuted under other existing offences.

That is one element of the scrutiny of the proposal to repeal the act that I find a wee bit baffling on some level. Many critics of the act, several of whom are on this panel, argue that it is illiberal and interferes with free expression, but the policing around football and of singing songs around football is not new—it was not invented by the Parliament in 2012. Before the act came into force, there were several breach of the peace cases that criminalised people singing. Sometimes, words read in context are different from those words in other contexts. If I go back to Glasgow this afternoon, enter a Celtic pub and start singing the famine song, on one level, that is my free expression, but it could of course lead to public disorder and could be analysed under the rubric of breach of the peace. Therefore, the idea that we can rather glibly and comprehensively say that we should not criminalise speech does not relate to the law as we had it before the 2012 act and presents a rather exaggerated image of the act's illiberalism. There are plenty of examples from the annals of our courts where what might be seen as just words have ended up with someone in court.

Ben Macpherson: Mr Tickell, could you elaborate on your specific concerns in relation to the drafting of section 1 of the 2012 act and your proposals for its amendment?

Andrew Tickell: There are three problems with it.

First, we have the list of prohibited behaviours, which are in five broad categories, including "expressing hatred of" groups or individuals on the basis of protected characteristics; "behaviour that is threatening"; "behaviour that is motivated" by hatred, which covers behaviour that in itself is not an expression of hatefulness or threatening; and offensiveness. I do not think that offensiveness is an appropriate threshold for criminalisation. That is what distinguishes the act from earlier breach of the peace provisions, which criminalised only behaviour that would cause a reasonable person to suffer fear and alarm in the context in which it takes place. I think that you should knock out that bit of section 1.

Secondly, the definition of "public disorder" in the act is absolutely baffling, in the sense that when the junior justice minister came to your predecessor committee to introduce the public disorder restriction, she represented it as a safeguard for individuals who might find themselves accused of committing a criminal offence. However, two things are excluded from the sheriff's deliberations about whether, in the context in which a criminal act took place, public disorder would have arisen. They can discount the fact that public disorder did not happen because of the police being there—that is, if the police were there and public disorder did not occur, the accused cannot claim any benefit from that. The second thing is that if no one is there to be incited—if someone is in the kind of scenario that Dr Webster has been talking about, where they are not marching into a Celtic pub to sing the famine song but are in a certain kind of fraternal Protestant brotherhood that sees singing that song as a way of articulating a shared identity—the sheriff is invited to invent fictional, absent incitees.

Proponents of the 2012 act would say that often the behaviour is offensive in the context of football matches and therefore it should be criminalised.

Whether or not you agree with that argument, the act specifically instructs judges to completely ignore the actual context in which the behaviour takes place. That is perverse. We can fix that, too, by knocking out the subsection that invites the court to invent fictional incitees. Even when it brought in that provision, the Scottish Government recognised that it was fairly indefensible—or not defensible in the long term—as it gave ministers the power to knock it out using an order as opposed to primary legislation.

Those are just a few examples of areas of problem and areas where there can be very straightforward fixes that would leave us criminalising only hateful behaviour—which I know that some panel members will not agree with—and threatening behaviour that is likely to give rise to public disorder in the context in which it is actually taking place. That would make it a mainstream public order piece of legislation that would be very much compatible with most UK approaches to dealing with the issue.

Ben Macpherson: Before Dr Webster comes in, I have another question for Mr Tickell. On the point about context, some witnesses have argued that football fans are unfairly targeted because of the context that section 1 targets. In your view, is that justified? Would an expansion of the context help to alleviate that sense of being singled out?

Andrew Tickell: I think that your colleague Fulton MacGregor put that point to the fans who are against criminalisation. Their argument is that the 2012 act is discriminatory because it targets only football fans. One way to make it not discriminatory is to make it apply to everyone, but the fans were still against the act because of the offensiveness provision.

When Lord Bracadale gives his proposals on hate crime, I think that we will see not sector-specific offences but a comprehensive piece of legislation on this issue that is like the common law breach of the peace. I think that the argument about discrimination against football fans is essentially a red herring, because if someone would be unhappy even if the provision was extended to cricket matches and rugby matches, their argument is not principally about discrimination but about the act setting too low a hurdle for criminalisation. That is my analysis.

Dr Webster: If we remove the aspects of the legislation that are being suggested here, my sense is that we would lose everything that is distinctive about the act and therefore we would have no need of the act itself. The existing legislation—particularly on breach of the peace, which we have already discussed—would seem to suffice.

In particular, if we remove the element of offensiveness, which is the one thing that is genuinely unique about the act, we will have taken out the one thing that makes the act what it is, and therefore presumably we would no longer need the act.

12:45

The Convener: We do not have much time left, Ben.

Ben Macpherson: Andrew Tickell, you said that in your view Bracadale would propose an extensive set of hate crime legislation. This question leads on from that and from what Dr Joseph Webster just said. Would revision take place as part of that new legislation? As part of the consolidation—

The Convener: We have got the point.

Ben Macpherson: Would that be a better way of using what is good in the act?

Andrew Tickell: No. That is partly because of the critical voices on the panel and outside the Parliament in relation to the 2012 act. The act needs to be fixed now. Section 5 gives to the Scottish ministers the power to make an order to fix all the things that I have described, and they could lay that before the Parliament tomorrow, if they wanted. That would be very sensible and would deal with the substantive criticism of the legislation. An amended bill could be considered in the context of the Bracadale report, which will cover a complicated area of law. I daresay that the Parliament will want to scrutinise it and hear from a range of different folk who will want to argue about what is in it. That is some way down the line.

There is strong argument to act now, not least because it would be good if the Scottish Government were to show some recognition that it got it wrong. Many people, who are otherwise sympathetic to the Government, recognise that several elements of the act were rushed through too hastily and mistakes were made—we all make mistakes when we rush things.

The Convener: What about Dr Webster's comment that if you remove all those things, the essence of the bill will be gone?

Andrew Tickell: There are two ways of looking at that. First, the message-related concerns raised by many people would be alleviated to some extent, because there would still be recognition of offending around football. Secondly, statisticians might like the data, in the sense that it would be useful to be able to identify specific categories of offending around football, because we do not have 20,000 people singing songs about being up to their knees in Fenian blood at cricket matches.

There is a particular set of problems around football in Scotland and whatever one thinks about the act, one cannot be blind to that fundamental fact.

Maurice Corry: Dr Webster, your written submission refers to your key concerns about section 6 offences. Can you elaborate on that?

Dr Webster: Do you mean how section 6 does not provide suitable provision?

Maurice Corry: Yes.

Dr Webster: My point is very simple. Section 6(5) claims that it does not restrict the behaviours outlined in section 7(1)(b):

"expressions of antipathy, dislike, ridicule, insult or abuse".

The legislation is not sufficiently finely drawn to allow police officers on the ground to distinguish hatred from antipathy, dislike, ridicule, insult or abuse. The inability to figure out which behaviour belongs in which category means that police officers need to interpret grey areas. My research conversations with police officers suggest that they do not like being put in that interpretative position and that it fuels resentment and anger among grass-roots fans who feel that expressions of antipathy, dislike, ridicule, insult or abuse are being criminalised, even though the act says that they are not.

Maurice Corry: Is it unfair on the police that they have to interpret those grey areas?

Dr Webster: The police interpret things all the time and generally do a very good job in doing so. The problem with the act is quite acute in so far as several different categories mentioned in section 7(1)(b) require far more interpretation than the police would normally be expected to apply under other pieces of legislation.

I am not against the police interpreting things—they are professionals and do a good job of interpretation in general. However, the level of interpretation that we expect in the context of the 2012 act goes far beyond that. As a result, it causes problematic situations within the police's job and how that job is perceived by those who feel that they are being targeted by the act.

Maurice Corry: What are the views of the three other panel members on repealing section 6 and any problems that might result?

Andrew Tickell: There is no direct provision in Scots law for incitement to religious hatred to be a distinct offence. That is a statement of fact; whether one thinks that it should be a distinct offence is an open question.

I should stress that this is not principally about football. Section 6 is not about fans. If fans are particularly preoccupied by that section, they are not reading the act closely. Section 6 covers the threatening communications element of the legislation, so it extends more widely. If you abolish that section in the bill process, I would be stunned if you did not reintroduce something similar a few months or years down the line. That raises fundamental questions of principle. Why repeal it if you are likely to want to back it in future?

Dr Waiton: The communication side of things is problematic. That law does not, in and of itself, restrict freedom of speech. Many laws do that and it has become an accepted cultural framework.

I have a real problem with the fact that you can get arrested for being threatening even though there is no evidence of any reality to the threat. We are arresting people for saying stupid things, often when they are drunk, and those things are often then called hateful even though, when we talk to the people, they are usually embarrassed and feel that they have been stupid.

There is a real problem with the criminalisation of words and putting people in prison for saying stupid things when there is absolutely no evidence of any intent to act upon those stupid words. We are, in essence, talking about thought and word crimes.

Dr Kelly: I agree with Dr Webster and Andrew Tickell pretty much in totality. If one were to revise the bill, that might alleviate some of the fears that some of the minority groups have. From the beginning, I have highlighted the following point as being positive about the act: it seeks to protect ethnic and national identities. However, because of the way that it has been policed, that is not what has been happening, unfortunately. The opposite has been the case.

Would there be a gap in the law if it were repealed? Potentially not. Lawyers and legal experts are in a better position to judge that than I am, but my gut feeling is that there might be a gap in protecting people's rights to express their national and ethnic identities. The implementation of that is key because the act claims to do that, but some of its workings and implementation do the opposite.

Mary Fee: Sectarianism is not defined in Scots law. If it is possible to define it, would it be helpful to do so? Would defining it help people to understand what it means and, if it needs to be eradicated, to eradicate it?

Dr Webster: That is an excellent question. The Scottish Government's advisory group on sectarianism has already produced numerous reports, two of which include pretty finely grained definitions of sectarianism. It would be helpful to define it. It has already been done by academics

whom the Scottish Parliament has asked to produce such a definition. I am thinking of the work of Dr Michael Rosie and others on the advisory group on sectarianism.

The definition exists. It is a good definition and it should be taken seriously in the legislative process and more widely in social and political debate.

Mary Fee: That is helpful. Does anyone else want to comment?

Dr Waiton: The question that researchers such as Professor John Flint and, recently, Tom Devine raise is not about the rise or problem of sectarianism but the obsession with it. They observe that, as far as most people can see or would argue, the problem of sectarianism in religion or its relation to the troubles in Northern Ireland is a fraction of what it was.

In fact, Graham Spiers wrote an article in 1996—that is twenty years ago, or almost a generation—making a point about people in wine bars being obsessed with sectarianism. I think that he may have been in too many wine bars in the past two decades, but never mind. Tom Devine said:

"For most of last century when the disease was rampant and noxious it was little discussed or debated in public. Like an unpleasant smell at a middle-class dinner party, everyone knew it existed there but nobody wanted to talk about it.

Today, with the old monster in its death throes, sectarianism has spawned a new growth sector: a well-financed anti-sectarian industry. A delicious irony indeed."

Time and money would be better spent trying to work out why politicians talk about sectarianism so much at a time when Tom Devine, who sees sectarianism as a historical problem, says that it is in its death throes.

Dr Kelly: From the early days of the act, and indeed before it, as an academic and speaker in any kind of forum, I always said when discussing such things, "Let's define it," because I do not think that we have a clear definition in this country, although I take my colleague's point that the working group provided a fairly reasonable definition. That needs to be a starting point if you are going to legislate for something that we generally call sectarian behaviour or sectarian identities.

We need to define sectarianism and agree on what it is, if that is at all possible. The police are good at interpreting but the act has not given them a framework to work from, and that has led to all sorts of issues. I have complete sympathy for the police and the courts, as well as for the football fans who have been arrested.

Mary Fee: It could be a generational thing, but how important is education to changing behaviour?

Dr Webster: It is absolutely essential. My understanding is that we have a debate within the panel about whether or not we want to go down the route of education and whether we want to aim for a behaviour change. That is a separate debate but, if we want to aim for behaviour change, the crucial way to bring about that change is to engage in early years education. Whether we value the aim of behaviour change is a different debate, but if we want to encourage people to do certain things and not to do other things, we probably need to start telling them that when they are three or four, not when they are 18, 19 or 20. By then, from a behavioural science perspective, it is simply too late.

James Kelly (Glasgow) (Lab): I have a question for each witness, starting with Dr Waiton. You have criticised the authoritarian nature of the act in your submission and in your evidence this morning. What is your view of the way in which the act has been policed?

Dr Waiton: It is an interesting question. I was invited to Ibrox to look at the policing, because the police are aware of my interest, and then I was invited to Hampden to watch the old firm semi-final, which was a bit more interesting, because 20,000 people started singing "Billy Boys". They had clearly been trying to hold their tongues for as long as possible, and then it just exploded, but it did not seem to create a public order issue, which is perhaps worth noting.

As far as I can tell from fans' responses that I have received over the years and from contact with fans, there is a sense of the escalation of surveillance. It does not necessarily lead to arrest, but there has been an escalation of surveillance and a sense that people are being permanently policed and have to watch their words, which some people would say is a good thing. That is a sentiment among fans.

There is also, especially among Rangers fans, a growing resentment—at least, based on the findings of a small piece of research that I did—about what they see as Celtic being grasses, not in relation to the act specifically but in general. There is a sense that Celtic fans tell the police, and I think that there is a new tension, which could develop among other fans, because there is a feeling that different fan groups tell tales on one another. It is not just about policing directly but about a sense that fans are policing one another, and resentment has emerged because of that.

13:00

James Kelly: Dr Webster, what does your research tell you about the impact that the 2012 act has had on the relationship between fans and the police?

Dr Webster: That is an important question. The 2012 act has done two things. First, it has changed the way in which certain behaviours that it deems offensive are enacted by fans, sometimes in quite ingenious ways. We might not like the behaviours, but people now hold their hands in front of their mouths when chanting something, aware that they are being recorded by CCTV during that speech act. That shows that there has been behaviour change but not a decrease in offensive behaviour; such behaviour is being enacted in a different way.

My second observation is about both sides of the sectarian divide. We can use Celtic and Rangers fans as the typical case, but it is not typical at all, although I will put that aside for the moment. The opposing fan bases feel themselves to be uniquely victimised by the police. Rangers fans think that they are the ones being picked on and Celtic fans think that they are the ones being picked on. As a result, fan bases find themselves at odds with each other and with the police. The 2012 act has made the policing of sectarianism more difficult, because fans have got wise to how to circumvent the law, and it has led to a deterioration in relationships between the fan bases and between them and the police.

James Kelly: Mr Tickell, I am interested in your view of how the cases are handled in the judicial system. We have had submissions from a couple of lawyers who said that, as low-level cases progress through the system, there can be plea bargaining between lawyers and the prosecution, and cases might be withdrawn by the prosecution if there is not enough evidence. However, those lawyers also said that almost all cases under the 2012 act are brought to trial and that procurators do not have the capacity to negotiate or plea bargain. Do you have a view on that?

Andrew Tickell: That is certainly likely to be the case, given the high priority that was given to the 2012 act by the Crown Office, which got very involved in bringing the legislation to fruition, and which stated to the Justice Committee that the legislation was an important tool. The Crown Office clearly felt that it had to back the legislation all the way.

As we have seen with the domestic abuse interventions by the police and the Crown Office, if a policy comes out of Chambers Street that is then enforced by procurators fiscal across the country, their liberty to deal with cases in different ways will be restricted—that seems to be clear. A point that many critics of the 2012 act would make is that, despite the number of cases that go to court under the legislation, the conviction rates are not great. The most recent figures show that the conviction rate for charges under the 2012 act is slightly lower than the general average of about 87 per cent. That might be because cases are ending up in court that might not otherwise have done so if procurators had more discretion over the cases before them.

James Kelly: My final question is for Dr Kelly. When the original legislation was introduced in 2011, you made the reasonable point that the law needs to be explicit and unequivocal. You were anxious about the legislation back then because you felt that it was not clear about what would be allowed and what would be prohibited. Having seen the passing of the 2012 act and its implementation over five years, how do you feel those issues have played out?

Dr Kelly: All I would say is: I told you so. What was predicted, not just by me but by a number of people who understand Scottish football, who are football fans and who research football—and possibly all of the above—has come about. Many of us suggested that this was likely to happen and that the police—I must come back to the police again—were being asked to do an impossible task.

I agree with my colleagues. Instead of there being more tolerance and decency and less offence—even though I do not think that giving offence should be illegal—things have gone the other way. There is mistrust between fans and between the police and fans, a feeling of hypersurveillance and a wrong feeling that certain behaviours are being targeted when they are not. There is confusion around pretty much all of this, and as far as I am concerned, a lot of it comes down to the fact that what is being policed is neither well worded nor clearly defined. As has been pointed out, if we are seeking to criminalise sectarianism and intolerance of someone else's sectarian activity, we need to be absolutely clear about how we define that for the police and for schools, and in the discussions that we have. Indeed, if we are talking about education, we should be seeking not only to train children to behave in a particular way but to question why people are offended by these identities in the first place. I know that I am going back to a previous point, but that sort of thing will be crucial to any such education programme.

In summary, I am absolutely not surprised at what has happened, and most commentators will agree that it is largely—although not exclusively—due to the act's poor wording and a lack of agreement over what is offensive and what is a human right to express an identity.

Andrew Tickell: As a very brief point, I am not sure that opponents of the legislation who want to roll things back to breach of the peace are being entirely logically coherent. According to Smith v Donnelly, the Scots law definition of breach of the peace is behaviour

"severe enough to ... alarm ... ordinary people and threaten serious disturbance to the community."

That does not exactly constitute a comprehensive set of detailed legal rules that the ordinary punter, wherever they are in Scotland, can understand.

What I therefore find slightly confusing about those who use that position to promote the repeal bill is that they criticise the 2012 act for being vague while saying that breach of the peace is fine, despite the fact that it is notoriously vague and has been used to prosecute everything from playing marbles on a Sunday on the island of Lewis to walking the streets of Aberdeen wearing women's clothing. The critics of the legislation have to give some account of the ways in which the common law is substantially better, because, even though I think that there are tremendous things wrong with the act, the common law is notoriously vague and unclear and does not specify to football fans what is and what is not criminal. It is also what will obtain if the bill is passed and the act is repealed.

The Convener: You may have the last word, Dr Webster.

Dr Webster: The 2012 act is a unique combination of problematic specificity and problematic vagueness. In other words, it is the worst of both worlds, and I think that breach of the peace offers a sufficiently general, though not perfect, form of legislation to deal with these behaviours without getting caught up in the reality or perception of this being targeted at football fans or in having to include or weave through the 2012 act a rather problematic attention to the nature of offensive behaviour. I am not saying that breach of the peace is perfect, but, as I have said, the 2012 act is a damaging combination of problematic specificity and problematic vagueness.

The Convener: That concludes our questions. I thank all the witnesses for their attendance, their participation and their help with the committee's scrutiny of the bill.

Justice Sub-Committee on Policing (Report Back)

13:08

The Convener: Agenda item 6 is feedback from the Justice Sub-Committee on Policing on its meeting of 9 November 2017. After we hear a verbal report from Mary Fee, there will be an opportunity for members to make brief comments, and I refer members to paper 7, which is a note by the clerk.

Mary Fee: The Justice Sub-Committee met on 9 November 2017 for an evidence-taking session on the police service's budget planning for 2018-19 in preparation for the publication of the Scottish Government's draft 2018-19 budget in December.

The sub-committee took evidence from the Association of Scottish Police Superintendents, Police Scotland, the Scottish Police Authority and the Scottish Police Federation; it heard about actions that were being taken by Police Scotland and the SPA to support financial planning and to develop three-year and 10-year financial plans; and it was informed that the Auditor General will publish a section 22 report again this year. The sub-committee was also told that more needs to be done to involve the unions and staff associations in discussions about budget priorities and future financial planning, and it heard about a reduction in custody capacity and the impact of the transfer of prisoners between custody centres.

The sub-committee's next meeting is scheduled for Thursday 23 November, when it will take evidence on the progress of the independent investigations into Police Scotland's counter-corruption unit.

I am happy to answer any questions.

The Convener: Do members have any questions?

John Finnie: I simply make the brief point that, although the discussion was about the budget, very important information was also forthcoming on the issue of custody. I was keen for Police Scotland to give us a human rights assessment of the current arrangements. I understand that that assessment has been asked for, but the sub-committee needs to look deeper into the issue, as there are significant matters that need to be addressed.

The Convener: Additional information was certainly requested—and will be received—on a number of issues that were raised.

As there are no more questions, I thank Mary Fee for that update.

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (Witness Expenses)

13:10

The Convener: Item 7 is an invitation to members to delegate responsibility to me to arrange for the Scottish Parliamentary Corporate Body to pay, on request, witness expenses for the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. Are members agreed?

Members *indicated agreement.*

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (Witness Expenses)

13:11

The Convener: Item 8 is an invitation to members to delegate responsibility to me to arrange for the Scottish Parliamentary Corporate Body to pay, on request, witness expenses for the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill. Are members agreed?

Members *indicated agreement.*

The Convener: That concludes the committee's 33rd meeting in 2017. Our next meeting will be on 21 November, when we will take closing evidence from the minister on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and consider the Domestic Abuse (Scotland) Bill at stage 2.

Meeting closed at 13:11.

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