OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 5 December 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 5 December 2017

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JUSTICE COMMITTEE
35th 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:

Claire Baker (Mid Scotland and Fife) (Lab) (Committee Substitute)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Craig French (Scottish Government)
James Kelly (Glasgow) (Lab)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 5 December 2017

[The Convener opened the meeting at 09:53]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the 35th meeting in 2017 of the Justice Committee.

Agenda item 1 is to decide whether to take in private, both today and at future meetings, consideration of our draft stage 1 report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. Do members agree to consider our draft report in private?

Members *indicated agreement.*

The Convener: We have received apologies from Mary Fee; I welcome Claire Baker to the committee as her substitute.

We have also received an indication that the Minister for Community Safety and Legal Affairs is going to be a little late. Given the heavy agenda, will we move to item 4, which is consideration of subordinate legislation?

Members *indicated agreement.*

Subordinate Legislation

Police Pension Scheme (Scotland) Amendment Regulations 2017 (SSI 2017/387)

09:54

The Convener: Agenda item 4 is consideration of three instruments that are subject to negative procedure. I refer members to the note by the clerk. The first instrument is the Police Pension Scheme (Scotland) Amendment Regulations 2017 (SSI 2017/387). Do members have any comments?

John Finnie (Highlands and Islands) (Green): I would like to declare an interest. I am in receipt of a police pension, although the regulations will not apply to me.

The Convener: That is duly noted. Thank you.

Do members agree that the committee will make no recommendation on the instrument?

Members *indicated agreement.*

Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2017 (SSI 2017/393)

The Convener: Do members have any comments on the second instrument?

Claire Baker (Mid Scotland and Fife) (Lab): I was hoping to get some clarity about the instrument. It is a challenging ambition to have smoke-free prisons by November 2018. My question is about the definition of smoking, which includes nicotine vapour products. I seek some clarity about whether that means that the same rule for the 30-minute clearing of the cell before an officer enters and the November 2018 target will apply to nicotine vapour products.

The Convener: Would you be satisfied if we were to seek more information, but approve the regulations in principle?

Claire Baker: Yes. Some clarity on that point would be helpful.

The Convener: The clerks will seek that information from the minister.

Do members agree that the committee will make no recommendation on the instrument?

Members *indicated agreement.*

First-tier Tribunal for Scotland Health and Education Chamber and General Regulatory Chamber Charity Appeals (Procedure) (Miscellaneous Amendments) Regulations 2017 (SSI 2017/398)

The Convener: If members have no comments on the third instrument, do we agree that the committee will make no recommendation on the instrument?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

09:57

The Convener: Agenda item 5, which we may as well move on to, is feedback from the Justice Sub-Committee on Policing from its meeting of 23 November 2017. In the absence of Mary Fee, I will read the report. There will be an opportunity for brief comments and questions. I refer members to paper 3, which is the note by the clerk, which states:

"The Justice Sub-Committee on Policing met on 23 November 2017 when it held an evidence session on the progress of the two independent investigations into Police Scotland's Counter Corruption Unit.

The Sub-Committee took evidence from Police Scotland, the Scottish Police Authority, the Association of Scottish Police Superintendents and UNISON.

The Sub-Committee heard about the restructuring of Police Scotland's professional standards department and how Police Scotland handles complaints against its officers.

The Sub-Committee also asked questions about the current status of the investigations into the CCU and the publication status of the forthcoming reports of those investigations.

The Sub-Committee will next meet on 7 December 2017, when it will hold an evidence session on Police Scotland's custody provision."

Are there any comments and questions?

John Finnie: As you know, the situation has dragged on for some considerable time, and it looks like it will continue to drag on. That is not in anyone's interests. There are three on-going investigations, which involve Durham Constabulary, Northumbria Police and the Police Service of Northern Ireland. We learned that there was an additional report from the English forces covering chief officers, which was something that I had not hitherto been aware of.

I encourage Police Scotland to turn things around as soon as possible in order to remove much of the unhelpful speculation that there has been about police work.

The Convener: There has been a brief discussion this morning about the possibility of bringing to the committee the new chair of the SPA and the interim chief constable—if a permanent appointment has not been made—which would give the full Justice Committee the opportunity to ask questions and to meet both those people.

We cannot go much further with the meeting until the minister arrives.

09:59

Meeting suspended.

10:01

On resuming—

Subordinate Legislation

First-tier Tribunal for Scotland (Transfer of Functions of the Additional Support Needs Tribunals for Scotland) Regulations 2018 [Draft]

First-tier Tribunal for Scotland (Transfer of Functions of the Scottish Charity Appeals Panel) Regulations 2018 [Draft]

First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [Draft]

First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals Cases and Upper Tribunal for Scotland (Composition) Regulations 2018 [Draft]

Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018 [Draft]

The Convener: The next item is consideration of five instruments that are subject to affirmative procedure. I welcome Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and her officials. Hannah Frodsham is a policy executive and John St Clair is a senior principal legal officer, both with the Scottish Government.

The item gives members a chance to put to the minister and her officials any points on the instruments on which they seek clarification before we formally dispose of them. I refer members to paper 1, which is a note by the clerk.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): I will deal with the first four draft Scottish statutory instruments and then with the draft Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018, if that is okay.

The Convener: If you could address each of them briefly in order, that would allow us to put our questions without getting too mixed up.

Annabelle Ewing: I will address each of the first four SSIs separately, in order.

This suite of fairly technical regulations will transfer the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel into the Scottish tribunals structure that was created by the Tribunals (Scotland) Act 2014.

The first two instruments are the First-tier Tribunal for Scotland (Transfer of Functions of the Additional Support Needs Tribunals for Scotland) Regulations 2018 and the First-tier Tribunal for Scotland (Transfer of Functions of the Scottish Charity Appeals Panel) Regulations 2018. The regulations will simply transfer the functions and members of the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel to the First-tier Tribunal for Scotland. In addition, the regulations set out the transitional procedure for cases that are in progress on the date of transfer. The regulations will also make consequential amendments to primary and secondary legislation resulting from the transfer of the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel into the Scottish tribunals. As the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel are listed separately in the Tribunals (Scotland) Act 2014, each of the jurisdictions needs to be dealt with in separate instruments.

The next set of regulations is the First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018. They specify the type of member who will hear cases in the health and education chamber. The provisions mirror the existing composition of the Additional Support Needs Tribunals for Scotland. The regulations will also allow the chamber president or a legal member sitting alone to hear any matter in a case under section 18(3)(ea) or (eb) of the Education (Additional Support for Learning) (Scotland) Act 2004. Those provisions, which are due to be commenced on 10 January 2018, will allow the tribunal to decide whether a child over the age of 12 has the capacity to exercise the rights under the 2004 act on their own behalf.

The regulations also set out the composition of the Upper Tribunal when hearing appeals from the First-tier Tribunal's health and education chamber and, mirroring the previous arrangements, allow for a Court of Session judge to hear an appeal in the Upper Tribunal. The president of tribunals will determine who hears the appeals and may select herself, the chamber president or, indeed, the Lord President, if appropriate.

Finally in this suite of four sets of regulations, the First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals Cases and Upper Tribunal for Scotland (Composition) Regulations 2018 specify the type of member who will hear charity appeals cases in the First-tier Tribunal for Scotland. Again, the provisions mirror the existing composition of the Scottish Charity Appeals Panel. The regulations also set out the composition of the Upper Tribunal when hearing charity appeals from the general regulatory

chamber and, again mirroring the previous arrangements, allow for a Court of Session judge to hear an appeal in the Upper Tribunal. The president of tribunals will determine who hears the appeals and may select herself, the chamber president or the Lord President, if appropriate.

Each of those four SSIs will play a part in enabling the transfer of the Additional Support Needs Tribunals for Scotland and the Scottish Charity Appeals Panel to the new structure.

The Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018 is a very technical instrument that adds the First-tier Tribunal for Scotland and Upper Tribunal to the list of authorities that are covered by the Public Records (Scotland) Act 2011. The act requires listed authorities to prepare and submit a records management plan to the keeper of the records of Scotland for his agreement, and to implement their agreed plans, comply with the arrangements set out in them and keep them under review. Currently, a number of the tribunals are listed separately in the 2011 act; however, because they will be abolished as they transfer into the Scottish tribunals structure, their listing will be deleted, and the order will rectify that situation by adding the First-tier Tribunal and the Upper Tribunal to the list of authorities.

That concludes my opening remarks. I am sorry that they were a bit long, convener, but given the technicalities involved, I felt it important to set out the position.

The Convener: Thank you for that detail.

As members have no questions or comments, we move to the next agenda item, which is formal consideration of motions S5M-08839, S5M-08840, S5M-08841, S5M-09234 and S5M-08843. I note that the Delegated Powers and Law Reform Committee has considered and reported on the instruments and has made no comments on them. After the motions are moved, there will be an opportunity to have a formal debate, if that is necessary.

Motions moved,

That the Justice Committee recommends that the First-tier Tribunal for Scotland (Transfer of Functions of the Additional Support Needs Tribunals for Scotland) Regulations 2018 [draft] be approved.

That the Justice Committee recommends that the First-tier Tribunal for Scotland (Transfer of Functions of the Scottish Charity Appeals Panel) Regulations 2018 [draft] be approved.

That the Justice Committee recommends that the First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft] be approved.

That the Justice Committee recommends that the First-tier Tribunal for Scotland General Regulatory Chamber Charity Appeals Cases and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft] be approved.

That the Justice Committee recommends that the Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018 [draft] be approved.—[*Annabelle Ewing*]

Motions agreed to.

The Convener: Are members content to delegate authority to me as convener to clear the final draft report?

Members *indicated agreement.*

The Convener: I thank the minister and her officials for attending, and I suspend the meeting briefly for a changeover of officials.

10:11

Meeting suspended.

10:23

On resuming—

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

The Convener: The next item is our fifth evidence session on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill. I refer members to paper 4, which is a note by the clerk, and paper 5, which is a private paper. I again welcome James Kelly, the member in charge of the bill.

I welcome back Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and I welcome her officials from the Scottish Government, who are David Bell, senior policy officer; Katherine Myant, principal research officer; and Craig French, solicitor with the legal services directorate.

Do you wish to make a short opening statement, minister?

Annabelle Ewing: Yes, convener. Thank you for inviting me to give evidence to the committee.

The Scottish Government believes that the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 should not be repealed without putting in place a viable alternative. The act did not appear in a vacuum. As far back as 2008, complaints were raised by the Irish consulate and the Catholic Church about the singing of the famine song at matches, which has been deemed to be racist by our courts. In 2011, we witnessed multiple arrests at a Scottish cup match, pitch-side aggression between the former Rangers and Celtic managers Ally McCoist and Neil Lennon, death threats being made to Mr Lennon and live bullets being sent through the post to a range of public figures. Those incidents could not be ignored and swift action was required to make it clear that such behaviour would not be tolerated. A strong signal was needed, and that took the form of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

That was not without precedent. The Emergency Workers (Scotland) Act 2005 is an example of legislation being used to send a strong signal that particular behaviours are not acceptable. The 2012 act responded to the circumstances that existed at the time and, as we have seen with the latest death threat to Neil Lennon, which resulted in a 54-year-old man being convicted under section 6 of the act, we are not rid of those problems.

However, there is more to the act than making a statement. It provides extraterritorial powers to ensure that those behaving in an abusive manner outside Scotland can be held to account, and section 6 brings Scotland into line with the rest of the United Kingdom in relation to incitement to religious hatred.

I am grateful to the committee for drawing the recent submission by the Scottish Human Rights Commission to my attention and I remain happy that the act is compatible with human rights. The commission's submission appears to be a statement of its 2011 position, which does not take account of developments such as the Donnelly and Walsh case of 2015, which did not identify any human rights issues. We remain happy to improve the act, based on evidence. Indeed, the reason for inviting Lord Bracadale to conduct a review of hate crime legislation, although entirely separate from the repeal bill, was to identify how all existing legislation in the area could be improved.

There are three principles that underpin our position in relation to the act. The first is acceptance that there is a problem with behaviour at and associated with Scottish football. Offensive singing and chanting are not a feature of any other sporting events. The vast majority of football fans are well behaved, but the fact that we continue to regularly hear offensive singing and chanting clearly tells us that there is a problem that needs to be dealt with. Football is not an island on its own where people are free to do as they choose without any need to consider the wider impact of their behaviours. Aggressive behaviour that is deemed acceptable at football will simply be carried into other areas of life.

The second principle is that action and interventions are required to tackle all social problems. Offensive behaviour at football will not simply disappear on its own. Football clubs and authorities have had decades to tackle the issue and have failed to take effective action to bring it under control.

The third principle is that although it is not in itself a panacea, legislation is needed. Legislation sets the standards for what is and is not acceptable in society, and it has an important role in tackling offensive behaviour at football. Outright repeal is not favoured by those who represent vulnerable minority communities and it is not favoured by the Scottish Government.

The Convener: Thank you. What are your thoughts on why so many people feel that the 2012 act should be repealed?

Annabelle Ewing: I cannot easily get inside the heads of those who seek repeal. It is important to

state that many people do not support repeal or do not support it absent a viable alternative being put in place. Some feel that, without such a viable alternative, repeal would risk sending entirely the wrong message. The possible consequence is that people could think that such offensive behaviour is in fact acceptable. It is difficult for me to put myself inside the heads and minds of those who seek repeal but, as the committee will be well aware, you have received a range of evidence with differing views on the issue.

The Convener: The Scottish Professional Football League and the Scottish Football Association have put in place a detailed set of guidance and regulations that go into minute detail on the behaviour, sanctions and checks and balances. You mentioned that the authorities do not seem to have tackled the problem. Is that still the case?

Annabelle Ewing: It is correct to say that it has taken quite a long time to put an arrangement in place, but there is now one that looks at unacceptable conduct. I believe that data is being gathered on the first season of the arrangement's full application, and we wait with interest to see what that will tell us. We are very keen to continue to work with the football authorities, and with clubs, to ensure that we eradicate such bile and bigotry from football in Scotland.

10:30

The Convener: In your opening statement, you said that the authorities did not have seem to have tackled that, but would you acknowledge that we have moved a considerable way to addressing the issue?

Annabelle Ewing: The arrangement is quite new and is in its first season of full application. It is fair to say that it has been quite some time in coming, but it is nonetheless welcome. We wait to see the data that is being collected over its first season of full application and whether it will tell us that more needs to be done. As I said, we are very happy to continue to work together with football authorities and clubs to eradicate unacceptable behaviour from Scottish football.

George Adam (Paisley) (SNP): Good morning, minister. In your opening remarks, you mentioned that unacceptable behaviour at football matches did not happen in a vacuum. There is an urban myth that it started when two managers went toe to toe at the so-called game of shame. As you said, bullets were sent though the post, a Celtic manager had sectarian slogans scrawled outside his home and the famine song was sung regularly—so much so that the Irish consulate complained about it. On both sides, there were also songs that were supportive of acts of terrorism. With all that in mind, do you believe that the introduction of the legislation was a proportionate response to what was happening?

Annabelle Ewing: Yes, I do. The match to which Mr Adam refers, and which I believe is called the shame game—

George Adam: It is the game of shame.

Annabelle Ewing: The game of shame—or "shame game" for short—was the tip of the iceberg. I do not think that it was the catalyst. There had been a catalogue of very serious incidents around football and, of course, decades of problems, such as religious and homophobic slurs, bile, bigotry, sexist comments, sectarianism and hateful and prejudiced behaviour, so there were a number of factors. When the original legislation was introduced, there was a backdrop of very serious events, and it was felt appropriate that the national Parliament of Scotland should seek to respond to them in a reasonable and proportionate manner, which culminated in the 2012 act.

George Adam: It is interesting that you brought up the fact that there was homophobia. That was covered in the evidence that we received from Colin Macfarlane from Stonewall Scotland, who said:

> "Repealing the act without putting other measures in ... could undermine work that has been undertaken by organisations such as Stonewall Scotland, the Equality Network, football clubs"

and

> "Police Scotland".—[*Official Report*, *Justice Committee*, 24 October 2017; c 9.]

What kind of message would it send to clubs if we were to go for repeal? Would fans who got involved in all that nonsense not think that that was a victory on their part and that they could behave as they wished from that point on?

Annabelle Ewing: I have read the comments from Stonewall Scotland and the Equality Network that were submitted to the committee. I very much understand their serious concerns that there is a significant risk that repeal of the act, without any viable alternative being in place, would send entirely the wrong message—that, somehow, such prejudiced and hateful behaviour might be condoned—and all that might come from that. They referred to surveys that showed that, for example, among the lesbian, gay, bisexual, transgender and intersex community there are very serious concerns about what happens at football. In response to questionnaires, the community consistently said that it has fears about football and the level of homophobic diatribe that is directed at people who are citizens of Scotland like everybody else.

I understand the serious concern that repeal, absent a viable alternative, risks sending significant signals that that behaviour is to be condoned and society is happy to see it continue.

George Adam: I have a final short question. We received evidence from an academic—I cannot remember the individual's name—that was interesting in a way. He told us that, in effect, he believed that it is a person's right to be offensive at football and that if they were not it would take all the passion out of the game. Surely, in the 21st century, that cannot be the way to conduct ourselves in a public place.

Annabelle Ewing: I sincerely hope not; that is not the kind of Scotland that most people want to live in. Freedom of speech is, of course, a fundamental right, but it is not an absolute right. There is also the freedom not to be subjected to hateful and prejudicial behaviour.

I think that Dr Duncan Morrow's advisory committee on tackling sectarianism made the point that football seems to provide a permissive environment in which some people—they are very much a minority, it has to be said—feel that they can behave in a way that they would not contemplate in any other part of their life. It is that permissive nature of the environment of football that we have to reflect on.

For my part, and that of the Scottish Government, hate crime—hateful and prejudicial behaviour in whatever form—is absolutely not acceptable. In exercising their freedom of expression, people have to recognise the rights of others with whom they live side by side in society.

The Convener: If the 2012 act is repealed, what steps will the Scottish Government take to ensure that there is clarity for supporters and the general public as to what will be criminal in the football context?

Annabelle Ewing: If it were the will of the Parliament that the act be repealed, absent any viable alternative, as a responsible Government we would continue to work with the football authorities and clubs and seek to continue to send strong messages. We would work with stakeholders with whom we already work at a grass-roots level, in an effort to meet the significant concerns that have been raised by various organisations—not just the equality organisations—that a very negative message might be sent.

In terms of criminal law, I think that the representative from the Crown Office indicated in his oral evidence that it would look at coming up with guidelines about breach of the peace and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. I imagine that we will come on to how that sits with the 2012 act, so I will leave it just now, but that could be done. Whether it would address people's real and significant concerns that repealing the act would send a very bad message is another matter. However, as a responsible Government, we would continue to do what we can.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I want to ask about something that we have not really touched on. Has the Government had any thoughts about how much it might cost if the act is repealed and there is a broad public messaging campaign? Given the difficulties facing the public sector across the board, which have been widely discussed, what might be the financial implications of such a campaign?

Annabelle Ewing: That is not knowable at this time. A number of strands would have to be reflected upon and fleshed out in detail; only at that stage could we start to attach a budgetary implication for each of those strands. It is a fair point and something to bear in mind, but it is not possible to give any figure today. We do not have enough knowledge about each of the elements that would require to be reflected upon to arrive at a comprehensive and accurate figure.

Fulton MacGregor: Given the amount of evidence that we have heard voicing concerns about how repeal of the act would lead to a message being sent out, I just wanted to put the thought out there that there might be financial implications to addressing that message.

Claire Baker: I want to pick up on a couple of things in the minister's opening statement.

The minister said that she cannot put herself into the heads of those who want to repeal the act. I find it disappointing that the Government is not able to articulate or recognise the concerns about the act. I accept that the Government might not agree with those concerns, but it is important that it recognises the arguments made by people asking for repeal of the act.

The minister said that we hear offensive chanting, which I assume meant that we continue to hear offensive chanting. That suggests that the act has not been as effective as the Government would have wanted, if chanting was an area that it wanted to tackle.

Although there is nothing that I disagreed with in the minister's comments about what behaviour is acceptable at football, I recognise Stonewall's comments and its concerns. My understanding is that the convictions made under the act have concentrated on sectarianism and not so much on homophobic abuse. I am happy to be corrected, but I do not know whether there have been any cases where homophobic abuse has been a key element of a charge. That situation would

strengthen the argument that other legislation in place is sufficient to deal with that type of hate crime.

Annabelle Ewing: I note all the points that have been made, but I do not necessarily agree with them.

On your first point, I have not suggested that other people are not entitled to their views or to have concerns—that is their entitlement. I just do not share those views. I imagine that we will get on to a lot of the detail of what is in the act versus what was in the existing law, for example.

I have read claims in the written submissions that the act has somehow criminalised a whole swathe of the fan body, but the number of charges does not reflect that statement. There is a suggestion that the act goes after specific football clubs and fans, but the evidence that has been given has shown that that is not the case. Police Scotland indicated that fans of 24 of the 42 professional clubs in Scotland have been involved in instances, which suggests that no one particular football club has been the subject of vindictive victimisation. I note all the points that have been made, although I do not necessarily agree with them. I guess that we will get on to some of the more detailed issues in due course.

On the effectiveness of the act, I said in my opening remarks that the act is one element of the Scottish Government's strands of work on hate crime in general. Legislation to set normative standards is an accepted way to proceed. The Crown Office stated in its evidence that the act provides a tool that it can use. In 2016-17, there have been some 377 charges, which is an increase of 32 per cent on the previous year. An absolutely tiny minority of fans engage in the behaviour, but, nonetheless, the behaviour can be seriously offensive, threatening and abusive. Surely as a society we will say that that is not acceptable.

The last point was about cases where charges were levelled with regard to homophobic abuse. I am afraid that I do not have that stat.

The Convener: We are on a supplementary, and we have a lot of questions to go through.

Annabelle Ewing: The Crown Office will have that statistic. Perhaps the clerk would be able to get it. I do not have that stat off the top of my head.

The Convener: Thank you. The next question is from Mairi Gougeon.

Mairi Gougeon (Angus North and Mearns) (SNP): Criticism has been levied at the legislation because of the speed with which it was perceived to have been passed, with people saying that it was rushed and, as a result, perhaps not drafted as tightly as it might have been. What is your response to those comments?

10:45

Annabelle Ewing: I raised the circumstances of the introduction of the legislation in my opening statement. The act was passed in a period of six months and went through all the normal stages; indeed, I was there at stage 1, when I believe there were 103 votes in favour of the bill proceeding, five against and 15 abstentions—so the bill passed at stage 1 and went through the normal procedure for legislative scrutiny thereafter. The original timescale for Mr Kelly's bill was perhaps eight months, which is not so different from the timescale for the original act.

My experience in life is that there are almost always improvements that can be made, and I have always said that my door remains open if people wish to come forward with constructive, evidence-based suggestions on how we collectively can work to improve the legislation.

Mairi Gougeon: That leads on nicely to my next question. I know that you said that your door is open, but has anyone contacted you with evidence-based proposals to improve the legislation?

Annabelle Ewing: I have not received any specific proposals for improvements or amendments to the act.

Mairi Gougeon: We had a panel of academics before us during our previous evidence session, and Andrew Tickell said that rather than repealing the act, we need to amend it, and he made some proposals. I imagine that you have seen the evidence that the committee took that day. How would you respond to the suggestions and ideas that he put forward during that session?

Annabelle Ewing: I read Andrew Tickell's written submission with interest. His suggestions are based on the act not being repealed, so if it were to be repealed, they could not be brought forward as improvements to the act. However, we are perfectly happy to reflect upon those suggestions.

Mairi Gougeon: Some of the questions raised were about what would happen if the act was repealed, what would be left in its place and what kind of behaviour we are, therefore, saying to the public is acceptable. Last week, there was a headline in the news about the number of football-related hate crimes on railways having increased by a third. How would we tackle that if the act was repealed? It would send completely the wrong message, especially if we are seeing such an increase in hate crime.

Annabelle Ewing: I seriously fear that repealing the act without a viable alternative would send entirely the wrong signal and, as I have said, a number of organisations have made that point because they are concerned about the risk of that happening—it might be more likely than not. I accept the concern of many organisations, such as Stonewall, the Equality Network, the Scottish Council of Jewish Communities, the Church of Scotland, and Victim Support Scotland, that when the incidence of hate crime has increased in different areas, particularly online, it would send entirely the wrong signal.

As I said in response to the member's initial questions, the Scottish Government remains happy to work to improve the act and to listen to those who have specific views on how that could be done on a constructive, evidence-based basis. We are happy to reflect on those.

The member said that the number of hate-crime incidents on our railways has increased by one third. When I read the submission from the Scottish Women's Convention, I was struck by what it said about women being afraid to go into the city of Glasgow if there is a big match on. That sums it up in one sentence.

Maurice Corry (West Scotland) (Con): Has the Government considered whether the act could be improved by amendment? If so, what changes to the section 1 offence could you foresee?

Annabelle Ewing: As I said, our door is open to constructive suggestions. Thus far, nobody has been exactly queuing outside my door, but it remains open. We have just discussed Andrew Tickell's interesting suggestions and I said that we would be happy to look at them in more detail, if that is helpful to the member.

Maurice Corry: Therefore, your Government has not actually come up with any amendments. Forgetting what other people might have suggested, you have not seen any need to amend the act.

Annabelle Ewing: We feel that, on balance, having section 1 versus having only the previously existing law puts additional tools at the disposal of those seeking to enforce the law of the land. A lot of the submissions have focused on that issue. I do not share the view that, if the bill were to be repealed without any viable alternative, the existing legislation would not involve limitations on what could be done. I think that it would involve such limitations, so I am not convinced completely that an amendment in that regard would be the way to go. However, I noted with interest Mr Tickell's suggestions and, as I said, we would be happy to reflect on those further.

The Convener: Before we move off that point, could I just absolutely nail whether you think section 1, as currently drafted, is fit for purpose?

Annabelle Ewing: Yes, I think it is fit for purpose, and that has been demonstrated in the courts. As for whether things could be improved upon, as I have said, convener, most things in life can benefit from improvement, so we are happy to consider what substantive improvements—constructively suggested and evidence based—could be made. I have been happy to reaffirm that commitment today.

Maurice Corry: Can I further ask, minister, whether the term

"other behaviour that a reasonable person would be likely to consider offensive"

should have been defined on the face of the legislation, to provide clarity? Do you accept that that provision, as currently drafted, is too broad? If the act were to be amended rather than repealed, would such a definition be required?

Annabelle Ewing: The reasonable person test is a common feature of the law. Much has been made of breach of the peace and of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. That law involves a reasonable person approach as well—it is quite common.

The danger of defining something to the nth degree is that something gets left out—there is always a balance to be found when drafting legislation. For example, there is not an exhaustive list of circumstances that need to be met for dangerous driving; there are facts and circumstances to be adduced for consideration.

Also, of course, the reasonable person test sits alongside the other part of the test, which looks at whether behaviour is

"likely to incite public disorder",

so there are two strands to the test, not just one.

The Lord Advocate's updated guidelines from August 2015 are also helpful in fleshing out exactly what behaviour is likely to be included. I think that the committee has had a look at those in previous evidence sessions. I am happy to refer to the Lord Advocate's guidelines; they are quite lengthy but they cover many of those issues.

Maurice Corry: Does that mean that you do not believe that it puts out too big a net, so that we catch all sorts of fish, shall we say? Is that approach not too broad brush? Should we not use a scalpel to identify the critical problem?

Annabelle Ewing: The member's concern is about the reasonable person test. That test is quite a common test in law, and indeed it is in the Criminal Justice and Licensing (Scotland) Act

2010. It is a common concept and one that the law has dealt with quite comfortably over many years, fleshed out by the Lord Advocate's guidelines of 2015. One must also bear in mind the fact that there is another element to the test, which is that the behaviour must be "likely" to cause "public disorder".

Maurice Corry: Thank you.

The Convener: We have the guidelines—

Annabelle Ewing: So you do not want me to read them out?

The Convener: No, thank you.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): There has been some discussion this morning about potential amendment of the act, minister, and you said in your opening statement that you would be happy to improve the act, based on evidence. Many witnesses from whom we have heard in recent weeks, including Andrew Tickell, representatives of the Church of Scotland church and society council and others, have said that it would be advisable to wait until the review that Lord Bracadale is undertaking is complete, so that we can consider the positions that he comes to before we consider amendment of the current legislation. Of course, that is predicated on repeal not taking place. Is that position similar to the Scottish Government's position?

Annabelle Ewing: Obviously, the Lord Bracadale review is independent of Government. Like everyone else, I do not know what his recommendations will be and I await their publication, which is expected in spring 2018. I would not want to pre-empt that process. I know that the remit of the review involved a consideration of hate crime in the round in Scotland and of whether what we have is sufficient for the 21st century. A look at the 2012 act was included in that context.

I know that Lord Bracadale has engaged in a wide-ranging consultation and that, when he invited views as part of the consultation, he also invited views, inter alia, on the potential consequences of a repeal of the 2012 act. I think that the consultation has now closed, so he will be looking at the responses that he has received across the piece on a host of issues, including that one.

Obviously, in the first instance, the progress of Mr Kelly's bill is a matter for this committee and the Parliament as a whole. If the committee felt that it wished to pause its deliberations pending the publication of Lord Bracadale's recommendations, that would be a matter for the committee.

Ben Macpherson: I think that we will expand on that issue later in the meeting, but I thought that it was important to raise it now as it dovetails with the subject of the previous question.

The Convener: Before you move on to your substantive question, Mr Macpherson, Liam McArthur would like to ask a supplementary question.

Liam McArthur (Orkney Islands) (LD): We will shortly go into private session to consider a report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. That piece of legislation is based on a report by Sheriff Principal Taylor that was published in 2013. It suggests that if we wait for the report from Lord Bracadale, we could be waiting for some four or five years before any legislation is brought forward to address the shortcomings that are accepted, by wide consensus, to be present in the bill, particularly in relation to section 1. Does the minister accept that, although it is interesting that Lord Bracadale is undertaking his review and we all await the outcomes of that review with interest, it would perhaps be naive to assume that any legislation is likely to flow from that any time soon?

Annabelle Ewing: I cannot pre-empt the work of Lord Bracadale, who is engaged in an independent piece of work. I would not dare to pre-empt that in any regard, whether in relation to recommendations, potential new legislation or anything else. We just have to let Lord Bracadale proceed in the way that he was tasked to do. Obviously, as Ben Macpherson has said, the work that he is doing dovetails with the work that is currently before the committee, and it would be a matter for the committee to decide whether it wishes to be informed by the work of Lord Bracadale.

Ben Macpherson: Minister, in your opening statement, you talked about the evidence that has been received from the Scottish Human Rights Commission about key provisions in the 2012 act perhaps falling short of the principles of legal certainty and the lawfulness requirement under the European convention on human rights. However, when Chris Oswald of the Equality and Human Rights Commission appeared before the committee, he said:

"Although the EHRC recognises that freedom of speech and freedom of expression are enormously important and are protected by article 10 of the European convention on human rights, they need to be balanced against the International Covenant on Civil and Political Rights, which says that states need to have in place laws that counter

'incitement to discrimination, hostility or violence'."—[*Official Report*, *Justice Committee*, 7 November 2017; c 4.]

Are you confident that the 2012 act has not fallen short of the principles that the Scottish Human Rights Commission referred to?

11:00

Annabelle Ewing: You received the Scottish Human Rights Commission's submission at the weekend. When the bill was introduced, like any bill, the Presiding Officer had to certify it as being competent—under the Scotland Act 1998, we have a duty to comply with the Human Rights Act 1998. The bill was passed by Parliament and, following its passage, the law officers did not seek to raise any action to challenge its compatibility. Since then, in March 2015, we saw the appeal case of Donnelly and Walsh v Procurator Fiscal before three appeal judges, who took the view that article 7 was not infringed. The appeal was dismissed.

The Scottish Human Rights Commission was engaged in the discussions on the original legislation and its submission seems to echo what it said then and does not take into account particular developments since then, including the appeal case I just mentioned and the fact that the Lord Advocate has issued guidelines. No account has been taken of that and issues of certainty of law, and so on.

On the member's other point about evidence from the Equality and Human Rights Commission and the reference to the international covenant taking precedence over the ECHR, I thought that that was an interesting submission and I imagine that the committee will wish to reflect on that when it is deliberating on the terms of its report.

Ben Macpherson: Thank you for clarifying that, minister. It was very helpful.

I will move on to other evidence that we have received and refer back to section 1 of the 2012 act. Some have argued that the act should be extended to include situations outside the football context, such as marches and parades. Bearing in mind the fact that no amendments have been proposed and that, if the act is to be amended, it cannot be repealed, is it feasible to seek to include marches and parades?

Annabelle Ewing: Having read the evidence, I know that certain marches have caused concern. Dr Michael Rosie's recent "Independent Report on Marches, Parades and Static Demonstrations in Scotland" put forward a number of issues, and I recall that he concluded that, in the investigation that he carried out, the majority of marches and parades of whatever persuasion were carried out in good order and peacefully.

The police have powers under the Public Order Act 1986 to deal with disorder at marches and parades but, given the open-door approach, if there were significant evidence of problems with disorder at marches and parades, the Government would be required to look at that, and if a possible response were to consider the 2012 act, assuming that it is still in place, we would be prepared to do that. It is obviously too early to pre-empt the result of such deliberations, but we would need to see evidence of a significant problem that needed to be tackled in some way, and we would then need to reflect on what we thought about it. Working with stakeholders and others would be the best way to tackle it. We keep the issue under advisement and will continue to do so.

Of course, that brings us back to one of the key arguments of those who seek to repeal the 2012 act—freedom of expression. Freedom of expression is always tricky: it is fine when you are expressing what you want to hear; but you do not necessarily want to hear the other view. However, we live in a society in which marches and parades are part of our understanding of freedom of expression. The people who participate therein are subject to the same rules and norms as everybody else and, if there is significant disorder, we will wish to look into that.

Liam Kerr (North East Scotland) (Con): Dr Rosie's research concluded that the vast majority of such marches are carried out peacefully and he went on to say that that was reason not to legislate against them. If we accept that the vast majority of football matches are carried out peacefully and people do not exhibit the behaviours that are complained of, is that not a reason not to legislate on them, too?

Annabelle Ewing: I do not know whether that is an exact analogy. What we have seen and continue to see at football matches are instances of abusive and threatening behaviour, offensive chanting and all the rest of it. We see that regularly at football.

The point made in the Rosie research was that in many cases no issues about disorder have been raised. Sadly, that is not the case in football, in which regard issues around unacceptable behaviour continue to be raised. As I mentioned a while ago, in 2016-17 there were 377 charges under the act, which is an increase of 32 per cent on the previous year. That suggests that there is still an issue with the conduct at football and that we are not yet ready to rest on our laurels. I agree with the member that the conduct relates to a tiny minority, but that minority can have quite an impact on the messages that are sent out, particularly to young people in Scotland.

Fulton MacGregor: Are not marches and parades subject to scrutiny by local authority committees prior to them taking place, whereas football games are not?

Annabelle Ewing: The process for approving marches, parades and static demonstrations is driven by local authorities, in discussion with the police, and is therefore a matter for them. As

regards the Parliament, if people come forward with significant evidence of disorder of such a nature that it might require action, we will consider that. However, the member is right to say that, in the first instance, an application is made to the relevant local authority and that there is a procedure in place for how local authorities reach decisions on whether a march, parade or static demonstration should go ahead.

Rona Mackay (Strathkelvin and Bearsden) (SNP): In its evidence to the committee, the Scottish Council of Jewish Communities said:

"Anybody who is old enough to remember the original race relations act, the Race Relations Act 1965, will realise how much society has changed, in that, for example, people do not say things now that they would have said in the 1960s—at least not in public. That is partly down to legislation, so I do not think that we can underestimate the effect that legislation has on attitudes."—[*Official Report*, *Justice Committee*, 7 November 2017; c 5.]

The Government has stated:

"There are contexts where strongly held religious, political or cultural views are acceptable and quite appropriate."

Can you outline those contexts and say whether there is still a place for that in football in 2017?

Annabelle Ewing: I read the evidence from the Scottish Council of Jewish Communities and it was an interesting point to say that a strong signal had been sent by the Race Relations Act 1965 to society about what was acceptable and what was unacceptable in relation to such matters.

The fundamental principle that I return to when having this discussion is the right to freedom of expression. However, freedom of expression is not an absolute right, because it is tempered by the need to respect the rights of others. That is the key element in the discussion about the act and the member's bill. Clear guidance is given by the Lord Advocate's updated guidelines of August 2015 on where the judgment on the dividing lines should be made. Police officers make judgments every day about a whole host of things. They use their judgment in accordance with guidelines and their training. It is the same for the act as it is for many other parts of the law.

Rona Mackay: Given that 69 per cent of offences under the 2012 act occur at football stadiums, is it fair to say that the legislation does not target football culture?

Annabelle Ewing: It is fair to say that the legislation is to do with behaviour in and around football—that is how it was drafted.

The 2012 act is not alone in looking at football. There is evidence of significant problems with football over the years. We have seen legislation in England and Wales. The Football (Offences) Act 1991 was introduced to deal with specific problems, including, I think, pitch invasion and chanting. We have also seen, both north and south of the border, legislation introduced to deal with alcohol sales and consumption in relation to football.

First of all, we have recognised that there are problems, and we have sought to address those. That is in keeping with other jurisdictions and with other legislation that recognises problems in this regard. It is fair to say, as I have said before, that a tiny minority of fans cause problems. The vast majority of football fans want to go to the match and enjoy the game. They want to be able to take their families.

I have read some quite depressing submissions from individuals, including from grandfathers who have said that they would not take their grandson to a game any more, because they considered it inappropriate that their young family member should be subjected to such behaviour. That is very telling. Indeed, it is very depressing that that is the situation in 21st century Scotland.

It is clear that there is a problem at football, which is caused by a tiny minority of fans. I think that the figure from Police Scotland is that there are about 4 million turnstile visits to football matches in a season. In 2016-17, 377 charges were brought under the 2012 act. That gives the context. However, just because there were 377 charges and 4 million turnstile visits, that is not to say that this is not a problem that is corrosive and damaging to society. This problem is corrosive and damaging to society and it impacts negatively on so many other people, including vulnerable groups. Therefore, it is appropriate that we recognised that there was an issue to tackle, and we sought to do that through this legislation, among other actions.

The Convener: It would be very helpful if members, and the minister, could be as concise as possible. We are about halfway through our questions but we have less than half our time left.

Liam Kerr: I will stick to previous evidence. BEMIS has stated that the 2012 act has had a "negligible" effect in tackling hate crime. It suggests that, if anything, there is confusion about what is criminalised under the act. Do you accept that criticism?

Annabelle Ewing: I have read both of the submissions from BEMIS. I did not follow the second one as clearly as I followed the first one. No, I do not really accept that criticism. As we have seen, in 2016-17 for example, 377 charges were brought. In 2015-16, we saw a conviction rate for charges brought under the act of about 76 per cent. In that same year, there were comparable conviction rates of 74 per cent for breach of the peace and 84 per cent for common

assault. That places the 2012 act in a reasonable spot. It has been effective.

The 2012 act is one element of the Government's work in this area. I think that Police Scotland has indicated that the act has been influential in making improvements in behaviour at football, but it should not be seen in isolation. Many other issues come to the fore, including improvements in—

Liam Kerr: Forgive me for interrupting, minister—time is an issue—but I want to ask you about that. You have said that we need to eradicate the bile. Has the act done anything to eradicate the underlying attitudes and beliefs that manifest themselves as offensive behaviour?

Annabelle Ewing: Yes. It was recorded in the evidence from Police Scotland that there is a greater awareness of the issues—they are much more to the fore. The police officer who gave evidence referenced an example of self-reporting at a match. The 2012 act has had an impact, but I am not suggesting that it is the only important piece of work in that regard, because it is not. As I said in my opening statement, the 2012 act is not a panacea, but it is nonetheless important in giving the police and the Crown Office the tools that they need to tackle the problems that we face in football.

11:15

Liam Kerr: Mairi Gougeon said that football-related hate crime has increased by a third on the railways. I think that you said that you accepted that point and noted that women were afraid to go into Glasgow on the railway, presumably on a match day—I imagine that you intended to add that qualification. Does that statistic not tend to suggest that the 2012 act is not working?

Annabelle Ewing: I was quoting from the Scottish Women's Convention's evidence on that point. The SWC made the point that, if a big match is on, women are afraid to go into Glasgow on a Saturday. As a Glaswegian female who lived in Glasgow for many years, I get that. I got it then and I still get it to this day.

I think that the issue that the member is getting at is the strong underlying feelings whose public display the rest of society finds unacceptable. We need to work in a number of ways to tackle underlying feelings that mean that to promote or celebrate their identity, people have to hate somebody else's identity. That point was made by one of the academics who gave evidence to the committee. There are therefore a number of strands, but the 2012 act has a role to play in that regard.

Liam Kerr: Yes. However, I had not heard Mairi Gougeon's statistic about a rise of a third in football-related hate crime on the railways. Presumably you would attribute any decline in such behaviour to the implementation of the 2012 act, but if such behaviour is on the rise again, does that not tend to suggest either that the 2012 act has worked but is no longer working or that any previous decline in that behaviour was a function of the other things that you said were going on, such as behaviours by football clubs?

Annabelle Ewing: As I said, the 2012 act is not a panacea in and of itself. Sadly, the fact that, in many regards, hate crime is increasing in our society is not a reason for taking our foot off the pedal; rather, it is a reason for reflecting carefully on what tools the police and the Crown Office and Procurator Fiscal Service have available to tackle problems of offensive behaviour, such as hateful and prejudicial behaviour that is criminal because it is against the law and norms of our society. I believe that the 2012 act plays a role in that regard.

As has been said, repealing the 2012 act without having a viable alternative in place could have serious consequences through sending out the wrong signal or message. That is an important point to bear in mind with regard to what the member rightly said about there being an increase in the incidence generally of certain types of hate crime. That is a good reason for reflecting carefully on the actions that have been taken and for not acting hastily but regretting at leisure.

Liam Kerr: You stated in your opening remarks that the offensive behaviours that are displayed by football fans are not replicated in any other sport. If someone at a rugby match, for example, made a homophobic or racist comment that was audible to others, caused offence and perhaps led to public disorder, I presume that they would be charged with an offence. If so, which offence?

Annabelle Ewing: That would be a matter for the Crown Office at the end of the day. However, I would imagine that, in such circumstances, a potential route would be a charge of breach of the peace through section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

Liam Kerr: So they would not be charged under the 2012 act.

Annabelle Ewing: No, because the behaviour would not be taking place in and around football, which is a part of the 2012 act. A number of written submissions to the committee have indicated that the problem of such behaviour does not exist to any degree in any other sport. I have seen submissions referring to a possible offensive behaviour at bowls act, but I am not aware that there is a huge incidence of disorder at bowling

clubs the length and breadth of Scotland whereby there are racist, religious and homophobic slurs and bigotry and bile. We therefore have to accept where the evidence leads us. The evidence leads us to a place where we see that there is a problem in and around football. It involves a minority of fans. The vast majority of fans do not want to engage in that behaviour, but I do not think that not recognising that there is a problem takes us very far in the debate on how best to tackle the issue.

Liam McArthur: Does the issue that Liam Kerr has highlighted not point to a fundamental problem, in that, if behaviour is offensive and something that we would wish to see eradicated, it does not really matter where it happens? Talking about this legislation as being of a piece with the Race Relations Act is to misrepresent that act, which targets racist behaviour across the piece, irrespective of where it took place, whereas the act that we are considering is focused solely on behaviour in and around football. Irrespective of whether such behaviour is more prevalent around football, it sends out the message that that behaviour in other contexts either is not deemed important enough to tackle or can be tackled by other means. That is certainly the case that has been made by many—that such behaviour is already covered by legislation that was passed prior to the 2012 act.

Annabelle Ewing: The member referred to a particular piece of legislation and said that it applied erga omnes and that the 2012 act does not. As I mentioned in my opening statement, the Emergency Workers (Scotland) Act 2005 is an example of an act that recognised a specific problem. There is an overlap in the offences for which people can be charged under that act, and they could be charged under other libels, but nonetheless it was felt important to recognise that there was a specific problem and to deal with it by way of a particular piece of legislation for emergency workers.

On the general issue that the member raises, the 2012 act provides an extra tool for the police and for the Crown Office and Procurator Fiscal Service. The committee has heard detailed evidence from the Crown Office explaining that the position of the existing legislation could be reverted to but that there would be limitations in regard to the behaviours that could be dealt with. That was explained clearly by Crown Office representatives in their oral evidence to the committee, so I will not repeat it all again. A clear explanation was given as to where, if the act is repealed without a viable alternative, we would fall short in relation to the cover that we currently have.

Liam McArthur: I will come on to that in a second, but if we deprecate the behaviour and want to see it eradicated, and if we want to send out a strong message to that effect, why on earth are we distinguishing between offensive behaviour in one context and offensive behaviour in another context?

Annabelle Ewing: We go back to first principles and to the debate that we have been having all morning, which is about the recognition that there is a particular problem in and around football that is not replicated at rugby, tennis or bowling clubs the length and breadth of Scotland.

Liam McArthur: It is replicated in society at large. I think that we would all agree that, in a sense, what we are seeing in football is a reflection of something that is still all too prevalent in society in general. There may be flashpoints at football, but if you are going to deprecate the behaviour, surely it should make no difference where that behaviour happens.

Annabelle Ewing: I go back to my earlier comment about Dr Duncan Morrow's approach to the advisory group on tackling sectarianism, which recognised that football provides a permissive environment where people may act in a way in which they would not act in other environments. That permissive environment seems to engender among a minority of people the idea that they can act with impunity and engage in behaviour that would not be acceptable in society at large. Recognising that is the fundamental crux of the issue here, and the legislation is designed to deal with issues in and around football. That was recognised in England by legislation passed in 1991, and in approaches on both sides of the border to dealing with alcohol at football. It is recognised that there are particular issues to be addressed. We also recognise, as I have said from the outset, that legislation by itself is not a panacea, but it is a tool and it has a role to play.

Liam McArthur: That suggests that you expect more charges and convictions to be brought in relation to incidents in and around football. However, that should not deter us from cracking down on and tackling such behaviour, wherever it occurs.

With regard to section 1, which you have touched on, and the Crown Office and Procurator Fiscal Service's evidence that repealing the 2012 act would leave gaps in the law for tackling these offences, I note that we also received evidence that removing section 1 would leave no real gap. Can you elaborate on the specific gap that would be left were the 2012 act—particularly section 1—to be repealed?

Annabelle Ewing: I would point to the evidence given by the Crown Office representative, which I thought was a very clear statement of the position.

Liam McArthur: It has been contradicted by other legal representatives from whom we heard, who disputed whether there was a gap.

Annabelle Ewing: We are talking about a person at the Crown Office who applies this law day and daily. Given that they work with the 2012 act to determine what charges can or cannot be libelled in particular circumstances, I thought that they were a reasonable source from which to get a clear picture of where exactly the Crown Office is on the matter as we speak.

First, it was said that the provisions in section 1 of the 2012 act concerning extraterritorial application were not present in existing legislation prior to the act coming into force. Secondly, there are limitations with regard to the different evidential test; indeed, we have already dealt with the issue of incitement to public disorder associated with breach of the peace under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which is, if you like, a fear-and-alarm test. There is an issue in section 6 with extraterritorial application that is not present in other legislation, and there is also an issue with having different sentencing powers under existing legislation—in other words, legislation prior to the 2012 act coming into force—in that penalties can be pursued on a summary basis under that legislation while they can be pursued on a solemn basis under the 2012 act. That is a very important extra tool that the Crown Office should have.

I would also point out that, in its letter to Mr Kelly, as part of the consultation on his bill, the Crown Office made it quite clear that behaviour could be prosecuted under section 1 of the 2012 act that

"would not be capable, or ... securely capable, of being prosecuted under"

existing legislation. I think that it happened in a previous session, but I believe that the former Lord Advocate, Frank Mulholland, explained to the Justice Committee that a benefit of the act was that existing cases would not need to be shoehorned into existing legislation.

That is a reflection of where matters stand for the Crown Office, which is independent of Government. It has explained very well the deficiencies in existing legislation and has shown quite clearly how the 2012 act gives an additional power and tool to those seeking to apply the laws of the country.

Liam McArthur: On the issue of deficiencies in legislation, we have heard a considerable amount of evidence about the deficiencies of the 2012 act, particularly in relation to section 1. Does the Government regret not having brought forward its own proposals to address and amend those deficiencies prior to the repeal bill's publication?

Annabelle Ewing: First, we do not believe that the 2012 act should be repealed—

Liam McArthur: That is a different point. You can argue whether it is easy to address the issues that we all agree exist and that Lord Bracadale will be looking, in part, to address in his own recommendations. It is debatable, though, whether it is easier to do that through using deficient legislation that needs to be amended or through clearing the decks and putting in place a firmer and more well-balanced structure. My question is: given the evidence that the committee has heard, does the Government regret not having brought forward its own proposals for reforming the 2012 act prior to the publication of James Kelly's repeal bill?

11:30

Annabelle Ewing: As I said in response to Claire Baker, I do not necessarily accept the complaints about the 2012 act that have been made in some submissions. I have also said to the convener on a number of occasions this morning that, in my experience, everything in life can be improved, including legislation. I do not accept that the act is deficient, but legislation can always be improved. I have also said that my door is always open to people with constructive, evidence-based suggestions. Not one person has sought to come to speak to me, so we are where we are. I note the evidence of a host of people, but, by the same token, it is important to note that there is evidence whereby people take different views. The committee will have to reflect on that in its deliberations.

Liam McArthur: If your door is open but you cannot get inside the heads of those who have been raising concerns, is it a surprise that they have not taken up that offer?

Annabelle Ewing: That is not a constructive comment. My door is always open. I have said that from the outset, and nobody has come to make any constructive suggestions at all.

As I have mentioned, some of the instances that have been set forth, particularly in the individual submissions, refer to the fact that all fans are being criminalised unduly. I do not accept as a matter of fact that the evidence shows that that is the case. I do not believe that. I find it difficult to get into the mind of somebody who says that the act is criminalising all football fans when the evidence patently shows that that is not the case. I struggle to understand why they hold that view when the evidence is to the contrary. By the same

token, I note that people have strong views on both sides, which fact the committee will want to reflect on in its deliberations.

Ben Macpherson: I want to touch on the threatening communications aspect of the current act and section 6, in particular, about which the Scottish Council of Jewish Communities remarked:

"We would deplore the message that repeal of section 6 would inevitably send both to perpetrators and victims of threatening communications, as well as the fact that it would be more difficult for such offences to be prosecuted."

In your opening remarks, you referred to the extraterritorial element in section 6. Indeed, evidence from the Crown Office and Procurator Fiscal Service referred to its benefits as well. Will you elaborate on why repeal of section 6 would be, according to the Government's evidence, "deeply problematic"?

Annabelle Ewing: Section 6 has provided some clarity. For the first time in Scots law it has introduced a specific offence of using threatening communications to stir up religious hatred. That offence existed down south but it was not a specific offence in Scotland, so the Crown Office now has a tool available to it when the circumstances of an incident are relevant. As I have mentioned, the act provides for extraterritorial application, which proved to be useful in a recent case. I do not have the details of that case to hand and I do not know whether Craig French does.

Craig French (Scottish Government): I do not think that the recent case involved extraterritoriality as such, but there is an extraterritorial aspect to section 6, which is that people beyond Scotland sending messages that are intended to be read by a Scottish audience about a person in Scotland are encompassed by the reach of the act. That aspect would obviously be lost on repeal.

For the sake of completeness, I should go back to Mr Kerr's point about gaps, as the committee may find that useful. It is accepted by everyone who has given evidence—and it would be my view—that there is no specific crime of incitement to religious hatred in Scotland outside section 6 of the act, and I suspect that that might be a relevant gap for the committee to consider.

Ben Macpherson: Thank you. That is helpful. We have heard different comments on section 6. For example, Dr Webster asserted that it fails to distinguish hatred from abuse, thereby conflating the two and criminalising both. Police Scotland, in written evidence, said that section 6 "is narrow in scope", which has made its broad use challenging for the police. Could you comment on those concerns?

Annabelle Ewing: I do not agree with Dr Webster's conclusion in that regard.

As for Police Scotland's view that the scope of section 6 might be narrow, my door is open and I am happy to discuss the point with Police Scotland. We hold regular discussions about many issues, including the 2012 act. If there are issues that it wishes to bring to my attention, I will be happy to look at those.

Ben Macpherson: Thank you.

Maurice Corry: Could you comment on the suggestion that the 2012 act has made tackling sectarianism in the context of football matches much more difficult?

Annabelle Ewing: I do not believe that that is the case. I am not quite sure what triggered the member's question.

Maurice Corry: Does the 2012 act make it more difficult for the police officer who has to deal with the issue to understand when he or she can bring a charge?

Annabelle Ewing: As I have said, the Lord Advocate's guidelines make it clear in which circumstances that can happen. Under the guidelines, it is a requirement to exercise common sense, to reflect football fan rivalry and to act proportionately. Police officers have been trained in the approach that they should take to various pieces of legislation, including the 2012 act.

It is important to remember that the act makes no provision for policing, which is an operational matter for Police Scotland. I think that it was Police Scotland that suggested, in its evidence, that around 85 per cent of the cases that were brought to the Crown Office were proceeded with. Given that so many cases were proceeded with, the Crown Office felt that the police had a good understanding of the legislation.

It is also fair to say, on the basis of what it said in its evidence, that Police Scotland does not think that much would change for policing if the 2012 act were to be repealed—it would be business as usual.

Maurice Corry: There are groups of fans who feel that their side has been unfairly targeted. Do you think that that is a reasonable representation of the facts?

Annabelle Ewing: No, I do not think that the evidence bears that out. The example was given by Police Scotland that charges had been brought against fans from about 24 of the 42 professional clubs in Scotland, which indicates that the legislation, rather than being applied to a particular kind of football fan, is applied erga omnes. It is applied with respect to the behaviour that is exhibited, not the team that the fan supports. It is

the behaviour of the individual concerned that brings them to the attention of the police in the context of the 2012 act.

Maurice Corry: As a lawyer, you will realise that sectarianism is not defined in Scots law. Will it ever be possible to define sectarianism in a Scottish context? That is quite an important issue.

Annabelle Ewing: That is an interesting question. The original intention of the 2012 act was that it should go wider than sectarianism. However, it is interesting that, in the interim period, Dr Morrow's advisory group on tackling sectarianism in Scotland has come up with a definition of sectarianism. I think that some work has been done with grass-roots organisations to get feedback on what people feel about that definition. We will be happy to reflect on where we are with that and whether it would be advisable, in all circumstances, to seek to proceed with a definition of sectarianism. The member will know that, as I said earlier, in coming up with a particular definition in law, it is necessary to be careful not to be unduly restrictive in how that definition is phrased.

It is interesting that the advisory group has done that work, and it would be timely to have a look at it.

Maurice Corry: Thank you, minister.

The Convener: That concludes the committee's questions, so I invite James Kelly to ask any questions that he would like to ask on the bill.

James Kelly (Glasgow) (Lab): Good morning, minister. You have made a number of comments about the behaviour of football fans and the atmosphere around football stadiums. What informs your view on that? How many football matches have you attended over the years?

Annabelle Ewing: My last football match was the first Rangers versus Celtic game after recent developments affecting Rangers Football Club, which I think was in September 2016, at Celtic park.

James Kelly: Have you ever actually paid to enter a football match?

Annabelle Ewing: I was there as minister, but I would have been happy to pay. I was at least tolerated by Celtic Football Club, and I visited the command centre and all the rest of it. If I am asked to pay, I am happy to do that.

James Kelly: Yes—but from what you say, I do not think that you have actually paid to enter a football match.

Annabelle Ewing: I have done in the past, but it is the national game that I perhaps find more interesting. I have been to football and I have paid, but the most recent match I attended was that one in September 2016.

James Kelly: Your experience of club football is somewhat limited, however.

Annabelle Ewing: I am not a hugely experienced club football person and have never pretended to be one.

James Kelly: Can you understand the criticisms that are made of you and your Government by people who feel that you have formed your view from your ministerial office and not from being at football stadiums and sharing the experiences of football supporters?

Annabelle Ewing: My job as minister is to work with all the relevant stakeholders and others, to read the evidence, to listen, to work hard and to reflect on the evidence that is before me and reach conclusions. For example, I have evidence on the claim that the 2012 act has criminalised football fans. The act has dealt with cases in which the behaviour itself has attracted attention, irrespective of club, football strip, affiliation or any other issue. That is the evidence that is before me and that has been given to the committee by, for example, Police Scotland.

James Kelly: On another issue, if a person goes to a religious venue such as a Church of Scotland venue, a Catholic church or a mosque and behaves in a hateful manner towards people who are entering that venue, how are they dealt with in the courts?

Annabelle Ewing: That would depend on the individual facts and circumstances of each case. How the person was dealt with would depend on what the behaviour was and all the rest of it. It is difficult to make a general sweeping statement, because there is not a template. Individual behaviour attracts attention. The answer depends on what the behaviour is and on the facts and circumstances.

I do not know whether my officials want to add anything.

Craig French: I can try to assist. The minister has given the correct answer, which is that the facts and circumstances—the context—are everything in determining whether a crime has been committed. To take Mr Kelly's example, at the highest level, if a person were to run into a church brandishing and firing a machinegun, that would result in one set of charges. If they were to run into a church and physically assault somebody by punching them, that would be a different set of charges, and if they were to try to incite religious hatred, that too would attract a different set of charges. The specific facts and circumstances are important in determining the charges, so it is not

possible to give a set answer without knowing the specifics.

James Kelly: I will be a bit more specific, then. If a person were to stand outside a religious venue and incite religious hatred and abuse people who were entering the venue, how would they be prosecuted through the courts?

Craig French: If the action involved threatening communications and if the person was looking to stir up religious hatred by issuing unrecorded speech such as a banner or leaflets that were threatening in that sense, that might be dealt with under section 6 of the 2012 act. Alternatively, it could be dealt with under breach of the peace or the Criminal Justice and Licensing (Scotland) Act 2010. There is a range of options. The specifics—what the person says or does and who else is there at the time—really matter.

11:45

James Kelly: So, if a person were to exhibit the same behaviour at a football stadium, that would clearly be unacceptable and would have to be prosecuted through the courts and the 2012 act would be used. Why do we need two sets of laws? Why do we need a particular set of laws for someone who exhibits religious hatred in the street or outside a religious venue, and a different set of laws for football grounds?

Annabelle Ewing: The idea of laws overlapping is not unique to football. I gave the example of the Emergency Workers (Scotland) Act 2005—other laws exist, but it was felt that there was a very specific problem that needed to be addressed. The 2005 act was duly passed by this Parliament. An overlap of laws is not a new thing.

On your question, "Why the act?" we have had a good go at that this morning. It exists because there was deemed to be a particular problem in and around football that needed to be addressed. I have already said that legislation, in and of itself, is not a panacea—it is not the only strand that is available in seeking to improve matters. Nonetheless, it was felt that legislation was a necessary response to behaviour that was unacceptable to the vast majority of football fans and people in society.

The Convener: Before Mr Kelly goes on, minister, you have made a couple of references to the Emergency Workers (Scotland) Act 2005. I was on the committee when we passed that act, which was very short and very problematic. For example, if someone disappeared through a door and was no longer in an emergency environment and the same sort of attack were to happen, it would not necessarily be covered by the act. In the absence of post-legislative scrutiny, it may be helpful to make that point to balance our understanding of how effective that act has been.

Annabelle Ewing: Okay—but the 2005 act is on the statute book. Nobody has come forward with a bill to repeal it: it is still there and can be used.

James Kelly: You have spoken a lot about the message and the signals that are sent. Surely, one effective piece of legislation that makes it clear that religious hatred and such behaviours are unacceptable in the football ground, in the street and outside religious venues would send a much stronger message than having multiple pieces of legislation does.

Annabelle Ewing: Lord Bracadale is looking, inter alia, at consolidation. That was part of his remit, so Mr Kelly's point is fair, in that regard. However, in terms of whether the behaviour will be tackled, both section 1 and section 6 of the 2012 act provide tools for looking at the limitations in the existing legislation. I have dealt with that at quite some length, particularly in response to Mr McArthur. The provisions allow such behaviour to be prosecuted. We have heard that it will be business as usual in terms of policing football matches, certainly as far as Police Scotland is concerned, even in the event that the 2012 act is repealed.

James Kelly: Okay.

On another issue, you will be aware that in August 2016, at a champions league qualifier match, the Celtic support took part in a display in support of Palestine. That was then supported by motions in Parliament that were lodged by your colleague James Dornan and by Ross Greer. The police took the view at the time that the demonstration was not in breach of the 2012 act. Do you have a view on that?

Annabelle Ewing: Individual examples are, in the first instance, for the police to act on, in accordance with the law and their training, having taken cognisance of the Lord Advocate's guidelines. It is then for the Crown Office to consider whatever the police pass on to it. Absent any other facts and circumstances, it is difficult to come to a particular conclusion. As has been mentioned, the importance of the law is that it deals with the facts and circumstances of each case, all of which are relevant in reaching conclusions. Otherwise, we would have a very dangerous situation in which we did not look at each individual fact and circumstance but, rather, took some sort of blanket approach.

James Kelly: Do you accept the view that the police took on the occasion that I mentioned?

Annabelle Ewing: I do not have all the facts before me, Mr Kelly. I would need to know all the circumstances of the case.

James Kelly: The case is a matter of public record, minister.

Annabelle Ewing: Yes—but I do not have information on all the circumstances of the case and on behaviour that took place around the banner and so forth. If James Kelly wishes to give me chapter and verse on that, he may do so.

James Kelly: It is a matter of public record that the police concluded that there were no relevant charges under the 2012 act. You can understand people's confusion, because that was a clear political display. People see other political displays that take place at football matches being captured under the act. For example, at a recent game between Rangers and Partick Thistle, at the height of the Catalan crisis, a person who was brandishing a Catalan flag was ejected from the game. Surely you can see the inconsistencies here, minister?

Annabelle Ewing: As I said, each case depends on its facts and circumstances. If James Kelly were to look in detail at the Lord Advocate's guidelines, which were updated in August 2015, he would find some helpful information on the benchmarks that are to be used to help the police and the Crown Office in their approach. As I said, the facts and the circumstances are very important—you have to look at the attendant circumstances of any particular behaviour. There are particular provisions in the Lord Advocate's guidelines in relation to banners, flags, chants and songs. I am happy to read those out, but I suspect that the convener would prefer it if I did not.

The Convener: We really have to move on.

Annabelle Ewing: I am sure that James Kelly is aware of the guidelines.

James Kelly: Can you understand why people think that that reinforces the point that was made by the Scottish Human Rights Commission on legal certainty? You are not being clear, minister. If people are not clear what is or is not a criminal act under the law, how can there be legal certainty?

Annabelle Ewing: I have already responded to the points that were raised in the Scottish Human Rights Commission submission. Again, I cite the case of Donnelly and Walsh v Procurator Fiscal, which went to the appeal court in March 2015, and in which three judges ruled that article 7 of the European convention on human rights was not engaged on the issue of the certainty of the law. That was the ruling of Scotland's court of appeal. I am sure that the member will consider that that judgment has some validity in the context of the debate.

James Kelly: Are you a member of the Law Society of Scotland, minister?

Annabelle Ewing: Yes, I am.

James Kelly: In that case, would you give weight to the views of the Law Society?

Annabelle Ewing: As the minister, I would listen to the views of the Law Society. I am a member and I have declared that interest on many occasions. I will do it again quickly: I am a member of the Law Society of Scotland and hold a current practising certificate, although I am not currently practising.

James Kelly: The Law Society submission on the bill says:

> "In 2015-2016, 287 charges were brought under Section 1 of the 2012 Act and we are of the view that all of them could have been prosecuted under pre-existing legislation or at common law."

Surely that opinion is credible, given that it comes from the Law Society, which has looked at the issue in detail. Will you give that opinion some weight?

Annabelle Ewing: I listen to the Law Society, just as I listen to every other organisation or person—anonymous or otherwise—that makes a submission. As I have said already, the issue about the extra tool that is provided by the 2012 act was clearly set out by the Crown Office in its oral evidence before the committee. In relation to section 1, the Crown Office explained that, under the pre-existing laws, there was no extraterritorial application and a different evidential test, which would mean that you would impose limitations if you were to repeal the act without a viable alternative. On section 6, we have heard that the extraterritorial effect is not applicable under pre-existing legislation.

There are also differences in sentencing opportunities: the pre-existing legislation's approach is under summary procedure, while the 2012 act's is under solemn procedure. The act introduced to Scots law, for the first time, a statutory provision that criminalises threats that are made with the intention to stir up religious hatred. If we were to repeal the act without a viable alternative being put in place, we would take all that away, and the provision would not be available to the police and the Crown Office to deal with behaviour that fell within such circumstances. That is the position, as has been clearly enunciated by the Crown Office before the committee.

James Kelly: On section 6, do you accept the police's view that the legal threshold is too high and that it is not effective, as is evidenced by there

being a small number of prosecutions and the Communications Act 2003 having to be used instead?

Annabelle Ewing: With any statute, we do not decide whether it is useful by looking at how often recourse is made to it. There are many laws out there that have been passed, for different reasons, by this Parliament and the UK Parliament. There is not a yearly swoop to see how many charges have been made, and we do not say that we have to disregard certain statutes and repeal them just because, in that year, charges were not brought thereunder. It is clear that each case falls within its own facts and circumstances. There will be circumstances in which section 6 will be the appropriate route and there will be others in which it will not. Each case is determined by its own facts and circumstances, which is entirely the right approach in any civilised legal system.

The Convener: That concludes our questioning. I thank the minister and her officials for attending.

We will move into private session. Our next meeting will be on Tuesday 12 December, when we will continue our consideration of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill. We will also complete our consideration of the Domestic Abuse (Scotland) Bill at stage 2.

I suspend the meeting to allow the gallery to be cleared.

11:56

Meeting continued in private until 12:53.

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