OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee (Virtual Meeting)

Tuesday 3 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 3 November 2020

CONTENTS

JUSTICE COMMITTEE
26th Meeting 2020, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Michael Clancy (Law Society of Scotland)
Roddy Dunlop QC (Faculty of Advocates)
Anthony McGeehan (Crown Office and Procurator Fiscal Service)
Assistant Chief Constable Gary Ritchie (Police Scotland)
Calum Steele (Scottish Police Federation)
Dr Andrew Tickell (Glasgow Caledonian University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 3 November 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Adam Tomkins): Good morning and welcome to the 26th meeting in 2020 of the Justice Committee. We have no apologies from members today.

Our first item of business is a decision on taking in private item 6 on our agenda. If members do not agree to take that item in private, please indicate that in the BlueJeans chat function.

No member has indicated that they disagree, so that is agreed.

Hate Crime and Public Order (Scotland) Bill: Stage 1

10:00

The Convener: Our second item is the continuation of stage 1 consideration of the Hate Crime and Public Order (Scotland) Bill. We have two panels of witnesses today. I welcome our first panel: Roddy Dunlop QC, the dean of the Faculty of Advocates; Michael Clancy, the director of law reform at the Law Society of Scotland; and Dr Andrew Tickell, a lecturer in law at Glasgow Caledonian University. I thank all the witnesses for their written submissions, which are, as always, available on the committee's web pages.

As we have a lot of witnesses and many issues to discuss, we will go straight to questions and I will not invite witnesses to make opening statements. Another reason for that is the length of and detail in the written submissions, which have been extremely helpful.

I want the witnesses to reflect on the proposed amendments that Humza Yousaf, the Cabinet Secretary for Justice, has indicated that he wishes to make to part 2 of the bill. Given the tenor of the written evidence from this morning's witnesses, it is obvious that they all welcome the amendments. However, do the amendments go far enough to ensure that the bill does all that it needs to do to protect the fundamental rights of free speech and privacy, and the right to a fair trial?

Roddy Dunlop QC (Faculty of Advocates): I am much obliged to the committee for hearing the views of the Faculty of Advocates. The convener is absolutely correct that the proposed amendments are welcome—they have been welcomed explicitly by the faculty. The amendments address a number of concerns. As members work through the faculty's submission, they will see that a recurring theme of our concerns is the potential damage that might be done by the "likely to stir up" provision, allowing for unintentional criminalisation in an area in which that would not be welcome.

Therefore, the amendments address many—not all, but many—of our concerns. I say "not all" because, for the reasons discussed in the submission in reference to what was said by Lord Bracadale, we have a residual concern about the use of "insulting" with regard to race only.

The answer to the concern, which has been given already—no doubt it will be given again by those who propose it—is that the provision in regard to race has been on the statute book since 1986, so what is the problem? The problem that I have with it is that it is difficult to see what the

provision adds. Despite its 20-year history, I have been unable to find a prosecution that even suggested, let alone ultimately turned on, "insulting" being the crucial provision. It is difficult to see a situation in which words are used that are not "threatening" or "abusive" yet which might still be thought worthy of criminalisation under reference to "insulting".

There are two aspects to that. Why would we want only one characteristic to be protected against insult? Secondly, but more importantly, with the term "insult", subjective concerns are brought in. All sorts of people are capable of being insulted by all sorts of things, whereas with "threatening", something is either threatening or it is not—that is quintessentially objective. Similarly, something is either abusive or it is not, and that, too, is quintessentially objective.

With notions of insult, we move into the notion of subjectivity, and there is a concern that material might be criminalised that really should not be. Even if that is not the ultimate result—for example, because there is still the check of whether there is an intention to "stir up hatred"—it might result in people being prosecuted, or in people demanding prosecutions because they have felt insulted by something that has been said. In a world in which we are told repeatedly—appropriately, it seems to me, and in reference to the European convention on human rights—that a pluralist society must be open to not only notions that are welcome but those that are liable to offend, shock or disturb, I struggle with a provision that allows the criminalisation of something that is merely insulting. I say "merely" because, if what is said is also threatening or abusive, it will be struck at.

The case of Fáber v Hungary, which we cite in our submission, is of some import in that regard. That was the case in which an offensive flag was flown close to an anti-racism demonstration. It was accepted that the use of the flag would cause unease and a sense of disrespect among past victims. That seems to be pretty close to something that would be deemed to be insulting—and insulting only. The European Court of Human Rights found there to have been a violation of article 10 of the convention, because there was nothing violent in the act so there was no threatening or abusive aspect to it. I struggle to square away the guidance in that authority with what is being suggested with a provision for "insulting" only. That is our primary residual concern with regard to the bill.

The Convener: I have a couple of follow-up questions on that, but I will first bring in Michael Clancy on the same question that I asked Roddy Dunlop. I also ask Mr Clancy to reflect on what Mr Dunlop just said.

Michael Clancy (Law Society of Scotland): At the Law Society of Scotland, we agree with the faculty dean's assessment of the cabinet secretary's amendments. We have taken a look at them, and they relieve much of our anxiety about the provisions in sections 3 and 5.

There are issues with the use of the word "insulting", as the dean points out, because it is a subjective test. In our submission to the committee, we note that it lowers the bar for criminality a bit too far. Not only is it a subjective test but, with the introduction of the new crimes in the bill, it might create a hierarchy between stirring up hatred on the basis of race and stirring up hatred on the basis of the other protected characteristics. It is important to take those points into account.

The convener asked about freedom of expression, which is not an absolute right under article 10 of the European convention on human rights—it has to be tempered. The article says:

"Everyone has the right to freedom of expression."

However,

"The exercise of these freedoms ... carries with it duties and responsibilities"

and it can be limited by prescriptions of law, as

"are necessary in a democratic society ... for the prevention of disorder or crime".

It is quite clear that it is perfectly legal under the terms of article 10 to seek to control freedom of expression; it is a question of how far one goes, and perhaps the word "insulting" is a word too far.

The Convener: I put the same question to Dr Tickell, and offer him an invitation to react and respond to what we have just heard from Roddy Dunlop and Michael Clancy.

Dr Andrew Tickell (Glasgow Caledonian University): Thank you for the invitation to the meeting. It is welcome to see the Scottish Parliament anxiously scrutinising a measure with regard to free expression. Parliament has not always done that and, as Lord Bracadale recognised when he made his recommendations, stirring-up offences inevitably raise questions of free expression.

With regard to the cabinet secretary's amendments, I very much welcome the shifts towards an intention form of mens rea, which I argued for in my submission, as others did in their submissions.

Some free speech anxieties in respect of the bill are well founded and some are exaggerated and excessive. Moving to an intention-only model should substantially allay the anxieties that people rightly had about the first iteration of the bill. We should not just jump over the idea of intentionally

proving an intention to stir up hatred as if it is a small thing to establish. It should not be too difficult for prosecutors to establish, but it is no small requirement. There is a lot of misinformed and exaggerated discussion around the bill, and we need to be quite careful about taking seriously the terms of the new offences. That shift is extremely welcome.

I tend to agree with Roddy Dunlop's propositions on issues around "insulting". The argument that, because it is in the Public Order Act 1986, it should be in the bill is not convincing in relation to any aspects. We should be considering the matter from a first-principles perspective and asking whether those protections, restrictions or extensions are necessary. I struggle to imagine circumstances in which communication or comment would be insulting but not abusive, as "abusive" is a pretty capacious concept.

In terms of the consolidation principle that notionally undergirds the bill, it would be a good idea to make the legislation more simple. I do not see what is added in terms of protection. If there are anxieties about perceptions that it would make it harder to criminalise people who engage in racial incitement, that can be addressed by those types of arguments.

As I argued in my submission, there is scope to allay anxieties about free expression. As has been commented, the bill is subject to the European convention on human rights, as would be any enforcement in court. The court is subject to the ECHR, and it would have to consider in convicting or not convicting any individual whether convention rights were engaged in that case.

However, the extent of the anxiety around the bill means that, although the reasonableness defence is welcome, there is perhaps scope to make more clear and to communicate—as a political goal as much as a legal one—that there are particular factors that should be taken into account with the stirring-up offences in relation to whether behaviour should be regarded by the court as reasonable or not. That is my main reaction to that element of the bill.

The Convener: That is helpful. I have two or three follow-up questions on what the committee has just heard.

The first question is for Roddy Dunlop in the first instance. The suggestion was made that "threatening" and "abusive" are objective tests, whereas "insulting" is a subjective one. I want to ensure that the use of "abusive" in the bill really is as objective a test as it is elsewhere in Scots law. That is, where "threatening" and "abusive" are used elsewhere in Scots law, there is a requirement that the abuse causes

"a reasonable person ... fear or alarm"

or "distress". There is no such requirement in the bill.

Therefore, is there not a danger that, even though elsewhere in Scots criminal law "abusive" is an objective test, in the bill, it could elide into that subjective space that we perhaps do not want criminal law to get into? If that is a problem, would the cure—for the test of "abusive" to be met—be an amendment that would require the Crown to show that a reasonable person was caused fear, alarm or distress?

Roddy Dunlop: I would not have any objection to that sort of amendment; my only query would be whether it was necessary. You are quite right that, in many contexts, there is an express provision making that approach clear, but the word "abusive", which is an ordinary word in the English language, has an objectivity to it that does not exist with "insulting". It is difficult for someone to say, "I subjectively felt that I was abused" by a behaviour that is not abusive under any ordinary definition of the word. "Abusive" already imports an objective test.

If there is any doubt about it, it does not seem that the objective behind the bill has anything other than an objective notion, so there should not be any objection to an amendment to make that positively clear.

10:15

The Convener: My concern is not that we are going to see people convicted on the basis of something that is alleged to be but is not really abusive. My concern—which I came to in reading your written evidence—is that police powers will be used to search people's homes and private premises for material that is said to be inflammatory or abusive but which would not cause a reasonable person fear, alarm or distress.

I talked about freedom of expression in my opening question, but I did not talk about only that. I also talked about the fundamental human right of respect for privacy and about the article concern around due process. Is there not a concern that allowing for a potentially subjective interpretation of "abusive" in the legislation would generate article 8 and article 6 considerations?

Roddy Dunlop: If there were any possibility of that, I would agree. That is not my reading of the word "abusive", but if there were any realistic possibility that it might be given that meaning, I would strongly agree that it should be corrected, or at least clarified, by an amendment to the legislation to make that crystal clear. That cannot be what is intended, and I would share your concerns about the repercussions if that were to be the case. It is those concerns that lead me to

rail against the retention of the "insulting" provisions that we have already discussed.

Dr Tickell: It is important that we underscore, as is implicit in the convener's question, the fact that threatening or abusive behaviour has been a crime in Scotland for 10 years. It is interesting that a lot of the response to the bill seems to suppose that that is not the case, which may tell us about public legal education as much as anything else. You have to establish fear or alarm; you do not have to establish distress for a section 38 prosecution, simply fear or alarm.

Given that section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is on the statute book, we must think about the bill in the context of what is already criminal. If we did what you suggest, convener, what would be the point of the bill? You would ultimately have an offence that required all the same behaviour and, on top of that, an intention to stir up hatred.

There might be an argument for that in relation to fair labelling and properly calling out particular types of behaviour, as Lord Bracadale said last week, as that would aim at a whole group rather than targeting individuals. However, you would get into the territory of removing any distinctive contribution that the bill makes to Scots law through its recognition of stirring-up offences.

Michael Clancy: Changing the bill as you suggest is an interesting proposition, convener. One answer is that one must read the statute book as a whole. Therefore, where abuse is defined elsewhere in the law, there might be an indication to those who are prosecuting, defending and judging that abusive behaviour could be considered in that context.

If we leave the bill without any specific definition, there might be a question as to why there is no definition of "abuse" in this legislation, whereas there is in other legislation. To rely on the ordinary English language usage of the word "abuse" takes us only so far. It raises questions and it would be neater—particularly in the context of an attempt to consolidate our law—if there were a definition in the bill.

The Convener: My final question picks up on an issue that we explored with the cabinet secretary and with Lord Bracadale last week. It is the possibility under the bill of what have historically been understood to be public order offences being committed in private.

Under the Public Order Act 1986, it is not quite a defence, but part of the constitution of the offence, that stirring up racial hatred cannot be committed by a person inside a private dwelling. There is no equivalent provision in the bill as it stands. Is that omission justified or should it be rectified?

Roddy Dunlop: There has obviously been an awful lot of media coverage of that issue in the past week and there are a lot of strongly held views. You will have noted that the Faculty of Advocates did not pick up on the matter in its submission. I see the position as quite finely balanced because, on the one hand, for the state to step in and interfere with freedom of expression in the home seems rather draconian, but on the other hand, as I think Dr Tickell pointed out, there are many instances in which the state does just that. It is equally criminal to punch somebody in your home as it is to do so on the street. I suppose that the countervailing view would be that we want to stop, for example, the radicalisation of children within the home by hate speech being propagated within the home, in the same way that we would want to stop it being propagated by someone on a soap box on the street corner.

My primary concern is that the provision could be abused and that there could be a situation where, as has been suggested in the media, one's least favourite uncle becomes the subject of a complaint to the police because of what he said over the Christmas turkey. That cannot really be what we are looking at here, but equally, should it be the case that you are able to breed hatred within the home without repercussion? It is more difficult to say that that should be allowed, given the pernicious effects of hate speech and the laudable aims of the bill, which I remind the committee that the Faculty of Advocates is supportive of.

The Convener: Thank you. We might therefore just want to take the words "and Public Order" out of the short title of the bill, if it is not a bill that contains offences against public order.

Michael Clancy: That is not something that the Law Society of Scotland's criminal law committee raised in its submission. My words on the matter, for what they are worth, are therefore without the sanction of the committee. One has to think about where the state intervenes in the home. Of course, we have seen instances quite recently where the state has done exactly that under coronavirus legislation—where there has been a threat to public health and a contravention of the regulations when someone has invited 50 people into their home, for example.

What is public order in these circumstances? Does it relate to the number of people? Does the number depend on the size of one's family? The dean of the faculty cited the example of a Christmas dinner table. It depends on the size of your table, but you might invite more people in and make some comments or, I suppose, allow comments to be made that would contravene this legislation, and there does not seem to be a particularly hard line about whether it is about

public order in the public space or public order in the private space. Therefore, I would edge towards including statements that are made in the home, for some of the reasons that the dean mentioned about the extent of criminal law and how it works. There is no sanctuary, in that sense, for most aspects of the criminal law and I do not think that there should be a sanctuary when it comes to hate speech.

Dr Tickell: It is worth remembering—I know that this is an irritable point to make—that the bill is about street harassment, which is a form of harassment that most of Scotland's minorities experience regularly. I must say that I find the fixation on those kinds of questions in the media quite ridiculous at points, given that we are talking about such a serious issue.

Most criminal offences do not have a dwelling defence. Indeed, some types of crimes—and most rapes and murders—mostly happen within dwellings. In 2018, the Scottish Parliament legislated on domestic abuse, which takes place mostly within dwellings. The fixation on dwellings is largely because that element happens to be in the 1986 act and because campaigners, having gained concessions from the cabinet secretary earlier, are trying to seek further concessions.

If the committee is in any way attracted to the idea, I suggest that it would be much more coherent to have a requirement of publicity. Breach of the peace was historically often used to prosecute domestic abuse in Scotland, but in 2009 the High Court, in the case of Harris v Her Majesty's Advocate, decided that in future the common-law crime of breach of the peace would require an element of publicity in order to comply with the ECHR.

A requirement that is based on the artificial limits of the household strikes me as rather unpersuasive. A requirement that conduct should have a public element—to echo the test from the common-law crime of breach of the peace—would at least seem to be more coherent than an artificial distinction relating to households.

Broadly speaking, I tend to agree with Professor Robert Black, who was quoted in *The Times* this week; he made the obvious point that criminal law is quite often concerned with what goes on inside people's houses, and in most cases very properly so.

The Convener: Liam Kerr has a quick supplementary before I bring in Liam McArthur.

Liam Kerr (North East Scotland) (Con): Good morning. My point arises from that line of questioning. Some commentators, including Lord Bracadale, have suggested that, given that between 2011 and 2018 there were only eight prosecutions for stirring up hatred under the 1986 act, the main purpose of the new offences will be symbolic, or will be about sending a message. Does the panel agree with that assessment of the new offences? In any event, do you take a view on whether that is the proper function of the law?

Roddy Dunlop: It is true that there has historically been a pretty low level of prosecution for the offence. Indeed, one might take the view that, if those are the only instances that were thought to meet the public interest test for prosecution, that should be welcomed. However, the fact that it does not happen that often does not mean that we should not criminalise it.

I do not think that the proposed legislation is symbolic. One sees on social media in particular now an increasing incidence of behaviour that is beyond the pale. It transcends the mere conveying of ideas liable to shock or offend, which is something that, in a pluralist society, we all have to be prepared not only to put up with but—to be frank—to welcome.

Where one transcends that and gets into a world where behaviour is abusive and/or threatening, legislation is not just a question of symbolism. The law really ought to step in to say, "This is not something that is to be tolerated—this is a proportionate fetter on your freedom of expression and the behaviour should be subject to sanction."

The Convener: That is helpful—thank you. I will bring in Liam McArthur.

Liam McArthur (Orkney Islands) (LD): Good morning to the witnesses—I am glad to see that Dr Tickell is back online and with us again.

I will reverse the order of the convener's line of questioning. We have touched on the issue of freedom of expression. Mr Dunlop talked about the existing ECHR protections that would apply in respect of any court rulings.

However, there have been concerns. A comparison has been drawn with the way in which the legislation is framed in England and Wales, where there are specific freedom of expression protections linked to each characteristic.

In his evidence last week, the cabinet secretary made clear that he is open to expanding not just the breadth but the depth of those protections. Do the witnesses have any specific views on what they would like to see happen in taking up the cabinet secretary's offer?

10:30

Dr Tickell: I am sorry—my sound cut out rather dramatically and I hope that my last point was coherent. The freedom of expression protections are, as you have said, limited to two of the

protected characteristics, which obviously seems rather jarring, given the bill's structure. Whatever the bill said about free expression, the European convention would apply.

One of the challenges that the Government has faced in drafting the bill is that it has tried to have carve-outs for particular types of statements—for example, the provisions try to capture statements that encourage people to desist from homosexuality. It is difficult to draft those provisions without having a long list of things that, in and of themselves, do not amount to threatening or abusive behaviour.

I suggested that one effective way to address the issue is to consider and try to flesh out the reasonableness defence in general and to have a non-exhaustive list of factors to be taken into account with regard to, for example, artistic, journalistic, scholarly and academic expression—one might wish to add more to that list.

Those factors are about the general genre in which expressions manifest, which a court could take into account as part of the contextual analysis of whether conduct is reasonable. The approach to free expression in the bill has severe limits, because one begins to accumulate more and more statements that should not, in and of themselves, be regarded as threatening or abusive.

That is the only way that I could devise of bumping up and making more robust the sense of free expression protections in the legislation, which is also about giving people reassurance. Journalists often think that the bill is about them. I think that they are generally mistaken about that, but if they are concerned about it, the appearance in the bill of the journalistic context of activity as a factor to which the court should have regard in assessing reasonableness strikes me as an effective way of addressing underlying anxiety. It would also gesture to the court that the context is a factor to be taken into account in any future prosecution—albeit that it is only one such factor. That is my view on an effective way to realise the freedom of expression aspiration in the bill.

Liam McArthur: That answered the question that I was going to ask about whether that would be in the bill or whether you would see it being put in subsequent guidance. That is helpful.

What are Mr Dunlop's views on the cabinet secretary's offer?

Roddy Dunlop: The difficulty with non-exhaustive lists is where to stop before you become exhausted. As Dr Tickell pointed out, one could have a never-ending series of factors that might be taken into account in the process. As has been pointed out, I wonder whether we are not already covered by the fact that any interpretation of the bill, or indeed of any legislation, must be convention compliant.

If we assume that we will not recant from the convention—there is absolutely no sign that we will—the bill must be read in a way that makes it convention compliant. That means that if the court arrived at an interpretation of section 3, or of any section of the bill, that contravened article 10 of the convention, that interpretation would be bad and unlawful—wrong in law. That being so, the particular protection that we are looking for would already be there.

To that extent, I wonder whether non-exhaustive lists become more of a problem than a solution, because the tendency is to consider them as tick-box exercises and to use principles such as ejusdem generis—the legal interpretive principles with which we have all grown up—to constrain the ability to enable freedom of expression. Leaving the provisions with a requirement to be compliant with article 10 of the convention might be enough.

Liam McArthur: Dr Tickell picked up a concern that those protections relate to two of the characteristics; at present, there appears to be a greater level of protection in some areas than others. We also have a better sense of how those protections work in practice, in relation to the law in England and Wales, which has been updated relatively recently. Are the concerns that you have in relation to those non-exhaustive lists borne out by your understanding and experience of that legislation?

Roddy Dunlop: Again, you will have seen that that was picked up in the faculty's response. I agree with Dr Tickell's description of sections 11 and 12 as "jarring". You wonder why there are carve-outs for two protected characteristics and not for anything else. Perhaps that highlights the dangers of non-exhaustive lists.

I am not aware of any particular difficulty resulting from the changes in the law in England and Wales. That is perhaps because—and I am answering my own argument here—if you have a non-exhaustive list, which itself has to be read in a way that is convention compliant, there really is not a difficulty, and perhaps it just provides more clarity. If more clarity is welcome and if more guidance to the ordinary citizen as well as to the courts is desired, non-exhaustive lists have a part to play.

My overriding point is that, regardless of whether there are non-exhaustive lists, the protection is there. Therefore, really, what you are saying is that, if these lists are to be brought in, it is more to provide comfort or clarity, because, ultimately, the protection is there in the requirement that the provision be read in light of article 10 of the convention as necessary and

proportionate before there is such a fetter on freedom of expression.

Liam McArthur: That is helpful. Michael Clancy, do you want to respond to the same question?

Michael Clancy: Sections 11 and 12 are exceptional, and the protection afforded to freedom of expression is not immune from criticism, if I may put it that way.

We noticed that the cabinet secretary had indicated that he is interested in the breadth and depth of these provisions. Of course, that is all about who gets protected in terms of their expression. One can see in section 11 that behaviour is not to be taken as threatening or abusive solely on the basis that it involves discussion or criticism of religion, religious beliefs and practices, proselytising or urging persons to cease practising their religion. Therefore, one might say that, under the bill, those who make that kind of comment are getting an additional protection to others, except those who make comments regarding sexual orientation, which would be protected under section 12.

Where does that take us? Criticism and discussion are very wide concepts, and being able to criticise or discuss is part of our suite of freedoms of expression that the dean and Dr Tickell have indicated are protected under article 10. Do we then move to extend the breadth and depth of those protections to the other protected characteristics? That is certainly an opportunity and a possibility that I am sure that the cabinet secretary is pondering even as we speak.

The Convener: I will bring in James Kelly next.

James Kelly (Glasgow) (Lab): I turn to the issue of plays and theatrical performances, which are covered in section 4 of the bill. Mr Clancy, can you explain the current law relating to plays and theatrical performances and say whether the provisions in the bill fill any gaps in the current law and are therefore required?

Michael Clancy: Thank you for that question, Mr Kelly. We have concerns about section 4, which will replace section 20 of the Public Order Act 1986 but is much more stringent. We think that it presents a threat to freedom of expression in the arts. There is no justification in the policy memorandum for the drafting of section 4, and it is not clear what mischief the provisions seek to constrain.

Section 20 of the 1986 act refers to presenting or directing

"a public performance of a play".

There is an exclusion under section 20(4), which states:

"a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer."

That is quite distinct from section 4 of the bill, which states:

"an offence under section 3 is committed during a ... performance of a play by a person who is a performer in the play".

That provision is different from the 1986 act and represents a significant change in the law.

Someone "who presents or directs" an event or performance is also captured in the bill, as is the case with the 1986 act. That causes difficulties, however, as there is no definition of presentation or direction in the bill. Someone could direct a play but not be present during the performance. Many directors would find the concept difficult to grapple with, but the drafters of the bill no doubt had a better idea of these things.

That provision would have an impact on the Theatres Act 1968, which was actually introduced to remove certain forms of censorship in theatres. The definition of a play in the 1968 act includes a ballet. We have to look closely at what the bill is trying to deal with and whether we need to revisit the wording to make it more modern and up to date.

I hope that that answers your question, Mr Kelly.

James Kelly: It does, indeed, Mr Clancy—it was comprehensive, as ever.

I turn to Mr Dunlop. Mr Clancy explained the situation with the 1986 act and the way that its provisions have, in effect, been extended in the bill to be more specific about performance. How do you feel about that? Does the Faculty of Advocates have similar concerns?

Roddy Dunlop: Yes, we do. When I looked again at our submission and the bill as originally drafted in preparation for today's session, it occurred to me to ask why we are addressing plays in particular. The term "play" is very broadly defined; it would include stand-up comedy, for example, which is not a play as it is traditionally understood. We are not talking only about Shakespeare.

Why is that being attacked—or rather, addressed—specifically? It is for historical reasons that go back into the dim and distant, when there was a need to address plays because they were the primary form of public performance in society at that time. Nowadays, a far more pressing concern would be things that are said on social media or via YouTube or a similar platform. I would suggest that that is a far more pressing concern than what might happen in the King's Theatre.

I wonder whether it might be appropriate simply to leave section 4 out of the bill, on the basis that an offence would be committed under section 3 if there was "threatening or abusive" behaviour or speech that was uttered with a view to stirring up hatred against a particular protected characteristic. If that happened in the course of a play, assuming there is the usual criminalisation of inciting or procuring such a matter, would that not adequately cover the concerns that might lie behind that aspect of the bill?

10:45

It seems to me that, if somebody deliberately wrote something of that nature and caused it to be brought to the public in the form of a play, it would be caught by the general offence anyway. If that is correct—and I suggest that it is—I am not sure why there needs to be a particular and direct provision that deals with plays.

James Kelly: Thank you, Mr Dunlop. Those are valid points.

Dr Tickell, with regard to potential amendments in that area, do you share the concerns of the other panellists, and do you feel that the bill should be amended to bring it more in line with the Public Order Act 1986, such as by taking out section 4 altogether, as Mr Dunlop has suggested?

Dr Tickell: Yes, I agree entirely with the dean of the faculty. It is completely unnecessary, and it is another good example of a red rag that has been unnecessarily waved at the culture war bull of this hate crime issue. It has made performers and actors think that something special has been designed for them. The only addition that I can identify in having the provision in the bill is that a director who, through their negligence, has one of their performers effectively commit a stirring-up offence on stage would be covered by the law. Under the Criminal Procedure (Scotland) Act 1995, in Scots law, a person can be found guilty art and part, as we call it, of bringing about a crime if they are part of a common criminal conspiracy. The example that is usually given is of bank robbers, with the heist runner, the person who wields the sawn-off shotgun and the getaway driver all being equally guilty of the crime of robbery. If we apply that logic to a play in which an actor, with the connivance of their director, engages in an offence, the director is already guilty as a matter of law. The idea that the provision involves a dramatic change to the status quo is mistaken, and I agree that we would lose nothing that we should not lose simply by removing section 4 altogether.

Section 4 is there because it is in the 1986 act—it is another good example of the copying and pasting of bits of the 1986 act resulting in yet more backlash for the bill that, politically, it did not require. It distracts from the fundamental points and issues here. I argue that we should simply remove it, because it does not add anything useful to the bill. How could such a situation conceivably arise? What kind of negligence could a director engage in that would result in one of their actors accidentally stirring up racial hatred? I find that a comically absurd proposition. I think that we could remove section 4 and really lose nothing that we should not lose from the criminal law.

The Convener: Thank you. I did not think that we would hear about bank robbers, heists and ballet this morning, but every day is a school day.

In a few minutes, we will move on from part 2, but Liam Kerr has a few questions to wrap up this part of the questioning before we do so.

Liam Kerr: Earlier, the convener briefly alluded to police powers, particularly around search and seizure under section 6 of the bill. The faculty raised concerns about malicious complaints and the seizing of devices for long periods. In its submission, the faculty goes on to say that the offence could lie

"in the mere possession of material, irrespective of intention",

which we spoke about earlier. The Law Society of Scotland highlighted the lack of a time period under section 6. On that basis, do you have concerns about how we amend that section? What do you suggest we do in relation to section 6?

Roddy Dunlop: As I recognised, some of the faculty's concerns are already met by the proposed amendment. By taking the word "likely" out of the stirring-up provision, we would narrow the scope for malicious complaints for abusive—[*Inaudible*.]—for the unwelcome consequences that we have referred to in the submission.

However, there remains the potential for concern. I suggest that the safeguards that the faculty has listed in paragraph 46 of its submission onwards ought to be looked at carefully. In particular, we should consider whether we need a search and seizure provision that is far more aligned with other areas of the law and that is not quite as widespread and draconian as the one in the bill.

As I said, a large part of the concern that was created by the "likely" to stir up hatred provision is avoided by the proposed amendment. If the "insulting" provision were to go, that would also water down our concerns. A very much holistic approach has been taken in that, if we were to take away those primary areas of concern, that would bleed into all the other concerns that were listed.

Liam Kerr: I am very grateful for that answer. Does Michael Clancy have any further thoughts on that?

Michael Clancy: In general, the Law Society's view is that section 6 lacks a lot of specification in that a warrant that was granted under the provisions would lack scope. We consider the provision to be unduly oppressive. We cited in our submission the case of the bill of suspension by Holman Fenwick Willan LLP and Duff & Phelps Ltd v the procurator fiscal at Glasgow. In that case,

"the terms of the warrant were limitless in date and wide in their description of the potential recoverable material and were too vague to have sustainable validity."

No one would want warrants that were issued under the bill to fall foul of such case law and to be unduly oppressive. Therefore, we want the terms of the provisions in section 6 to be tightened in order to make them clearer and more effective.

Liam Kerr: I am very grateful.

I will move on to a separate issue, which is the cross-border element of the bill. If the witnesses watched the session last week, they will know that I explored that issue then. Lord Bracadale's report included discussion of whether Scottish courts can deal appropriately with an alleged offence in which some aspects of the case take place in a different country. Lord Bracadale did not see a need for a specific provision on the issue in the bill. Last week, we heard from the cabinet secretary about how he felt cross-border issues were being dealt with. What are the witnesses' views? Dr Tickell is on my screen, so perhaps he would like to start.

Dr Tickell: That is an interesting question. I suppose that the issue might apply particularly to situations in which there was cross-border co-ordination in the distribution of hateful materials. My understanding of how the Scottish criminal courts have adopted their approach is that, if part of a conspiracy takes place in Scotland, in general, that is enough to establish jurisdiction and to prosecute the case here.

In general, we apply an idea of territorial jurisdiction—in effect, what goes on in Scotland stays in Scotland. Some of the offences that have been created in recent times have included provision relating to extraterritoriality. I am thinking particularly about the Domestic Abuse (Scotland) Act 2018, which provides that, if there is a course of abusive conduct, some of which—or, indeed, all of which—takes place abroad, the perpetrator can be prosecuted in Scotland. In general, that is quite an exceptional approach to criminal law, but the Parliament has adopted that approach in the past.

My strong impression is that, when behaviour has had a strong association with Scotland, the criminal courts have generally been quite satisfied in indicting people in this jurisdiction for that behaviour, even if some elements of it have taken place outside Scotland.

The Convener: We will move on, unless Roddy Dunlop or Michael Clancy has a burning issue that they want to add to the points that Dr Tickell has covered. I see that they do not.

Shona Robison and John Finnie have questions about part 1 of the bill, which is about the statutory aggravation.

Shona Robison (Dundee City East) (SNP): Good morning. My first question is about Lord Bracadale's recommendation that statutory aggravations should continue to be the core method of prosecuting hate crime in Scotland. Do you agree? Do you think that the bill effectively provides for that? Perhaps we can start with Roddy Dunlop.

Roddy Dunlop: Absolutely. As the committee will have seen from our submission, we have no difficulty at all with part 1 of the bill. It seems to do exactly what Lord Bracadale suggested, which was, in effect, that there should be a continuation of the status quo—a situation in which statutory aggravation is seen to be the appropriate way of dealing with the vast majority of hate crime in Scotland. The vast majority of hate crime in Scotland already accompanies other criminality, and it is appropriately dealt with as an aggravation. We have no difficulty whatever with that.

Michael Clancy: Like the dean of the Faculty of Advocates, we agree with Lord Bracadale's assessment, and we think that part 1 of the bill covers that. We have no difficulty with the aggravations, which are relatively uncontroversial.

There is an issue around the use of the word "evinces" in section 1(1)(a)(i), which I think we might come on to, but if you wanted me to, I could go into that a bit further.

Shona Robison: Yes, I was going to ask about the language that is used, so it would be helpful if you could respond on that.

Michael Clancy: We think that the use of the word "evinces" is anachronistic and a bit old-fashioned. I could see me starting a campaign to use "evince" in everyday language, but that would probably not go very far. It is an issue that other people have picked up on. Our law ought to be written in a way that makes it easy to understand, accessible and clear, and the use of language that is not currently in common usage probably does not meet that objective. A phrase along the lines of "demonstrates malice or ill will" might be a suitable substitute. That is the kind of thinking that the Law Society has been doing about that particular provision.

Shona Robison: Thank you for that. You might be aware that the cabinet secretary has said that he is open to looking at the wording and that he has suggested similar language to that which you have suggested.

Can we hear from Andrew Tickell?

Dr Tickell: Absolutely. Practically speaking, part 1 of the bill—although it has attracted almost no public commentary—is the most important part of the bill, because we know from all the different jurisdictions in the world that have hate crime rules that such aggravators are what we are talking about when we talk about hate crime. We are talking about behaviour that is already criminal, to which an aggravator is attached on the basis of what the accused person does in the perpetration of that criminal behaviour or immediately before or after the offence.

I am sorry to come back to this, but the bill has often been junked in the media as though it is comprehensively awful, ghastly and misconceived. Well, people who say that are junking aggravators as well. Aggravators are not only the law as it stands but a tremendously important way of marking out such behaviour as being, as the name suggests, aggravated or additionally wrongful. If someone picks their victim on the basis of their perception of their characteristics, that is one of the critical ways in which hate crime is realised and effected in our country, and I think that it is critical that the bill recognises that.

I am surprised that there has not been more conversation in the parliamentary debate about whether the factors and characteristics that are listed in part 1 of the bill are comprehensive enough. If we look at how other jurisdictions approach things that can potentially aggravate offences—the report by Professors Leverick and Chalmers to the Bracadale review is a very accessible way of doing that—we will find additional characteristics there. I would be very sympathetic to the characteristic of homelessness being added to the list. We know that people who are perceived to be homeless are much more likely to be victims of not just street harassment or abuse in the street but assault by members of the public, simply by dint of the fact that they do not have a home to go to.

11:00

It is perhaps unfortunate that we have got locked in to those existing characteristics, partly because of this terrible fixation on the stirring-up offences. It might be at least worth contemplating whether other things might, and perhaps should, feature in the list of aggravating factors on the basis of the social experience in Scotland and the experience of the people whom we know tend to be the predominant victims of crime. That, after all, is what the bill is mainly about.

Shona Robison: Thank you. That is an interesting thought, on which I am sure we will reflect further.

That is all from me, convener. I know that colleagues have other questions in this area.

The Convener: Thank you. John Finnie wants to come in, and then Annabelle Ewing, unless she thinks that her questions have already been covered.

John Finnie (Highlands and Islands) (Green): Good morning, panel. I have questions for Mr Clancy and Mr Dunlop about the written evidence that they submitted.

Mr Clancy, in your submission and in the meeting a moment ago, you welcomed the continuance of statutory aggravations. In your submission you said:

> "The statutory aggravation model should continue to be the means used for prosecuting hate crime to maintain similar and appropriate thresholds for criminal offending as exist at present."

Are you satisfied that the thresholds for criminal offending as outlined in the bill are appropriate?

Michael Clancy: Yes, we are. Subject to the issue to do with insulting behaviour, which we discussed earlier—of course, when our submission was written, the signal about the provisions that are now subject to amendment had not yet made its way through to anyone—I think that we are on solid ground now and can say that we are content in that respect.

John Finnie: Thank you.

Mr Dunlop, in the Faculty of Advocates submission, you said:

> "Lord Bracadale's conclusion in relation to aggravation in particular was based on the consistency which the unified approach would achieve with other existing hostility aggravations which he considered to be more easily understood by practitioners and the public".

Do you believe that the bill delivers a unified approach with other existing hostility aggravations? Will the public understand that, and is such public understanding important?

Roddy Dunlop: Yes, I think that it consistently does what Lord Bracadale suggested would be done. Part 1 of the bill extends the existing list of aggravations to a wider range of protected characteristics. That seems to me to be consistent with the bill's aim. As long as that is done along with the amendment to take out the aspect about behaviour that is likely to stir up hatred, making the crime one of intention only, as we discussed—and I echo Mr Clancy on the need to address the concern about insulting behaviour—that seems to

me to raise the matters to a level at which they should be criminalised under part 2.

I have no difficulty whatever with the provisions on aggravation, because part 1 really just says that the offence is aggravated if someone who is committing a criminal act is doing so because of hostility towards a protected characteristic—and the protected characteristics that are listed are well understood in terms of employment law, for example—which seems to me to be entirely appropriate and exactly what Lord Bracadale was suggesting.

John Finnie: Thank you.

My next question is for the whole panel, but may I come to Dr Tickell first? Lord Bracadale recommended repealing the offence of racially aggravated harassment, but the Scottish Government did not accept that recommendation. Is it your view that the other characteristics have been sold short and that a hierarchy is being created in that regard?

Dr Tickell: I have a couple of thoughts on that. If we are going to keep the offence of racially aggravated harassment, there is no argument for it not to be in the bill. If one of the key reasons for the bill is to consolidate the law, I find it crackers that the offence is not present in the consolidating measure.

As you say, the Scottish Government did not accept that recommendation, which raises questions about what additional contribution or protection the offence under the Criminal Law (Consolidation) (Scotland) Act 1995 provides now in Scotland. We know that it has been used a lot by Scottish prosecutors, but the offence of threatening or abusive behaviour aggravated on the ground of race would seem to cover much of the same areas. However, if the 1995 offence is to be retained, it must surely be retained in the bill. If the bill is a consolidation measure to end fragmentation, I find it incoherent that the offence is not present in it.

It is undeniable that the idea of treating all the protected characteristics equally is no longer a structuring force in the bill. The Scottish Government's decision to try to protect the issue of race has resulted in more complexity than would otherwise have been the case.

It is probably worth stressing how the law defines the idea of race, because it does not define it in the way the ordinary person might assume. It applies much more generally to national origins and citizenship, as well as to race and ethnicity, which is perhaps a wider framework for the activity of potential forms of abuse to take place in than many people might immediately realise.

I agree with Lord Bracadale about simply repealing the section 50A offence. Organisations such as Engender probably wish to model a form of misogynistic harassment on the offence, which I think is one of the reasons, in addition to those given by the Cabinet Secretary for Justice, why it has not been repealed and why it has not been proposed that the bill should repeal it.

Michael Clancy: I agree that consolidation should mean consolidation. Consolidation is generally a good idea for the public at large who are affected by laws and for the operating practitioners, whether they be defence solicitors or prosecuting procurators fiscal. The continuance of section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 looks out of kilter with the concept of consolidation.

We have been trying to consolidate law for a long time. The Scottish Law Commission, which was founded under the Law Commissions Act 1965, has consolidation of the law as one of its objectives. If we consider consolidation as a national objective for the law, we should be doing exactly that, especially when it is reinforced by a judge-led report.

Roddy Dunlop: I wonder to what extent it is the optics of the issue that are proving to be crucial. We have already spoken about the retention of the provisions on "insulting", which has been driven largely by the fact that they have been on the statute books since 1986. There is a concern about the optics of taking them out, as if that would dilute a protection that has been there since 1986. Provisions regarding the performance of plays have been on the statute books for decades, and there is a concern that, if they were taken out, that, too, would dilute the protection. This offence might be another good example of that, as the worst thing for the optics would be to be seen to be getting rid of a legislative provision that has been used regularly by prosecutors and which has provided protection.

I wonder to what extent there continues to be a need for the section 50A offence, given what would be enacted by the bill. What additional element would not otherwise be caught by what is struck at by the bill? To the extent that there is a need for the offence—to echo the other witnesses—it really ought to be included in the bill.

The aim of a consolidating statute is to have the whole law of that particular genus in one place, so that one can go to the act and find out what is allowed and what is not allowed. The suggestion that we have a hangover offence in which we would have to go to a completely different statute—indeed, we would have to go to an amendment to a completely different statute—does not seem to me to be coherent. If you are going to retain—[*Inaudible*.]

John Finnie: I thank the witnesses very much for their responses.

The Convener: Annabelle Ewing also has a question relating to that issue.

Annabelle Ewing (Cowdenbeath) (SNP): I want briefly to pick up on the threshold test of evincing malice and ill will, first with Michael Clancy. However, before going to Michael, I refer members to my entry in the register of members' interests, wherein they will note that I am a member of the Law Society of Scotland and I hold a practising certificate, albeit that I am not currently practising.

The Law Society is not happy with the use of the word "evinces" in the term "evinces malice and ill-will", but seems content with the term "malice and ill-will". Michael Clancy will recall that Lord Bracadale recommended that we use the phrase "demonstrating hostility". I think that the Crown Office and Procurator Fiscal Service said that the use of that phraseology would not change the test. What is the Law Society's position on that point?

Michael Clancy: You ask an interesting question, as always. I think that we have settled on "malice and ill-will" because it is a well-understood phrase. It is not particularly out of popular usage—certainly not as much as the word "evince" is. A body of case law is present for us to reflect on the meaning of malice and ill will. That being said, if "hostility" is shown to have exactly the same characteristics as "malice and ill-will"—I am not sure that it does—we would examine that closely and give a view on it.

Annabelle Ewing: I put that question to the other two witnesses, starting with Dr Tickell.

Dr Tickell: It is a good question. The term "evinces malice and ill-will" sounds rather Dickensian, or slightly old-fashioned, does it not? I do not see how shifting the language from that term to "demonstrating hostility" is likely to dramatically change the scope of aggravators, not least because aggravators must be attached to underlying criminal behaviour—if the underlying behaviour is not criminal, it cannot be aggravated.

I do not see how Lord Bracadale's "demonstrating hostility" is likely to dramatically add to or subtract from the scope of the aggravators. However, from the perspective of the ordinary person, the term "demonstrating hostility" is much clearer than the idea of "evinces malice and ill-will".

Annabelle Ewing: That is one vote for each side of the argument. Mr Dunlop has the casting vote for this morning's purposes.

Roddy Dunlop: I live in a world inhabited by those using Dickensian language, so I do not have any particular difficulty with the notion of evincing. In fact, the notion of malice is arguably more elusive. If one passes into the world of defamation in which malice is a recurring concept, malice can mean more than one thing. It means different things under the law of fair comment from what it means under the law of qualified privilege. Malice can mean intent to harm; it can also mean having an ulterior motive.

To that end, if the aim is to make things simpler for the man in the street, I see considerable merit in getting rid of the more Dickensian language and using the term "demonstrating hostility", because that is an easily understood concept that does not have the wriggle room that the notion of malice might have. As I said, malice means a number of different things in a number of different contexts in the law. Therefore, I see some attraction in saying exactly what is meant, and that is demonstrating hostility.

Annabelle Ewing: I think that the jury is out on that point and, obviously, the committee will have to reflect further on it.

11:15

The Convener: Although I am delighted that we have had references to Shakespeare and Dickens, can we please stop using "Dickensian" as a pejorative term? With that thought, over to Rona Mackay.

Rona Mackay (Strathkelvin and Bearsden) (SNP): We have covered the different approach to race extensively, but I would like to ask a couple of brief supplementary questions on that. I have one for Roddy Dunlop and Michael Clancy, and a separate question for Andrew Tickell. Offences of stirring up racial hatred have existed since 1986 in all parts of the UK, so the one in the bill is not new. Last week, the cabinet secretary told the committee in evidence that two thirds of all hate crimes relate to race and that, last year, there were 3,038 racial stirring-up offences. Do those figures not make the case for not removing the word "insulting", and for race to be an exception? If we removed "insulting", as Roddy Dunlop suggests, would that not dilute the importance of the severity of hate crimes relating to race?

Roddy Dunlop: [*Inaudible*.]

The Convener: We need to unmute Roddy Dunlop, please.

Roddy Dunlop: The question is how many of those convictions were perilled on the notion of the word "insulting". I will warrant that the answer is none, or almost none. To come back to the point that I made at the outset, it is difficult to conceive of a situation in which the language that has been used is not threatening or abusive but is deemed

to be insulting in a way that should be criminalised.

I have been trying to figure out examples that might help on the issue. To pick up on one of Dr Tickell's points, race includes national origin, so is it abusive to say that all Scots are stingy? Probably not. Is it threatening? Definitely not. Is it insulting? Probably. Do we want to criminalise that sort of matter? Is that not really too venial to merit the attention of the law? I suggest that it is.

I come back to the point that the English legislature made when it considered the background of the notion of "insulting". The view was taken that the word could be removed without having any material impact on the legislation, because no prosecutions turn on that word and there was no realistic risk of dilution for that reason.

Therefore, I would not be concerned about dilution; rather, my concern lies the other way round—it is that the subjective notion of "insulting" would be ripe for abuse. I do not mean that in the sense that I anticipate that there would be convictions because, if we read the provisions as article 10 compliant, with reference to the Hungarian case that I mentioned, we will probably never get a conviction. My concern is about the anterior stage, at which the provision would be subject to abuse and misuse, such as malicious complaints. There would potentially be the draconian effects of a search without warrant, on the basis of retention of devices and so on. It would be a very easy way to get back at the neighbour you do not like—you make a complaint, and all their computers and so on are seized, and there would be all the potential cascading effects that might come from that.

Therefore, I do not see removing the term as a dilution; rather, I see it as a necessary fortification of the protection for freedom of speech.

Michael Clancy: As the dean said, there are good arguments for removing the word "insulting". Lord Bracadale recommended that the word be removed. I suppose that one could approach the issue in a couple of ways. You could either remove "insulting" from the provisions of section 3(1), or you could add "insulting" to the provisions of section 3(2). However, neither of those sounds quite right. In relation to adding "insulting" to the provisions of section 3(2), there should be equality before the law. Retaining "insulting" creates a suggestion that there is a hierarchy of offences and some people who might be accused of committing an offence would be put to an additional hurdle. The bar of "insulting" is quite low and it is subjective.

On the point that you made about the numbers of offences, one can see that the use of racial epithets or insulting, threatening or abusive behaviour is a serious problem in Scotland, and you will probably return to that issue when you speak to the police officers later on. However, if the net of behaviour is larger—as it will be, if we include "insulting"—that is a potential source of the larger number of prosecutions under the previous legislation. I think that, if we were to remove "insulting", the cohort that persists in making threatening or abusive comments towards people in the groups that are mentioned in section 3(1)(b) for the purposes of stirring up hate will not stop trying to stir up hate against those groups because "insulting" is not part of their weaponry. They will continue to be threatening and abusive and will still need to find themselves subject to the law.

Rona Mackay: Thank you; that is very interesting.

Andrew Tickell, in your submission, you say that the bill

"risks becoming mired in hyperbole and confusion".

In evidence last week, Lord Bracadale said that, when he published his review, which is broadly represented in the bill, there was little or no pushback. Why do you think that "hyperbole and confusion" is happening now that we are taking evidence?

Dr Tickell: There are lots of reasons for that, which expand beyond Scotland. The bill is an intervention at a number of intersections of what can be thought of as culture-war issues. Whether we are talking about criticisms of religions by atheistic people, criticisms of Islam, churches criticising homosexual lifestyles, homosexuals criticising churches for criticising their lifestyles, or transgender reform and issues around the Gender Recognition Act 2004, this bill has something for everyone, hence the wild coalition that formed improbably over its proposals.

I feel that I was naive to say that the bill risked being

"mired in hyperbole and confusion",

because that miring has more or less happened now, and I regret that. We are losing the point here. Some time ago, I wrote an article in a newspaper about one of the worst experiences with hate crime that I have encountered as a teacher. Some years ago, at Glasgow Caledonian University, a number of young students came to me and said, "I cannot come to class, because I have seen reported in the newspapers and on air that tomorrow is punish a Muslim day." I cannot think of a more heartbreaking moment in my history as an educator. What does one say, beyond burning with fury at the experience of young students—principally women—who are part

of my class in their own city and who feel that way?

At times, I find the way in which the bill has been discussed—often from a position of extreme casual privilege—to be repulsive. There are legitimate questions about free expression, which I posed, as you will have seen from my submission. As I said at the outset, it is absolutely right that the bill is anxiously scrutinised for its undoubted potential to chill free expression and I believe passionately that that is important. However, I find the bloodlessness of the discussion of hate crime, as if it is some kind of woke nonsense and virtue signalling, deeply inhumane and unrecognisable. I ask critics of the bill who talk about the bill in such a way what they would say to my student who came to me and said, "It's punish a Muslim day, so I'm afraid to set foot in my university in Glasgow". I felt profoundly ashamed that that was something that anyone could experience in our society.

Rona Mackay: Thank you.

The Convener: We will move on to explore some of the other hate crime characteristics.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I will leave the issue of sex and the list of hate crime characteristics to my colleague Annabelle Ewing, because I know that she was following that up last week.

I want to ask about some of the suggestions that we have heard that the hate crime characteristics might cover Gypsy Travellers, asylum seekers and refugees. Is there any merit in adding those groups, or are they already covered by the characteristic of race?

To save time, because I know that it has already been a long session, I will ask my second question now. The bill does not include any specific provisions dealing with sectarianism. Should it deal with sectarianism, or are the hate crime characteristics of race and religion, as defined in the bill, suitable to cover behaviour that is motivated by sectarianism?

Michael Clancy: The Law Society's committee did not specifically consider the issues of Gypsy Travellers, asylum seekers or refugees. It may be that some of the people who fall into those groups would be covered by aspects of the bill, for example, under section 3(1) and the crime that is created under section 3(2) because they might belong to a race or ethnic group or have specific national origins, and presumably that would apply to asylum seekers and refugees, too. However, there may be issues that would cause some difficulty in putting those characteristics into the provisions for race. That would have to be dealt with on a case-by-case basis. It is something that the Lord Advocate and the prosecutors would have to consider when seeking to make their decision on prosecution for breach of the provisions of section 3. I hope that that gets to Mr MacGregor's point.

We had noted that sectarianism was not provided for in the bill. If one takes sectarianism to relate only to religion, there may be a shadow of it in section 3(3)(3), which talks about

"religion or, in the case of a social or cultural group, perceived religious affiliation,"

but sectarianism can be related to other factors, too, some of which also come up in the bill. [*Inaudible*.]

The Convener: We have lost Michael Clancy. Fulton, do you want to direct that question to Roddy Dunlop?

Fulton MacGregor: I think that I got the gist of what Michael Clancy was saying. Yes, we can move on to Roddy Dunlop.

11:30

Roddy Dunlop: In answer to the first question, it seems to me that the wording that is used at the moment will adequately protect the groups that you have mentioned. For example, you mentioned Gypsies—[*Inaudible*.]—jurisprudence in that area in regard to protection under employment law, for example, in which protected characteristics are already well understood. I think that I am right to say that Irish Travellers and Romany Gypsies have both been recognised as ethnic groups for the purposes of employment protection, and by the same token that would make those groups fall under the definition in the bill for

"race, colour, nationality ... ethnic or national origins".

The term "ethnic or national origins" is sufficiently wide to cover the groups that you mention and, likewise, it will cover asylum seekers, so I do not think that there is any difficulty there.

Scotland's particular difficulties with sectarianism mean that issues will always be thrown up. We are well aware of the ill-fated attempts to deal with them using the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. It seems to me that the provisions in the bill are sufficiently flexible to deal with problematic sectarianism. If we are dealing with behaviour that is threatening on the basis of religion, as defined in the bill, there is flexibility in the bill, as Mr Clancy pointed out.

There is also some dubiety—and the faculty has alighted on this in its submission—because of a potential vagueness about the definition of "religion" or, in the case of a social or cultural group, "perceived religious affiliation" and what exactly is meant by that.

However, if the question is whether the bill will sufficiently catch sectarianism that should be criminalised, the answer is yes, it will. If the question is whether it is too wide to catch activity that might be thought to be problematic, I come back to my central point, which is that, as long as we take away the potential for accidental criminalisation by removing the "likely to stir up" provision, the faculty's concerns in that regard have been addressed.

Dr Tickell: I suppose that it is worth stressing that the perception that is referred to in the bill is the accused person's perception of the characteristics of their victim. In that sense, if the accused perceives them to be of an ethnic minority, that is likely to be caught by the bill.

The S-word—sectarianism—has been mentioned. As Annabelle Ewing will know, when the football act was being repealed, a group was formed—at the insistence of the Justice Committee, in fact—to consider whether we should have a legal definition of sectarianism. That has largely been memory-holed. I think that what we recommended went down like a cup of cold sick, to use a technical legal term. We recommended that, in context, there could be a definition of sectarianism. It would be fair to say that that caused considerable controversy and did not persuade everyone.

One of the distinctive features of sectarianism in Scotland is that it is what the American scholar Kimberlé Crenshaw would describe as an "intersectional issue". Perhaps it is a missed point that Lord Bracadale did not use the language of intersectionality—when people are targeted because they have a combination of factors, not only one—in his report. It is not simply an accident of gender or sexuality that sees lesbians being invited by strangers on buses to kiss each other; it is because of an intersection of both their sex and their sexuality.

Sectarianism is not so different in the sense that it is often related to a toxic combination of ethnic origin and Christian denominational questions in a range of forms. This bill will not address that, and the language of sectarianism will remain elusive in legal terms even if, practically, someone who engages in that kind of sectarian behaviour would be caught by the bill. One good example of that was the famous assault of Canon Tom White, who was spat on and subjected to abuse based not only on his religion but also on his perceived Irish national origins or citizenship.

At the very least, the way the aggravator is constructed in the bill means that we could much more tidily combine those two elements. However, the language of sectarianism will not be used. For some people, that will probably be a good thing. Some people would argue that to use the language of sectarianism is to draw a sort of false equivalence in effect and to throw a cloak over predominantly anti-Catholic and anti-Irish feeling by using the language of sectarianism, and those people would insist that the language of race is much more appropriate. That is where we are at at the moment. That is clearly an omission from the legislative language of the bill although, having worked with colleagues to try to define sectarianism, I know that it is not easy to do. As we encountered, it caused considerable controversy and I suspect that the bill does not need any more of that.

Fulton MacGregor: I thank the panel for their detailed answers. I am happy for the convener to move on to Annabelle Ewing. I have one final question, which would be better placed after Annabelle's questions. Perhaps when the witnesses are responding to her questions or summing up, they could say whether they have any concerns about the way in which various hate crime characteristics are defined in the bill, further to what they have already spoken about.

The Convener: As Fulton MacGregor suggests, I will bring in Annabelle Ewing at this point. If witnesses want to respond to Fulton's question, could they respond to Annabelle and Fulton in a oner—another technical legal term?

Annabelle Ewing: I will turn to an obvious exclusion from the bill, which is the characteristic of sex. The panel will be aware that it seems that a parallel working group will be set up, although that has not yet been done, to look at creating a stand-alone offence of misogynistic harassment. It would be interesting to hear the panel's views on that approach and what, if any, risks that may involve.

In terms of process, there is a kind of get-out-of-jail-free card in the sense that it is proposed that the bill will have a provision to allow secondary legislation to be lodged to introduce the characteristic of sex in the scope of the legislation. What does the panel feel about that process and its appropriateness when we are dealing with serious criminal offence issues?

Roddy Dunlop: That is a question that the faculty addresses towards the end of its submission. We note Lord Bracadale's recommendations on that controversial area. The question that arises most clamantly is why, when protected characteristics are well understood to include sex in many other contexts, that is not being addressed at the same time in the bill. I understand why the view has been expressed by many that the characteristic of sex should be addressed at the same time in the bill.

Equally, that gives rise to a variety of considerations that have been looked at by Lord Bracadale. Doubtless, that is why the

characteristic of sex has been stripped out and looked at separately. It seems to me that it is a quintessentially political matter and I understand why it is being taken separately.

The matter needs mature consideration. If it is not thought possible to put it through at the same time as the provisions in the bill, that is okay as long as it is being given the consideration that it needs. It is fairly obvious that we need to merely glance at Twitter or any other form of social media to see that there are difficulties with misogyny in the same way that there are with the other species of hate crime that the bill directly addresses.

Michael Clancy: Similarly, the Law Society is looking forward to hearing what the working group on the sex characteristic will produce. It is a matter of policy as to whether the Government goes down that road.

On section 15 in general, the way in which the matter is being approached in the bill is potentially problematic. There could be the creation of crimes under the proposed regulations. That is not necessarily a bar to dealing with the matter by regulations, but we think that, where a new crime is created—particularly, as the dean of the faculty has indicated, in what is likely to be a very controversial area—it should receive the fullest scrutiny of the Parliament. In the first instance, that would suggest primary legislation for implementing any change, but we think that, if the Government is insistent on using regulations, those regulations should be subject to the super-affirmative procedure so that there is an opportunity for the relevant committees of the Parliament to take evidence on the terms of the regulations and to ask the Government to think about amendments to those regulations. That is where we stand on that issue at the moment.

Dr Tickell: I agree with much of what has been said thus far. Obviously, the proposed provisions do not represent the most satisfactory way to achieve a consolidation, with on-going uncertainty about a core element of what would look like the global picture of hate crime after the bill has passed. However, that is where we are.

The underlying issue of whether sex should be a protected characteristic for aggravator purposes and stirring-up offences, and of whether there should be a separate offence of misogynist harassment, raises some fascinating and important questions around gender neutrality in our law, which we have been moving towards in general. However, echoing what I was saying about the sectarianism example, I ask how many men are subject to misandric harassment on the streets of Scotland. I am not sure that I have met any who have been subject to it, and I certainly have not been myself. If the social reality is one thing, I can perhaps see the argument that the law should effectively reflect the misogynistic framework within which that kind of harassment occurs, as it does to more or less every woman I have ever met in my puff.

It is unsatisfactory that we are where we are on this matter. I agree with Michael Clancy that scrutiny of the proposals will be important, and it will raise fascinating questions of principle about how far we want our law to be gender neutral and how far, by making the law gender neutral, we are in effect disguising the gender inequality in our society. That, ultimately, is what I think the whole debate is driving at.

Other people can speak for themselves on the subject, but there are wider questions about lots of other crimes that could be interpreted through a feminist framework as being motivated by and rooted in misogyny and hatred of women on some level. That is a difficult thing to realise in the law. Can we think of examples of serious sexual offences that are not, to some extent, failing to recognise the full humanity of a female victim in those contexts?

That kind of debate is sensitive and complicated, and it would have been far preferable to deal with all these matters in a oner, instead of approaching them in what is a fragmented way.

Annabelle Ewing: I thank all the witnesses for their comprehensive answers. We have been given further issues to reflect on when we come to consider this matter further.

The Convener: The final questions go to Liam Kerr.

Liam Kerr: I will direct my first question to Roddy Dunlop, followed by Michael Clancy.

Last week, I put to the cabinet secretary the concerns of the Scottish Courts and Tribunals Service on the financial memorandum and the costs that are associated with the bill. What resource implications does the bill have for the legal profession and the courts? Are they adequately reflected in the financial memorandum?

Roddy Dunlop: I cannot instantly think of a particular such implication—there is no impact on the legal profession itself. If the bill leads to more prosecutions, that will lead to more business for the legal profession. I think the real concern is whether it will lead to resourcing problems for the police.

I come back to the question whether the right balance is struck. If the right balance is struck, such that one is only targeting people who are setting out with intent to stir up public hatred, or who are already committing crimes anyway—referring to part 2 followed by part 1, getting those the wrong way round—I do not see that that will

create a massive additional problem. As always, the proof of the pudding will be in the eating, and it is important to recognise that we are expanding the existing aggravators to deal with all protected characteristics. However, I do not think that that will have a huge resource implication, so that does not seem to be a consideration that ought to concern the committee.

11:45

Michael Clancy: It is likely that lawyers will require additional training. When a new consolidation measure reaches the statute book, there is always the potential for a flurry of activity in continuing professional development. People will certainly want to learn about how the law will work in future and the changes to how the law has worked hitherto. Therefore, there will be training for lawyers in both prosecution and defence, and there will be training for judges, which I am sure the Judicial Institute for Scotland will take on willingly. I suspect that there will be training for others in the justice system, especially the police and, potentially, social work departments, because if people have been subjected to threatening or abusive behaviour, they might need additional support across the piece. However, that does not tie into the financial memorandum, and if we have any further thoughts on the financial memorandum or the impact assessment, we will come back to the committee on those.

Liam Kerr: With your indulgence, convener, I will ask a final question. Dr Tickell, I was very interested in all submissions, but I was particularly interested in your reference to Thomas Aikenhead and your comment that striking blasphemy from the statute book will be the "least restitution" that we can give. I am paraphrasing, of course, but Aikenhead was indicted for having engaged in conversation with friends at the University of Edinburgh in which he suggested, in much stronger terms, that Christian religion was "nonsense". It is a slightly philosophical question, but could it be argued that, by repealing blasphemy but incorporating some elements of part 2, we might be bringing in blasphemy by the back door for challenging the prevailing orthodoxy after the bill is passed?

Dr Tickell: No, I do not think so, to be honest. Thomas Aikenhead was a 20-year-old university medical student. He denied the trinity and mocked the history of the "impostor Christ", who he said pretended that he was a magician to poor fisher folk in and around Israel—those were his criticisms. He was ratted out by his friends and, thanks to the Lord Advocate of the day and the General Assembly of the Church of Scotland, he found himself throttled by the hangman aged just 20, with all cries for mercy turned away. He was the last man in this country to die for the crime of blasphemy, so his ghost, at least, will be laid to rest if that element of the bill passes, and I would welcome that.

To go back to the initial point, with the new thresholds proposed in the cabinet secretary's changes to the bill, we would need to prove threatening or abusive behaviour that would stir up hatred against the protected characteristic and demonstrate that the behaviour was not reasonable in the context, taking into account the idea that criticism of religion is an important part of not just article 10 of the European convention on human rights but article 9, on freedom of religion or lack of belief. Although I can see the rhetorical charms of envisaging this as a new form of criminalising the Thomas Aikenheads of our time, looking at the detail of the bill, I would not accept that. However, I very strongly welcome the repealing of the offence of blasphemy. It has existed for far too long on the Scottish statute book, as Mr Aikenhead reasoned to his terrible cost.

The Convener: That is a good consensus on which to end. It has been a long evidence session. I am grateful to our witnesses for their time and detailed consideration. You have all helped the committee very much with our deliberations on this important bill. We will suspend for five minutes before reconvening at 11.54 for the second panel of witnesses. Thank you.

11:49

Meeting suspended.

11:54

On resuming—

The Convener: Welcome back, everybody. I apologise for keeping everybody waiting for so long while we explored a variety of issues with our first panel of witnesses. We now have with us Assistant Chief Constable Gary Ritchie, from Police Scotland; Calum Steele, the general secretary of the Scottish Police Federation; and Anthony McGeehan, procurator fiscal from the Crown Office and Procurator Fiscal Service. You are all very welcome.

As with the first panel, I will not invite you to make opening statements, as that will eat up even more time, which we just do not have. We will launch straight into questioning, if you will forgive me. I will start questions for you exactly where I started with the first panel. Given the nature and tenor of your written submissions, it is obvious that you all welcome the cabinet secretary's proposed amendments to the stirring-up offences in part 2 of the bill. The question is whether, in your view, they go far enough to ensure that the bill does

everything that it needs to do to protect fundamental human rights, such as free speech, privacy and fair trial. I direct that question to ACC Gary Ritchie first.

Assistant Chief Constable Gary Ritchie (Police Scotland): I appreciate the opportunity to speak. I will preface my comments by saying that, from my perspective and the police perspective, two main considerations should apply to the examination of the legislation. The first is the enforceability of the legislation, in a practical policing sense. How realistic is it and how does it help us respond to public demand and expectation?

The second element is something that we have seen quite a lot of recently, through the establishment of coronavirus legislation. There are now considerations about whether a policing intervention is likely to affect public trust and confidence in the police. Obviously, that impacts on the fundamental principle of policing by consent and with legitimacy. All my answers, in terms of the official position of the police service, will be based on those two principles.

To answer your question, yes, we welcome the proposed amendments to require intent, for two reasons. First, it creates equivalence across all the protected characteristics. As has been mentioned before, it removes the potential for members of the public to perceive a hierarchy of discrimination. It also provides consistency for policing. Quite simply, it makes things easier to understand and easier for us to get the message across to our officers and apply the principles and thresholds for when an offence has been committed.

Touching on what I said about the second principle, as far as the police are concerned, someone having intent is the basis of all interventions. It provides a very strong threshold—it is just a lot clearer in practice.

Calum Steele (Scottish Police Federation): Like the three previous witnesses, the Scottish Police Federation welcomes the amendments that the cabinet secretary has proposed. They are a substantial move towards alleviating a lot of the concerns that would arise for police officers, the reputation of policing and the managing of public expectations of the enforcement of the bill; they certainly remove a lot of areas of conflict.

The “likely” provisions were fairly recognised by a large number of people as being by far the most controversial. As was properly picked up earlier by Mr Dunlop, that addresses or certainly goes a long way towards responding to the risks that would have accompanied those provisions in terms of search and the pernicious effect that that could have on the relationship between the public and the police service.

12:00

We identified some remaining elements in our submission, not least of which is the proposal to grant powers of search to members of police staff. The ability for police officers to exercise powers over the public is something that is generally accepted, but the Parliament should consider very carefully whether to extend that to police staff who do not have the same limitations placed on activities in their private lives and are not subject to the same disciplinary regime.

I am sure that we will get into this later on, but some of the comments about moving away from subjectivity towards objectivity in tests that should be applied by a police officer will be helpful.

Demands will inevitably be placed on the service. Whenever anything new is introduced on to the statute book and policing enforcement is expected, the requirement to record, measure and report on that tends to be understated in accompanying financial memoranda. I am sure that ACC Ritchie will touch on that later.

Generally, the removal of the “likely” provisions will substantially address many of the SPF’s concerns.

The Convener: Thank you. I put the same question to Anthony McGeehan.

Anthony McGeehan (Crown Office and Procurator Fiscal Service): The restriction of the stirring-up offences in relation to the majority of the protected characteristics on the basis of intent only is welcome. It provides welcome clarification of the behaviour that will be criminal.

However, a consequence of that restriction is that it expands the difference between the approach taken to the majority of the protected characteristics and that of race. As touched on during the earlier evidence session, offences based upon race include behaviour that is insulting, and it also includes behaviour that is likely to stir up hatred against a group, based on its racial characteristics.

The Convener: I have three follow-up questions and I will ask them all together in the interests of time. I invite the witnesses to respond to them all in one go. They were explored earlier this morning with the first panel.

Should “insulting” be removed from the bill, so that we are seeking to criminalise only those stirring-up offences that are “threatening” and “abusive”, for the other characteristics and for race?

Secondly, does “abusive” need to be defined to ensure that it is objective rather than subjective? In other words, before the Crown can show that something is abusive, does it need to show that

such behaviour would have caused a reasonable person to feel fear or alarm?

Thirdly, should there be a dwelling defence in the bill, as there is in the Public Order Act 1986, or are you relaxed about the idea of public order offences being committed in a private dwelling coming within the scope of the criminal law?

Perhaps we will take answers in the same order, with Gary Ritchie going first, please.

Assistant Chief Constable Ritchie: As Calum Steele and Anthony McGeehan said earlier, the simple answer to your first question is yes, because it could create a hierarchy of discrimination and because it is inconsistent. It makes it more difficult for the officer to understand what types of behaviour and what circumstances cross the criminal threshold. In circumstances in which they were dealing with more than one type of discrimination at the same time, that would further add to the confusion.

On the second question, "abusive behaviour" is pretty common parlance for police officers in the execution of their duties. We would always welcome further clarification, but should the provisions of the bill remain as they are, police officers would not have difficulty in interpreting and applying the legislation.

On the third question, I am probably getting into personal opinions, but I think—and I think that this would be my organisation's position—that some of the potential offences are so insidious that it goes a bit too far for the public expectation to be that people would be considered to be protected just because they committed them in their own home. I refer members to answers that witnesses gave earlier this morning about crimes that can be committed in people's own homes. It is not unusual to see that crimes of such significance would not carry a dwelling defence. My view and, I think, the view of the police service would be that that should not apply.

The Convener: Thank you very much. That is very clear and helpful.

Calum Steele: The short answer to the question whether "insulting" should be removed is yes. The reasons that were given previously—it is a hangover from section 18 of the 1986 act—were well made, and there is little that I can add to that.

The question whether there should be an objective rather than a subjective test for being abusive is, arguably, one for the criminal law to determine. The fact that there has been debate and discussion about that particular point gets to the very heart of one of the remaining challenges for police officers.

Currently, we correctly identify that section 38 of the Criminal Justice and Licensing (Scotland) Act 2010—in police parlance, we refer to a statutory breach of the peace—provides the objective test for the reasonable person. In many instances, that objective test against things that are immutable and plain to see is very easily applied, but I am not so sure that the same objectivity could be applied to things that are much more opinion held, for example—religion being the obvious manifestation there. Of course, there are areas of sex and gender to consider. In the view of some people, sex is immutable. Gender seems to be much more fluid, but others take the view that, rather than being opinion sourced, views that people hold passionately are, in fact, immutable in their own right.

Like the previous witnesses, I think that it would probably be helpful if that objective test were written into the legislation. Although the current test for objectivity relates to threatening or abusive behaviour or, indeed, insulting behaviour, we have to recognise that there are areas of discourse in Scotland right now—about sexual orientation or gender recognition, for example—in which things that are insulting could very quickly be redefined as abusive in order to hit the criminal threshold in the legislation. I think that, without the reasonable person test, it would be much harder for those who have been accused of crimes to put forward a defence. I do not think that that will make the policing of that any easier in any way, shape or form. In any event, the removal of "insulting" does not apply to sexual orientation and transgender identity, but I think that it is inevitable that, as such crimes become more known across our society, there will be a clamour for the police reach to go much further than the original statute perhaps intended.

On the dwelling defence, I largely concur with the three learned gentlemen on the previous panel. There is no general defence for people committing crime in their own home in any event. The follow-over from the Public Order Act 1986 is highly relevant, but the removal of the "insulting" provision would, to some extent, ameliorate the requirement—or the perceived requirement—for a dwelling defence. Again, we have to recognise that there are some fairly hot topics that can be discussed in homes that could then find themselves being repeated in public that, depending on the particular cause or case that was being advocated by others, could be deemed to be a form of hate crime taking place in the home.

The one that presents itself front and centre at this moment in time in Scotland is transgender identity; that is a conversation that is taking place in our homes and being repeated in the playground—"My mum said," or "My dad said"—and it is then repeated by other children to their parents, who hold a different view. Although that,

at a conceptual level, would be insulting, I do not think that it would be too much of a stretch for people to argue that those are hateful and abusive views to be discussing in the home.

I do not think that it is so much in terms of the more extreme or the more obvious forms of hate crime—and I am mindful of how I use this terminology—that the SPF has some concerns. It is about those that very much fall into the grey areas—sexual orientation and transgender identity most obviously at this particular point in time, but it is not beyond the realms of possibility that legitimate discussions over immigration status and refugees that are taking place in the home could similarly find themselves being reported to the police as hate crimes. Conversations that were had in private could be taken out of the home and repeated, possibly rather innocently, by other members of the home and an "abusive" label could be attached to that.

The Convener: Absolutely. Bearing in mind what I call the iron law of unintended consequences is exactly what I am struggling with here. That is very helpful, thank you. I ask Anthony McGeehan to answer the same questions.

Anthony McGeehan: The proposal to remove the word "insulting" was reflected in Lord Bracadale's review and, in making that recommendation, Lord Bracadale referred to a review conducted by the Crown Prosecution Service of relevant offences reported to the CPS and a conclusion that the removal of the word "insulting" did not reduce its ability to take prosecutorial action in relation to reported offences. The COPFS has not seen the same scale of relevant offences reported to it recently in relation to the 1986 act, but between April 2009 and March 2020, 27 charges under section 18 of the 1986 act and 13 charges under section 19 of the act were reported to the COPFS.

Policy officials have conducted a review of those cases and that review has confirmed that the removal of the word "insulting" would not diminish the ability of the Crown to take appropriate prosecutorial action in relation to those reported offences. Therefore, the COPFS would support the removal of "insulting" and would observe that its removal would reduce the gap between the approaches taken in relation to race and the remaining protected characteristics.

In relation to your second question, which was whether a definition of "abusive" should be included in the legislation, the concepts of threatening and abusive behaviour are familiar concepts in Scots law and familiar concepts to Scottish prosecutors, but if there was concern that the term "abusive" was not sufficiently clear or perhaps risked a subjective assessment of behaviour, there are precedents for defining abusive behaviour, not only in relation to section 38 of the 2010 act, which has already been referred to today, but in relation to the Domestic Abuse (Scotland) Act 2018, which introduced a definition of abusive behaviour. Again, the introduction of that definition would not be a proposal that the COPFS would object to in principle.

On your question about the absence of a dwelling defence, the reality of offences reported to the COPFS today is that some offences occur within domestic settings. Unfortunately, hate crime occurs in domestic settings. The absence of a dwelling defence, in the wider context of Scots criminal law, is not remarkable.

The Convener: Thank you. Those were crisp, clear and helpful answers from all three of you.

12:15

Liam McArthur: I want to start with the issue of freedom of expression. In the previous session, there was a general feeling that ECHR provisions provide protections already, but an acknowledgement that the bill allows for more specific freedom of expression protections in relation to a couple of characteristics, although it does not do so across the board. The cabinet secretary made clear to the committee that he is open to widening and deepening those protections. What are your views on that?

Anthony McGeehan: The question of whether the provisions in relation to freedom of expression should be broadened or deepened is a matter for the Parliament. However, I can confirm that, at present, when assessing relevant cases, prosecutors are cognisant of article 10 rights and would consider any case reported to the COPFS with reference to the right to freedom of expression, albeit that the right to freedom of expression is not unqualified. If the Parliament decides to broaden or deepen the provisions relating to freedom of expression, those provisions would be reflected in prosecutorial guidance and would continue to be reflected in prosecutorial decision making.

Liam McArthur: That is helpful. The concern that was raised with regard to the way that things are expressed at present is that a hierarchy could be construed with regard to where those freedom of expression protections apply. There is also the concern that, if we embark on a non-exhaustive list of protections, we will end up not including some protections that some groups might want. Does the COPFS think that those risks could be managed if the Parliament were to take up the cabinet secretary's offer?

Anthony McGeehan: Regardless of the approach that is taken by Parliament, article 10

would apply to prosecutorial decision making. Obviously, prosecutors will have regard to the terms of legislation but, today and tomorrow, they will have regard to article 10 rights in relation to people who are accused of those crimes and reported to the COPFS.

Liam McArthur: ACC Ritchie, do you have any observations in this area?

Assistant Chief Constable Ritchie: Again, my observations are similar to those of Anthony McGeehan. The proposal is to be welcomed. Of course, the extent to which the matter is defined is an issue for the Parliament. We are well used to ensuring that—as is the case in relation to public order legislation—article 10 protections are built into our policing plans and responses.

It is helpful to police officers to have that freedom of expression provision included in the legislation. However, it is for Parliament to decide how extensive it is.

Liam McArthur: We talked earlier about the benefits of additional clarity being as much about those with whom the police are engaging as they are about the police's understanding of offences that they are well used to dealing with. In that light, would you say that a non-exhaustive list might actually be quite helpful?

Assistant Chief Constable Ritchie: It is always more helpful to us if the people who we are policing understand the legislation. That is actually what I meant when I said that it is helpful to police officers to have the freedom of expression provision included. If the provisions lay out in clear terms what is permitted and what is not, that is helpful, purely in terms of our engagement with people.

Liam McArthur: Calum Steele, do you have any comments on that?

Calum Steele: I suppose that, to an extent, this is where the law at the prosecution stage and the law at the stage at which it is applied by the police tend to clash. The point was made earlier, most strongly by Mr Dunlop, that it would be almost impossible for prosecutions to take place against the backdrop of article 10 rights, even though the bill does not provide an exhaustive list of freedom of expression defences.

However, set against that, we face the very real situation in which the absence of an express freedom of expression provision in the bill will be utilised as a vehicle to levy criticism at the police service for not acting on concerns that certain kinds of behaviour might be perceived by certain groups as being threatening or abusive. That is an area in which we need to pay much more attention to the potential impact on the relationship between the public and the police service.

To an extent, the police always have to make a value judgment as to whether the activity that they are policing is in its own right likely to be found criminal by the courts. I do not want to labour the point about transgender identity, but that is an area that clearly has the potential to result in fairly significant comment by a whole load of people. It also has the potential to result in fairly significant expectations on the police service to undertake certain action in response to that and to result in adversarial contact between the police and members of the public, but it will probably not result in a prosecution, because of the article 10 provisions.

Therefore, extending the list would be helpful from a policing perspective but not particularly informative from a prosecutorial perspective.

Liam McArthur: That was very helpful—thank you.

Liam Kerr: I have one brief question, which I will direct first at ACC Ritchie.

As you heard from our discussion with the first panel, there are concerns about the search and seize provisions in section 6. In particular, there are concerns about the precision of the drafting and the definitions of what might be seized. I note that Calum Steele raised an issue about the extension of the power of search to police staff. Do you share those concerns? If so, what needs to be changed in section 6 to address them?

Assistant Chief Constable Ritchie: From my reading of section 6, it seems to provide for a fairly traditional power of search, which requires a warrant. Police officers will need to ensure that the evidence is compelling or convincing enough to take to a sheriff or justice of the peace in order to get a warrant in the first place, so the point that was made earlier about the possibility of malicious reports leading to us taking positive interventionary action that involved us crashing down a door needs to be put in context. Receiving one anonymous phone call about the possibility of somebody having materials that crossed over into the realms of being an offence would be insufficient for us even to approach a sheriff or a justice of the peace to seek a warrant. Therefore, in a practical sense—as I said earlier, I need to keep looking at things in a practical sense—I do not really have an issue with the power of search as it is framed.

I turn to Calum Steele's earlier point about certain powers being exercised by members of police staff, which is the unusual element here. I think that the intention behind that aspect of the bill is probably to recognise that in various elements of policing we have recruited experts in areas such as forensic or cyber analysis. In the future we might see much more such investigative

capability not being in the hands of police officers. That is perhaps a nod to the future, but it is probably worth exploring a bit more.

Calum Steele: I do not want to sound like a scratched record, but I believe that, to an extent, the removal of the "likely" provisions would significantly ameliorate the concerns that surround section 6. However, as in all such matters, ultimately, case law will be the determining factor as to whether the provisions are being used correctly. I highlight the concerns that were identified by Mr Dunlop, Mr Clancy and Dr Tickell in the earlier evidence session. They will be able to give much more rounded and relevant answers on the subject than anything that the SPF could offer. Police officers will always do what we believe the law allows us to do. If case law then finds against us, our practice is moderated accordingly thereafter.

Liam Kerr: I am grateful for that answer.

Calum Steele: Sorry, Mr Kerr but, just before I leave that subject, I would like to come back to the issues of investigative powers and the role of police staff.

Police staff currently have the skills for many roles, and the technology to enable them to perform them, but the use of invasive and coercive powers still tends to be reserved to police officers, even if the investigative capacity rests somewhere else in the police service. I cannot envisage any occasion on which a non-warranted individual would be going through a door and seizing equipment from members of the public.

Let us not forget that members of police staff are not curtailed from taking an active part in politics or in public or political debate. To reiterate a point that we made in our submission, it is entirely possible that, through the freedoms that police staff enjoy as members of the public who work in the police service, they could then find themselves using coercive or enforcement powers on other members of the public in the course of an investigation that relates to issues on which they have taken public positions. That is not a helpful wedge to introduce into debate on the role of police officers in society or who should have such powers over members of the public.

Liam Kerr: Thank you for that. Anthony McGeehan, do you have anything to add?

Anthony McGeehan: The issue might arise because the remaining concerns have not been set in a real-world context. As Mr Steele has said, a number of the concerns that have been raised have been mitigated by the proposed Scottish Government amendment. I will set the remaining ones against the background of a real-world warrant situation.

As ACC Ritchie has indicated, the police would consider an application for a warrant only where the officers involved thought it a proportionate response to the alleged offence. They would not take a warrant directly from a justice of the peace or sheriff; they would apply to a procurator fiscal for an assessment of whether there were reasonable grounds to approach a JP or sheriff for one. The sheriff would have to make a final assessment of whether granting a search warrant was an appropriate and proportionate response to the alleged offence. Therefore, although concerns remain, some would be mitigated by the systemic approach that is taken to the consideration and granting of a warrant.

12:30

Mr Steele raised the issue of the granting of a warrant to a member of police staff. Again, I will set that in a real-world context. It is not unusual for a procurator fiscal to be approached for a warrant in relation to material that is held electronically, and for the requesting police officer to advise that, in order to effectively execute the search warrant, they will require the assistance of forensic experts. It would not be unusual for a procurator fiscal to seek a search warrant that allowed a uniformed police officer to execute a search warrant with the assistance of other members of police staff, as opposed to a search warrant being executed distinctly by a member of police staff who was not a police constable. That concern could be addressed through the tightening up of the drafting of section 6.

One concern that was raised this morning related to the lack of a time limit being attached to search warrants that are granted under section 6. There are statutes, such as the Misuse of Drugs Act 1971, that impose a time limit on search warrants, but other statutes provide for search warrants that do not have a time limit attached to them. The vast majority of common-law warrants that are granted in Scotland do not have any time limit attached to them. Therefore, the fact that a time limit is not attached to the proposed warrant provision is not remarkable. However, if the Parliament were to decide that a time limit should be attached to the warrant provision, from a practical perspective and subject to anything that Calum Steele or Gary Ritchie might offer, I do not think that that would cause a practical problem.

The Convener: Shona Robison has questions about the statutory aggravation.

Shona Robison: I will wrap two questions into one, for the sake of time. Lord Bracadale recommended that statutory aggravations should continue to be the core method of prosecuting hate crime in Scotland. Do the witnesses agree, and does the bill effectively provide for that?

In line with existing legislation, the bill states that the court must make it clear what difference an aggravation has made to the sentence that is imposed. The witnesses might be aware that Lord Bracadale recommended removing that requirement. I think that he felt that the practicalities of pulling out that element of sentencing would be quite challenging. It would be helpful to hear whether the retention of that requirement is helpful.

Anthony McGeehan: I will deal with those two questions in turn. I confirm that the bill makes effective provision for the continued approach of addressing hate crime by way of statutory aggravations. That well-established approach in Scotland is familiar to the police and prosecutors. The approach is also not limited to hate crime—a similar approach is adopted in relation to domestic abuse, for example. The COPFS supports the continuation of that approach and its articulation as set out in the bill.

The second question related to the court making it clear at sentencing the proportion of the sentence that is attached to the aggravated nature of the offence. The COPFS is not best placed to offer comment on that. I suggest that those who are best placed to offer comment on the practicalities of that process would be members of the judiciary. I know that judicial representatives have provided written evidence to the committee in that regard. I presume that it would also be useful for the committee to hear from representatives of victims, who might be better able to offer an alternative perspective on the value that victims receive as a result of that approach.

Shona Robison: Obviously, the argument in favour is around increasing transparency so that victims can see the aggravation element, but the question is whether that is feasible in practice. Would the other witnesses like to comment on that?

Assistant Chief Constable Ritchie: I agree with Anthony McGeehan. From a policing perspective, we are well used to dealing with statutory aggravators. It makes it easier for police officers to understand and would make the training and communication of the new provisions easier for us.

On the second question, it is not for me to comment on the sentencing provisions, but the current approach in the bill will require officers to provide more information, perhaps at the police reporting stage and when talking to victims. However, I see that as being likely to increase public confidence in our actions, so I have no issues at all with it.

Calum Steele: For the sake of brevity, I will just say that I agree entirely with what Mr McGeehan has said.

John Finnie: I have a question for the whole panel that follows on from Shona Robison's questioning. I note that, in his evidence, Mr Steele commends the approach of the sentencing judge stating the background. My question for the police officers is about the implications of recording that information. Would it have an impact on how subsequent investigations might take place or is it just interesting to note? I am referring to the requirement to retain information about the aggravation in criminal records.

Assistant Chief Constable Ritchie: As I said, we are used to dealing with statutory aggravations in reporting crime—we capture that information at the moment—so I do not see recording or using that information being problematic for us.

John Finnie: I have a further question, which I posed to the previous panel, on Lord Bracadale's recommendation about repealing the offence of racially aggravated harassment. The Scottish Government did not accept that position. What are the views of the panel on that? I noted that Mr Ritchie used the term "equivalence". There is clearly a difference. The bill is consolidating legislation. Do you think that it creates a hierarchy among the protected characteristics?

Assistant Chief Constable Ritchie: You are right that I said that the consolidation creates an equivalence. That will make it easier for police officers to understand hate crime as a whole and what is and is not acceptable. I recognise the recommendation and the actions of the Scottish Parliament, but I think that, broadly, the consolidation will be welcomed in policing and in shaping public understanding of what is acceptable behaviour and what is unacceptable.

John Finnie: I want to push you a little on that, Mr Ritchie. Is that your view, notwithstanding that difference, with the aggravation being applicable to only one of the characteristics?

Assistant Chief Constable Ritchie: Yes. There is undoubtedly a danger of such a hierarchy potentially causing uncertainty. That is why we would always support legislation that seeks to consolidate and create equivalence across a broad definition of hate crime.

John Finnie: Thank you for that. I do not know whether Mr Steele or Mr McGeehan wants to comment on the matter.

Calum Steele: I suppose that, to some extent, it comes down to whether the retained offence would be libelled in its own right, or whether it would be libelled as an alternative to the new offence in section 3(1).

I consider that the way in which the offence is drafted means that the alternative would always be libelled as an alternative. As such, and in line with the comments of the previous witnesses, I am not entirely sure what is gained by its retention. The consolidation and simplification of legislation should be just that. The very learned gentleman in the previous session made that point convincingly.

Anthony McGeehan: The fact that hate crime legislation in Scotland has evolved over a number of years is reflected in hate crime provisions being found in a variety of statutes. The titles of those statutes often do not indicate immediately to the reader that they relate to hate crime. The bill is an opportunity to consolidate hate crime legislation in a single place, with an easily understood title and an easily understood reference point for the public, the police, prosecutors and the courts. To leave section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995 outstanding—to leave it as an outlier—would arguably be inconsistent with the approach of consolidating all relevant hate crime law in a single place.

Lord Bracadale recommended the repeal of section 50A. In doing so, he observed that the repeal of section 50A would not diminish the ability of the police or prosecutors to respond to racial hate crime. That is the experience of COPFS. If we look at offences that are reported as section 50A offences, they can be libelled as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, with an aggravation. Therefore, COPFS's position is that a repeal of section 50A would not diminish our ability to respond to racial hate crime.

Rona Mackay: My question follows on from John Finnie's. Anthony McGeehan said earlier that he did not think that removing "insulting" from the bill with regard to racial hatred would diminish the ability to prosecute. Given that two thirds of hate crime relates to race, do you agree that there might be a danger from the point of view of public perception? If insulting behaviour is removed as an offence, people might say, "It's okay—I can say what I like, because I'm not going to be prosecuted. I'm only insulting them." Is there not a danger of swinging too far the other way if we take that out?

Anthony McGeehan: If there is a risk, I would suggest that it would be mitigated by securing public confidence through responding effectively to hate crime. COPFS's analysis is that the removal of "insulting" would not diminish our ability to respond effectively to racial hate crime.

I would also suggest that there is a consequential and different risk if the insulting offence is retained in relation to racial hate crime, whereby there is understood to be a difference in the behaviour that is allowed in relation to the other protected characteristics but not in relation to race crime. I think that that would be a legitimate expectation, should Parliament choose to describe different types of hate crime as criminal in different ways. Therefore, although the risk that you have identified may be a real one, I suggest that it can be effectively addressed through the continuing effective prosecution of hate crime with an amended piece of legislation.

Rona Mackay: Does Calum Steele or Gary Ritchie want to come in?

The Convener: They are both saying no, so we will move on to other hate crime characteristics, including sex and misogynistic harassment.

12:45

Fulton MacGregor: Good afternoon. I do not know whether you watched the previous session, but I will ask the same questions that I put to the first panel. Again, I will ask them together.

It has been suggested that the proposed hate crime characteristics should be added to so that they cover Gypsy Travellers, asylum seekers and refugees. To what extent do you think that those groups are already covered by the characteristic of race? Do you think that there is any merit in adding to the existing characteristics?

There are no provisions in the bill specifically to deal with sectarianism. Do you think that the hate crime characteristics of race and religion cover that or should there be a specific provision on sectarianism? Perhaps we can start with Calum Steele.

Calum Steele: I genuinely do not think that I can contribute anything on additional characteristics that would trump the comments and observations of the previous panel. If people in the legal profession are content that the bill as drafted would cover asylum seekers and Gypsy Travellers, I bow to their superior knowledge on that issue.

The question of sectarianism is much trickier, because implicit in it is the issue of whether the activities that currently take place in football grounds would be covered by the bill. To an extent, that is more a policy question than a legislation question. I am fairly comfortable that the bill as drafted would cover behaviour that is threatening or abusive in a religious or sectarian sense that takes place in environments such as football stadia.

The question is whether there is a policy appetite for the police service to police that in a very officious manner, with large numbers of individuals almost certainly facing criminal prosecution as a consequence, compared with dealing with individual examples of sectarian

behaviour that may take place in much smaller environments. The bill almost certainly adequately covers the question of sectarianism from a legal perspective, but the challenge relates to the appetite for the policing of what would be criminal behaviour in certain environments, simply because of the other challenges that we face from a policing perspective.

Anthony McGeehan: I will take Mr MacGregor's two questions in turn. In relation to whether hate crimes directed at refugees, asylum seekers or Gypsy Travellers would be captured under the bill as it stands, my assessment is that they would be covered by the expanded definition of race that is provided in section 1(2), which captures not only race but

"colour, nationality (including citizenship), or ethnic or national origins".

Each case would obviously depend on its own facts and circumstances but, broadly speaking, the categories of victims that you have described would be protected under the terms of the bill.

On your second question, which was about whether there should be a separate statutory aggravation in relation to sectarianism, ultimately, that is a policy decision for the Scottish Parliament, but the committee will be aware that Lord Bracadale's assessment is that the current statutory aggravations in relation to race and religion are sufficient to address behaviours that are broadly understood to be sectarian in nature. COPFS agrees with that assessment.

From an operational perspective, should such an aggravation be introduced, it would be necessary to have a clear understanding of the interaction of that additional statutory aggravation with the presumably pre-existing statutory aggravations relating to race and religion.

Assistant Chief Constable Ritchie: I do not have much to add. I do not think that there is a gap in the legislation relating to sectarianism or race but, of course, that is a matter for the Parliament. Whether behaviour is defined as sectarianism or dealt with under the provisions of the bill as it stands, I do not think that that will have any material impact on the appetite for policing and providing a policing response in respect of behaviour that we see anywhere.

Fulton MacGregor: I thank the witnesses for those clear, concise and consistent answers.

The Convener: The final questions in this area are from Annabelle Ewing, after which James Kelly will wrap up the session.

Annabelle Ewing: My question is directed at Mr McGeehan, but if the other witnesses wish to chip in, they are welcome to do so. That being the case, for the purposes of broadcasting, we would hear first from Calum Steele and then from the assistant chief constable.

It would be interesting to hear from COPFS on the issue of the non-inclusion of the characteristic of sex in the bill as drafted and the in-tandem development of policy through the working group on misogynistic harassment. That is likely to take some time, and the parliamentary session will expire next March, although I hope that the Parliament will pass a bill on the matter. Does Mr McGeehan feel that there would be any gap relating to the characteristic of sex and misogynistic harassment? I notice from the written submissions that some are of the view that current statutory offences would be sufficient to cover misogynistic harassment. However, now that we have the expert here, it would be interesting to hear what he has to say.

Anthony McGeehan: For the record, I take exception to being described as "the expert" in the area. However, I will offer the observation that the statutory aggravation model, by definition, proceeds on the basis that there is an existing foundation offence. Therefore, the absence of an aggravation in relation to gender does not prevent COPFS from taking prosecutorial action in relation to cases that are reported at present. The addition of a statutory aggravation in relation to gender would not aid our ability to address offences that are reported to COPFS.

I recognise that Lord Bracadale recommended the addition of an aggravation in relation to gender or sex. On that, I echo my observation on the potential for an aggravation in relation to sectarianism. From an operational perspective, it would be necessary for there to be a clear understanding of, and a clear decision in relation to, the interaction between three things: the potential additional aggravation in relation to gender; the potential new free-standing offence of misogyny, or something similar; and the foundation offences that most commonly feature evidence of misogyny or to which those conditions would normally attach.

Annabelle Ewing: Thank you. Obviously, there is further work for us to do as a committee in reflecting on that matter. I make the point that we would not want to conflate sex with gender; sex is the protected characteristic. Lord Bracadale made indirect reference to that in his testimony last week.

I am checking, but I do not think that either of the other two witnesses wishes to chip in.

The Convener: The final questions are from James Kelly.

James Kelly: Will the passing of the bill significantly impact the call on police resources? Do you consider that the bill's financial

memorandum adequately reflects that? I ask Mr Steele to respond first, and then Mr Ritchie.

Calum Steele: Ultimately, of course, we will have to see what the bill as passed looks like, but with the modifications that are being suggested, a large proportion of the concerns about the likely costs of policing and police training time will be significantly addressed. That being said, and as I alluded to earlier, it is inevitable that, when new legislation is created, the requirement to measure, record and report on it, and on the circumstances surrounding it, will create a fairly hefty administrative burden on the police service.

Although the bill is unlikely to change the approach to policing per se, in our considered view, it will place very weighty costs on the police service. The financial memorandum comes nowhere close to describing that adequately.

Due to time and additional pressures, and through the fault of no one, regrettably, we have not had the opportunity to sit down with the service to quantify properly what the costs are likely to be. Experience going back over the guts of a decade and a half tends to suggest that, when it comes to police technology and recording systems, anything that is associated with cost tends to be grossly underestimated by the parliamentary authorities.

Assistant Chief Constable Ritchie: We need to know what the final provisions of the bill will look like, as that will allow us to make an accurate estimate of the extent of training that we will need. If we are talking about statutory aggravations, the training could potentially be done online. If we are talking about using different terms, such as "insulting behaviour", perhaps the training would have to be more extensive. We need to wait to see the final bill.

In respect of the technology and recording, as Calum Steele rightly says, the costs are unknown, but given that we are developing systems that will be far more flexible, they might not necessarily be significant. We have to wait and see.

The most important point about demand is that we know that hate crime is underreported. It is our policy to do what we can to increase the reporting of hate crime. A bill in which the offences are consolidated, and which is easier to understand, such that there is public knowledge of what constitutes acceptable and unacceptable behaviour in the eyes of the law, is all to be welcomed. I hope that that, in a way, increases demand. Of course, that will bring costs, but the intention behind the bill, and of members of this panel, is to have a real impact on hate crime in this country. That will raise attendant demands for the police, but we have been looking for that impact for a number of years.

13:00

James Kelly: Thank you for those answers. I turn to Mr McGeehan to get the Crown Office and Procurator Fiscal Service's point of view. Last week, the committee heard that the Scottish Courts and Tribunals Service had some anxiety about not having adequate sight of the financial memorandum. What is your view on resources, and on the financial memorandum?

Anthony McGeehan: The Government engaged with COPFS on the costs that are likely to result from the bill. The principal cost identified was in relation to training and revised guidance for prosecutors; the cost that was attached to that work was £50,000. Our assessment is that that is a reasonable estimate of the cost that would immediately result from the bill.

There is a potential cost in relation to the new offences. The financial memorandum does not anticipate significant numbers of new offences being reported and, subject to the important caveat that Mr Ritchie has just raised, the approach taken in the financial memorandum is reasonable. I say that because very limited numbers of the preceding offences under the Public Order Act 1986 have been reported to COPFS. In relation to the broadly analogous offences on religious prejudice that were created by the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, again, limited numbers of those were reported. Finally, as recognised by Lord Bracadale, a number of the stirring-up hatred offences would not be new offences, but would be a different articulation of existing criminal offences.

As I said, the approach taken in the financial memorandum is reasonable. We would monitor the subsequent rates of offences that are reported to COPFS; should those numbers rise significantly, we will engage with the Government.

I return to Mr Ritchie's caveat. Increasing numbers of hate crimes being reported might reflect increased public confidence in the reporting of those offences and an appropriate response from the state, and that would not be a bad thing.

James Kelly: Okay; thank you for that. That is all from me, convener.

The Convener: I thank all the witnesses for their time and thoughtful contributions this morning and this afternoon. All three members of this panel have helped the committee with our work on the bill and we are grateful to them.

Subordinate Legislation

Electronic Monitoring (Approved Devices) (Scotland) Regulations 2020 (SSI 2020/308)

Electronic Monitoring (Relevant Disposals) (Scotland) Regulations 2020 (SSI 2020/309)

13:03

The Convener: The next item of business is consideration of two negative Scottish statutory instruments. Do members have any comments on them? In particular, do members wish to take up the question about the vires of the relevant disposals regulations? The Law Society of Scotland gave evidence on that to the committee when we considered the Management of Offenders (Scotland) Act 2019. As I understand it, if the committee wants to, there is time for us to write to the minister in order to obtain assurances as to why the Government's view is that those regulations fall within vires.

My personal view is that, as there is time for us to do that, we probably should do so, given that the Law Society of Scotland raised those concerns with the committee last year. Do members agree to write to the minister? No one is unhappy with that, so that is what we will do.

That means that—the clerk can correct me if I am wrong—we do not wish to make any comment on the approved devices regulations and that we will return to the relevant disposals regulations after we have heard from the minister. I see that members agree with that.

Justice Sub-Committee on Policing (Report Back)

13:05

The Convener: The final item of public business is to consider a report on last week's meeting of the Justice Sub-Committee on Policing. John Finnie has indicated to me that he is content not to add to the written report. I see that Annabelle Ewing wishes to comment.

Annabelle Ewing: I am not sure about the etiquette and process, because this is a sub-committee matter, but I have just noticed that, whereas the United Kingdom Government minister seemed to indicate that all matters about the impact of Brexit had been duly clarified, the Police Scotland representative basically said in evidence that that was news to them and that they had not been sighted on that. It is important to seek clarification on that, because the European arrest warrant and all the rest of it are very important issues for the on-going administration of justice. I hope that we can seek clarification on that from the UK Government.

The Convener: I agree completely that those are extremely important matters. However, I would have thought—John Finnie will correct me if I am wrong—that that is a matter for the sub-committee to take up in correspondence with the relevant UK minister. Perhaps he would like to clarify that.

John Finnie: Annabelle Ewing makes a valid point. We had a diplomatic reply from Mr Kerr, the deputy chief constable on that issue. It is fair to say that there is on-going engagement by the sub-committee. The sub-committee acts on the parent committee's behalf on those issues, so we can follow up that specific request.

The Convener: Annabelle, are you content for that correspondence to come from John Finnie as convener of the sub-committee on behalf of us all?

Annabelle Ewing: Yes, I am content.

The Convener: Thank you very much. That concludes our public business today. Our next meeting will be on Tuesday 10 November, which will be another virtual meeting, when, as we did today, we will continue to take stage 1 evidence on the Hate Crime and Public Order (Scotland) Bill.

13:07

Meeting continued in private until 13:18.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba