OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 24 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 24 November 2020

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JUSTICE COMMITTEE
29th 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:

Bill Brash (Scottish Government)
Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)
Philip Lamont (Scottish Government)
Emma Ritch (Engender)
Dr Marsha Scott (Scottish Women's Aid)
Susan Smith (For Women Scotland)
Rachael Wilson (Scottish Government)
Humza Yousaf (Glasgow Pollok) (SNP)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 24 November 2020

[The Convener opened the meeting at 10:10]

Decision on Taking Business in Private

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the 29th meeting in 2020 of the Justice Committee. We have received apologies from Shona Robison. I welcome Bill Kidd, who is attending as Shona's substitute. We have also received apologies from James Kelly.

Our first item of business is to decide whether to consider in private at future meetings all drafts of the committee's report on the Hate Crime and Public Order (Scotland) Bill. If members disagree, could they please indicate that? No member has indicated that they disagree, so that is agreed.

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

10:10

The Convener: Our second item of business is continued consideration of the Hate Crime and Public Order (Scotland) Bill. We will take evidence from two panels of witnesses. These will be our final evidence sessions on the bill.

Before I introduce the first panel of witnesses, I will say a few remarks to correct one aspect of the record of last week's oral evidence session.

In evidence to the committee, Lucy Hunter Blackburn referred to stickers that had been displayed at the University of Edinburgh, which said:

"Woman. Noun. Adult human female".

She told us:

"The Scottish Trans Alliance suggested that people might want to refer those stickers to the police, and the university did so as potential hate incidents."

Later in her evidence, Lucy Hunter Blackburn said that the Scottish Trans Alliance "encouraged that process" of having the stickers referred to the police.

Responding to that, Becky Kaufmann, who was giving evidence to us on behalf of the Scottish Trans Alliance, said:

"The STA was not approached, and nor did we give any advice to anybody as to whether they should be referred."—[*Official Report, Justice Committee,* 17 November 2020; c 58-60.]

The following day, Becky Kaufmann wrote to me via email to correct the record. She wrote in the following terms, which I will quote in full, rather than paraphrasing and risking misrepresenting her. She wrote:

"Since the session, I've discovered that I was wrong to say that Scottish Trans Alliance was neither approached, nor did we give any advice, as to whether or not stickers should be referred to the Police.

I am now aware that one of my colleagues was approached by a journalist at the Times on 22nd January 2019 asking for a comment on stickers that had been going up around Edinburgh University campus. My colleague emailed this quote to the journalist:

'If people feel distressed or alarmed by transphobic stickers they see posted around Scotland, we do encourage them to report this to the Police. It is then a matter for Police Scotland to decide if they record this as a hate crime or not. The reason that we encourage people to report these sorts of incidents is simply that we want to improve trans people's confidence in approaching the Police if they encounter something that they think may be a crime. Our Scottish LGBTI Hate Crime Report found that just 2% of trans people had reported all incidents they felt may be hate crime to the police—this is unacceptably low.'"

That is the end of the quotation that was given to *The Times*.

The email goes on to say:

"This comment was not included in the Times in full, and instead what was published was:

'If people feel distressed by transphobic stickers, we encourage them to report [it] to police. We want to improve trans people's confidence in approaching the police.'"

Becky Kaufmann concluded her email by saying:

"I apologise for this error yesterday, which was made in good faith—and just wanted to correct what I'd said".

That is the end of the quotation from the email.

I am grateful to Lucy Hunter Blackburn and Becky Kaufmann for their evidence last week, and I am very grateful to Becky Kaufmann for writing to me to correct the record. The record has now been corrected and I consider the matter closed.

I welcome our first panel of witnesses. We have with us Emma Ritch from Engender, Susan Smith from For Women Scotland and Dr Marsha Scott from Scottish Women's Aid. I thank the witnesses for their written submissions, which are, as always, available for the public to read on the committee's web pages. I invite Annabelle Ewing to open the questioning.

Annabelle Ewing (Cowdenbeath) (SNP): I would like to start our discussions on the non-inclusion in the bill of sex as a hate crime protected characteristic. It would be interesting to hear the views of our witnesses on that, and on whether the current proposed approach, which is to have a working group on misogynistic harassment, is the best way to go. In adopting that approach, could there be a gap in protection while the work of the group plays out?

10:15

Dr Marsha Scott (Scottish Women's Aid): It is worth pointing out that I was instinctively in favour of adding the characteristic of sex as an aggravation when we first contemplated the possibility 10 or 15 years ago. As someone who has spent 35 years working in the women's rights sector and on violence against women, my gut feeling was that anything that would help people to understand the enormous violation of human rights that violence against women represents was a good thing.

The committee will know from our submission that our assessment of the impact of adding sex as an aggravation for women who are experiencing violence and the more general population would not do those groups any favours. In fact, it might have unintended negative consequences. I have looked at the evidence; although there is not a huge amount of it, what we have indicates that adding sex as an aggravation is not likely to help; I think that it is likely to harm.

There is a gap in protection, but we all know—the committee will know better than I do, certainly in terms of expertise in the law—that an aggravation works only in the context of legislation in which something is against the law. Those laws are in place now; the aggravation will not fill an existing gap.

My biggest concern about adding sex as an aggravation is that we really struggle with women being treated as a minority. The reality is that something much bolder needs to happen in order to turn the very large ship of misogyny and misogynistic crime. If we introduce sex as an aggravation and do nothing else, there is a strong possibility that a lot of folk will tick the box and will say that they have added gender to the aggravation and so do not have to worry about women or the fact that it is theoretically impossible to put the aggravation in place in the context of their deeply safe policy.

We could go on, but we would be back here, at the same place, 10 years from now saying, "Well, that didn't work." I am too old for that. We need to do something different, because what we have been doing does not work.

Annabelle Ewing: I will pick up on two points to which Emma Ritch could try to respond.

First, that deals with the statutory aggravation issue, but there is also the issue of the stirring-up offence. In the light of Marsha Scott's comments, what would be the problem with going ahead with including the characteristic of sex in the bill now, and having the working group look at it as a stand-alone offence?

Emma Ritch (Engender): Engender and other national women's organisations are used to working incrementally. I share Dr Scott's view that when we came to the issue of hate crime, we were instinctively in favour of adding sex as an aggravation. Even if it gives women only a small measure of protection, surely it is worth doing now, rather than waiting for something better to come tomorrow. However, we see four critical risks with going forward with a "Let's just do this now" approach, while having the misogyny working group, which we welcome and advocated for.

The first of those is the issue with violence against women. It is fundamentally contradictory, according to the analysis of violence against women that Scotland uses, to say that some incidents of violence against women are a product of discrimination or animus on the ground of sex, and some are not. That is just not how we understand violence against women, so such an

approach has the potential to undermine equally safe, which is our world-leading violence against women strategy.

The second risk that we see is that Scotland is broadly committed to a bunch of human rights frameworks that are ambitious for women's and girls' equality and rights. They include the rights that are set out in the Convention on the Elimination of All Forms of Discrimination Against Women and in the Istanbul convention, which is the Council of Europe's instrument on violence against women. They are crystal clear that the presumption should be against gender-neutral laws that protect men and women in exactly the same way, and are strongly of the view that a symmetrical approach to incidents of violence against women is likely to harm women and that states should review their practice in that respect.

So, in the absence of a particular purpose for the sex aggravation or sex-based stirring-up offence, we started to consider whether those two things would just be harmful. That leads on to what is, in our view, the third risk, which is legislative and policy inertia. Even when something is not an appropriate or relevant solution and will not do anything for women but symbolise the justice that remains functionally out of reach, it can be satisfying, particularly when we are dealing with things that are as complicated as hate crime and women's equality and rights. Johann Lamont said something wise and prudent in the debate on the issue, which is that we should recognise the damage that is done if rights appear to exist but are not enforceable. That is so often the case when we look at misogynistic harassment, public sexual harassment and online harassment.

The final risk concerns the baseline position. The evidence from our review of how similar legislation operates around the world shows that hate crime and hate speech are poorly understood in the context of women. Hate crime is understood as being targeted at minority populations and is understood when it comes to race, religion and belief, and sexual orientation—but it is not understood when it comes to women. We think that rushing to legislate in a way that has not met women's needs in other jurisdictions runs the risk of entrenching that misunderstanding further in criminal justice bodies and public understanding, and in women's perception of what the state will or will not tolerate for them and their lives. Symbolism cuts both ways.

Annabelle Ewing: I thank Emma Ritch for that comprehensive answer. I see that Dr Marsha Scott would like to come back in, but I will go to Susan Smith first to get her view, then bring in Marsha Scott before going to my second and final question.

Susan Smith (For Women Scotland): Thank you, and thank you for the question. The first point is that fundamentally we believe that as long as there is a statutory aggravation model, woman need to be protected, which can be done by adding the category of sex. An issue in recent conversations around transgender identity and women's sex-based rights is the feeling that if there is no mirror aggravation for sex, women are left exposed.

What some women have described in conversations has been deemed to be hateful and has in some instances been reported as hate crime, but there is no equivalent protection for women. That is important in terms of the contested nature of what constitutes hate, which is a big conversation. I do not want to get stuck on the issue of the stickers, but it is pertinent here.

I am not sure what evidence there is that a stand-alone misogynistic offence would mitigate or reduce the harms that have been identified. The simple fact is that the conversation on this issue has been going on for a very long time. The need for an offence was first identified 17 years ago. Twelve years ago, people from the same organisations were giving the same evidence at committee, and nothing has moved on.

Even if the suggestion is not a perfect solution, it gets things started and gets the ball rolling, and it might well be that a stand-alone working group could come up with something far better, but there is a genuine risk that we will be here in another 12 years with nothing having been proposed or an unworkable proposal.

I note that Lord Bracadale did not think that there are any gaps in relation to offences that need to be covered. A lot of the objections that people have to the aggravation model are objections in general to hate crime using an aggravation model.

Among the issues that keep coming back are data and training. At the moment, there is neither the facility nor the capacity to collect data, and there is no will to collect it.

In the Nottingham trial that started in 2016, misogyny was listed as a hate crime and it was identified that there are issues around understanding of hate crime. Another issue was the definition of misogyny, which was felt to be elitist and academic, and was poorly understood. A lot of the women who were interviewed as part of the research felt that something clearer would have been more appropriate; terminology is critical. Sex as an aggravation is understandable and can be rolled out, and we can consider sexist abuse.

Another thing that came through clearly from the Nottingham trial was that there were pretty

universal levels of support. Although it could have been better publicised and better education and a multi-agency approach were needed, victims felt that they had had better support from the police because some of the motivating factors were clearly understood.

In previous panels, witnesses have talked about the need for education and training, and that goes along with starting the ball rolling on legislation such as this. I know that Engender has picked up on the lack of policies around sexist bullying in school, but policies are in place for other forms of bullying. It all needs to be considered in a suite of legislation.

I understand the issue around the domestic abuse aggravator. We try to consult as widely as we can. We have a lot of people in our network from various organisations but, unfortunately, the situation being what it is, a lot of people are nervous about putting their name to anything, although I have some testimony from people in the domestic violence sector about current approaches.

The women whom we speak to feel that there needs to be consultation and that heed needs to be paid to ordinary women's voices, but I agree that some people feel that that ignores some of the wider harms to women. I understand that. The matter could be covered by a working group that might look broadly at the issues.

One of the most compelling arguments was fed back to us from one of the networks that deal with abuse survivors, which felt that they have not been consulted; they said that

> "We are shocked that given the prevalence of violence against women and in the time of the #MeToo movement and 'The rapist is you!' movement, we are still being denied the protections we so vitally need. We feel leaving us out will create a hierarchy of oppression, with us at the bottom and as the only oppressed group not included. It will also go against CEDAW. When gender identity is included but not sex, it puts our lives at risk by limiting our access to female-only safe spaces."

They went on to say that they want guaranteed protection now, not possible protection in months or years that may never come to fruition.

Knowing as we do that hate crime is on the cards and that the Scottish Government wants to legislate in that area, we believe that it is very important that women are not ignored.

10:30

Another important point is that a sex aggravation is a decision for MSPs as elected representatives; we concur with the Faculty of Advocates on that. The issue came up in a previous debate on the bill, and a number of MSPs—especially women MSPs—said that they strongly wanted to be able to discuss it. If sex is left out of the bill at this stage, MSPs will be denied the opportunity to explore that aspect. It is vital that the matter goes back to our elected representatives, rather than going to a working group of individuals who have been selected by ministers.

Annabelle Ewing: I thank Susan Smith for that long and comprehensive answer. I caution witnesses that each of my colleagues will have their own questions that they want to ask.

I will ask my second question, to which Dr Marsha Scott can respond, followed by Emma Ritch and Susan Smith. I also ask Dr Scott and Emma Ritch to outline the supplementary points that they indicated they wanted to raise. What involvement have you each had thus far with the working group on misogynistic harassment that is to be set up? Would you expect to be involved in its workings?

Dr Scott: We have not had any involvement. As far as I know, nothing has gone forward yet. There has certainly been discussion in round tables and as part of the original consultation process. We very much supported the establishment of a working group and are keen to see it go forward, and we would be happy to participate in the group if and when it is set up.

My supplementary point was that I had meant to mention a significant danger that may arise as a result of adding a sex aggravation. In our experience, there is no evidence that such an aggravation would work. We have strong concerns that, if a sex aggravation were added, it would be another tool for perpetrators of domestic abuse to use in their abuse of women. We are very familiar with perpetrators accusing women of abusing them as part of their controlling behaviour towards women.

We spend an enormous amount of time gathering and sharing evidence about the importance of not arresting a woman when she calls the police for help and a perpetrator has accused her of being the abuser. There are libraries of evidence about how that happens, and we can absolutely see it playing out. We have 36 services around Scotland, and we have heard a consensus of opinion that perpetrators of domestic abuse would use such an aggravation in that way. We are very concerned about the possibility that that would happen, and about the enormous amount of energy that would have to go into the system if we were even to have a chance of preventing it from happening should the aggravation be added.

Emma Ritch: My answer on the question about the misogyny working group is similar to the one that Marsha Scott gave. We advocated for it and are very keen to see its work go forward, and we

would be pleased to engage with it. Our conversations with the Scottish Government have not been any more detailed than that. We have asked the Government several times what is happening with the group, and we look forward to the cabinet secretary's announcement later.

With regard to my supplementary point, I was hoping to speak briefly about data. The Nottinghamshire example has given us some good detail on why some of this stuff just will not work. There has been a very favourable pilot of a hate crime approach in Nottinghamshire. Obviously, those involved were not empowered to change the law, but they treated misogynistic street harassment as important and encouraged women to report it. In the space of two years, in an area with a population of around 1 million people, there were 174 reports, only one of which led to a prosecution, and only 73 of which were categorised as crimes.

The Nottinghamshire example tells us that hate crime is not a concept that tracks easily across to women's experience of harassment. Even when the police make good-faith efforts and have been trained by expert women's organisations, that is still not enough to counteract the prevailing understanding of hate crime.

We have seen that in international jurisdictions, too. New Jersey has operated hate crime law for more than 20 years. In that time, there have been just 18 reports of sex-based hate crime, against a comparator of 6,810 for race-based hate crime. The model or concept does not really do anything to address gender-based violence—violence against women—so we need different approaches. That is why we are so pleased that the misogyny working group is going ahead.

Susan Smith: We have not had any interaction with the working group at all.

We have raised concerns with the Delegated Powers and Law Reform Committee. There was a suggestion that there might be a modification to add interpretive powers relating to the characteristic of sex. We were not entirely sure what that meant, and we wanted to be clear that the definition of sex could not be changed if that characteristic were added.

We also noted the mention of a different provision for different purposes. I do not know whether that could mitigate some of the concerns that have been raised or whether the committee could consider that.

Concerns about domestic abuse being used against victims have been raised in the domestic abuse consultation, but that has not prevented the court approach from being preferred, even though that was raised as a potential issue.

Many people have raised data issues at various committees and feel that there is underreporting. Perhaps that is a problem with hate crime per se, rather than with just one characteristic.

Annabelle Ewing: We have indeed been considering the issue of reporting, too. I thank our witnesses for their responses.

Bill Kidd (Glasgow Anniesland) (SNP): You have covered a great deal, and it has been very helpful. How might a separate offence of misogynistic harassment work? How would that benefit cases being taken forward?

The Convener: Could you direct your question to a particular witness first?

Bill Kidd: I apologise.

The Convener: Perhaps Emma Ritch could respond first.

Bill Kidd: Yes, please—I was thinking that Emma would be most likely to be able to respond on that.

Emma Ritch: We certainly do not want to anticipate the work of the misogyny working group too much. We hoped that the group would first consider the evidence base. We think that there is some data out there that suggests that women are having an almost universal experience of public sexual harassment. We are also seeing a significant increase in online harassment.

When we were talking to male MSPs about hate crime and misogyny, we got a strong acknowledgement back that they saw the experience of their female colleagues as really significant, noting that there were threats on social media and elsewhere, with some very misogynistic expressions being directed towards female parliamentarians, which was very different from their own experience.

We are increasingly seeing some very serious links between misogyny and terrorism. Some of those have been picked up by expert bodies. In looking at terrorism, we have noted some murders in 2014, and there has been some tracking of the work that was done following the murder in Santa Barbara in 2014. It was identified that 90 murders and significant injuries were attributable to what are known as incel ideologies, which are a subsection of misogyny. This year, federal authorities in Canada have brought terrorism charges against a young man who murdered and injured women in a machete attack, which they also attributed to incel ideology. Therefore, there are real questions about whether we need to look at misogyny in the context of securitisation as well as at what might be seen as much lesser offences relating to police harassment.

It is also vital to consider the question of stirring up hatred and hate speech. In its analysis, the Council of Europe found that, despite the availability of civil, criminal or administrative penalties in member states, there are not many court cases dealing with sexist hate speech. Therefore, we hope that the working group on misogynistic harassment will look at the breadth of evidence across all these distinct experiences and consider where there are gaps in the law and then act to fill those gaps. That would be an evidence-based approach that would, nonetheless, tackle and challenge the most serious forms of misogyny that women face as a constraint on their lives and liberty.

Bill Kidd: That is very helpful. Often, one of the worries is that, when a characteristic is included in such a large bill, it might turn out to be little more than symbolic. Therefore, it is important that it is covered in the manner that you have just described.

The Convener: I invite either Marsha Scott or Susan Smith to address that question. There is no obligation to answer.

Dr Scott: I will add—I mean this sincerely, and I am not buttering up the committee—that, if any body were capable of creating a misogyny offence that was sufficiently nuanced and sophisticated to make a difference to the women and girls of Scotland, it would be the Scottish Parliament. I say that because I was deeply involved, as you all know, in the development of the Domestic Abuse (Scotland) Act 2018, which is now being held up as the world's gold-standard domestic abuse legislation. One of the reasons why it acquired that status was the collaborative work between victims organisations, such as Scottish Women's Aid, and officials in Government and in the field of justice to understand survivors' experiences of coercive control and to find a way to embed those in a very complex piece of legislation that reflects a very complex social phenomenon.

I do not know exactly what a misogyny offence should look like, and anybody who says that they do is wrong. However, we have another opportunity to lead the world, and we already have a bit of practice at doing something really difficult in a way that takes us all a step forward. It might sound slightly aspirational, but either we can be back here in 10 years from now, or we can take an uncertain but bold step forward.

The Convener: Susan Smith wants to come in on that. Please be brief, Susan.

Susan Smith: It is perfectly reasonable to have a working group to consider wider and deeper harms, because misogyny is endemic, and it is ignored, which is part of the problem. Finding patterns in behaviour means that you can disrupt those patterns more easily and earlier. It might not be perfect at the moment, but it could be a start in the interim.

Symbolism has been mentioned. If you are looking at symbolism, you must also consider the symbolic impact of saying that, at this point, even though we know that there is an epidemic of violence against women and harassment of women, as a Parliament or as a country, we are content to put off addressing that until an unspecified and, possibly, remote later date.

10:45

The Convener: On the basis of what she just told the committee, I have one, very specific supplementary question for Emma Ritch. On 27 October, Lord Bracadale told the committee that it seemed to him

"that there was no gap in the law that required to be filled by an offence of misogynistic harassment".

He went on to say that it was

"difficult to pin down a precise definition of misogyny laws",

because

"different groups had different understandings of what the term meant."—[*Official Report, Justice Committee,* 27 October 2020; c 38.]

Emma Ritch, will you respond quickly, but specifically, to those observations from Lord Bracadale?

Emma Ritch: When Lord Bracadale met Dr Scott and me, he was looking for evidence of gaps in the law, and we were obliged to tell him that we did not know, as there has been no systematic evaluation of that. I am not sure that Lord Bracadale has undertaken such a systematic evaluation, so that is something for the misogyny working group to pick up as a matter of urgency.

I read Lord Bracadale's evidence to the committee, and I did not hear him speak about the potential links between misogyny and terrorism, specific sub-strands of misogyny or public street harassment. I think that he focused his remarks to the committee on the subject of online misogyny.

With all due regard to Lord Bracadale, I would dispute the extent to which the existing law is working for women. We see epidemic levels of online harassment that have a material impact on women's lives and wellbeing. We see women experiencing anxiety and sleepless nights, deciding not to enter technology-related professions and choosing to study different subjects at school, not availing themselves of leisure opportunities that are open to them, and deciding to go to different places and do different things due to the fear of online attack and harassment. If the law is considered to cover

those areas of life, I am not sure why it is not working for women. Therefore, the misogyny working group should look at the matter with some degree of urgency.

The Convener: All the members of the committee share that sense of urgency, and we will be putting questions about timing, among many other issues, to the cabinet secretary later this morning.

Liam Kerr (North East Scotland) (Con): I have three quick questions on the definitions, particularly in part 3 of the bill, which have been raised in submissions. I will direct each question to a particular witness, but if anyone else wishes to comment, they can do so.

The first question is for Susan Smith, because there is a specific section on transgender identity in her submission. In a parliamentary question some time ago, I asked the cabinet secretary how gender identity was defined. I got what I felt was a slightly circular answer, which I did not really understand. Susan Smith, as you have referred to it in your submission, will you explain your thoughts on the definition of "transgender identity" in the bill?

Susan Smith: I will concentrate on one of the main concerns, which is the inclusion of cross-dressing in the definition. In preparing for today's meeting, I came across an interesting freedom of information response that has just come out in relation to correspondence between the Equality Network and the Government on what the definition is. The correspondence says:

> "A man who is not a trans woman but wears a dress for a drag performance, or a trip to the Rocky Horror Picture Show, or because he feels an emotional need to cross-dress occasionally".

There are several points to make. First, the reference to cross-dressing is evidently there to protect men, because it is hard to think of circumstances in which a woman might be considered to be a cross-dresser. It is also setting up a scenario in which, if a man and a woman wear the same costume and go to see "The Rocky Horror Picture Show", and the man is the victim of a crime, that would be a hate crime. However, when the case goes to court, the woman could potentially be asked what she was wearing. There is a bizarre and, frankly, sexist base to that.

Then there is the issue of why one set of people is being protected for what is essentially sartorial choice and others are not. There are plenty of examples of people being attacked for what they are wearing, such as Goths, and for having facial tattoos, body piercings, the wrong football strip or the wrong school uniform. Why is one dress sense being protected but not another? The rationale given was that it might be because those ways of dressing are assumed to be trends, but I think that that should be captured anyway so that somebody is assumed to have a protected characteristic and to have the protection of that law. I do not think that that is an excuse.

The other issue is that, at one extreme, cross-dressing can be dress sense and at the other it can be a paraphilia. It is listed as such in the *Diagnostic and Statistical Manual of Mental Disorders*. Sometimes it is accompanied by a crossover with other indicators for offences. Therefore we get the quite bizarre situation where something that might be done for purposes of arousal is being protected under a hate crime law.

Then there is Glasgow Life's policy last year, which was quite an extraordinary situation. Glasgow Life was openly advocating that cross-dressers—who, as we have seen, the Equality Network says might just be dressed up to go to a party or a Rocky Horror Picture Show event—could access the female changing rooms at its facilities. The policy states that, if women objected to that—and I think we can all see quite good reasons why women might object—the policy should be explained to them and, if they continued to object, a hate crime report could be filed.

It is obvious that this can be used—it is how it is proposed that it can be used—as a weapon against women.

One of the other issues is the different—

Liam Kerr: Forgive me for interrupting, Susan—I am just aware of the time that we have. I will move on to my next question, which is for Emma Ritch. If you have something to say on the back of that, perhaps you can indicate that and come back in.

Susan Smith raised an interesting issue, which, in responding to this question, Emma Ritch might also look to respond to. In a parliamentary question some time ago, I asked the cabinet secretary where I could find the definitions of "non-binary persons" and "persons who cross-dress", which is what the bill refers to. The cabinet secretary's answer—I will paraphrase it, but anyone can look it up, as it is in a public document—was basically that definition was unnecessary. He said, "it is not ... necessary" to define those terms. Emma Ritch, do you have a comment on that? Is that a sufficient and fair answer or should there be a separate definition?

Emma Ritch: I cannot speak for the cabinet secretary. When there was a suggestion, in the context of the initial consultation on the Gender Recognition Act 2004 by the Scottish Government, that the term non-binary be in some way added to the Equality Act 2010, Engender's view was that that needed very careful scoping out by the lawyers who worked on women's equality and

rights. We are very concerned that women's protection from sex discrimination is not confused by any interjection around other protected characteristics.

The question about definition is a matter for my colleagues who work in LGBT rights organisations. Engender works around the issues of women's equality and rights, and I will stay in our lane, if I may.

Liam Kerr: Of course. If no one else wants to comment on that, I will put the final question to Dr Scott. It is similarly on definitions. In section 14(6)(b) of the bill, there is talk of

"persons of a different sex".

That differs from the definition of the reference to "sexual orientation" in the Offences (Aggravation by Prejudice) (Scotland) Act 2009—which refers to "the opposite sex". I will put that to the cabinet secretary later, because I do not quite understand why a different term is being used, but do you take a view on the use of "a different sex" as opposed to "the opposite sex" or is that not a significant issue, Dr Scott?

Dr Scott: Either all the implications of that are going completely over my head or it is not a significant issue. Those are my two choices at the moment.

Liam Kerr: That is a very fair answer, Dr Scott. Unless Emma Ritch or Susan Smith want to comment on that, I will hand back to the convener.

The Convener: Do the witnesses want to share any reflections with the committee about the way in which the bill tackles the stirring up hatred offences? Emma Ritch, I heard you say to Liam Kerr that you want to stay in your lane, so you might not want to say much about that. It is completely up to you. In particular, do you have any reflections on the relationship between tackling hate crime and protecting fundamental rights, such as privacy and freedom of expression?

Emma Ritch: We have a general interest, as all citizens do, in seeing the stirring up hatred offences in part 2 balance the need to protect minority groups from hate with the need for persons, especially those from marginalised groups, to articulate their views, including feminist speech. Organisations that advocate for equality and rights have all defended causes that are sometimes unfashionable, and, sometimes, offence is caused to some groups. We should not criminalise that or make a veiled threat of criminality. In our written evidence, we suggested that the bill be amended to replace the current freedom of expression provisions with a more generalist freedom of expression protection that is not absolute but which applies equally to all characteristics, which would be enabling.

There is potentially also a job of work for the Government to do to communicate the purpose of that part of the bill to the citizens of Scotland. Witnesses have talked about the language of the bill being clear, but normal people do not need to memorise the text of legal restrictions, so what the public understands by the bill will be critical. I will leave my comments there.

Dr Scott: I do not really have anything to add. We are so far from having a language, even in this setting, in which we can talk about many of these issues with shared assumptions and definitions. It is a long path to get to a place where the general public moves in the same direction and we have a law that is useful in people's everyday lives. Beyond that, it is about finding a way to get there rather than saying that we know how to do it right now.

Susan Smith: We would prefer to see part 2, almost in its entirety, dropped, because it is hugely complicated to try to untangle some of the issues there. We see the case for a separate bespoke solution for racial hatred, because racism is and continues to be an animated force, and it is differentiated by a degree of political organisation. However, in some of the other categories, the nature of hate is contested. Accusations have been levelled at us for all kinds of reasons simply for talking about sex and biology. The problem is that those are sometimes given a degree of legitimacy by people, including MPs and MSPs.

Only this week, Amnesty International Ireland made a quite extraordinary comment about a group in Ireland. It objected to the fact that the group was defending biology and said that it should have no legitimate political representation.

At that point, the granddaughter of Seán MacBride, who won the Nobel prize and was one of the founders of Amnesty, heavily criticised the group and said that its comments were contrary to what Amnesty was supposed to do. That shows just how difficult it can be when people start throwing out accusations of hate, especially when those people are perceived to have authority. We think that there will be a chilling effect—there has been already.

11:00

It does not have to come to trial. I take on board previous comments that if standards of evidence are high, a trial might not end in a conviction. However, that is not always the main issue. It is often about what happens way before people get to trial. There have been cases where women have been questioned away from young children and sometimes sick children. The first trial on

transphobic hate in England was held last year and the case was against a transsexual person. Miranda Yardley, the person on trial, described it as 10 months of hell. The stirring up part of the bill has the potential to make life very much harder for many people and make it easier for others to use the law as a weapon.

An issue that is not particularly in our lane, but which came up in our consultation, is the need to consider learning difficulties in the disability section of the bill. There have been cases where people with Asperger's have made comments. There was a case in North Wales last year in which someone with Asperger's was fined for having committed a hate crime. Disability charities have said that sometimes people with Asperger's can make blunt comments without really understanding that as hate speech.

When we are talking about inflammatory language, stirring up hatred and abuse, we have to be extremely careful that there is cover for categories including antipathy, dislike and ridicule, so that, in introducing the law, we are not potentially introducing a new blasphemy law and opening the door to the limitation of freedoms. Freedoms are so important.

The Convener: Thank you for those views, which the committee will take on board. We have about eight minutes left and there are two other members who wish to ask questions.

John Finnie (Highlands and Islands) (Green): I will be very brief. I have asked about the use of statutory aggravations as the core method of prosecuting hate crime in Scotland. Do panel members have any views on that? The bill is consolidating legislation and, without revisiting some of the early discussion, can I ask whether there is anything that we are missing out?

Dr Scott: I am sorry, John, but I do not really understand your question.

John Finnie: I apologise. Are you content with the continuation of the statutory aggravation model as a form of prosecution? Are there any categories that we should be considering for inclusion in the statutory aggravations?

Dr Scott: Do you mean in addition to those that have already been raised?

John Finnie: Yes.

Dr Scott: First, it is clear to me that the aggravator model is not terribly effective. I have some concerns about the aggravator that we included in the Domestic Abuse (Scotland) Act 2018—that makes it sound as though I was the one who wrote it, but of course I did not. However, that discussion is probably for another day. I have big questions about how effective aggravations are as a tool in creating community change. Secondly, I only have an opinion about whether we add sex. I cannot think of another area that I would want to throw in.

Susan Smith: There clearly are some issues with the model and many people have raised them. The committee might consider whether we should keep those categories of aggravation or whether the bill should just cover any crime that can be proven to be motivated by prejudice or hatred. Broadly, there are a lot of issues with the aggravator model.

Emma Ritch: I have heard a number of witnesses talking about the inclusion of sex as though it is a matter of fairness or equality. I want to correct the misapprehension that equality involves treating all protected groups in the same way. In fact, even in the Equality Act 2010, which is standout, banner equality legislation, protected characteristics and protected groups are not all treated the same. Different provisions in that act relate to different groups, contingent on the experiences that they have. For example, the equal pay elements relate to sex, but not to other protected characteristics. There are protections for pregnancy and maternity, as well as for disabled people, that do not apply to other groups.

I urge the committee to resist the tempting narrative that sex should be included in the bill for equality reasons. A real equality approach would be to treat women and misogynistic harassment in the way that the evidence suggests that they should be treated, which is what we are advocating for.

I do not have any further comments on statutory aggravations. They are demonstrably not working for women in other jurisdictions around the world. I notice that they have not been tried and tested in a lot of other places because of that, per the excellent paper submitted to the committee by Professors Leverick and Chalmers. I urge the Scottish Parliament to align with other jurisdictions that have looked at statutory aggravations and seen how ineffective they would be for women and have gone in a different, and as Marsha Scott described it, bold and ambitious direction.

Rona Mackay (Strathkelvin and Bearsden) (SNP): In addition to legislation, what more do the witnesses think needs to be done to support victims and tackle crimes that target women? I am thinking in terms of engagement with organisations such as those that the witnesses represent, resourcing support services and seeking to change attitudes in general. Are we progressing in changing those societal attitudes? If so, how?

Dr Scott: That is often the elephant in the room with these kinds of conversations. We all know that legislation is not a panacea and it is never a

silver bullet. It is only as effective as the enabling environment in which it operates. The domestic abuse legislation is a good example of that.

To steal Bill Clinton's phrase, "It's the economy, stupid"—which will tell you how old I am—I would say, "It's the gender mainstreaming, stupid." There are still so many indications that officials and public sector professionals across Scotland do not understand gender inequality and women's inequality. Dislodging and challenging gender stereotypes and holding ourselves and officials accountable for robust and confident equality impact assessments are the kinds of things that will help to create an enabling landscape that—should we have an effective misogyny law—would allow Scotland to leap forward. By themselves, none of those things will effect change.

Emma Ritch: I agree with everything that Marsha Scott said. I add that we have been talking about the issue of hate crime and women for about five years now, and we talked to women and women's organisations a lot. I know that the Scottish Women's Convention has run a programme of engagement on the issue with women across Scotland.

One of the messages that constantly comes back is that women do not think that decision makers and the criminal justice system understand the extent and level of sexism that women face in every aspect of their lives. Some of the bill feels as if it tinkers around the edges rather than engaging with the core issue.

Marsha Scott is quite right to point at gender mainstreaming. In Scotland, the public sector equality duty is supposed to really transform women's lives, but it does not do so at the moment, and that is something for parliamentarians to keep an eye on in the next session.

I am heartened by the moves to incorporate CEDAW into Scots law. To have that minimum standard of women's rights will be profoundly transformational if Scotland can make it work. I urge parliamentarians to keep their eye on that, too, as we move into a new session of Parliament.

Scotland can be hugely ambitious when it comes to tackling egregious forms of violence against women and sexism, as we have seen with the Domestic Abuse (Scotland) Act 2018, which gave Engender and other national women's organisations hope that we could do something similarly transformational with misogyny offences. We could take bold steps that other nations have, as yet, failed to take and grasp the nettle of where harassment of women is at.

Susan Smith: There clearly need to be multi-agency approaches and more needs to be done on changing attitudes. We absolutely agree that CEDAW needs to be incorporated in, and put at the heart of, everything that is done in Government. However, when we talk about things such as the public sector equality duty or equality legislation, we have to be able to talk about women as a sex class and, unfortunately, we are currently prevented from doing so, and messages are coming from the top that make women's lives extremely difficult.

One of the biggest reasons that women get attacked online is their standing up for their sex-based rights, and we are not seeing the support, either from Government or indeed from the national women's organisations, to enable that conversation to take place. That needs to change.

The Convener: I thank Emma Ritch, Susan Smith and Dr Marsha Scott for their evidence. It has been genuinely helpful to all members of the committee to hear what you have shared with us. I thank you for your time, and your patience and forbearance earlier while we were trying to sort out our technical glitches.

11:13

Meeting suspended.

11:15

On resuming—

The Convener: I welcome our second panel: Humza Yousaf, the Cabinet Secretary for Justice, and two of his officials, Bill Brash and Philip Lamont, who are with him in person. Online, we are joined by a further four officials from the Scottish Government: Jo Gillies, Rachael Wilson, Clare McKinlay and Patrick Down. You are all very welcome.

Cabinet secretary, as usual, we will direct all our questions to you, but if you want to bring in your officials at any point, I will leave that to you. I understand that you want to make a short opening statement.

The Cabinet Secretary for Justice (Humza Yousaf): I thank the committee for inviting me to give evidence for a second time on the Hate Crime and Public Order (Scotland) Bill. I have heard with interest the evidence that has been presented to the committee over the past four weeks. I remain committed to taking the opportunity to shape legislation so that it is fit for the 21st century and, most importantly, affords sufficient protection for those who need it.

It is clear that many of the committee's witnesses focused on what the bill will mean for their continued right to free expression, whether through religious, artistic and cultural practices,

public debate, or the simple expression of opinions or beliefs.

It is also clear that the vast majority of witnesses welcomed the changes that I outlined to Parliament in September, which will make intent to stir up hatred an essential part of the new stirring up hatred offences. However, a number of witnesses presented concerns. I have always said that I will listen to all voices that engage in the debate, and I have carefully listened to and watched the evidence that has been presented. I will set out a couple of my reflections on the evidence.

Section 4, on the performance of plays, clearly sets out when directors and presenters of plays can be held criminally liable if a performer commits an offence of stirring up hatred. I recognise the concerns of the performing arts community that the provision appears to single it out, and the anxiety that that has caused. The Public Order Act 1986 includes a similar provision and on that basis section 4 was included in the bill. However, the evidence that the committee heard has led me to conclude that section 4 can be removed from the bill. We also accept that neglect on the part of a director or presenter of a play is too low a threshold for criminal sanction in such a case.

You have heard evidence from, among others, the Law Society of Scotland, the Faculty of Advocates and Dr Andrew Tickell about general criminal law rules regarding criminal liability of those who aid, abet, counsel, procure or incite the commission of a criminal offence. I will seek to remove section 4 from the bill, and instead look to apply existing rules on aiding and abetting an offence.

My second point relates to section 11 and freedom of expression of religion. Many witnesses, including those from faith groups, have indicated that the current provision in section 11 should be more closely aligned with the equivalent provision in England and Wales under the 1986 act. We will propose amendments to the provision to cover the absence of religious belief, and to clarify that mere expressions of antipathy, dislike, ridicule and insult are not, on their own, criminal behaviour.

I am committed to working with Parliament to ensure that hate crime law is effective, while protecting freedom of expression, and I will continue to reflect on other areas of the bill as stage 1 reaches its conclusion.

Finally, I know that, before my appearance today, the committee took evidence from a range of women's organisations. I am keen that we make progress on the working group that will advise us in relation to a potential stand-alone offence of misogynistic harassment, and the use of the power to add sex as a characteristic to the hate crime scheme. This morning, I am able to announce that the working group will be chaired by Baroness Helena Kennedy. Baroness Kennedy has extensive experience and knowledge in relation to women and the legal system and will provide a strong independent perspective for our important work in that area.

I have had an initial discussion with Baroness Kennedy—she is hugely enthusiastic and ready to start on that important work. I will be discussing further with her a detailed remit, membership and timescales for the group, so that that vital work can move at pace. I am delighted to have someone of Baroness Kennedy's stature and integrity leading that important piece of work.

I am happy to conclude there and to take any questions that the committee might have.

The Convener: Thank you for those opening remarks. As you noted, cabinet secretary, the amendments to the stirring up hatred offences that you proposed and announced in Parliament in September have been welcomed by most, although not by all, of our witnesses. However, the majority of our witnesses told us that, in addition, further amendments to part 2 of the bill, which deals with those offences, will be required. I will ask you some detailed questions about two of those suggestions.

Many witnesses have called for the word "insulting" to be removed from the bill. Having heard the evidence that we have been given, what are your thoughts on that?

Humza Yousaf: Thank you, convener. I did not get to listen to that evidence session, but I read the report afterwards. I continue to pay close attention. When I came to the committee's first evidence session, I said that it is exceptionally important that we listen and give weight to all views but that it is important to give additional weight to those who are often the victims of a particular hate crime. There is a justification for treating the offence of stirring up racial hatred differently from the other offences. You are absolutely right that it goes against legal purity—I accept that. Some would suggest that it could create a hierarchy, and that is not an unfair suggestion. However, there is a justifiable case for treating race differently. Two thirds of all hate crime in Scotland is related to race. There is no denying the prevalence of racial hate crime in Scotland, let alone in other parts of the United Kingdom.

Removing the word "insulting" would mean that Scotland would then be the only legal jurisdiction in the UK that did not have "insulting" as part of the legal threshold. In England and Wales, "insulting" continues to be part of the legal threshold for the stirring up of racial hatred. In

Northern Ireland, the word "insulting" is retained. Therefore, there would be the perception at least that Scotland had the weakest offence of stirring up racial hatred at the same time as racial hatred offences making up two thirds of all hate crimes.

I listened to the evidence and, as you say, there were many people, particularly from the legal fraternity, who raised concerns. On the flipside of that, given that I talked about giving weight to those most affected, it was significant and important to note that, when Danny Boyle from BEMIS, Dr Jenny Galbraith from the Coalition for Racial Equality and Rights, Kevin Kane from YouthLink Scotland and Amy Allard-Dunbar from Intercultural Youth Scotland gave evidence, they all supported the retention of "insulting" in the threshold. I am not quoting them verbatim but summarising their position.

The Convener: Yes, they did, and you are right to record that. I will put two particular pieces of evidence to you on that point and invite you to reflect on them. You said that the legal fraternity—I think that that is the term that you used—was strong on that point. Lord Bracadale himself is strong on that and Roddy Dunlop, speaking on behalf of the Faculty of Advocates, is strong on it. The two pieces of evidence that I want to put you were obtained from Assistant Chief Constable Ritchie and from Anthony McGeehan from the Crown Office and Procurator Fiscal Service. On the inclusion of the word "insulting" in the offence of stirring up racial hatred, ACC Ritchie said:

"It makes it more difficult for the officer to understand what types of behaviour and what circumstances cross the criminal threshold."—[*Official Report, Justice Committee,* 3 November 2020, c 37.]

Therefore, the inclusion of the word "insulting" on the criminal statute book makes the operational function of police officers enforcing the law more difficult. What are your thoughts on that?

Humza Yousaf: First, we always listen to the comments of Police Scotland because, from an operational point of view, of course, it is hugely important that we do not make life any more difficult for the police. What I would say to Police Scotland—of course, I will continue the conversation with it—is that the insulting threshold has been in law since 1986 and I have not, to this day, in my role as Cabinet Secretary for Justice, come across officers who have told me that they have found the application of that law challenging or difficult. Of course, what is in the bill is not an exact replication of what is in the Public Order Act 1986, because we have talked about—and I am sure that we will get into—issues such as the dwelling defence. However, it has been in operation for 34 years and Police Scotland has not expressed to me that it has encountered any difficulties from an operational point of view.

The Convener: I hear what you say about the fact that the word is in the 1986 act, but the committee has been told, as you will know, that just because something is in the 1986 act, that is no reason for it to be in the hate crime bill that is before us.

Just this morning, you pointed out that there will be yet more differences between the 1986 act and the bill, given that you now propose to remove the provision in section 4 of the bill regarding theatres, plays and public performances, even though it appears in the 1986 act. The fact that something is in the 1986 act is not, in itself, a good reason for putting it in the bill.

I put to you what Anthony McGeehan from COPFS said, which echoed what Lord Bracadale had already told the committee on 27 October. Mr McGeehan said:

"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."—[*Official Report, Justice Committee,* 3 November 2020; c 39.]

The word "insulting" was removed from section 5 of the 1986 act, and Lord Bracadale recorded that that did not diminish the ability of prosecutors at all to act effectively and appropriately. If the removal of that word from the statute book would make no material difference to what the Crown can prosecute, why do we want to keep it in the bill?

Humza Yousaf: I have two points to make. I am not suggesting that, simply because something is in the 1986 act, it has to be in the bill. You asked me a question, based on a police officer's evidence, about what difference it would make to the operation on the ground. My analysis is that, if it has not presented an operational problem so far, despite being an offence and a threshold for nearly 35 years, why would it suddenly present such a problem now? I am happy to take up that question with Police Scotland offline. The point is not simply that something that is in the 1986 act should be in our bill—it is an operational point.

On your second question, I do not disagree with the legal purity of the argument, nor do I disagree that it may not take away from the Crown's ability to prosecute. I have always said that, at the very least, there is a perception among those who are targeted most by racial hatred that the bill would be weakened or diluted if the word "insulting" was removed. Those are not just my words. Dr Jennifer Galbraith from the Coalition for Racial Equality and Rights said:

"We, too, have significant concerns about that—we agree that its removal would dilute those protections, even outside the legal context. In reality, with regard to people's everyday lived experience, it could have a potential harmful effect on black and minority ethnic communities in Scotland."—[*Official Report, Justice Committee,* 17 November 2020; c 31.]

Danny Boyle from BEMIS—

The Convener: I understand that that perception is held, and I have no doubt that it is honestly and genuinely held. However, it is an inaccurate and incorrect perception. The prosecutors, and Lord Bracadale, have told us that the removal of the word would make no material difference to what the Crown is able to prosecute. Yes, the perception exists in the communities to which you referred, but it is inaccurate, is it not?

Humza Yousaf: I am sure that you would agree that public confidence in the law is hugely important. If those who have been afforded protection under the 1986 act for the best part of 35 years perceive that the law is being weakened in that regard, and that it is weaker than it is in England and Wales and in Northern Ireland, that perception alone could be damaging. I do not disagree with the legal purity of your argument that the removal of the word "insulting" may not have a material impact in terms of prosecution, but that is not the only factor to be considered. Public perception and confidence in the law are also exceptionally important.

The Convener: They are, but so is the confidence of the police that they know what they are doing when they enforce criminal offences that are passed in legislation by this Parliament.

Humza Yousaf: I agree. The police have enforced the provisions in the 1986 act for nearly 35 years without there having been—as far as I can tell, although I am happy to take the discussion with the police offline; I have spoken to them about the matter already—any significant operational issues on the ground during that time.

The Convener: I have asked about the word "insulting", which I wanted to do. I will now move to the word "abusive" which, as you know, appears elsewhere in the bill. We have heard evidence on the term, suggesting not that it needs to be removed from the bill but that it at least needs to be defined in the bill, ensuring that it is an objective, not a subjective, standard. What is your position on the notion that the word "abusive" needs to be defined, to ensure that it is objectively understood in the context of the bill?

11:30

Humza Yousaf: Taking a Scottish perspective, you know only too well that there has been an offence of threatening or abusive behaviour for the past 10 years. It has been prosecuted without much challenge as far as the definitions of "threatening" or "abusive behaviour" have been concerned—certainly, not that has come to my attention.

In your previous question, you referred to the Crown Office, and its evidence to the committee regarding the word "abusive" was that it was a very familiar, well-understood concept in Scottish criminal law—I am paraphrasing slightly. That was also the view of the Faculty of Advocates. I am not convinced that there has to be a definition of "abusive". As you know, where there is not a definition, the ordinary meaning of the word is taken. I am not convinced that there is a need for such a definition.

Remember that there is a second part to the test, as we are all aware, particularly for the new offences, which will only be about intent. There is an additional safeguard there when it comes to the threshold for the offence. Having listened to the evidence thus far, I am not convinced that there is a need to define "abusive".

The Convener: Would any harm be done by defining "abusive" in an objective way? For example, in oral evidence to the committee on 17 November, Tim Hopkins from the Equality Network suggested, in quite strong terms, that he thought that "abusive" must be interpreted in an objective way. He suggested that a way of doing that would be to amend the bill such that it said

"that behaviour or material is abusive if a reasonable person would, in all the circumstances of the case, consider it to be abusive."—*Official Report, Justice Committee*, 17 November 2020; c 6.]

What harm would be done by an amendment such as that? If no harm would be done by an amendment such as that, why not lodge one?

Humza Yousaf: I would say a couple of things in response to that. First, as I should have said at the very beginning, we will of course continue to reflect on the evidence that was given, and on any recommendations for amendments.

This is the law of unintended consequences: if we have a definition, anything that falls outside that definition would not be included. Therefore, we must ensure that, if we are going to include a definition of "abusive", it must absolutely capture all the behaviour that we want it to capture. That could be challenging, whereas I see no reason why the ordinary meaning of the word "abusive"—its dictionary definition—cannot be used or would not be well understood.

I will continue to reflect on the evidence, but I remain open minded about any amendments that are lodged regarding the word "abusive". As I say, however, it has not seemed to cause a problem in relation to the Equality Act 2010, which has been prosecuted thousands of times by our courts over the past 10 years, and I am not sure that it would present a problem in the bill.

The Convener: We will move on to consider the free speech provisions in sections 11 and 12 of

the bill, to which you referred in your opening remarks. Liam McArthur will pick up the questioning.

Liam McArthur (Orkney Islands) (LD): Good morning, cabinet secretary. You referred to the subject in your opening remarks, and you gave some more detailed evidence on it last month. You have said that you are open minded about considering both a broadening and a deepening of the safeguards relating to freedom of expression under sections 11 and 12.

I am sure that you will have seen the evidence that we have received. It is fair to say that it was broadly supportive of the provisions, although some concerns were expressed by a number of witnesses about the practicalities of delivering them. Have you had an opportunity to reflect on the evidence? What are your intentions leading up to stage 2?

Humza Yousaf: I thank Liam McArthur for those questions. He will have heard my opening remarks, so will know that we are happy to deepen the freedom of expression provisions around religion, and I will lodge amendments at stage 2 to that effect.

The evidence that the Justice Committee took demonstrated the challenge that lies in widening the freedom of expression provisions: many different organisations and stakeholders came up with different formulations of freedom of expression provisions that they thought would satisfy them. That demonstrates the problem: many different approaches can be taken, and they all have their pros and cons.

The short answer is that we are still reflecting on the issue. I am certain that we will make further changes to the freedom of expression provisions, but at this stage I cannot tell you exactly how they will be formulated.

Liam McArthur: That is helpful—in a sense. I detect from your response that there is perhaps a cooling of the idea that broadening the protections is likely to form part of the Government's thinking at stage 2. Obviously, it is up to members to lodge amendments, but at this stage you are looking only to deepen the provisions in relation to religion; you are not minded to go further in that regard or in relation to the broadening of the protection.

Humza Yousaf: I am not sure what gave Mr McArthur that impression—I would not describe it as a cooling at all. We are still very actively exploring how we might satisfy the concerns of the many stakeholders who want either further or expanded freedom of expression provisions. We have been able to do that with religion, because we can align it closely with the English and Welsh provisions. With regard to the other freedom of expression provisions that a number of organisations want, we just have to think a little more carefully about how to do that. I would definitely not describe it as a cooling; we are still very much actively exploring the issue.

Liam McArthur: Okay. I will move to section 4. There was a brief exchange earlier about some of the concerns that have been raised with us around the implications of the bill for plays and other public performances in theatres. Relevant witnesses have told us that they do not believe that there is any need for the bill to make separate provision in that regard. Do you agree that section 4 could safely be omitted, on the basis of what the committee has been told?

Humza Yousaf: I am not sure whether Liam McArthur was able to hear all my opening remarks, but I indicated that we will lodge amendments at stage 2 to remove part 4 of the bill, having reflected on the evidence—

Liam McArthur: Section 4.

Humza Yousaf: Section 4, not part 4—thank you. We definitely do not want to get rid of part 4 of the bill—that is staying.

It is a policy choice to remove section 4. Members might remember that, in my first evidence session, James Kelly asked me a question about section 4, and I tried to explain why I thought that it was important in terms of criminal liability. However, I also made the point that we might reflect further on the issue of neglect, because at that point the argument that the threshold was too low seemed persuasive.

I hope that removing section 4 will address the concerns of a number of those in the performing arts. In particular, we have reflected carefully on the evidence that was given by the legal and performing arts communities when they came before the committee.

Liam McArthur: I apologise for not picking that up. I am pleased that you have managed to resurrect part 4 of the bill, having inadvertently excised it.

The Convener: Thank you, Liam. Moving from one Liam to the other, I call Liam Kerr.

Liam Kerr: Good morning, cabinet secretary. I will take you to section 6, entitled "Powers of entry etc with warrant". In our evidence sessions, you will have heard that some witnesses have concerns about the scope of police powers to investigate allegations of stirring up hatred. Having heard that evidence, are you satisfied that police powers of entry, search and seizure are appropriately circumscribed in the bill, or is there more to be done?

Humza Yousaf: I was interested in that discussion. I notice that Police Scotland felt that, from an operational perspective, the power to search under warrant was "fairly traditional".

The committee took remarkably helpful evidence from the Crown Office, which went into detail around the application of the warrant. It is not simply a matter of a police officer saying that they need a warrant and the court granting it; much deeper consideration takes place. Police Scotland said in evidence that police officers will need to ensure that

"the evidence is compelling or convincing enough to take to"

a court

"in order to get a warrant in the first place." —[*Official Report, Justice Committee,* 3 November 2020; c 42.]

I will not read it out in full, but the Crown Office's evidence in the same session was exceptionally important in mitigating some of the concerns that have been raised. For example, the Crown Office dealt with the concern raised by the Scottish Police Federation around police staff, particularly in relation to forensics.

I am satisfied with the power that is set out in the bill. The question whether that power should be time limited is worthy of further consideration post stage 1.

Liam Kerr: That power of course operates in circumstances in which there has been a report and an investigation has taken place.

However, we have heard quite a lot of evidence about the chilling effect that could happen. Having heard the evidence, do you think that the bill could have a chilling effect on writers, journalists and artists, particularly given people's fears about investigation, such that it might cast a long shadow?

Humza Yousaf: I certainly hope that that does not happen. To go back to the question of perception, I accept that there could be a perception that the bill restricts people's freedom of expression or restricts journalistic expression, which is why we will move to make changes to restrict the new offences to "intent" only and remove the "likely" limb. The fact that there was, at the very least, a perception that the bill might infringe people's freedom of expression persuaded me in that regard. We would not want people—particularly journalists and writers—to self-censor. That is not what the bill is about.

I hope that the changes that I propose to make at stage 2, including those that I announced today, will help to mitigate any concerns about there being a chilling effect on free speech.

Liam Kerr: My final question about section 6 relates to the point that you have just made. The bill contains a reasonableness defence. Having heard the evidence, what changes do you think still require to be made to the way that the bill provides for that defence? Such changes would perhaps reassure people in the way that you have just described.

Humza Yousaf: We will move to having intent only, so I am not sure that there is a need to make substantial changes to the reasonableness defence, although I again look forward to reading what the committee's stage 1 report says in that regard.

I could flip the question and ask for an example of a case in relation to the new offences in which somebody's behaviour was threatening or abusive and intended to stir up hatred in a way that was reasonable. I raised that in my first evidence session but, to this day, I have not been given a good answer.

I also noticed the evidence from the Faculty of Advocates in relation to the reasonableness defence. Roddy Dunlop, the dean of the faculty, said that

"the difficulty with non-exhaustive lists is where to stop before you become exhausted."—[*Official Report, Justice Committee,* 3 November 2020; c 11.]

The dean has a good way of putting such matters, and I thought that his point was well made. That would be my concern about introducing a non-exhaustive list.

I will continue to listen to the evidence and will read the recommendations on the issue from the committee in its stage 1 report.

Annabelle Ewing: In relation to possible defences and exceptions, the issue of the dwelling house exception has been raised, with people citing the Public Order Act 1986. However, at the same time, we heard that the Law Commission of England and Wales is proposing the removal of the dwelling house exception.

We have heard evidence from both sides. Some folk are uneasy; in contrast, we heard evidence from Michael Clancy of the Law Society of Scotland who said that he thought that, for most aspects of the criminal law, there was no sanctuary in relation to what happens in a dwelling house—and nor should there be. He felt that that should be the case in regard to hate speech, too.

11:45

We also heard from Dr Andrew Tickell, who made essentially the same point—that the criminal law does not stop at the doors of the dwelling house—although he recognised, for example, that common-law breach of the peace requires a public

element. Taking that evidence into account, would the cabinet secretary be prepared to consider an amendment to the effect that, at the very least, there would have to be some sort of public element to the conduct at issue?

Humza Yousaf: I preface my remarks by saying again that I will give serious consideration to an amendment lodged by any member or a recommendation in the committee's stage 1 report.

Listening to the evidence from the legal experts that Annabelle Ewing has just mentioned, and the evidence from the operational partners, I found that the majority of them were robust in relation to concerns about a so-called dwelling defence. Annabelle Ewing has quoted some of that evidence. It is also important to say that Police Scotland noted that it is not unusual to see crimes of such significance that although they occurred in the home, there could not be a dwelling defence. In Police Scotland's view, a dwelling defence should not apply. There were a number of views from the legal fraternity as well as from the operational partners, and they did not agree with a dwelling defence.

However, I take the point that a number of stakeholders wish to see a dwelling defence. I have met many of them, including the Christian Institute. I will continue to listen to the arguments on the question of there being a public element to any offence. I would be interested to see how that could be defined. Annabelle Ewing mentioned breach of the peace as an example. If an amendment were lodged in that respect, I would consider it.

The area where I can see the most persuasive argument for some sort of safeguard would be around the offence of stirring up racial hatred, where the threshold continues to be "likely"; it does not require intent only. At the moment, the offence also has the "insulting" threshold—if that is how the bill ends up. If there was one area of the bill where there could be an additional safeguard that I would be open minded to, it would probably relate more to the offence of stirring up racial hatred.

Annabelle Ewing: It is encouraging to note that the cabinet secretary will reflect further on the issue should the committee wish to make a particular point. As a matter of information, in respect of the evidence given by Dr Tickell, the relevant case on the public element of common-law breach of the peace is Harris v HMA, which was decided in 2009. I am sure that the cabinet secretary's officials are aware of that, but they might wish to study it in greater detail.

The Convener: I have a couple of supplementary questions before I bring in John Finnie, who has questions on a different area.

Cabinet secretary, the proposed amendments that you announced today were trailed in the Sunday press and, in particular, in an interview that you gave to Dani Garavelli in *Scotland on Sunday*. I hope that I am quoting from that article correctly. It said that the bill

"could not—as some have claimed—be used to target dinner table conversation",

but it could be used in relation to events organised in a private home. I cannot remember now whether that is an exact quotation or a paraphrase of what the article said, but is it your understanding that the bill

"could not ... be used to target dinner table conversation"?

Humza Yousaf: It depends what is meant by "target". Forgive me, but I would need to check whether that is a quotation.

For me, the bill is not about specifically targeting dinner table conversations. Of course, if someone sitting around the table with 10 mates stirs up hatred in a way that meets the threshold for the new offences—in that the behaviour is threatening or abusive, and is an attempt to stir up hatred—and that can be proven beyond reasonable doubt, they could be prosecuted under the offence. There is no dubiety around that.

The Convener: What you have just said is also my understanding of what the bill would entail, which is different from what was written about it in the papers on Sunday. Thank you for clarifying that. At least we understand the bill in the same way as far as that is concerned.

I have a final supplementary question on the stirring-up offences, which comes on the back of Liam Kerr's question. As you know, the committee has heard evidence about the way in which those who want to argue about the meaning of the word "woman" have been brought to the attention of the police on the basis of that being a hate crime. I ask a straightforward question: could the bill, if enacted in its current form, be used to criminalise the expression of the opinion that biological sex is immutable?

Humza Yousaf: No. It may be an opinion that is offensive to some or controversial to others; for many others, it may be absolutely the mainstream view. However, simply expressing the opinion is not in itself criminal. If it is proved beyond reasonable doubt that the behaviour that accompanies that expression was intended to stir up hatred and was also threatening or abusive, a person may well face a criminal sanction. That would not be down to the perception of any particular victim or individual in society, but would

follow an objective analysis by the courts. Therefore, expressing an opinion by saying that a trans woman is not a woman would not in itself lead to a prosecution under the legislation.

The Convener: What if someone was not merely expressing an opinion but campaigning for the position to be understood that biological sex is immutable? Are there certain circumstances in which you can imagine such campaigning being prosecuted? Unless we take great care to ensure that the term "abusive" is objectively and not subjectively understood—and you are resisting a proposed amendment at the moment—might campaigning on a position that says that biological sex is immutable be caught by the terms of the bill?

Humza Yousaf: I do not think that you are doing so intentionally, but you are not referencing the second part of the objective test, which is that there has to be an intent to stir up hatred. Even if someone could argue that a course of behaviour was abusive, under the bill, that in itself would not be enough to lead to a stirring-up offence. It would have to be proven beyond reasonable doubt in a court of law that the behaviour of that person or organisation was intended to stir up hatred. If someone is campaigning in a non-threatening and non-abusive manner, without the intent to stir up hatred, I do not see how that would be captured as an offence under the bill.

The Convener: Thank you—that is helpful. I will pass over to John Finnie, who has been waiting patiently, as he always does.

John Finnie: I want to ask about the continued use of statutory aggravations, which has been widely welcomed. We all want to do our very best, and we are keen to ensure that there are no unintended consequences and that we do not miss anything out. On the question of age, you might be aware of the generality, if not the detail, of work commissioned by the Justice Committee following our inquiry into elder abuse. The research was undertaken by Dr Hannah Bows of Durham law school. I will quote from it selectively. She says:

> "There is insufficient evidence to support the introduction of a statutory aggravator of 'age' or 'elder abuse' ... absolutely no evidence that violence/abuse against older people is usually, often, or even sometimes committed by offenders who have a hatred of, or hostility towards, older people."

In her report, Dr Bows gives examples from other jurisdictions where that aggravation is barely used at all, or is not used in some instances. Can you comment on that? Of course we want to do our very best, but we want evidence on why that aggravator is included.

Humza Yousaf: Similar to my response to the question on race, I point out that the evidential base is incredibly important, but so, too, are the voices of those who are often impacted. Mr Finnie will have noticed that there was support for an age aggravator right the way through the spectrum of organisations that have an age concern, from Youth Scotland to Age Scotland. The calls and the voices of those who represent the real life experience of people on the ground must be given sufficient weight.

In the current climate in which we live, if we take into account a number of factors, such as the age demographics of how people voted in various referendums, including on Brexit and on Scottish independence, or how the virus and the global pandemic that we are in the midst of has affected younger and older people, unfortunately, it would not be hard to envisage that people could be targeted in an unpleasant or unsavoury way because of their age.

We will continue with an age aggravator in the bill for those reasons. Of course, that was recommended by Lord Bracadale, too. I am always happy to look at evidence papers, and the committee will make stage 1 recommendations, but I would be keen to keep the bill as it is in relation to an age aggravator at this stage.

John Finnie: I will raise another, linked issue. Lord Bracadale recommended that the Government consider the creation of an aggravation covering exploitation and vulnerability. His view is that that would not fit into the scope of hate crime and should be looked at separately. The policy memorandum says:

> "In the longer term, the Scottish Government will consider whether there should be reforms to the criminal law to improve the protection available to people who may be at increased risk of becoming victims of crime because of their vulnerability".

What gap are you trying to fill, or what gap would be filled by doing that? Can you give examples? Given that this is a consolidation bill, is it the vehicle to address any gap that you are seeking to fill?

Humza Yousaf: Forgive me if I am misunderstanding John Finnie's view, but he and I perhaps have different interpretations of what Lord Bracadale said. My understanding on the question of vulnerability is that Lord Bracadale thought that the issue of people being exploited because of their vulnerability should be looked at, but not in the framework of hate crime—I see John Finnie nodding at that. Lord Bracadale did not view that as hate crime per se, but he believed that people can be targeted because of their perceived vulnerability. I would align myself with his opinion. He asked the Government to look at that outwith the hate crime framework. I am happy to do that.

Vulnerability should be considered, but, frankly, I need to get this hate crime bill through the door and passed through the Parliament.

On the age aggravator, that is about prosecuting someone in relation to hatred because of a person's age—perhaps because of their youth or because they are older. That is different to being targeted due to a perceived vulnerability, which might be because a person is frail, has a physical disability or some other impairment, or because of contextual factors that could make a person vulnerable. Vulnerability is different, which is why Lord Bracadale rightly suggested that that should be viewed outwith the prism of hate crime.

John Finnie: Will the cabinet secretary humour me with the argument that it could be said that age is about arithmetic and that it is a figure? We should be covering what Lord Bracadale talked about—exploitation and vulnerability—rather than something that is simply based on age.

12:00

Humza Yousaf: I accept that some 80-year-olds might look 80 and that some might look a lot younger—or older—than that, and that they might be targeted in different ways because of how they look. However, that does not take away from the fact that there are a number of examples, as I know from speaking to relevant stakeholders, of people who are targeted because of their perceived age—if not their actual age—so it is important to add an aggravator in that regard.

I do not know whether Philip Lamont wants to add to what I said, particularly around the age aggravator.

Philip Lamont (Scottish Government): I do not have much to add. I confirm that, when the vulnerability aggravation was suggested, Lord Bracadale was clear that that was not a hate crime, because it was opportunity, not prejudice, that motivated it—the doorstep scam is an example of that. He certainly recommended that the Government should consider it, but not in the context of this bill.

John Finnie: I commend to the cabinet secretary Dr Hannah Bows' research, which is about that issue. If someone is going to snatch a person's handbag, they might do it because of that person's age or they might do it simply because of their propensity to commit a crime of that nature. In the examples of jurisdictions that have an age aggravator, it is not used; it is the principal offence that is dealt with, and age is a factor to be considered in sentencing.

I will leave it there, convener.

The Convener: Thank you, John. I want to pick up on this line of questioning. One of the characteristics that some witnesses have suggested should be considered for inclusion in the bill is that of homelessness. It is not clear to me whether offences against those who sleep rough on the street are offences that are motivated by prejudice or by vulnerability. It might be that categories exist wherein vulnerability and prejudice overlap and are not quite so clearly distinguished. Have you considered whether homelessness ought to be added as a hate crime characteristic?

Humza Yousaf: It was considered. Lord Bracadale refers to it in his report and he makes what I think is quite an important distinction. I do not disagree with what you say, convener—there can be characteristics wherein an overlap potentially exists in relation to vulnerability and other factors.

However, hate crime and the protected characteristics that we have are different to the societal or socioeconomic factors that can change over time—and we often hope that they do change over time. You and I, and all the other MSPs around this table—virtually or otherwise—have people who are homeless come to us regularly. We do our best to get them a house and a secure tenancy, so that, we hope, they can move on from that homelessness status.

I cannot do that with my race or religion; it is difficult to do so with a disability and so on. Socioeconomic factors will often change, so they are different to the protected characteristics that we have in place. I am again willing to take this conversation further if the stage 1 report and other stakeholders recommend that we do.

Rona Mackay: My line of questioning throughout these sessions has been on race, but I think that we covered that extensively at the start of the session. I agree with the cabinet secretary that the removal of the word "insulting" with regard to race would, in essence, dilute the bill and send out the wrong message.

Does the cabinet secretary agree that the purpose of the bill, despite a large amount of often misinformed hype around it, is to give reassurance to victims that hate crime of any kind is not acceptable in Scotland and that the law will always protect them?

Humza Yousaf: Ultimately, that is correct. However, I recognise that people have expressed concerns around how far the bill will go in relation to freedom of expression, which I do not dismiss. The bill is about protections from hate crime, but it is also about giving as much reassurance as we possibly can that people's freedom of speech, expression and so on is protected.

I have often said that I do not think that there has to be conflict between the two ideas: they can

work hand in hand and we can get the balance right. People could give few examples of legislatures with almost unfettered freedom of expression—the United States, with its constitution, is probably one of them. However, in many other countries across the world—in the western world and Europe in particular—there is hate crime legislation. It is absolutely vital to afford people protections in relation to hate crime, but I do not want to, nor would I, dismiss people's concerns about getting the balance right in relation to freedom of expression.

The Convener: On the subject of race, if the existing offence of racially aggravated harassment is to be retained, why not consolidate it in the bill?

Humza Yousaf: I am open minded to looking again at section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995. The questioning on that was helpful. Unless I am mistaken, and I am happy to look again at the transcript, I do not think that the question about section 50A was asked of the race groups that you had before you, because it would have been interesting to have heard their perspective.

The only reason that we would not consolidate racially aggravated harassment is because it would not fit in with the hate crime framework. Again, I am happy to pass over to Philip Lamont or Bill Brash to give more detail on that.

Philip Lamont: That is a stand-alone offence. As the cabinet secretary has indicated, if the committee was of the view that it should be retained as part of this set of hate crime laws, that can be considered as a stage 2 amendment.

The Convener: That is helpful.

As no other member wants to ask about race, or about that offence, we will move on to other hate crime characteristics.

Annabelle Ewing: I will turn to the issue that formed much of our discussion with our first panel of witnesses. I do not know whether the cabinet secretary had an opportunity to listen to all or part of that.

As the committee has noted over the weeks, notwithstanding Lord Bracadale's recommendation that the characteristic of sex be included as a hate crime characteristic, thus far it has not been formally included in the scope of the bill. Could the cabinet secretary take the opportunity today to explain his rationale for that? Perhaps he could pick up on some of the points that were raised in our earlier evidence session, if he had an opportunity to listen to it.

Humza Yousaf: I hope that the member will forgive me, but I was at a different committee this morning. I caught some of the evidence session towards the end, but I probably missed the substantial part of the discussion.

In terms of my view on the matter, I hope that I gave an indication in my first evidence session before the committee that I would be open minded to hearing views from committee members, the committee and stakeholders, because I can certainly understand the concerns of a number of stakeholders about the omission of a statutory aggravator in relation to sex.

I could not say whether the committee has definitely heard this evidence, but I am certain that if Emma Ritch and Dr Marsha Scott were giving evidence, they would have pointed to what they believe to be some of the risks relating to such a statutory aggravator, such as how that might be misused by a domestic abuse perpetrator and how—this is a point on which Engender holds particularly strong views—the evidential basis for it is weak.

Ultimately, I have listened to the largest and most established stakeholders when it comes to women and women's rights in Scotland—Scottish Women's Aid, Rape Crisis Scotland, Zero Tolerance and Engender. They were pretty unanimous in their view that a statutory sex aggravator could potentially do more harm than good.

I could have just removed that aspect from the bill and not created an order-making power in that regard, but I was keen that that issue be revisited in greater detail, hence the committee's evidence sessions and the work that the working group on misogynistic harassment will do. I would like the working group to look at that issue. Having spoken to Baroness Kennedy, I know that she is keen to make progress in that regard and to look at the issue. Of course, the order-making power in the bill would allow the aggravator to be added at any point in the future.

Annabelle Ewing: A lot of the evidence that we heard was interesting, particularly from Emma Ritch, who cited pieces of evidence that I would like to go away and have a look at in more detail in order to get a better handle on the risks that she raised, particularly those of unintended consequences. Of course, we would not want to do anything that would make the situation worse than it is for women. Obviously, the committee will reflect on all those matters.

On the proposed working group on misogynistic harassment, I welcome the announcement that it is to be chaired by Baroness Helena Kennedy. That is a great coup, if I may say so, on the part of the Scottish Government, because her track record speaks for itself.

Can the cabinet secretary share any information about the likely membership and remit of the

group and, in particular, the timescale for its work? A point that emerged clearly this morning is that we do not want to be hanging around discussing the intricacies of the issue in 10 years' time. We need to move forward with some urgency. With that in mind, is the cabinet secretary in a position to advise us on those matters?

Humza Yousaf: I hope that Annabelle Ewing will forgive me, because I will be a little bit coy in that I have appointed Baroness Kennedy to take on the work and it is really important that she directs the work of the working group and that it is free from ministerial interference. Therefore, she should determine the membership.

We have certainly had initial discussions on the remit. I mentioned in my first evidence session with the committee some of the phasing of the working group and what I thought that it would need to consider with regard to the evidence base that it must gather and with regard to the detailed mapping of the law as it stands to determine whether there are any gaps in that area. Thereafter, it will make proposals. However, the detail of the remit and the membership are for Baroness Kennedy to decide.

On the timescale, I agree with Annabelle Ewing. I caught the latter bit of the evidence from the representative of For Women Scotland, when she said that discussions on the issue have happened over the past decade, or even longer, and that she does not wish for them to continue for another decade. That is a reasonable point to make. I can give Annabelle Ewing an assurance that, when Baroness Kennedy and I spoke yesterday afternoon, there was certainly no desire to dither or delay and that we were agreed that the work should progress at pace.

Annabelle Ewing: I thank the cabinet secretary for that answer. We hope—I imagine—that, in the weeks to come, further announcements will be made on all the issues that I have raised with him.

The committee has also heard evidence and differences of opinion on the best approach to variations in sex characteristics. Covid makes it difficult to remember which week is which, but I think that it was last week when we heard views expressed by dsdfamilies—"dsd" stands for differences of sex development—which did not seem convinced that the approach in the bill is the best one. I am sure that you have already seen reference to that in the *Official Report* of our evidence session. Furthermore, dsdfamilies also felt that it had not been given a fair hearing to ensure that its view was expressed. Can you respond to that?

Humza Yousaf: On the latter point, I am happy to continue to engage with any stakeholder, so if dsdfamilies does not feel that we have engaged with it, we can pick that up. I also note that dsdfamilies has provided a written submission, in response to the Justice Committee's call for evidence, so I was very aware of its views on the back of that. Although I absolutely respect its opinion, it is fair to say that a number of stakeholders hold a different view and agree that "variations in sex characteristics" is the right term to use—terminology can be really difficult and challenging, and I have no doubt that we will have further discussions on that—and that there should be an aggravator that covers those variations in sex characteristics.

That does not take away from anything that dsdfamilies said about the need for greater physical and mental health support not just for the children who may be affected by variations of sex characteristics, but for their parents. The two things are not mutually exclusive. We can give that support as well as having an aggravator. We will continue to engage. There may be disagreement about our approach, but that will not prevent us from engaging.

12:15

Annabelle Ewing: I welcome the cabinet secretary's comment that he will continue to engage with dsdfamilies Scotland, which raised issues that go beyond the scope of the bill. I hope that those issues can be given consideration because I am aware that the organisation has been raising them for quite some time.

The Convener: There are several members waiting to come in, but Liam Kerr has a brief supplementary question. Is it directly on the same topic, Liam?

Liam Kerr: Yes, it is about the terminology. You may have heard me ask this question earlier, cabinet secretary. Section 14(6)(b) of the bill talks about persons of "a different sex", but the Offences (Aggravation by Prejudice) Scotland Act 2009 and the Equality Act 2010 refer to persons of "opposite sex". Why is there a difference in terms? Would it be better to use "opposite" for consistency and to avoid the inevitable legal argument that something different is meant by the use of the word "different" as opposed to "opposite"?

Humza Yousaf: My officials will jump in and tell me if I am wrong, but "a different sex" was the term that was used in the Marriage and Civil Partnership (Scotland) Act 2014. I will double check that. As you say, terminology changes and evolves. The issue is that "opposite" would suggest that there are only two options—A and its opposite, B—but that might not fit people who are non-binary and who do not feel opposite to a male or opposite to a female. The term "different" is

seen by equality organisations as being more inclusive, particularly of non-binary people. That is why we are using the term. I would be happy for any of my officials to come in to add to that point.

Bill Brash (Scottish Government): What the cabinet secretary has said is correct. Rachael Wilson may want to come in on that.

Rachael Wilson (Scottish Government): I do not have much to add. However, I would clarify that the Marriage and Civil Partnership (Scotland) Act 2014 uses the term "mixed sex" rather than "different sex", although the principle is the same. I note that the Equality Network and Stonewall Scotland were supportive of the move away from the term "opposite sex" and towards a more inclusive approach, just as the cabinet secretary suggested.

Humza Yousaf: I am sorry—the term "mixed sex" was used in the Marriage and Civil Partnership (Scotland) Act 2014. Different terms are used in different acts, and I understand Liam Kerr's concern about the potential for confusion, but the term "different" has been used because it is seen as being more inclusive of non-binary people.

Liam Kerr: I am grateful for that answer.

The Convener: Liam McArthur has a supplementary question on the appointment of Baroness Helena Kennedy.

Liam McArthur: I join others in welcoming the appointment of Baroness Kennedy. I have no doubt that she is absolutely the right person for the job and will pull together the remit and membership in a way that can give us confidence that the issues will be drilled into. The concern, which was raised with you when you last appeared before the committee, cabinet secretary, is the timeframe. I hear what you are saying about Baroness Kennedy getting things done without undue delay, but the concern across the committee is the level of oversight that the Parliament will have of any recommendations that are made. Although I am certain that those recommendations will be well founded, I am sure that you will accept the real need for Parliament to be engaged in robust scrutiny of the proposals, given their significance and potential ramifications.

Humza Yousaf: I completely accept the concerns that Liam McArthur raises. As the bill stands, we are proposing an affirmative procedure. We could possibly consider a superaffirmative procedure, whereby there would also have to be a consultation, if an order-making power were enacted. There is scope to consider the issue further, in order, I hope, to address concerns that members may have about parliamentary scrutiny.

Liam McArthur: The ability to take evidence and to test the proposition as fully as possible will be essential, so I welcome that assurance. We will probably have to return to that.

The Convener: Still on the topic of hate crime characteristics, John Finnie, Fulton MacGregor and Bill Kidd have questions. I will take them in that order.

John Finnie: Thank you, convener. As my colleagues have questions, I will ask just one specific question, on something that the cabinet secretary might be aware of. It relates to calls from the Equality Network, BEMIS and others for

"a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland, and any other relevant duty bearers to develop a bespoke system of hate crime data collation and disaggregation across all characteristics covered by the Hate Crime and Public Order (Scotland) Bill."

We have heard about the importance of that throughout our evidence taking. Are you considering developing such a bespoke system?

Humza Yousaf: To answer briefly, I am very sympathetic to the proposal. However, as I have said before in response to questions from committee members, there could be an implication with regard to information technology systems for our stakeholders—Police Scotland and the Crown Office and Procurator Fiscal Service, in particular. That might come at some financial cost, which we would have to factor into any revised financial memorandum. Therefore, the implications of such a system for disaggregated data and the potential for a legal duty on disaggregated data in the bill are being discussed with partners, and I am open minded about further consideration of the matter.

Fulton MacGregor (Coatbridge and Chryston) (SNP): The cabinet secretary will be aware that the Scottish Commission for Learning Disability has called for specific recognition of learning disability in the listed characteristics. What are your views on that? Have you heard the evidence that the committee received on that? On a similar point to John Finnie's question, even if it is not listed as a separate hate crime characteristic, do you agree that disaggregated data for hate crime focused on different types of disability should be available?

Humza Yousaf: Learning disability is covered by the current definition of "disability", so we do not need a separate category. The definition of "disability" in the bill includes

"a physical or mental impairment of any kind."

Therefore, a separate category is not necessary. On the second point, I go back to what I said to John Finnie. We need a greater level of disaggregation, which should include, but not be

limited to, disability. We will reflect on that and continue to have conversations with stakeholders.

Fulton MacGregor: I apologise for the wee bit of doubling up on the questions. On my second question, I asked you about this on your first appearance before the committee, cabinet secretary, and, now that we have heard all the evidence, I wonder whether your view is the same. Is the Government open to considering the possibility of adding further hate crime characteristics? The convener has already spoken about homelessness, but the committee has also been asked about refugees and asylum seekers. I will give you the opportunity either to reiterate your point from the first evidence session or to say that the Government is reconsidering the matter.

Humza Yousaf: My view on that is the same. Of course, we always continue to reflect on the evidence, but, as things stand—and Lord Bracadale referred to this in his report—the existing definitions cover asylum seekers and refugees. Therefore, at this stage, I do not see the need for a separate aggravator.

Fulton MacGregor: Thank you. I have no more questions, convener. I apologise to Bill Kidd if I have taken up time on issues that he wanted to speak about.

The Convener: Do you want to add anything, Bill?

Bill Kidd: No, that is fine—and there is no problem, Fulton. These are incredibly important issues and, whoever brought them up, what matters is that the committee got decent answers. Thank you.

The Convener: In that case, we will move on.

Liam Kerr: I want to turn to costs—something that I have explored throughout our evidence sessions. As a prelude to that, cabinet secretary, I noticed that, in your answer to John Finnie, you talked about a need to revise the financial memorandum.

You will recall that, the previous time that you appeared before the committee, I asked about the costs to the Scottish Courts and Tribunals Service. I understand that there was a meeting on 9 September between the SCTS and the Crown Office and Procurator Fiscal Service to resolve issues on recording offences aggravated by prejudice against particular characteristics. What are your thoughts on the outcome of the meeting? Are you content that costs are sufficiently accounted for?

Humza Yousaf: Let me make it clear that a revised financial memorandum is nothing unusual—for example, after stage 2 amendments have been passed that change the nature of a bill and increase the financial burden on organisations or, indeed, the Government. When I talk about a revised financial memorandum, it is in the context of the normal course of a bill's passage, and particularly stage 2.

To answer your question I would need to look at the notes of the meeting, but I can tell you that I speak to the Scottish Courts and Tribunals Service at least every fortnight and that I raised those matters with the chief executive, Eric McQueen, earlier this month. He gave me a strong indication that they are being resolved well by the implementation team at SCTS and the Government and that he does not think that there are any significant issues. Clearly, everyone is waiting to see how the bill is amended at stage 2, which might have implications for that discussion, but Eric McQueen certainly seemed to be in a more positive place.

Liam Kerr: On a similar point, it is obviously important—regardless of how the bill is amended—that the police and others who apply the law get appropriate training. The other side of that, which I think came up earlier, is that the public need to understand what the bill says and what their rights and responsibilities are. What discussions has the Scottish Government been having with the various agencies in that regard?

Humza Yousaf: We speak extensively to Police Scotland about the implications of the bill, including for training and IT systems. Your point is well made, and it is worth reminding ourselves that the vast majority of hate crime will still be prosecuted under the statutory aggravations in various parts of the legislative framework—with the exception of age, which is the aggravator that we are adding. The vast majority of hate crime is investigated and prosecuted under the statutory aggravation model, so we would not see a need for particular additional training—although that is not to say that there will be no training; I think that there will be some.

I was persuaded by the answer that the committee received from Police Scotland on the matter and by Police Scotland's evidence to the Finance and Constitution Committee when it said that it had had positive discussions. I am keen to speak again to the Scottish Police Federation. I spoke to the SPF shortly after I announced changes to the bill on 23 September, and I had a further conversation with it thereafter—forgive me, but I cannot remember the exact date. As the bill progresses and, potentially, is amended, I will be keen to continue conversations with trade unions and the SPF as well as with Police Scotland.

Rona Mackay: We know that the underreporting of hate crime is a problem. What is the Government doing to tackle that? Are there public awareness campaigns? Separately, what support is available for victims of hate crimes?

12:30

Humza Yousaf: I have always accepted that legislation will not, in itself, rid Scotland of hate crime, which I hope is a goal that we would all associate ourselves with. Legislation is one part—albeit an important part—of a suite of measures that we can use to tackle it and build a much more inclusive and equal society. I am talking from personal experience as someone who has been the target of hate crime, against which there was a recent successful prosecution. Legislation is important but, in itself, it will not solve the problem.

Education is hugely important, and we need to continue with our marketing campaigns, which address people's prejudices. Our letters from Scotland hate campaign was relaunched in October—you might have seen it displayed on the sides of bus shelters or on billboards. The money that we invest in education is hugely important. I have seen great examples in my constituency of a number of organisations such as Show Racism the Red Card going into primary school and high schools and making a big difference.

In short, legislation, in itself, will not resolve the issues or eliminate hate crime, so we will continue to invest in education programmes and marketing campaigns to raise awareness of the issue.

The Convener: I do not think that other members have any additional questions—those who are in the room should catch my eye, and those who are not should catch my attention via BlueJeans, should they wish to do so.

I will ask you a couple of questions about timetabling before we finish. There is huge public interest in the bill, which is understandable for all sorts of reasons. You have now twice come to Parliament to announce that you propose to make amendments to the bill at stage 2, and the committee is working as hard as it can to meet the Government's preferred timetable for the bill. Given those three aspects, assuming that our stage 1 report is published by 11 December, can you commit today that the Government's response to the report will be published in advance of the stage 1 debate in Parliament, which is scheduled for Tuesday 15 December?

I know that your officials will not thank me for asking that question, because it means that they will all have to work over the weekend to get that done. However, given how much the bill has changed—at your own hand—and the huge public interest in it, I do not think that it would be appropriate for Parliament to debate the bill until we have seen your response to our stage 1 report. I hope that you share that view and that you will commit to ensuring that your response is published in advance of the debate.

Humza Yousaf: Forgive me, but I do not have my calendar in front of me. However, judging from what you said, 11 December must be a Friday. That would leave us with one working day to respond to what I assume will be a substantial report, given the number of witnesses that you have—rightly—taken evidence from.

Today, you will have from now until 11 December, which is 13 or 14 working days, to draft the report, and we would have one working day to respond to it. I accept your general premise that a lot of the timetabling issues are because of the changes that have been proposed by the Government. However, if I may be so bold, I would urge the committee, if possible, to publish its report before 11 December. The Government's team would be eternally grateful for any extra days that we were given to respond.

If we are given that one day to respond, I will ensure that there is a response. I cannot promise you that that response would be as detailed as it would be if we were given more time to respond. However, we will endeavour to get a response to the report even if we are given just one working day to do so.

I hope that there can be an element of close collaboration between the Government and the committee on the report. I do not doubt at all what you say about how hard you are working. I appreciate the effort that the committee has put in and the number of stakeholders from whom you have taken evidence, which has included indulging me twice. However, if the report can be published before 11 December, the more extra days that we can get, the better.

The Convener: The other way in which to create extra days would be to move the stage 1 debate to later that week.

Humza Yousaf: Yes. Again, we are happy to consider that with the Minister for Parliamentary Business and Veterans. The committee will be aware of my anxieties about the tight timetable, but it is a fair point and we will reflect on it. Even if the timetable is as you have articulated it and there is only that one day, we will provide a response and I will commit to that. It goes without saying that, if we had longer, we could provide a more definitive response.

The Convener: We will collaborate and co-operate where we can, and we will not try to surprise the Government at the last minute or anything like that. That is not part of the committee's agenda. However, it would be inappropriate for the Parliament to debate the bill at stage 1 if it had not heard what the committee had to say and the Government's response to that. We owe that to all the people who have given us both oral and written evidence over the past few

months. We are working at breakneck pace because of the timetable that the Government has set down, so I am glad to have the cabinet secretary's commitment on record that there will be at least some form of stage 1 response from the Government before the Parliament debates the bill at stage 1. Thank you for that.

Humza Yousaf: I am not sure that you have made me popular with my officials, but I am happy to commit to that.

The Convener: I am not sure that I have made myself popular with your officials either, cabinet secretary, but, with all respect to them, that was not my first consideration.

I thank the cabinet secretary and his officials for their time. We will move straight on to the next item of business.

Subordinate Legislation

International Organisations (Immunities and Privileges) (Scotland) Revocation Order 2021 [Draft]

12:37

The Convener: Our next item of business is consideration of the draft International Organisations (Immunities and Privileges) (Scotland) Revocation Order 2021, which is an affirmative instrument.

Does the cabinet secretary wish to make any remarks?

Humza Yousaf: It is important for me to say that the draft International Organisations (Immunities and Privileges) (Scotland) Revocation Order 2021 amends the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to revoke schedule 17 in relation to privileges and immunities that are conferred in respect of the Unified Patent Court. It wholly revokes the International Organisations (Immunities and Privileges) (Scotland) Amendment (No 2) Order 2017, which is the instrument that inserted schedule 17 into the 2009 order. That is being done simply because, given the UK's withdrawal from the European Union, the UK will no longer seek to participate in the unit trade patent or the Unified Patent Court. It would be highly undesirable for any unnecessary immunities to exist in the statute book.

I will not say any more than that. I am happy to take any questions from committee members.

John Finnie: Long-standing members of the committee will know that I often speak on these matters. I understand the place of immunities and privileges in international law and diplomacy, but I absolutely commend—and I appreciate that this is not necessarily at the hand of the cabinet secretary—the word "revocation". I hope to see many such orders appearing before the committee in the days to come.

Humza Yousaf: I am not sure that that is a question. I will allow John Finnie to have his moment on the record.

The Convener: Indeed, I am sure that it was not a question, but I thank Mr Finnie for his comment. No other members have indicated that they wish to ask a question about the instrument.

The next item of business is the formal consideration of the motion on the instrument that we have discussed. The Delegated Powers and Law Reform Committee has considered and reported on the instrument, and it has made no comments.

Motion moved,

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Revocation Order 2021 [draft] be approved.—[*Humza Yousaf*]

Motion agreed to.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the statutory instrument.

Members *indicated agreement.*

The Convener: That concludes the committee's consideration of the instrument. I thank the cabinet secretary and his officials for attending.

Our next meeting will be on Wednesday 25 November at 7 o'clock, when we will meet in private to begin our consideration of a draft stage 1 report on the Hate Crime and Public Order (Scotland) Bill.

12:40

Meeting continued in private until 12:49.

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