OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee (Virtual)

Tuesday 2 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 2 February 2021

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JUSTICE COMMITTEE
4th Meeting 2021, 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)
*Rhoda Grant (Highlands and Islands) (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 ATTENDED:

Johann Lamont (Glasgow) (Lab)
Margaret Mitchell (Central Scotland) (Con)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 2 February 2021

[The Convener opened the meeting at 10:00]

Hate Crime and Public Order (Scotland) Bill: Stage 2

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the Justice Committee's fourth meeting in 2021. We have received no apologies. We are joined by Johann Lamont, Margaret Mitchell and the Cabinet Secretary for Justice, Humza Yousaf. I welcome you all to our meeting.

Agenda item 1 is stage 2 consideration of the Hate Crime and Public Order (Scotland) Bill. Members should have a copy of the marshalled list and the groupings for debate.

This is a fully virtual meeting and we will use the chat function on BlueJeans as the means of voting electronically. When we vote, I will call for members to type Y in the chat function to record any votes for yes and I will do the same in turn for no, for which members will type N, and for abstain, which members will record by typing A. The clerks will collate the results and I will read them out and confirm which member voted in which way. If I make an error, please alert me immediately so that we can correct it. I will take the voting as slowly as we need to so that we all have time to manage everything properly.

The cabinet secretary is joined by a number of officials, who are welcome. I remind them that they cannot speak at this stage, but they can communicate directly with the cabinet secretary.

If we lose the connection to anyone at any point, I will suspend the meeting so that we can try to get them back. If we cannot do that after a reasonable time, I will have to deem that the member is not present and consider with the deputy convener whether we can proceed or whether we need to suspend the meeting for longer.

I intend to take a short break at about 10 past or quarter past 11, and the meeting will not continue beyond half past 12. We are unlikely to finish stage 2 consideration today, which means that we will continue it next week.

If there are no questions about anything that I have just said, we will get under way.

Before section 1

The Convener: The first group of amendments is on freedom of expression. Amendment 103, in the name of Liam McArthur, is grouped with amendments 65, 77 to 79, 117, 81, 82, 82A, 82B and 112. If amendment 117 is agreed to, amendment 81 will be pre-empted.

Liam McArthur (Orkney Islands) (LD): We live in a gloriously diverse world and we are all the stronger because of it. Evidence shows that societies and economies are healthier when every person can contribute, and that means stopping the discrimination that rules many people out of living their lives to the full. Genuine equality of opportunity means equality no matter what we look like, who we are or where we come from.

As a liberal, I believe passionately in freedom of expression, even when the exercise of that freedom can be challenging, unpleasant or offensive, but there are necessary limits on that freedom when it impinges on the rights of others. Freedom of expression does not amount to freedom to erode the rights of others. Establishing its thresholds and limits in criminal law is not easy or straightforward, but we need to meet that fundamental challenge in amending the bill.

I pursued freedom of expression protections with every panel of witnesses that we heard from at stage 1, and such protections have been a priority for me as we moved to stage 2. I welcomed the cabinet secretary's offer to look at how they could be widened and deepened, but I came to the view that that opened up the risk of a piecemeal approach. As the Equality and Human Rights Commission noted, that brings its own problems, which is why I was attracted to the idea of a catch-all freedom of expression amendment.

Amendment 103 reflects such an approach. I note that the Equality Network and the Scottish Trans Alliance both "strongly support the principle" behind the amendment and argue that a freedom of expression provision to cover stirring-up offences generally is preferable to

"singling out certain protected characteristics"

as being more acceptable to criticise.

I fully accept that amendment 103 is flawed and requires further refinement, but it provides a basis on which to strike the balance that we all wish to see. It has served a purpose by opening up discussions between committee members and the Government, and with key stakeholders, about how such a catch-all amendment could be made to work.

I am aware of concerns that, if we are not careful, the process of arriving at an approach that addresses our collective concerns may lack the

necessary transparency and rigour. Taking further evidence between stages 2 and 3 is almost certainly impractical in the timeframe that is available, which has proved to be extremely challenging for the committee. Nevertheless, a way will need to be found to expose any proposed wording to the widest possible scrutiny and input ahead of stage 3.

Suggestions have been made to improve amendment 103. I am grateful to the Equality and Human Rights Commission for its constructive proposals, which draw on the wording that is used in the Marriage and Civil Partnership (Scotland) Act 2014. That might not suffice, given that we are dealing with criminal law and the additional pressure to provide clarity on scope and application, but it might offer a basis from which to develop something that is more suitable.

On the clarity that is needed, the Equality Network made a reasonable point in observing that no single piece of legislation can be expected to comprehensively list all the things that are not criminal; rather, criminal law is designed to articulate what behaviour is not allowed in our society. That is not straightforward and it certainly still requires clarity, but it is a useful frame of reference. I look forward to hearing the views of colleagues and the cabinet secretary on the amendment.

To turn briefly to the other amendments that are in the group, the approach that the cabinet secretary takes in amendment 65, in relation to age, and amendment 82, on gender, means that I cannot support those amendments, for the reasons that I have set out. The same is true of Liam Kerr's amendments 81 and 82B and, for the sake of balance, of my amendment 82A, which was an attempt to explore an alternative means of addressing the issue. I will not move that amendment.

John Finnie's amendment 117 is interesting. In referring to

"criticism of matters relating to sexual orientation",

it appears less open to being targeted at individuals. I look forward to hearing the thinking behind that approach.

I understand the intention of Rhoda Grant's amendment 112, but I am concerned about the scope that it would allow for actions and behaviour that purport to be

"for the purpose of advocating for women's rights"

but which go beyond anything that I suspect she would wish to endorse.

Notwithstanding what I have said, the cabinet secretary's amendments 77 to 79 do not seem to trigger the same issues as the other amendments in the group do. They appear to be a reasonable response to the overwhelming written and oral evidence that the committee received from a broad range of groups that represent different faiths and religions and the secular community. On that basis, I am comfortable with supporting those proposed changes.

Hate crime legislation should not be used to criminalise good-faith, well intentioned and respectful debate, even when the views that are expressed in that debate are found to be unpleasant, hurtful or offensive. We know that many people have genuine questions about changing the process of gender recognition. The bill should not criminalise such conversations, but there are vulnerable people in the conversations who need and deserve to be protected.

I move amendment 103.

The Cabinet Secretary for Justice (Humza Yousaf): Good morning. I hope that the committee can hear me loud and clear—if not, I have a fetching headset that I am happy to wear if the sound drops off. Please alert me if that happens.

I thank Liam McArthur for his remarks. Members will be aware that the purpose of the bill's provisions on the protection of freedom of expression is to provide reassurance and greater clarity about the boundaries of the criminal law. That reassurance comes through provisions that highlight behaviours that will continue to be legal once the offences of stirring up hatred are implemented.

In particular, transgender identity has repeatedly been cited as requiring new provisions to help to clarify the operation of the new offence of stirring up hatred in relation to transgender identity. I make it clear that, as Liam McArthur said, nothing in the bill prevents robust debate or even criticism of policies such as those contained in the proposals for reform of the Gender Recognition Act 2004, as long as such behaviour does not cross the line into being threatening or abusive and intended to stir up hatred.

Above and beyond the issue of transgender identity, there are clear and compelling calls for provisions across all characteristics. Views differ on how we might best achieve reassurance and clarity. It is therefore incumbent on us all to work together to strike the appropriate balance. It is for that reason that, despite having lodged amendments 65 and 82 in the group, I advise the committee that I will not move either of them, because it is clear that there is no agreement yet on the best approach. I thank Opposition members, with whom I have engaged over the past few days, for agreeing to take a collaborative approach to finding a solution on which I hope we can all agree in advance of stage 3—one that

gives comfort to those who are concerned about free speech and protects communities from hatred. I have always said that those two aspects are not mutually exclusive.

I intend to move amendments 77 to 79, which are on religion, for reasons that I will explain and to which Liam McArthur alluded.

It is apparent that there is a lack of consensus on how to approach freedom of expression protections—that much is clear from reactions to the amendments that have been lodged on the subject. That is exemplified by amendment 82A, in the name of Liam McArthur, and amendment 82B, in the name of Liam Kerr, which have both been lodged to adjust my amendment 82 but which take radically different policy paths.

Following discussions in recent days that have involved all of us who have lodged amendments on freedom of expression, I think that it is right that we should take time between stages 2 and 3 to reflect on the amendments and see whether we can develop a collaborative approach that produces a set of provisions that will command support across the board.

Notwithstanding my intention not to move amendments 65 and 82, I will offer a brief commentary on them, as well as speaking to the other amendments in the group. Amendment 103, which we just heard about from Liam McArthur, would add a general provision on the protection of freedom of expression that applied to all protected characteristics that the bill covers. It would also make it clear that nothing in the bill affects a person's rights under article 10 of the European convention on human rights.

I do not doubt that amendment 103 is well intentioned. Subsection (1) of the proposed new section would apply across the characteristics and is the type of freedom of expression protection that is likely to inform the solution that is necessary. However, as Liam McArthur recognised, there are technical and policy concerns about how the amendment would achieve the aim, which I will explain briefly.

The most important issue with subsection (1) of the proposed new section is that it appears to disapply the operation of the stirring-up offences, because it provides that

"nothing under this Act should prohibit discussion or criticism in relation to characteristics".

The policy on offences of stirring up hatred is such that, if discussion or criticism of characteristics amounts to behaviour or material that is threatening or abusive and is intended to stir up hatred, the bill will prohibit such discussion or criticism.

The practical effect of subsection (1) of the proposed new section is that a person could discuss or criticise race or religion in a threatening or abusive manner, with the intention of stirring up hatred against Jews, Muslims or black people, but no offence would be committed. I know that that is not what Liam McArthur seeks to achieve through amendment 103. It is likely that, ahead of stage 3, a provision could be developed that is capable of providing for certain types of behaviour or materials that are not solely to be taken to be threatening or abusive in relation to characteristics that the bill covers.

I have concerns about subsection (2) of the proposed new section in amendment 103. Liam McArthur touched on them; they are largely about what subsection (2) would do to the compatibility of the bill's provisions with ECHR rights, while not providing additional guidance on the boundaries of the criminal law. That could create unwelcome legal uncertainty. Although provisions in other legislation might well mirror what is in subsection (2), Liam McArthur was right to point out that there are different thresholds and implications for criminal law versus civil law.

10:15

We can use Liam McArthur's amendment 103—particularly subsection (1)—as a potential starting point for any consideration between stages 2 and 3 of a broader freedom of expression provision.

I will move amendments 77 to 79, which are on religion. There should be a minimum standard of freedom of expression protection for characteristics that the bill covers—as I said, I have agreed to work on that collaboratively with colleagues. However, to draw on the consensus about specific protections that relate to religion, there should be additional protections, which my amendments 77 to 79 will provide.

As I have stated throughout scrutiny of the bill, the Scottish Government recognises the importance of balancing freedom of expression with people's right to be protected from hateful speech—those aims are not mutually exclusive. I am aware of concerns that have been expressed about the extension to religion of the stirring up hatred offence and about the perceived likelihood that self-censorship might arise in relation to the right to express views about faith or discuss and debate religious matters. That is not the bill's intention.

It is important to recognise that the right to freedom of expression is not without limit. We must strike an appropriate balance between respecting rights of expression and protecting victims sufficiently. For characteristics that the bill covers, we will work together to achieve effective

protection that can be considered at stage 3. However, additional protections for religion are needed, and I am comforted that many witnesses and stakeholders, including those from faith groups such as the Catholic church, have indicated that the current provisions in section 11 could usefully be aligned more closely with the equivalent provisions in English and Welsh legislation under the Public Order Act 1986. In effect, that is what amendments 77 to 79 will do. I will move those amendments and I ask members to support them.

As I indicated, I will not move amendments 65 and 82. However, I will explain why they were lodged, because I wish to put on the record how the general approach to protecting freedom of expression in relation to the characteristics that amendments 65 and 82 cover could be capable of application to all the characteristics that are in the bill.

Amendment 65 would insert after section 10 a new section to provide for freedom of expression in relation to the characteristic of age for the purposes of the stirring up hatred offence in section 3(2). Subsections (1) and (2) of the proposed new section provide that

"for the purposes of section 3(2) ... Behaviour or material is not to be taken to be threatening or abusive solely on the basis that it involves ... discussion or criticism of matters relating to age, whether relating to age generally or to a particular age or age range."

Amendment 82 would insert after section 12 a new section to provide for freedom of expression in relation to the characteristic of transgender identity for the purpose of the stirring up hatred offence in section 3(2). The approach that the amendment takes is similar to that for the age characteristic, which I just spoke about. There are two amendments to amendment 82, which I have touched on.

Amendments 117 and 81 would adjust the protection of freedom of expression provision for the characteristic of sexual orientation in section 12. Amendment 81, in the name of Liam Kerr, would add to the protections a new specific matter relating to the sex of parties involved in marriages. I say without pre-empting him that, after a constructive discussion, I understand that he has agreed not to move his amendment, which I welcome.

I have had constructive dialogue with John Finnie on amendment 117, which would largely remove section 12(2) and replace it with a protection in respect of

"discussion or criticism of ... sexual orientation."

The existing provision is more focused on sexual practices and conduct, which would still be covered by amendment 117. On balance, and in line with what I hope and expect will be a collaborative approach ahead of stage 3, I ask Mr Finnie not to move the amendment.

I also hope, in the light of constructive engagement that she and I have had in the past few days, that Rhoda Grant will not move amendment 112. It has been clear from scrutiny of the bill that protection of freedom of expression is a key element of its overall safeguards. Such provisions play an important role in reassuring people and in providing clarity about the boundaries of the stirring-up offences.

Amendment 112 relates to protection of freedom of expression for those who advocate for women's rights. It is important that the bill does not inadvertently cause anyone who wishes, in a non-threatening and non-abusive manner, to discuss or criticise matters that relate to women's rights to feel that they must self-censor because they fear that they might commit an offence. I recognise that many women with sincerely held beliefs are concerned that they would have to self-censor because of what is in the bill. That is absolutely not the bill's intention. I am committed to providing reassurance through what I hope will be a broad freedom of expression provision that applies to all the characteristics, which will give comfort to the many women who have raised such concerns. The fact that the new offences can be committed only when the behaviour is threatening or abusive and—if my amendments 1 to 4, in a later group, are agreed to—when it is intended to stir up hatred is an important safeguard.

Under amendment 112, if behaviour or material was threatening or abusive and was intended to stir up hatred in respect of any characteristics in the bill—such as race, religion or transgender identity—that would be permitted if it was in the context of advocating for women's rights. I cannot support that. I know that Rhoda Grant's amendment is well intentioned, but it is deeply flawed. It could mean that, under the guise of protecting or advocating for women's rights, somebody could engage in racism, homophobia, Islamophobia or antisemitism, which I know is not Rhoda Grant's intention. The issue will be covered by the freedom of expression provision that I mentioned. I have had constructive dialogue with Ms Grant and I hope that she will agree not to move amendment 112 and to work with other members to develop a broader freedom of expression provision that covers all the protected characteristics.

My door has been open and it remains so. I will continue discussions with a wide range of stakeholders and with the Opposition to ensure that we lodge a freedom of expression provision at stage 3 that commands as much support as possible across wider society. People expect us to

work together to rise to the challenge, and I am sure that we can.

The Convener: Thank you, cabinet secretary.

I call John Finnie to speak to amendment 117 and the other amendments in the group.

John Finnie (Highlands and Islands) (Green): We have already heard about the worth of our system of scrutiny, which builds on the committee's stage 1 report. The cabinet secretary said two key words. We all want "reassurance" on freedom of expression; we also want absolute "clarity" about what the law does and does not say.

We all know that, with any legislation that includes a list, questions are immediately raised about what is not on the list, or what should be on it. My amendment 117—which was added to our list—takes the same approach in relation to sexual orientation as amendment 65 takes in relation to age and amendment 82 takes in relation to transgender identity.

Amendment 117 would make a significant improvement to section 12. It would remove what the Equality Network referred to as the "laundry list". There are some unpleasant things on that list—I refer to the removal of language relating to conversion therapy, for example. I am delighted that amendment 117 would have pre-empted amendment 81, whereas amendment 82B may be a case of least said, soonest mended.

However, it is clear, even this far into the debate, that a general provision on freedom of expression would be preferable. To that end, I align myself with the comments of both members who have just spoken—in particular, those of my colleague Liam McArthur on his amendment 103. Such a general approach would not single out protected characteristics, which would make it more acceptable to some people.

We know that words are important. We want robust provision for freedom of expression, but we also want clarity on hate crime so that there is no dubiety about what constitutes such crime. There is undoubtedly a danger that, if we get the legislation wrong, it would embolden would-be perpetrators and reinforce the idea that lesbian, gay, bisexual, transgender and intersex people are, for some reason, less valuable than others.

I thank all those who have submitted briefings. The Equality Network's briefing has been helpful. It talks about

"a chilling effect on ... confidence",

which cannot be underestimated.

Many people who are able to see things over the longer term understand the advances that have been made in people's outlook, largely due to education rather than legislation. We want no regression in that regard whatsoever, but I fear that there is the potential for that to happen. The willingness of all parties to engage in discussions on that can—I hope—sort the matter out.

I will not say much more, other than to highlight the lack of precision in the drafting of amendment 112. I know that my colleague Rhoda Grant would never condone stirring up hatred, but amendment 112 is clumsily worded, and I will not support it.

On the cabinet secretary's remarks about religion in relation to his amendments 77 to 79, I will lend him my support. We heard in committee that there is strong support for such an approach, and it is important that that is reflected in the legislation that is passed.

I hope that the collaborative approach to which members have alluded will continue, because that is how we make the best legislation. Our obligation is to make good law, and we do that when we work together.

Liam Kerr (North East Scotland) (Con): I have two amendments in the group on freedom of expression.

Given my contributions to both the debate that I brought to the chamber and the debate at stage 1, it is no secret that I think that the stirring-up offences and protections in part 2 suffer from real challenges. As I set out clearly in those debates, were it up to me, we would have taken those elements out of the bill in order to deal with them separately, outside the extraordinarily truncated timetable facing us.

However, we are where we are. It is my firm belief that if the Government insists on putting limits on freedom of speech, it has a duty to make absolutely clear, without ambiguity, what those limits are. That is the clarity and precision that John Finnie rightly talked about.

Pretty much all my amendments start from that position. They try to make the bill as tightly drafted as it can be, not only so that it protects those people whom it seeks to protect, but so that it does not inadvertently create grey areas and uncertainty. The bill must be clear and unambiguous to ensure that those who require protection get it and those who wish to exercise freedom of expression are able to do so and know precisely what the limits are. The cabinet secretary said that nothing in the bill will criminalise certain things, but people need to be clear on that.

Here is the situation in which we find ourselves. All colleagues have been required to draft and lodge amendments, and are now required to debate them, in an extraordinarily tight window. I believe that we all recognise our duty to make the bill as good and as workable as possible—after all,

that is the purpose of amending it—so that we ensure that the coverage, and the protections that are required, can be made to work.

The cabinet secretary articulated his view that the aim of the amendments on freedom of expression may be more productively achieved through reflective, collaborative working, whereby all MSPs can articulate what we seek to achieve, work with stakeholders and ensure that whatever mechanism we use to protect both the protected categories and freedom of expression works.

Liam McArthur mentioned the briefing from the Equality and Human Rights Commission. I noted that briefing too, because it rightly suggests that there exists the risk of a piecemeal approach. This debate takes us towards that approach.

There is merit in many of the amendments in the group, but, as other speakers have articulated, there are challenges and limitations to all of them, and we have to get this right. I am persuaded by that; I think that there must be merit in members working collaboratively, but transparently and openly, in order to come up with an amendment or amendments that tighten the bill appropriately and ensure that the protections that are needed work.

10:30

In his remarks, the cabinet secretary articulated that certain things are absolutely "not the intention" of the bill. That may be, but it is imperative that intention is translated into legal certainty—the "absolute clarity" that John Finnie referred to.

For those reasons, I shall not move amendments 81 and 82B today. I look forward to working with colleagues and stakeholders to make the bill as good as it can be.

The Convener: Thank you. I call Rhoda Grant to speak to amendment 112 and the other amendments in the group.

Rhoda Grant (Highlands and Islands) (Lab): I understand the evidence that was received from Engender and other organisations, and what they say about hate crime against women being based on a power dynamic that is different from the hate crime that is suffered by minority groups. However, I still believe that leaving misogyny out of the bill could leave women at a disadvantage, because it could be deemed hateful to stand up against misogyny, yet the person doing that could have no protection at all.

My amendment 112 is not a general freedom of expression amendment; I lodged it in order to put some protection in the bill for a group that is subject to hate crime that is not covered by the bill. I understand that the power exists to add misogyny to the legislation at a later date, but I am keen that women get protection from the start, even if that protection is removed when we later legislate against misogyny.

I know that my amendment does not achieve what I was looking for it to achieve, and the last thing that I want to do is provide a loophole. I lodged it as a probing amendment, with the aim of hearing the thoughts of the cabinet secretary and the committee, and with a view to lodging an amendment that provides that protection at stage 3.

I am attracted to Liam McArthur's approach of having a more general freedom of speech protection, but I want to see some balance in the bill that gives protection against misogyny.

I am grateful to the cabinet secretary for the discussions, and I want to be part of future discussions with him, with committee members and with all stakeholders to get the bill right. I believe that we have just one chance to do that, and we need to make sure that it is right for everybody concerned.

I will not move amendment 112, and I look forward to working with others on the issue.

The Convener: Thank you. Before I call Fulton MacGregor, I want to add a few words of my own to the debate, given the importance of the subject matter and the centrality of this question to the committee's stage 1 report.

All the conclusions and recommendations in our stage 1 report were reached and made unanimously. In paragraph 44, we said:

> "The Committee agrees that the right to freedom of speech includes the right to offend, shock or disturb. The Committee understands that this Bill is not intended to prohibit speech which others may find offensive, and neither is it intended to lead to any self-censorship. The Committee is anxious to ensure, however, that these are not unintended consequences of the Bill."

That anxiety is evident in a number of the contributions that we have heard this morning.

I started my speech in the stage 1 debate by reciting some of the American criticisms of the bill, which I have been reading about ever since I first read the bill and which are about why hate speech laws are not the right way to combat hate in society. That is not my view, but I wanted to read the view of those free speech lawyers, advocates and campaigners who take the view, which is commonly taken in the United States, that the way to combat hate is with more speech, not less. Their criticisms of hate speech law really resonate with me as I read and puzzle over the bill.

The criticisms boil down to two: vagueness—that we lack precision when we ban speech or criminalise aspects of it; and the risk of overbreadth. All the amendments in this group seem to have been designed to mitigate those

risks and meet the challenge of how to legislate to criminalise hate speech without falling into the trap of either vagueness or overbreadth.

I want to say a few things about the matter, particularly in the context of the on-going and difficult debate over transgender identity and its role in the bill. The events of the past few days and the reaction to the amendments that have been lodged in this group with regard to transgender identity make it even more obvious that we absolutely must define what we mean.

I have been disturbed by the reaction to what I thought were modest, innocent and perfectly reasonable amendments in the name of the cabinet secretary—particularly amendment 82, for which I would have voted if the cabinet secretary had pressed it. It is clear that the cabinet secretary's carefully chosen words in amendment 82 have caused fear, alarm and distress. I take that fear, alarm and distress seriously, but I have to say that I am alarmed, distressed and, if I am honest, a little afraid of the reaction, or aspects of it, to the amendment.

Yesterday, a leader of one of the parties in the Scottish Parliament tweeted that, in his view, a number of the amendments to the Hate Crime and Public Order (Scotland) Bill that have been lodged were "shockingly overt transphobic ... amendments". We seem to have come to a point at which, if we are going to criminalise hate speech on the ground of transgender identity, we have to define what we mean.

I struggle to find an amendment in this or any other group that I think is a "shockingly overt transphobic" amendment. I do not know whether the MSP to whom I have just referred was tweeting about Liam Kerr's amendment 82B, but

"stating that sex is an immutable biological characteristic"

does not make one transphobic. Does

"stating that there are only two sexes"

make one transphobic? Really? Does using

"'woman' or 'man' and equivalent terms"

or "pronouns" in a certain way make one transphobic? Are we trying to criminalise that sort of speech?

The parties that are represented in the Parliament seem to have reached a sort of conclusion, behind closed doors, that the way forward is to find a generic free speech provision that would be based on, but not identical to, Liam McArthur's amendment 103. I really worry about that.

Given that we are trying to tackle the problems of vagueness and overbreadth, having a generic provision, rather than a series of specific provisions, might not meet the challenge. I do not rule out the possibility that a provision that is based on amendment 103 might turn out to be the solution. However, I want to put down a marker. If the challenge is to combat the problems of vagueness and overbreadth in criminal law, having a generic free speech provision, rather than a series of specific and carefully worded provisions, might not be the solution that some people seem to think that it is.

To put a slightly different gloss on the matter, I have always thought that, in the end, it will not be free speech provisions that do the real work of delimiting and defining the scope of the offences. The words that we use in the bill define the offences. For example, I support the cabinet secretary's amendments in a later group that ensure that the word "abusive" is defined and understood objectively by the insertion into the bill of a reasonable person test. Those amendments are likely to do much more work in practice when it comes to defining and delimiting the scope of the offences than free speech provisions.

I support the collaborative approach—of course I do. However, as Liam McArthur said, we are talking at one and the same time about matters of fundamental principle and about some very vulnerable people. On a subject as sensitive and as difficult as this, that collaborative approach in law making surely has to be in Parliament and in public, and not behind closed doors, with party representatives talking only to themselves.

John Finnie is right that we need absolute clarity in this area of law. I am one of those people who now needs more reassurance about the matter than I did 48 or 72 hours ago, because of some of the things that I have seen written in the context of these amendments. I am less reassured now than I was a few days ago that we will be able to fix this, and fix it appropriately. That is what I wanted to say about this debate.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I will speak about amendments 65 and 82, in the name of the cabinet secretary. I agree with a lot of what the convener said. A reasonable analysis of amendment 82 in particular would quickly determine that it is a well-intended and modest—as the convener put it—amendment to tighten up the bill. As the convener also alluded to, however, that is unfortunately not how it has been interpreted over the past few days in relation to some aspects. It is up to that point that I agree with the convener.

I had some concerns when I first saw the amendment, although not to the extreme extent that we have seen on social media and certainly not about the intention behind it. However, the nine of us on the committee and people who have been following the bill have an understanding of it

that the general public do not in relation to the possible unintended consequences.

We all know that there is a heated debate going on and I was worried that it could lead to further isolation and marginalisation of our transgender community, which is a concern that I have heard. I am glad that the cabinet secretary has said that he will not press the amendment and that we can go back to the drawing board on this—that is definitely the best place to be. I also agree with the Equality Network, Stonewall Scotland and the Scottish Trans Alliance that a broader and more generalised definition that incorporates all hate crime would be beneficial. Although I appreciate the concerns that have been raised by the convener and others, that is the way forward.

Obviously, there must be freedom of expression; we have all agreed on that throughout the committee's scrutiny of the bill, and that has to include all the debates that we have, including the gender reform debate that we are having now. There has to be scope and permission for people to have strongly held views on both sides of that debate.

However, as a committee and as a Parliament, we need to work together to get this right going into stage 3. I agree with the convener's final comments that it will be very difficult. However, it is also a good opportunity, at the end of this parliamentary session, for Parliament to come together and work to find a solution. I am confident that we will be able to do that.

The Convener: For what it is worth, I certainly pledge to work with the cabinet secretary and anybody else, preferably in public, to resolve these issues that it seems we cannot resolve today.

10:45

Rona Mackay (Strathkelvin and Bearsden) (SNP): I agree with Fulton MacGregor's comments, and I want to address a couple of your comments, convener. Everyone on the committee is as one on the fact that we must protect freedom of expression, which is the crux of the bill. Convener, you used the phrase "behind closed doors". I am not sure that I agree with that. The cabinet secretary was clear and open about the fact that he has spoken to party leaders about their amendments, which is normal practice. There was nothing cloak and dagger about that, and he did it for the right reasons. I hope that it will lead to consensus and that we get a good bill.

The other point that I want to make is about being very specific. As you will know, when we start to be very specific about characteristics, we will always get an opposing view, which would not achieve consensus.

The Convener: I ask the cabinet secretary to respond briefly to some of the points that have been made in the debate, before Liam McArthur winds up.

Humza Yousaf: Thank you, convener. I will touch on some of the points that you made. All the contributions that we have heard have been extremely helpful, and I appreciate your reflections, convener, given your expertise in the law. It is a difficult balance for all of us to get right between stages 2 and 3, because we must recognise that there is an obligation on us to be specific and to provide clarity—to come together to find precision where we can. However, as I heard loudly and clearly on Friday when I met stakeholders and, indeed, when I spoke to a number of members across political parties, we must recognise that that focus—being specific—can also lead to some groups feeling as though they are being targeted and marginalised. How do we get that balance right between telling people that they are not being targeted because of who they are and saying that we are trying to create law and give people assurances that are specific? Perhaps we can do that by using the wording of Liam McArthur's amendment 103, which refers to "discussion" and, possibly, we should even think about using the word "criticism", which amendment 103 does, because it is important, in a democracy, that people are allowed to criticise. How do we do that in a way that also does not make any group feel marginalised or targeted? Applying the freedom of expression protection that is set out in amendment 103 to all the protected characteristics might be a way to get round some of the fears that a number of groups have mentioned.

Convener, I take on board your point, and you speak for a number of people who might be concerned about the fact that we are going to withdraw or not move several of our amendments, but I hope that they will take some comfort from our saying that we will come back at stage 3 with, we hope, a freedom of expression protection that will still be robust and strong and provide the clarity and precision that are needed, without making any group feel that it is being targeted. I am happy to leave it there, convener.

The Convener: Thank you for that helpful set of remarks, cabinet secretary. I invite Liam McArthur to wind up the debate on the group and to press or withdraw amendment 103.

Liam McArthur: Like you, I found the cabinet secretary's comments and all the contributions to the debate helpful. The cabinet secretary is right to remind us that the challenge is to create robust protections for freedom of expression that avoid marginalising or targeting individual groups. John Finnie helpfully drew out the concerns about so-

called laundry lists for articulating freedom of expression protections. That is why I chose to take a more generalised catch-all approach in amendment 103.

Liam Kerr was also right to point to the need for clarity in what is being criminalised and in how the intention that we all share—as is clear from the comments that we have heard this morning—is translated into legal certainty. I am grateful to Rhoda Grant for helpfully walking us through the probing nature of her amendment and her concerns about the omission from the bill of sex as an aggravator. I welcome, too, Fulton MacGregor's support for the approach that has been taken to amendments, albeit that that needs to be revised.

I understand Rona Mackay's concern to push back at the notion that discussions are somehow taking place behind closed doors in a way that is not normal practice or—as she referred to it—"cloak and dagger"; I do not think that there is any suggestion that that is what has been done in recent times. The formulation of an approach where there are disagreements between individual members or parties is not unusual.

However, we are now in a different situation—the cabinet secretary has demonstrably reached out to as wide a cross-section of people as he can to see whether there is a way forward, and I commend him again for doing so. Nonetheless, the convener was absolutely right to apply a challenge—not just a free speech critique of hate crime laws and their vagueness and risk of overbreadth, but a challenge to us that, in adopting a collaborative approach, to which we all appear to be signed up, we develop that in Parliament and in public. A way needs to be found to ensure that, as we develop a version of a catch-all freedom of expression amendment that builds on amendment 103 and addresses its flaws and deficiencies, the process is seen as transparent, robust and vigorous, for all the reasons that the convener highlighted with regard to the way in which the debate is playing out.

Again, I appreciate the fact that all members have referred to, and have shown strong support for, a collaborative approach, but there is a risk that such an approach excludes those who are not part of the discussion. We need to avoid that at all costs. I am sure that the cabinet secretary will have heard that loud and clear during this morning's deliberations and will be giving active thought to how we can avoid that happening.

For the time being, I am content not to press amendment 103 and to commit to working with the convener, other colleagues and the cabinet secretary to develop wording that addresses the concerns that have been outlined today.

Amendment 103, by agreement, withdrawn.

Section 1—Aggravation of offences by prejudice

The Convener: The next group is on language of statutory aggravations. Amendment 5, in the name of the cabinet secretary, is the only amendment in the group.

Humza Yousaf: I recognise the importance of accessibility of the language that is used in legislation. The issue of language in the operation of the statutory aggravators has been discussed throughout the scrutiny process. In that regard, part 1 of the bill makes provision for the aggravation of offences by prejudice and provides that a criminal

"offence is aggravated"

if

"the offender evinces malice and ill-will towards the victim ... based on the victim's membership or presumed membership of a group defined by reference to a characteristic"

as listed, or if

"the offence is motivated (wholly or partly) by malice and ill-will towards"

any such group.

Lord Bracadale, in his final report, recommended updating the language in that area to aid understanding, and I have given that careful consideration. Importantly, his recommendation in that regard was not intended to change the applicable legal threshold. That is why we took the decision, on introducing the bill, to retain the existing wording, in order to provide reassurance that the current legal threshold would continue to operate. The approach was informed by bodies such as Police Scotland, which stated that any change to the existing wording, specifically "malice and ill-will", might alter the threshold under which offences aggravated by prejudice are captured.

However, in my evidence to the Justice Committee, I indicated that a potential compromise would be to adjust the language on the threshold so that it talks about demonstrating malice and ill will. That is the effect of amendment 5, which will replace "evinces" with "demonstrates", so that a criminal offence will be aggravated by prejudice if the offender demonstrates malice and ill will towards the victim, based on the victim's membership or presumed membership of a group defined by reference to a listed characteristic.

I am pleased that, in its stage 1 report, the committee supported such an approach, which will aid accessibility of the language without having the effect of lowering the current legal threshold.

I move amendment 5.

Amendment 5 agreed to.

The Convener: Group 3 is on the characteristic of age. Amendment 30, in the name of Margaret Mitchell, is grouped with amendments 43, 86, 87 and 99A. If amendment 86 is agreed to, I cannot call amendment 87, because of pre-emption.

Margaret Mitchell (Central Scotland) (Con): Amendments 30 and 43 would remove "age" from the list of characteristics in the bill. Amendment 86 operates on the basis that if age is removed from the list of characteristics there will be no need for it to be defined in section 14, "Meaning of the characteristics". Amendment 99A would remove from Government amendment 99 the requirement for age as a characteristic to be captured by reporting.

In his review, Lord Bracadale recommended that, outwith the hate crime scheme, the Scottish Government should consider introducing a general aggravation that covers exploitation and vulnerability. The inclusion of age as a characteristic follows on from his conclusion that there ought to be

"a new statutory aggravation based on age hostility."

In his report, Lord Bracadale said that, for a crime to be considered to be aggravated by age hostility, it would need to be

"proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence."

In practice, proving that would be quite a difficult task. In particular, for crimes committed against the elderly, it would need to be determined that the crime was motivated by hatred of the old as a group and the victim's membership of that group, rather than by a desire to exploit the victim's perceived vulnerability because of their age.

The Justice Committee thought that, given the evidence that it received and the conclusions of research that it commissioned, the approach should be based on vulnerability, not age. The committee asked the cabinet secretary to set out, outwith the bill, his plans for dealing with exploitation of people based on their vulnerability. I therefore lodged probing amendments to give the cabinet secretary the opportunity to do just that.

The committee commissioned from Dr Hannah Bows, of the University of Durham, research on elder abuse. She concluded:

"there is no available evidence that older people are targeted as victims of crime ... because they represent the older community."

Furthermore, she noted:

"there is limited reliable evidence that older people are specifically targeted because of hatred and hostility"

towards older people.

11:00

That is key to our understanding of what is a hate crime. The purpose of hate crime legislation is to distinguish between ordinary crimes, as it were, and those that are motivated by hatred or prejudice towards certain aspects of the victim's identity. Hate crime is characterised by the targeting of the victim because of their difference and perceived membership of a particular group towards which the offender is antagonistic. That is why characteristics such as race, disability and sexual orientation are included in hate crime legislation, as they are distinct groups of individuals.

However, although there is recognition that older people are the victims of crime and there are legitimate concerns about how the criminal justice system currently responds to cases in which the victim is elderly—in particular, there are concerns about low prosecution and conviction rates—including age as a characteristic in this bill will not address those issues.

It has been argued that age ought to be included in the bill because other characteristics that are protected by equalities legislation are included. For the sake of completeness, therefore, age should also be captured. However, equalities legislation and hate crime legislation serve different purposes. Equalities law aims to prevent discrimination against an individual, in the workplace and wider society, based on their protected characteristics. Discrimination against older people when applying for a promotion at work, for example, is not equivalent to assaulting someone because of the offender's hatred and malicious feelings towards older people as a group.

The Crown Office and Procurator Fiscal Service stated in its written submission:

"There is a distinction between offences which demonstrate hostility towards someone's age and offences where the accused has exploited someone because of their age and perceived associated vulnerability. The aggravation relating to age in the Bill captures the former"—

that is, hostility—

"but not the latter"—

that is, vulnerability.

The Law Society of Scotland pointed out the difficulty in distinguishing between hostility to someone's age and their perceived vulnerability because of their age. In addition, John Wilkes, of

the Equality and Human Rights Commission, told the committee:

"The commission does not consider that age should be a listed characteristic, as it thinks that there will not be sufficient evidence to meet the threshold for statutory aggravation."—[*Official Report, Justice Committee,* 17 November 2020; c 27.]

The cabinet secretary's amendment 87 will amend the wording of section 14(2) from

"age falling within a range of ages"

to "age range", which I agree is clearer.

However, the inclusion of age as a characteristic in the bill will not serve to address some of the fundamental issues that the justice system faces when the victim of a crime is elderly. Furthermore, evidence heard by the committee noted the lack of clarity on the difference between crimes motivated by a hatred of a certain age group and those that involve taking advantage of someone because of their membership of that age group.

Therefore, age as a characteristic ought not to be included in the bill. Instead, other approaches, outside legislative change, should be considered when it comes to elder abuse and crimes that are based on an individual's perceived vulnerability.

I move amendment 30.

Humza Yousaf: Margaret Mitchell's amendments in this group, when read with amendment 11 in the name of Liam Kerr, which is in a later group, would remove the characteristic of age from the bill.

The bill includes age as an additional characteristic to ensure that hate crime legislation provides sufficient protection against offences that arise from age-related prejudice. It includes a new statutory aggravation in relation to age, as well as new offences that relate to the stirring up of hatred based on age.

The inclusion of age as a characteristic in hate crime legislation will send a clear message to society that those offences will be treated seriously and will not be tolerated. Importantly, the offences cover persons of any age or age range. That means that they do not apply only to older people or children and young people, although it might be that, in practice, offences that relate to the characteristic of age are more likely to be committed against those groups. I note that, during its stage 1 scrutiny, the committee heard from Age Scotland and YouthLink Scotland. Both organisations have said that the people who they support feel targeted because of their age, and both support the inclusion of age in the bill.

Amendments 30, 43 and 86 would remove that protection for people who are targeted on the basis of their age. Amendment 99A would amend amendment 99, in my name, which provides for the publication of reports by police on recorded hate crime, to remove the requirement to report hate crime offences involving age. The number of prosecutions under the characteristic of age might not be high, but I see no reason why that should prevent us from providing that additional protection.

I am aware of concerns around the need to tackle the exploitation of vulnerability, as opposed to hate crime based on age and I note that Margaret Mitchell referenced research by Dr Hannah Bows, who explored that matter in depth. As I outlined in my response to the committee's stage 1 report, the Government is committed to considering whether there should be reforms to the criminal law to improve the protection that is available to people who might be at increased risk of being exploited and becoming victims of crime because of their vulnerability. That is very distinct from hate crime.

Our having age as a characteristic in hate crime law while separately seeking to introduce, at some future date, new criminal law reforms in respect of vulnerability are not mutually exclusive approaches, not least because they seek to achieve different policy outcomes. The addition of age would do no harm—[*Inaudible*.] That is a conversation that we will, no doubt, have later in relation to—[*Inaudible*.] In fact, a number of stakeholders support the inclusion of age as a characteristic.

Therefore, I very much consider that the offences in the bill should apply to age in a way that is similar to how they apply to other characteristics. I ask the member not to press amendment 30 and not to move amendments 43, 86 and 99A. If she does, I ask members not to agree to those amendments.

Amendment 87, in my name, will make a minor change to refine the drafting in section 14 in relation to the meaning of "age", and I hope that members will support it.

The Convener: Thank you, cabinet secretary. No other member has indicated that they wish to speak, so I invite Margaret Mitchell to wind up and press or withdraw amendment 30.

Margaret Mitchell: I note what the cabinet secretary said about the inclusion of age as a characteristic sending out a strong message, but that is a pretty weak reason to include it in the hate crime bill. We are talking about not hate crimes but crimes against young and old on the basis of vulnerability. Dr Hannah Bows said that seeking to recognise and respond to elder abuse through specific criminal offences or by widening access to the hate crime framework to include

older age will neither reduce violence and abuse nor improve prosecution and conviction rates.

I am disappointed that the cabinet secretary did not say more about what the Scottish Government could do to raise awareness and recognition of the exploitation of elderly people, and sometimes younger people—very often through scams—based on their vulnerability. Perhaps there is a need for a holistic approach to the work that is being done under current strategies and for wider work on older people and a broader view of family law with respect to older people.

I hope that the cabinet secretary will reflect on those serious concerns as we move to stage 3. It would be a tragedy if the Government thought that age being included as a hate crime was a done deal and just walked away and forgot about the issue. If the exploitation of vulnerability is not included in the bill, elderly people and younger people who might be targeted will still be vulnerable.

However, as I said, my amendments are probing amendments. I will not press amendment 30.

Amendment 30, by agreement, withdrawn.

The Convener: Before we move to the next group, we will suspend for five minutes, so that we can check on our home-schooling children, or have a biscuit or a cup of tea.

11:10

Meeting suspended.

11:16

On resuming—

The Convener: The next group is on the characteristic of sex. Amendment 31, in the name of Johann Lamont, is grouped with amendments 89, 93 and 95 to 98.

Johann Lamont (Glasgow) (Lab): I have some problems with my connection, so I apologise if people have difficulty following me.

I sent a letter to committee members, which I hope has proved to be useful in providing the detailed thinking behind my amendments. [*Inaudible*.]—wants to include—[*Inaudible*.]—lose the definition of sex that is currently—[*Inaudible*.]—the act—[*Inaudible*.]—fundamental point—

The Convener: I am sorry to interrupt, but we should move Johann Lamont from video to audio only, because I am struggling to hear her. I understand that her connection will be improved if she is on audio only. Please make that change, because we need to be able to hear her arguments.

Johann Lamont: I apologise. I hope that my letter provides enough detail should the connection break again.

If we seek to produce legislation that addresses behaviour that is motivated by hate, it is essential that we address the hatred that blights the lives of women—a group of people that is, of course, in the majority, although that does not prevent misogyny surfacing.

Earlier, I was struck by committee members' anxiousness to find consensus and to be clear about how particular groups should be treated. However, the bill excludes women, and most women have experienced misogyny during their life—that is not a controversial or disputed point. Indeed, those who argue against including sex as a characteristic in the bill are explicit in recognising that that is a reality for women.

I think that that is a matter for us, as legislators. I note that the working group on misogynistic harassment has been established; it can do an important job, but it is not a substitute for a decision to include women in primary legislation.

Amendment 31 would add "sex" as a characteristic, recognising that sex can be a motivator in a hate crime. The amendment would not preclude the working group from doing its job. The group can address any potential challenges and work on improving the situation; it could also propose stand-alone legislation, if it saw fit to do so. However, at the moment, women are excluded from the bill, and that is not acceptable.

The Government has relied on arguments that have been made by Engender and other groups. Those groups should be treated with respect; what they have to say is important. However, other academics, women's organisations and groups have argued, some for a long time, that the hatred of women—misogyny—should be recognised in law. It is not a new idea.

I will briefly touch on some of the arguments that have been made against including sex as a characteristic in the bill. It has been said that that would not be a panacea, and that we need more than simply a signal, such as education. That is true for all the characteristics that are listed in the bill, because no part of the legislation will work unless there is education and public awareness, so it would seem that women are unique in not even being given that signal. The current position is that the Government will invest in education and public awareness, but that women's experience would not be part of that conversation.

There is also an argument—which I understand—that the legislation could be

manipulated by abusers of women. However, that has always been the case. If we were prevented from legislating because abusive men would manipulate the legislation against women, we would not have legislated on stalking, sexual assault, domestic abuse or coercive control. There might be a job for the working group to look at the way in which legislation can be used by abusers against the abused. I note that it might be the case that the legislation could be used against other characteristics, too.

Groups have made the point that we should not use gender-neutral language and that we should name the crime. I recognise that strongly—we should talk about male violence against women and so on. However, the same groups have applauded the Domestic Abuse (Scotland) Act 2018 and called it world leading, yet the 2018 act uses neutral language. Indeed, in the discussion on age, the cabinet secretary has already talked about the way in which the characteristics are described in legislation.

There is also the argument that women are not a minority group and that people find it uncomfortable to have legislation for women because they are not in the minority. However, that fact should give us even greater cause to think that the characteristic of sex should be included. Women are still abused not just in Scotland but globally, despite being the majority.

It is important to understand the experience of misogyny, which should be in primary legislation and decided democratically. That is what Lord Bracadale argued, as have other witnesses. It is clear that, when women are included, they have become more visible in public policy and data gathering. That helps the experience of women to be understood, including in the justice system. We should not be afraid of gathering such information and of better understanding women's lives.

I have a final couple of points. I appreciate that the convener has been generous in the time that he is giving me.

The Law Society of Scotland makes a key point about the importance of education and public awareness campaigns. If we are to have this legislation, it cannot simply be a signal. However, as I said, as the bill is drafted, hatred of women would be absent from the discussion. We cannot afford to be excluded from that discussion, because so many women and girls are affected.

I have heard no compelling argument that there is a risk to including women at this stage; indeed, doing so would treat them with respect. If we accept that women's lives are shaped and limited by misogyny and hatred, we should be clear that that is unacceptable. As more groups are identified and named in the legislation, the absence of women becomes harder to understand.

I hope that the committee will recognise that my amendments are not about making life more difficult. We have the provision of the working group, which can look at some of the concerns that have been expressed. It is a fundamental reality of women's lives that they experience hatred, so I do not understand why a bill on hate crime would exclude women. Whatever the weaknesses of the bill might be, they should apply to all characteristics. I believe strongly that women should be included and I hope that the committee agrees with me.

I move amendment 31.

The Convener: Thank you. I am sorry that we were not able to see you, but we caught clearly what you were saying. Annabelle Ewing, Rhoda Grant, John Finnie, Liam Kerr and Liam McArthur all want to contribute to the debate, and I will call them in due course. First, I call the cabinet secretary to speak to amendment 95 and the other amendments in the group.

Humza Yousaf: I thank Johann Lamont for her remarks. It is important to recognise her life-long contribution to and efforts in respect of equality for women and more broadly across the board. Despite the fact that I will disagree with her in relation to her amendments, I hope that she will not doubt our motivations with regard to equality for women and, indeed, across the board.

As I have stated throughout the scrutiny of the bill, the Scottish Government recognises the importance of tackling misogyny and all forms of gender-based violence in Scotland. That is evident through our work to implement the equally safe strategy and to progress the recommendations from the First Minister's national advisory council on women and girls. We understand the significance of how such behaviour can limit women's and girls' space for action, and we want to address that. However, I also know that there are strong—sometimes diverging—views on how that important matter should be tackled.

Johann Lamont's amendments would see the characteristic of sex added to the list of characteristics in section 1 of the bill, and add provision to define sex. Consequently, the amendments would remove the power to make those additions by regulation at a later date. On the surface, that seems appealing. Including sex in Scotland's hate crime framework would make it clear that offences that are aggravated by malice and ill will towards individuals based on their sex are unacceptable and subject to sanction by the criminal law. Some of the witnesses that the committee heard from at stage 1 initially favoured that approach, but a number of them went on to

change their minds when more evidence was heard. That additional evidence has persuaded me, as I know it has persuaded some members of the committee, that the issue needs further expert examination.

It is my view that the issue of misogyny is far bigger than the hate crime framework. The Government has put on record its belief that work should be done to explore having a stand-alone offence of misogyny, and Baroness Helena Kennedy's working group will examine and explore that matter.

If adding a sex aggravator was a neutral act, I would have no hesitation in supporting it. However, it must be recognised that a number of experts of pedigree, with decades of expertise in that area, have provided evidence that such an aggravator could harm women. In particular, a number of national organisations with expertise in tackling misogyny and violence against women, including Engender, Scottish Women's Aid, Rape Crisis Scotland and Zero Tolerance, have all warned of potential harms to women and unintended consequences flowing from the inclusion of sex in the hate crime framework.

During the committee's stage 1 oral evidence sessions, we heard the concerns directly, including the potential for an expected low level of prosecutions to mask the true extent of misogyny that exists across our society, and, importantly, that domestic abuse perpetrators might use the threat of criminality and a gender-neutral aggravator as part of a wider pattern of coercive control over women. Above all, I do not want to legislate for something that has not been fully considered and could potentially have detrimental impacts on tackling the very real consequences of violent and oppressive misogyny.

The bill proposes a different approach. At present, section 15 contains an enabling power to allow for the characteristic of sex to be added to the bill at a later date. The rationale for including the enabling power was closely tied to the creation of the working group. The working group will consider how the criminal law deals with serious misogyny and misogynistic acts; it will also consider whether to use the bill's power at section 15 to add the characteristic of sex to the hate crime legislative framework.

Assembling a group with a significant level of expertise and granting it the time to consider relevant evidence and data will allow us to be presented with a set of robust conclusions on how we best tackle misogyny in the Scottish context.

11:30

The group might well come back with the conclusion that a sex aggravator is an important tool. If that is the case, the Government will, of course, give that recommendation consideration and, if necessary, it will trigger the enabling power that I hope will be in the bill after stage 2. The proposals represent a unique way forward that provides the best approach to help shape society so that women and girls can live their lives free from harassment and abuse.

Towards the end of last year, I was delighted to announce Baroness Kennedy's appointment as chair of the working group. The committee's stage 1 report recommended that MSPs wait until the working group has reported before Parliament considers legislating to add sex as a hate-crime characteristic. I strongly agree with that approach.

In response to the call from parliamentarians for the working group to progress its work at pace, Baroness Kennedy confirmed yesterday that she has agreed to meet the 12-month deadline recommended by the Justice Committee in its stage 1 report. That means that the working group is committed to delivering its findings in 12 months, and I hope that that gives comfort to anybody who feels that the issue is being kicked into the long grass. It is not. There will be a recommendation, one way or another, after expert advice and analysis, on whether a sex aggravator should be added to the bill via the enabling power.

It is for those reasons that I ask members to give the working group the time that it needs to scrutinise the data and evidence on misogyny in Scotland; to test the ability of the criminal law to respond to these problems; and to work through the issue of whether a sex aggravator could unintentionally do harm to women. I believe that, if we give the working group that time, its report will be substantial and informative. I therefore ask members to vote against the amendments in the name of Johann Lamont.

The amendments in my name in this group will adjust the enabling power so that it can also be used to modify other provisions of the bill in the event that the characteristic of sex is added to the hate crime legislation framework in future.

Amendment 96 will allow future regulations to make provisions for the data reporting requirements, which I have proposed adding to the bill under a separate amendment.

Amendment 98 will ensure that, in response to the stage 1 report, we strengthen the procedure applying to regulations that enable the characteristic of sex to be added so that the power is subject to a form of super-affirmative procedure.

Amendment 95 will allow protection of freedom of expression provisions to be added to the bill for the characteristic of sex. That would provide flexibility to allow freedom of expression provisions to be included, or not, by means of regulations

made under section 15, as well as providing the flexibility to determine how those freedom of expression provisions should be framed. However, in light of previous discussions on the general approach to freedom of expression in the bill, I will not move amendment 95 at this stage, which will allow members to work collaboratively to achieve the most effective protections for consideration at stage 3.

I encourage members to support amendments 96 and 98 in my name.

The Convener: As I mentioned earlier, a number of members have indicated their desire to participate in the debate on this group. I call Annabelle Ewing first, to be followed by Rhoda Grant.

Annabelle Ewing (Cowdenbeath) (SNP): During the stage 1 debate on the bill on 15 December 2020, I made a number of points on this topic, which I wish briefly to reiterate.

First, the genesis of the bill has nothing to do with the current debate on the immutability of sexual dimorphism and the importance of not conflating sex and gender. I know, because I was the junior minister in the justice team who commissioned Lord Bracadale to conduct the review of hate crime legislation.

Secondly, the approach being proposed by the Scottish Government reflects a long-standing debate about the best way to tackle misogyny against women because of their sex. That debate centres on whether that is best tackled by a symmetrical approach—an approach that, to date, has patently failed—or whether there should be a presumption against gender-neutral laws, as set forth in the Istanbul convention on preventing and combating violence against women and domestic violence.

Given the scale of the problem that affects women, and on the basis of the evidence that was submitted to the committee, I am persuaded that wider reflection on the issue is long overdue. In that regard, I have been reassured by the Crown Office and Procurator Fiscal Service's comment that, in the meantime, the absence of a specific sex aggravator will not prevent prosecutions from taking place.

I therefore welcome Baroness Helena Kennedy's working group, which is to look at the issue in detail. I note the calibre and expertise of the working group's newly announced membership and I am pleased that Baroness Kennedy has confirmed that the group will conclude its work within 12 months. I pressed for that in the committee, and was pleased to receive the support of my committee colleagues and the Scottish Government in that regard. I understand that the working group will have its first meeting next week.

I am of the view that we should allow the group to conduct its vital work and that we should not pre-empt the outcome, so that we can all get to a point at which women cannot be attacked with impunity because of their sex.

Rhoda Grant: I support amendment 31, in the name of Johann Lamont, for the same reasons that I gave when I spoke to my amendment 112. Johann made the point that violence against women is men's violence against women. It is important that we understand that when we legislate.

I, too, support the establishment of the working group and look forward to hearing its findings. Meanwhile, however, the problem remains that women do not have any protection and are being left out of a bill on hate crime. I welcome the fact that the group will report quickly, within 12 months, but the cabinet secretary cannot guarantee what the group will say about its findings and what legislation will follow. I would be more comfortable if we added "sex" to the list in the bill, with provision to remove and replace it after the working group on misogynistic harassment has reported, because not to do so will leave a gap in the legislation and in protection for women.

John Finnie: I have just a few months left of my stint as a parliamentarian, and at no time previously have I been so aware of the idea of people taking sides and asking, "Whose side are you on?" I am on the side of good, informed law making. I think that that is very important.f

Johann Lamont talked about domestic violence. I should declare that I am an office bearer of the cross-party group on men's violence against women and girls. The title of the group is important. We talk about men's violence against women and girls—language is important, as we said earlier—and although they are not exclusively the victims of domestic violence, they are overwhelmingly the victims of domestic violence and it is overwhelmingly the case that we still live in a deeply flawed, patriarchal society.

Johann talked about our work to legislate on controlling and coercive behaviour. We are rightly proud that we dealt with that concept, which is challenging to deal with, and it is important that the training that followed the legislation recognises the role of men's controlling behaviour in our society.

The bill is fundamentally about consolidating hate crime law; it is also about some extension of hate crime law, as we made clear in our report.

In November of last year, the committee welcomed the appointment of Baroness Kennedy, and yesterday, or possibly it was the day before,

we learnt of the composition of the task force that she will lead to consider whether misogynistic behaviour should be a stand-alone offence in Scots law. If I thought for one second that what the Scottish Government was presenting was a version of kicking the matter into the long grass, I might take a different approach. However, I ask Johann Lamont to reflect on whether, having engaged the impressive membership of that working group, which has a very impressive leader—we were all delighted that Helena Kennedy would lead it—it would be inappropriate to—[*Inaudible*.]—its work. There is important work to be done, which will be reflected in legislative changes in due course. This is not—[*Inaudible*.]

Liam Kerr: I was not set on speaking to this group of amendments, but I will do so because, as members will know, the issue has played on my mind from the start, much as it has on the minds of my committee colleagues.

In my contributions in committee and debate, I have always started from the position that there should be an aggravator for sex. As Johann Lamont put it, women should be included. I regret that the issue was not included at the outset and fear greatly that it could be kicked into the long grass, as John Finnie just alluded to. Annabelle Ewing said that it is a long-standing debate and it seems to be, which worries me greatly.

I received Johann Lamont's letter, in which she articulates why she feels that her amendments should be included. I found her argument very persuasive. She argued her case well and spoke well today. The key question that I have asked myself throughout the process is along the lines of: why not just do this? Where is the prejudice if we put the protection in, unless and until the working group reports? Rhoda Grant made a similar proposition, but I come to a different conclusion. I heard evidence in committee about where the prejudice might be, which made me pause a little, but, for completeness, I found that Johann Lamont argued coherently why we should prefer her side.

Crucially, in my mind, we received a briefing from the Law Society of Scotland—of which I remind colleagues that I am a member—to which Johann Lamont referred. She said that there is no risk in including women at this stage, but the Law Society's submission said

"any substantial change to the list of aggravations should be subject to robust scrutiny",

and it is right. We should have had that opportunity, but it has not been afforded to us and we cannot subject it to that scrutiny at this stage. That is disappointing, but it is the reality.

Like others, I am reassured by the news that the working group has been constituted and particularly pleased that it has set a 12-month timeframe for when it will report. That gives me comfort that the issue will not be kicked into the long grass. I am disappointed because I would have preferred to be in a different position today, but we are where we are. For those reasons, and only after deep reflection, I will vote against Johann Lamont's amendments.

Liam McArthur: Like John Finnie, I start with a declaration. I have recently been appointed ambassador to the newly established White Ribbon Scotland Orkney organisation. I am pleased to say that it is going from strength to strength here in the islands.

Like Liam Kerr, not only can I understand the anxiety underlying Johann Lamont's amendment 31—I, too, thank her for the information that she provided ahead of this committee session—but it is very much the position that I held at the outset of the scrutiny process. The bill appears to offer the perfect opportunity to create a legislative tool to deal with the vile misogyny that remains all too prevalent in our society.

It was said that disgraceful online vitriol had largely motivated the exodus of women from public office in the run-up to the 2019 general election, which reinforced the clear and pressing need for more to be done to tackle misogynistic harassment—a problem that is not confined to the world of politics and too often blights the lives and chances of women and girls in this country. The Scottish Liberal Democrats are wholly committed to tackling the matter robustly and with urgency.

In our evidence sessions, however, a variety of equality organisations called for that work to be done in a holistic way that would recognise the full extent of misogynistic behaviours; they persuaded me. Moreover, I believe that the group that Baroness Kennedy assembled and chairs is equipped to carry out the task in a thorough and inclusive manner.

Although I support the establishment of that group, I share the concerns of a number of members about how realistic it is to expect the group to produce recommendations within a year. Even if it meets that heroically optimistic timeframe, legitimate concerns exist about the scope that would be available to Parliament to scrutinise those recommendations effectively.

I look forward to hearing what the cabinet secretary has to say on that point. In the meantime, I thank Johann Lamont for lodging her amendment, which allows for a debate on the question of misogynistic harassment at stage 2, but confirm that I will not support amendment 31.

11:45

Rona Mackay: We have had good contributions so I will be brief—I just want to say a few words.

I thank Johann Lamont for lodging her amendment. I have huge sympathy and understanding for what she says, and she puts her case forward very well. I am one of the conveners of the group on men's violence against women and girls, so the subject means a lot to me. On balance, due to the evidence that we have heard, I will not support the amendment for reasons that members have already articulated, so I will not go over them again.

Johann said that the matter of misogynistic harassment was not even being discussed. Although it might not be part of the bill at this stage, the matter is being discussed and the setting up of the misogynistic harassment working group shows how seriously the issue is being taken.

The issue is standing alone, in that an eminent group has been set up to consider the whole issue. Misogyny has been with us for ever and it seems to be getting worse, so I hope that the group's work will show us the way forward. I would rather let the group do its scrutiny within a year and see what comes out of the process, and that is the only reason why I will not support amendment 31 at this stage.

Shona Robison (Dundee City East) (SNP): I will be brief as well. As a feminist, I have spent my whole life fighting misogyny. We all want the same outcome, but it is about how to get the best one. If I thought for a minute that amendment 31 would solve the problem of misogyny in Scotland and beyond, I would support it. However, the evidence that the committee has heard over the past few weeks and months shows that the issue is complex, which is why the working group has been established.

I want us to consider the issue of misogyny, not just in relation to this piece of legislation but across the criminal justice system. As I understand, the working group will consider how the whole criminal justice system in Scotland deals with misogyny. Far from kicking the issue into the long grass, we have an opportunity to examine it as a whole across our criminal justice system and to consider how best to ensure that women are afforded the protection that they should have.

We need to hear reassurances from the cabinet secretary that action will be taken on that eminent group's recommendations as soon as it reports—I want to ensure that action happens at the earliest opportunity. We can all agree on the fact that Baroness Kennedy and her colleagues will do a good job on the matter.

Fulton MacGregor: I echo the comments made by Rona Mackay and Shona Robison. First, I thank Johann Lamont for lodging the amendment and for her work in this area. I have got to know Johann over the past few years, sitting on cross-party groups together, and I know how passionate a campaigner she is on this and many other issues, particularly in regard to children affected by childhood sexual abuse. I thank her for that and for the amendment.

I hope that I can reassure Johann. She will know this, but the committee discussed the issue at length. It was probably one of the most discussed topics during stage 1, and it is important that we get it right. The evidence that the committee heard from women's organisations was finely balanced. We heard that such an amendment might not help women, but we also heard evidence to the contrary. The stage 1 report demonstrates that we believe strongly that the working group on misogynistic harassment should be allowed to do its work and to make a recommendation. We all have a lot of faith in that working group, as other members have said. For that reason, I do not support the amendment at this stage. However, like everybody else, I see the merit in it, and I look forward to seeing how the working group addresses the matter.

The Convener: A couple of points made by members in the debate were directed to the cabinet secretary, so I ask him to respond to those briefly before I invite Johann Lamont to wind up the debate.

Humza Yousaf: I am happy to do that, convener. The central point put forward by a number of committee members, including those from my party, was that they sought an assurance from the Government that, if the recommendation of the working group, which is to report within 12 months of its first meeting, is that sex should be included as an aggravator and that that is its firm and unanimous view, I would commit to including that in the bill. On the basis that there is an enabling power to add that to the bill, that would be done with a super-affirmative procedure. I am happy to give that absolute assurance. I am slightly disturbed that some members believe that the Government would kick things into the long grass, but I hope that committee members feel that they have been given an assurance that the 12-month timescale means that there will be no kicking of the issue down the road. I look forward to the expert deliberations of Baroness Kennedy's working group.

The Convener: Long grass is getting a bad name in this debate. I invite Johann Lamont to wind up the debate and to press or withdraw amendment 31.

Johann Lamont: I thank committee members for the seriousness with which they listened and have responded to what I said. I do not agree with what committee members have said, but I respect that it is something that people have thought about. Therefore, it is not with disrespect that I argue still that this needs to be in the bill.

The cabinet secretary says that, if the working group decides that sex should be included as an aggravator, we will respond to that. Frankly, it is a matter for legislators to decide that. We have seen other matters on which, in dealing with the complexities of addressing the views of different groups in the legislation, the committee has been clear that it needs to come together to address the issue and sort it, and I am asking no more than that for women. It is clear that this is a finely balanced argument and that the Government, in particular, has weighed the evidence from Engender, Rape Crisis Scotland, Scottish Women's Aid and Zero Tolerance more heavily than the evidence against their views.

I do not accept that there has been no scrutiny of the matter. Lord Bracadale made a clear recommendation in favour of including what he referred to as "gender" but that would clearly be sex. Academics and women's groups have argued for sex to be included. This is not something new. It has been a live issue in the Parliament—goodness, it was an issue when I was a Government minister, back in 2004. We have wrestled with these arguments over a long period of time, so the argument that there has been a lack of scrutiny simply does not hold. People are making a judgment on the basis of the evidence. I have great respect for the national organisations that have argued their case, and I think that I have at least made a serious effort to argue why, on balance, I believe that they are not right in this instance.

On the question of gender-neutral language, the Equality Act 2010 and the Domestic Abuse (Scotland) Act 2018, which is regarded as world leading, both use the language that I propose. Using the term that I suggest would not affect our ability to tackle violence against women. The groups to which I referred say that there is evidence that it could be used against women, but they have provided no such evidence. Even if that were the case, it would logically mean that we could not legislate on such matters at all because of manipulative abusers.

Members have referred to the fact that I have been involved in these arguments for a long time. It is not that long ago that we were told that domestic abuse was not a matter for the courts or for legislation and that it was not a matter of public interest but a private matter. We disagreed with that view, and we showed that it could be changed.

I feel very strongly that, sometimes, when we say something out loud, there is a commonsense reaction that we should listen to. We have been asked to accept the proposal that the Scottish Parliament wants to address hate in our society that is targeted at particular groups but that it wants to exclude women from that legislation, despite the fact that all the evidence shows that women experience misogyny and hatred in their lives at a level that everybody accepts is very serious. We accept that women experience hate in their lives in a way that damages their opportunities and denies some young women the ability to achieve their potential, but we are nevertheless saying that there is no place in the bill for women. When we say that out loud, it is clear that the commonsense argument is irrefutable.

There are weaknesses and limitations in the bill, but those apply to all the characteristics that are identified. Nobody wants to create harm for anyone, and in all such cases, in whatever way the bill was taken forward, we would have sought the same effect. The case has not been made why women should be excluded from legislation that seeks to understand the motivation behind crimes and to understand hatred and address it not just in the criminal courts but through education and public awareness.

I propose that sex be included as a characteristic and that, if that would present problems for particular offences, the working group could address those problems. I accept that I have not persuaded all members of the committee today, and I do not intend to press my amendments at this stage, although I expect that I will bring the matter back at stage 3.

Nevertheless, I am looking for strong reassurances regarding the transparency of the working group and who is going to be on it. Specifically, I seek a reassurance that they will be charged with the responsibility of looking not simply at the issue but at what the weaknesses would be if sex were included as a characteristic. We would be asking the group not to decide whether sex should be included, but to show why it should not be and what would need to be done to ensure that there is protection in place. That is the position that the group could look at.

I am not talking about the long grass. The issue has, for many years, exercised women and women's groups and organisations that are currently campaigning on the matter. In contrast to the commonsense view, no explanation has been given as to why women, who experience hatred daily, should not be included in legislation that is about giving people further protections and

educating society about the corrosive nature of hatred in people's behaviour.

12:00

As I said, I do not intend to press the amendment at this stage, but I will bring it back at stage 3. It is a matter that needs to be democratically decided, and then working groups or whatever can work on the detail of it. [*Inaudible*.]—with which people have addressed the matter.

In conclusion, I ask that members think about how they would answer the question: if there is hate crime legislation to protect groups that are vulnerable, why are women not included? If we cannot answer that question, I think that we should include such an amendment at the next stage of the bill's consideration.

Amendment 31, by agreement, withdrawn.

The Convener: The next group is on "Characteristic of transgender identity". Amendment 104, in the name of Liam Kerr, is grouped with amendments 107, 109, 113 and 114. If amendment 15, which is in the group entitled "Stirring up hatred offences: characteristics", is agreed to, I will not be able to call amendment 107.

Liam Kerr: These amendments of mine are grouped under the title "Characteristic of transgender identity". They are probing amendments through which I seek the clarity that we were all discussing earlier.

As I have said, my approach to the bill—which I think is also the approach of my colleagues—is simply that, if the Government is going to legislate, it has a duty to make it absolutely clear and unambiguous to whom the legislation applies and whom it protects. Pretty much all my amendments to the bill start from the position of trying to make it as tightly drafted as it can be, so that we not only protect those people whom the bill seeks to protect, but do not inadvertently create grey areas and uncertainty.

A core principle of any law is that it must be comprehensible to those who are subject to it—ordinary citizens. They must understand the scope of the law so that they can take all appropriate action to remain within it. That is the issue that I seek to probe the cabinet secretary on. I do not know where to find a definition of "transgender identity". I cannot find the definition of "a non-binary person". Indeed, the Scottish Government responded to a freedom of information request by saying:

"The Scottish Government does not have an official definition of non-binary."

During the stage 1 debate, when the cabinet secretary was talking about any future statutory aggravator that would be aimed at protecting women under hate crime law, he said that it would need to align to the protected characteristic of sex in the Equality Act 2010. There was sense in that, and I am probing the reason why the definition of "transgender identity" in the bill would not be aligned to the definition of "gender reassignment" that is used in the Equality Act 2010. It seems to me that that would add clarity to the legislation, because it would point to a clear definition of whom the legislation is trying to protect.

It might be that the definition in the bill is intended to go beyond the definition in the Equality Act 2010. That is perfectly within the compass of the cabinet secretary's remit—it is "his" legislation, if you like. However, once it is passed, people need to be clear on that. If it is going beyond that definition, I ask, through these probing amendments, for the cabinet secretary to clarify to whom precisely he is seeking to extend the protection of criminal law and to confirm that those groups are not covered by the definitions that are given in the Equality Act 2010.

I move amendment 104.

John Finnie: Members have all seen what the Equality Network briefing says, particularly in relation to—[*Inaudible*.]—which I will quote verbatim:

"We strongly disagree with the amendments in this group, and ask members to reject them. By replacing 'transgender identity' with 'gender reassignment', amendments 104, 107, 109 and 113 would change the terminology that has been in use for 10 years under the existing statutory aggravation legislation."

The Equality Network points out that

"the police and other parts of the criminal justice system ... are very familiar with that and what it means",

and they have expressed no concerns about the current terminology. It goes on to say:

"Amendment 114 would remove protection for crimes targeted at nonbinary people and cross-dressing people".

That protection has been in place for 10 years, and its removal would be regressive and, indeed, offensive.

I get that Mr Kerr lodged probing amendments, as he put it, and wants to generate discussion, but I sincerely hope that he does not press amendment 104 or move the other amendments in the group.

Rhoda Grant: I agree with John Finnie. In addition, the amendments would probably take people who are transitioning out of the scope of the bill, because gender reassignment takes an awfully long time. We often hear the transgender community say that waiting lists are overly long. If

people are not protected by legislation while they wait, they will have just cause for complaint about the long waits that they must face.

Humza Yousaf: The amendments in the group would remove the term "transgender identity" from the bill and replace it with "gender reassignment", which would limit the protections provided in the bill to male-to-female transgender people and female-to-male transgender people, excluding non-binary people and cross-dressers.

I recognise that the term "gender reassignment" is used in the Equality Act 2010, as Liam Kerr pointed out. However, it is important to note that the act and the bill serve very different purposes. In this instance, the amendments would have an adverse effect on the clear and inclusive definition that is currently used and proposed in the bill for hate crime purposes.

I am aware of suggestions that the only reason why cross-dressers are included in the bill's definition of transgender identity is that they are protected under the current legislation. Although that is a key and important point, cross-dressers are also included because there is evidence to suggest that they experience hate crime. The Equality Network, whose briefing was mentioned by John Finnie, has provided examples of that. For instance, a man who is not a trans woman but wears a dress for a drag performance could be at high risk of transphobic hate crime. The Equality Network says that it is very likely that a perpetrator could later claim that they had no issue with trans women who are really transitioning and had a problem only with men who dress up as women without transitioning. To me, therefore, it is clear that prejudice can be based on the fact that a person cross-dresses and not just the fact of their being trans or the presumption that they are trans. It is therefore essential that cross-dressing people continue to be protected in the bill.

The use of up-to-date and inclusive language is an important overall objective as we update and modernise hate crime legislation, and I have sought to ensure that, where possible, the language that is used is simple and is understood by stakeholders and the general public. The amendments lack clarity. They would be damaging to non-binary people and would remove protection from people who cross-dress, who are currently protected by the law. They would significantly limit the protections that the bill expressly affords to such people.

The Government remains committed to improving the lives of people, including non-binary people. Not only is transgender-related hate crime a significant issue that needs to be tackled, but trans people continue to suffer poorer outcomes relative to the wider population. That needs to change, and the amendments in Liam Kerr's name, if they were supported, would take us in the wrong direction. I hope that Liam Kerr will not press amendment 104 or move the other amendments in his name, which I think he said are probing amendments. I hope that, through the provisions in the bill, we can improve outcomes for trans people.

The Convener: I invite Liam Kerr to wind up and to press or withdraw amendment 104.

Liam Kerr: I am grateful to all members for their contributions to the debate. The issue that amendment 104 deals with was brought up by witnesses who gave evidence to the committee, and it is important that it is examined. It is important, too, that members have put their views on the record. What the cabinet secretary has just said is particularly important. It is a question of providing clarification and protecting people. It has been a good debate.

Therefore, I can confirm that it is not my intention to press amendment 104, or to move any of the other amendments in the group. We have had the debate, and I think that it was a valuable one.

Amendment 104, by agreement, withdrawn.

The Convener: The next group is on the characteristic of variations in sex characteristics. Amendment 105, in the name of Liam Kerr, is grouped with amendments 106, 108, 110, 111, 115 and 116.

I must point out that there are a number of pre-emptions: if amendment 105 is agreed to, I will not be able to call amendment 106; if amendment 16 in the group on the stirring up hatred offence as it relates to characteristics is agreed to, I will not be able to call amendment 108; if amendment 110 is agreed to, I will not be able to call amendment 111; and if amendment 115 is agreed to, I will not be able to call amendment 116. There will be a test on that later to make sure that members were paying attention.

In the meantime, I ask Liam Kerr to move amendment 105 and to speak to all the amendments in the group.

Liam Kerr: All members of the committee recognise that the question whether "variations in sex characteristics" should be included in the bill as a hate crime characteristic is a sensitive area. Indeed, our report says:

"This is an exceptionally sensitive matter".

It is one on which I certainly do not claim any expertise. The committee's report asked Parliament to reflect on the area

"carefully as the Bill is debated further."

With my amendments, I seek to give the committee that opportunity. I lodged the amendments that relate to the deletion of "variations in sex characteristics" in order to probe the Government's rationale for adding "variations in sex characteristics" as a statutory aggravator.

As I understand it, the term refers to a set of around 40 conditions that affect the development of the reproductive organs and genitals. There seems to be a general acceptance that it was inappropriate to have grouped those with other characteristics in the Offences (Aggravation by Prejudice) (Scotland) Act 2009, which is why a new protected characteristic was created. I note that the terminology is contested. At stage 1, we heard from dsdfamilies, which favours the term "differences in sex development"; apparently, that is the term that is used by national health service clinicians. In the 2009 act, the term "intersexuality" was used, which I understand is more commonly referred to as "intersex".

My probing amendments simply ask the cabinet secretary to set out his case for the inclusion of "variations in sex characteristics" as a hate crime characteristic, bearing in mind the evidence that we heard from dsdfamilies. In its submission to the committee, it said:

> "If the government is determined to add VSC to the hate crime bill, we would urge them to provide a clear definition of what conditions they cover, an evidence base for the sort of hate crime they believe people may experience, and the reason why this is not the same for anyone else with more readily obvious body difference."

Similarly, the representative of dsdfamilies who gave evidence at stage 1 was concerned, in particular, that the proposed inclusion could be stigmatising. In its written response, dsdfamilies states:

> "Singling out a biological condition in this way reinforces stigma rather than working towards understanding and societal acceptance."

I would very keen to hear the thoughts of the cabinet secretary and my fellow committee members on that issue.

As with my amendments in the earlier group, with my amendments that seek to change "variations in sex characteristics" to "differences in sex development"—in passing, I note the typo in amendment 116, which I will correct at stage 3, if it is agreed to—I simply seek absolute precision in the language of the law, so that everyone knows precisely what is being talked about.

12:15

In response to a parliamentary question that I lodged last summer, the cabinet secretary said that "variations in sex characteristics" had been used because

> "this is an inclusive term, increasingly being adopted by stakeholders."—[*Written Answers*, 4 June 2020; S5W-29138.]

The first question is whether those stakeholders included national health service clinicians who work with people with those characteristics, and whether those clinicians were included in the consultation. I ask that not least because I see that the NHS refers to "differences in sex development" and gives a definition of that. One would have thought that that should be followed, for consistency and clarity.

I would be grateful for the thoughts of the cabinet secretary and committee members on the amendments.

I move amendment 105.

John Finnie: I did not hear Mr Kerr mention the Klinefelter's Syndrome Association or the adult support co-ordinator at the CAH Support Group, or the concerns that those organisations have voiced about amendments 106, 108, 111 and 116. It is clear that there is a measure of discomfort for some people in discussing the issues. I want to have legislation that is inclusive and that covers everyone.

Once again, we have a probing amendment. There clearly is a place for probing amendments to try to understand the Scottish Government's rationale in introducing the bill. However—it is a large "however"—any amendment that would remove protection that, as we discussed previously, has been in place for 10 years is unacceptable. That would be the effect of amendment 105 for intersex people and people with variations in sex characteristics. Therefore, whether or not it is a probing amendment, there is no place for it, and I hope that it will be rejected.

Humza Yousaf: At the outset, I note Liam Kerr's point that he has lodged the amendments largely as probing amendments to generate discussion and debate. I agree that stage 2 is often a good place for discussion and debate.

Amendments 106, 108, 111 and 116 seek to replace instances of the term "variations in sex characteristics" with the term "differences in sex development". As Liam Kerr pointed out, there are differing views on the terminology that should be used. I think that we all recognise the sensitivity of the issue and the need to use the correct terminology. The decision to use "variations in sex characteristics" was based on that term being used increasingly by stakeholders. For example, in a call for evidence that was issued in January 2019, the United Kingdom Government equalities office used the term "variations in sex characteristics".

People with a variation might of course refer to their specific variation or diagnosis, but it is necessary for the legislation to refer to them as a

group. I recognise that some organisations and individuals prefer to use the wording that Liam Kerr proposes. However, on introducing the bill, we took cognisance of the association, and sometimes confusion, between the terms "differences in sex development" and the more outdated "disorders in sex development". That further contributed to our decision to proceed with using the term "variations in sex characteristics" in the bill. We want to use the term that has the maximum possible support from stakeholders.

Liam Kerr's alternative option is to remove the protection that is offered by the hate crime legislative framework for those with variations in sex characteristics. That gives me concern. As members will know, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 lists "intersexuality" as part of the definition of "transgender identity". However, although the wording of the 2009 act reflects understanding of the position at that time, that is no longer the case. Therefore, the bill will remove "intersexuality" from the definition of "transgender identity", given the clear differences between people with variations in sex characteristics and people with transgender identities. However, so as not to lose the protection for that group of people, the bill includes VSC as a separate characteristic within hate crime law.

I recognise that there remains a lack of consensus on whether VSC should be included as a characteristic in the bill at all. That was highlighted when the committee took evidence from a number of stakeholders who, as I say, have differing views.

I offer reassurance that I recognise the need to consider all the issues that concern people with variations in sex characteristics, including health issues. I think that we can do that and ensure that they receive adequate protection in the criminal law against hatred. Amendments 105, 110 and 115, in Liam Kerr's name, when read with amendment 16 in group 10, would entirely remove the protection that the law offers to those individuals. I do not believe that that is the correct way forward. For those reasons, I cannot support any of the amendments in the group, and I urge members to vote against them.

The Convener: I ask Liam Kerr to wind up and to press or withdraw amendment 105.

Liam Kerr: I thank Mr Finnie and the cabinet secretary for their contributions. I start by assuring Mr Finnie in particular that no one is seeking to remove protections. This is an important debate that reflects the differences in evidence that we heard in the committee, and I am grateful to him for bringing up the evidence from the Klinefelter's Syndrome Association and other evidence that we heard and had submitted to us. It is an important debate, and it is important that people hear it. I absolutely reassure both Mr Finnie and the cabinet secretary that I am not looking to press amendment 105 or to reduce the protections.

In terms of the amendments about definitions, I agree with the cabinet secretary. Again, this is an interesting debate, because I do not know the answer. Interesting points are made by all contributors. Having listened carefully to what the cabinet secretary has said on that matter, I think it likely that I will not press those amendments. I shall reflect on it, and we will no doubt hear from people who have a view and who might seek to guide us.

That is where I am, convener. I will not press amendment 105, and I may well take the same view on the other amendments in the group.

Amendment 105, by agreement, withdrawn.

Amendment 106 not moved.

Section 1, as amended, agreed to.

The Convener: That takes things as far as we can take them today. We will recommence our stage 2 considerations next week. The clerks will be in touch with everyone in due course to confirm arrangements. Our next meeting will be on Tuesday 9 February.

Meeting closed at 12:22.

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