



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 16 February 2021

Session 5



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JUSTICE COMMITTEE

6th 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 PARTICIPATED:

Johann Lamont (Glasgow) (Lab)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 16 February 2021

[The Convener opened the meeting at 10:30]

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

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the Justice Committee's sixth meeting in 2021. We have no apologies, and we are joined by Johann Lamont and by the Cabinet Secretary for Justice, Humza Yousaf.

The first agenda item is to complete our consideration of the Hate Crime and Public Order (Scotland) Bill at stage 2. Members should have a copy of the marshalled list and the groupings for debate. I remind everyone that today's meeting is fully virtual and that we will use the chat function on BlueJeans as our means of voting electronically.

When we come to a vote, I will ask members to type Y in the chat function to record any votes for yes. I will do the same in turn for no, with members typing N, and for abstain, with members typing A. The clerks will then collate the results and I will read out and confirm which committee member has voted in which way. If I make any mistakes, please alert me immediately by typing R in the chat box, because we cannot go back once the next vote has been called.

If we lose the connection with anyone at any point, I will suspend the meeting for a short time to try to get them back. If we cannot do so after a reasonable time, I will consult the deputy convener on whether we can proceed fairly. Those instructions are the same as for meetings in previous weeks—I hope that that is all reasonably clear. If there are any questions, please ask them now.

As there are no questions, we move directly to consideration of amendments.

Section 6—Powers of entry etc with warrant

The Convener: The first group is on the removal of provisions that are ancillary to sections 3 and 5. Amendment 20, in the name of Liam Kerr, is grouped with amendments 21 to 24, 26, 28 and 29.

Liam Kerr (North East Scotland) (Con): Amendments 20 to 24, 26, 28 and 29 are grouped as being ancillary to section 3 and to section 5,

which has been removed. The amendments are a function of, and entirely dependent on, amendment 17, which I did not move last week. The amendments are entirely consequential—they hinged on amendment 17 being agreed to, which did not happen. It would not therefore be appropriate to seek to remove the sections to which the amendments refer, and accordingly I will not press amendment 20 or move the other amendments in the group.

I move amendment 20.

The Cabinet Secretary for Justice (Humza Yousaf): I am happy with that. If the amendments had been pressed, I would have opposed them. I am happy to say nothing more than that.

The Convener: This has been a short debate. Does Liam Kerr wish to press or withdraw amendment 20?

Liam Kerr: I have nothing further to say, convener. I seek to withdraw amendment 20.

Amendment 20, by agreement, withdrawn.

Section 6, as amended, agreed to.

After section 6

Amendment 55 not moved.

Section 7—Recording conviction for offence under section 3 or 5

Amendments 56 to 58 moved—[Humza Yousaf]—and agreed to.

Amendments 59 and 21 not moved.

Section 7, as amended, agreed to.

Section 8—Forfeiture and disposal of material to which offence relates

Amendment 60 moved—[Humza Yousaf]—and agreed to.

Amendment 22 not moved.

Section 8, as amended, agreed to.

Section 9—Individual culpability where organisation commits offence

Amendments 61 and 8 moved—[Humza Yousaf]—and agreed to.

Amendment 23 not moved.

Section 9, as amended, agreed to.

Section 10—Provision in relation to providers of information society services

Amendments 62 and 63 moved—[Humza Yousaf]—and agreed to.

Amendment 24 not moved.

Section 10, as amended, agreed to.

Amendment 64 moved—[Humza Yousaf]—and agreed to.

Schedule 1—Offences relating to stirring up hatred: information society services

Amendments 66 to 75 moved—[Humza Yousaf]—and agreed to.

Schedule 1, as amended, agreed to.

Section 11—Protection of freedom of expression: religion

Amendment 76 moved—[Humza Yousaf]—and agreed to.

Amendment 25 moved—[Liam Kerr].

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Kerr, Liam (North East Scotland) (Con)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 25 disagreed to.

Amendments 77 to 79 moved—[Humza Yousaf]—and agreed to.

Amendment 26 not moved.

Section 11, as amended, agreed to.

Section 12—Protection of freedom of expression: sexual orientation

Amendment 80 moved—[Humza Yousaf]—and agreed to.

Amendment 27 moved—[Liam Kerr].

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Kerr, Liam (North East Scotland) (Con)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 27 disagreed to.

Amendments 117 and 28 not moved.

Section 12, as amended, agreed to.

After section 12

Amendment 112 not moved.

Section 13—Interpretation of Part 2

Amendment 84 moved—[Liam Kerr].

The Convener: The question is, that amendment 84 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Kerr, Liam (North East Scotland) (Con)
Tomkins, Adam (Glasgow) (Con)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 84 disagreed to.

Amendment 29 not moved.

Section 13 agreed to.

10:45

Section 14—Meaning of the characteristics

Amendment 85 moved—[Humza Yousaf]—and agreed to.

Amendment 86 not moved.

Amendment 87 moved—[Humza Yousaf]—and agreed to.

The Convener: The next group is on the characteristic of disability. Amendment 88, in the name of Dean Lockhart, is the only amendment in the group. He is not with us, so Liam Kerr will speak on his behalf.

Liam Kerr: Dean Lockhart lodged amendment 88 but is unable to attend the meeting and has asked me to speak to and move the amendment. The amendment is a simple one that was recommended by the Law Society of Scotland, of which I remind colleagues that I am a member as a practising solicitor.

The amendment proposes a simple but important change to the particularisation of

“a medical condition which has (or may have) a substantial or long-term effect”

in the definition of disability. The amendment would replace that with the particularisation of

“a medical condition which has had, or may have, a substantial or long-term effect”.

That is a small but crucial change that would extend protections. Under the existing drafting, if a condition were to be substantial but not long term, it would be covered only while the person had it. If the person ceased to have such a condition, they would lose protection.

By way of example, let us say that at some future date someone committed what would otherwise be a hate crime against people who had in one way or another struggled with their mental health to a level that it constituted a disability. If a target of the hate crime had managed to overcome their mental health issues but was nonetheless targeted because of their mental health, they would arguably not be covered by the bill. I do not imagine that that is what is intended, especially as the stigma around mental health can endure for a long time. To cover that scenario and ensure that the protection endures, an amendment to include the words “has had” will suffice. I see no reason not to ensure that clarity.

I move amendment 88, in Dean Lockhart’s name.

John Finnie (Highlands and Islands) (Green): This is the first and perhaps only time that I will find myself supporting Mr Lockhart on such a matter. What is important is the motivation of the attacker—what they presume. This is a welcome tidying-up operation and I will support amendment 88.

Humza Yousaf: The Government will support Dean Lockhart’s amendment 88, although it does not necessarily make a practical legal difference in its effect. For clarity, I say that the current provisions will apply when malice and ill-will are based on a person having had a disability in the past. If a person is the victim of an offence in which the offender demonstrated malice and ill-will on the basis that the victim had recovered from cancer, for example, the victim will still be a member of a group that is defined by reference to a disability.

All that said, I take the point that Liam Kerr makes on Dean Lockhart’s behalf that the amendment could provide clarity and reassurance that those who have had a disability or medical condition in the past, and who are targeted for that reason, are included in the definition of disability. For clarity, I am happy to support amendment 88, in Dean Lockhart’s name.

Liam Kerr: I am grateful to Mr Finnie and the cabinet secretary for their comments. I have nothing further to add, so I will press amendment 88.

Amendment 88 agreed to.

The Convener: I call amendment 89, in the name of Johann Lamont, already debated with amendment 31. Johann, do you wish to move or not move amendment 89? I cannot hear Johann Lamont.

Johann Lamont (Glasgow) (Lab): I apologise, convener. Can you hear me now?

The Convener: Yes.

Johann Lamont: I am now having to join you by phone. I wish to flag up the fact that amendment 89 relates to the debate that we had about whether sex should be included in the bill’s list of characteristics. The amendment would simply insert a definition of “sex”, as defined in the Equality Act 2010. The bill should include that definition. If we end up with a working group, it should still be linked to that definition. I will not move the amendment at this stage, but I hope that the Cabinet Secretary for Justice will look at it. Even if he continues to resist the idea of including sex as a characteristic, there should be an established definition for the working group to use, should that be agreed at stage 3.

The Convener: That is very clear.

Amendment 89 not moved.

The Convener: The next group is on the characteristic of sexual orientation. Amendment 90, in the name of Johann Lamont, is grouped with amendments 91, 99B and 99C.

Johann Lamont: I confess that I feel rather anxious about having this debate. Last week, it seemed to me that members were being condemned just for lodging amendments, even though they were within the scope of the bill. I continue to be concerned about our ability to stress test the bill and its provisions and about the closing down of debate. It is essential that we can have an open and rigorous debate.

I do not intend to press these amendments at this stage, but I want an explanation from the cabinet secretary for the use of the term “a different sex”. It is clear in law that there are two sexes, and definitions matter. If we are going to

use different language from that in the Equality Act 2010, there is a responsibility on the cabinet secretary to explain the reason for that. In some places, there is a debate about whether there are only two sexes or whether sex is on a spectrum, and we should not ignore that debate. If that is what is being suggested, we need to be clear about that. I want to use the terms used in the Equality Act 2010, and the purpose of my lodging these amendments is to ensure that the cabinet secretary provides an explanation and states whether the Scottish Government believes that there are only two sexes and, if not, what the other ones are. It is essential that we have that explanation if we are to use different definitions in the bill from those in the Equality Act 2010.

I move amendment 90.

The Convener: John Finnie has indicated that he wishes to speak. If any other member wishes to speak, they should please type R in the chat box.

John Finnie: I agree absolutely with Johann Lamont about the need for unfettered discussion. In the Scottish Parliament's unicameral set-up, legislation is scrutinised primarily in committees. We must be able to express views that others find uncomfortable.

Johann Lamont knows that I disagree with her on the issue that her amendments raise, but it is important that people respect differing views. Good grief—surely our *raison d'être* is to prompt discussions and to be courteous in them. I agree with her about that, although I disagree about the specifics of her amendments, for a good reason that concerns consistency of approach.

The bill uses the phrase

"persons of a different sex",

which is consistent with other Scottish legislation of the past decade, including the equal marriage act, which is the Marriage and Civil Partnership (Scotland) Act 2014, and the equal civil partnership act, which is the Civil Partnership (Scotland) Act 2020. In 2014, I was a member of what was then the Equal Opportunities Committee, and I do not recall that the issue was a feature in the rigorous debate that took place then. Changing the bill's language in the way that Ms Lamont suggests would be inconsistent with all other recent Scottish legislation.

I will pick up on a point that I raised in relation to Dean Lockhart's amendment 88, which we have just discussed. To quote the Equality Network, Johann Lamont's amendments would be

"likely also to mean that the statutory aggravation could not be applied where a sexual orientation hate crime was committed against a person because they are in a relationship with a non-binary person".

That would be because a person's partner was presumed to be neither of the same sex nor of the opposite sex but of a different sex. As I said in relation to amendment 88, on disability, which we just discussed, what matters is the attacker's motivation—what the attacker presumes a person's sexual orientation to be. The actual identity or legal sex of a victim or their partner is, to an extent, irrelevant.

If Johann Lamont were to press her amendments, I would oppose them.

Liam McArthur (Orkney Islands) (LD): It is important to echo the sentiments that John Finnie expressed. I am grateful to Johann Lamont for lodging her amendments, in no small part because of some of the debate about the bill. If we shy away from robust debate of issues that arouse considerable emotion and are seen as highly sensitive, we fail in our duties, not least because the committee structure is intended to do the heavy lifting of scrutiny, as John Finnie said. Johann Lamont deserves considerable credit for lodging amendments that allow the debate to take place.

Like John Finnie, I disagree with Johann Lamont's amendments, but that is not to take away from the importance of having the debate. John Finnie set out well how the bill's language is consistent with previous legislation, which reassures me that the bill's approach is worthy of support.

As I said, it would be remiss of us not to say that we need to have, and be seen to be having, the debate that Johann Lamont's amendments have prompted.

Humza Yousaf: Thank you—[*Inaudible.*]—with the remarks that John Finnie and Liam McArthur made. I heard from them a reasonable and reasoned articulation of why they disagree with Johann Lamont's amendments. I also heard their willingness to engage in discussion, which I hope calms the anxiety that Ms Lamont said that she felt about lodging the amendments. No one will condemn her—certainly not from the Government or among her colleagues who we just heard from. I associate myself with the remarks of Liam McArthur and John Finnie about the need to have such debates, as uncomfortable as they might be. Unfortunately, outside the committee setting, such debates can sometimes be toxic.

We have all seen examples of that, but I am pleased that the debate in the committee has been respectful, and I am sure that, when we discuss the issue in the chamber at stage 3, if that is Johann Lamont's intention, the debate will be equally respectful.

11:00

Like John Finnie and Liam McArthur, I cannot support Johann Lamont's amendments now and could not do so if they were lodged again at stage 3, simply because, as legislators and lawmakers, we should be consistent in our approach to legislation. As John Finnie said, the term "different sex" has been used in legislation. Indeed, Johann Lamont has previously voted for legislation containing the term "different sex". She now wishes to revert to using the term "opposite sex", so it would be interesting, when she winds up, to hear what has changed.

Consistency and precedent are important in legislation. Being inclusive is important, too. Organisations such as the Equality Network and Stonewall Scotland support the use of the term "different sex" because they believe it to be more inclusive, particularly of non-binary persons. I agree. For those reasons, I agree with John Finnie and Liam McArthur that we should be respectful in the debate. I have heard no one wanting to close down the debate, but I would respectfully disagree with Ms Lamont. It will be interesting to hear why she has changed her previous support for the term "different sex" and now supports using the term "opposite sex".

Johann Lamont: I note members' emphasis on respectful debate. I am concerned, however, that the cabinet secretary has still not explained whether he believes that there are two sexes. There is a difference between saying, "You're a different sex from me" and saying, "I'm a different sex." It is not semantics. I have not changed my position. In fact, the definition that we are dealing with—as opposed to the conversation—is in the Equality Act 2010, and I have not yet heard an explanation of why that would change. It is, of course, important to be inclusive and respectful, and to understand how people feel about themselves and the world, but we are simply dealing with a definition here, and it is a definition that is in the Equality Act 2010.

I hope that, at some point, we hear the cabinet secretary confirm his view about whether there are two sexes. One of the things that has changed is that there is now a conversation about there being a spectrum, and more than two sexes, but that discussion will not be determined by the bill. That is why, although my amendments are part of an on-going debate on the issue, I will not press amendment 90.

Members have talked about the need for respect. I understand that the parties have met to talk about freedom of expression and that there will be further meetings. There is some anxiety that that process is not transparent. I do not know whether the convener is able to comment on how we can reassure people who have expressed

concerns to the committee about the bill's impact on their ability to say what they think. Will the cabinet secretary meet groups such as For Women Scotland who gave evidence to the committee? Will there be a chance for people to stress test the bill? I realise that I am straying slightly off subject, but it is all in the same context. Even by simply raising these issues, people like me have been accused of stirring up hatred, which is precisely what the bill deals with. The cabinet secretary will understand the need for these anxieties to be addressed.

I thank the committee for considering the issues raised by the amendments. I will not press amendment 90 or move the other amendments.

The Convener: It might be appropriate at the end of this process to say some words about where we are with freedom of expression provisions.

Amendment 90, by agreement, withdrawn.

Amendment 91 not moved.

Section 14, as amended, agreed to.

Section 15—Power to add the characteristic of sex

Amendment 92 moved—[Humza Yousaf]—and agreed to.

Amendment 93 not moved.

Amendments 94 and 96 moved—[Humza Yousaf]—and agreed to.

Amendment 97 not moved.

Amendment 98 moved—[Humza Yousaf]—and agreed to.

Section 15, as amended, agreed to.

After section 15

Amendment 99 moved—[Humza Yousaf].

Amendment 99A not moved.

Amendment 99B not moved.

Amendment 99C not moved.

Amendment 99 agreed to.

Sections 16 to 18 agreed to.

Schedule 2—Modifications of enactments

Amendment 100 moved—[Humza Yousaf]—and agreed to.

Schedule 2, as amended, agreed to.

Section 19 agreed to.

After section 19

Amendment 101 moved—[Humza Yousaf]—and agreed to.

Sections 20 and 21 agreed to.

Long title

Amendment 102 moved—[Humza Yousaf]—and agreed to.

Long title, as amended, agreed to.

The Convener: That ends stage 2 consideration of the bill. I place on record my thanks to the cabinet secretary and to Johann Lamont, Dean Lockhart, Margaret Mitchell and all the members of the committee for the way in which they have conducted themselves during stage 2 consideration of the bill. We all know that this is a difficult bill that has generated a lot of controversy and not a little heat. I also place on record my thanks and indeed my debt to the clerks and all the staff who support the committee in our work.

Members know that discussions are under way between the parties and the cabinet secretary about stage 3 amendments, particularly those that relate to freedom of expression. Those discussions, which Johann Lamont referenced a few moments ago, will continue, and we are all determined to ensure that they are as transparent and open to the public and to all relevant stakeholders as possible.

I say formally that the bill will now be reprinted as amended at stage 2 and published online tomorrow morning. The Parliament has not yet determined when it will hold stage 3. Members will be informed of that date in due course along with that of the deadline for lodging stage 3 amendments. In the meantime, members will be glad to know that stage 3 amendments can now be lodged with the clerks in the legislation team.

Subordinate Legislation

Parole Board (Scotland) Amendment Rules 2021 (SSI 2021/4)

Fireworks (Scotland) Amendment Regulations 2021 (SSI 2021/14)

The Convener: Item 2 on our agenda is consideration of two negative Scottish statutory instruments: the Parole Board (Scotland) Amendment Rules 2021 (SSI 2021/4) and the Fireworks (Scotland) Amendment Regulations 2021 (SSI 2021/14).

Before we consider the instruments, I point out to members the correspondence that we received about the second one—on fireworks. We have received a letter from the Minister for Community Safety, which says that there has been an unintended error in the drafting of the regulations and that she intends to revoke them and to introduce a new instrument later this week. I thank Ash Denham for her letter, which explains the matter to us.

Secondly, the British Fireworks Association has sent us two letters that raise objections to that instrument, in which it says that

“the industry has not been consulted with details of the proposed legislation (in accordance with the requirements of the Fireworks Act 2003) and the industry does not agree with the contents of the business and regulatory impact assessments.”

I suggest that we state for the record that the committee makes no formal recommendation on the Fireworks (Scotland) Amendment Regulations 2021, on the basis that the Government has made a commitment to revoke them. I also suggest that we ask the Minister for Community Safety to respond to the concerns that the correspondence from the British Fireworks Association drew to our attention, to make clear in her view whether the association was consulted and, if not, why not.

It might also help if the minister could make clear why the association believes that the business and regulatory impact assessment seems to indicate that it is in favour of the instrument when it seems from its correspondence that it is not. Finally, it might help if the minister could address the policy points that the British Fireworks Association raised in its correspondence to us.

Are members content to proceed on that basis? I see that members are content. I am grateful for that. Thank you very much.

Do members have any comments on the Parole Board (Scotland) Amendment Rules—the other SSI that is in front of us?

No member has indicated that they have any comments, so that concludes consideration of the SSIs and our meeting today.

Our next meeting will be on Tuesday 23 February, when we will start, and hope to complete, stage 2 consideration of the Domestic Abuse Protection (Scotland) Bill.

Meeting closed at 11:13.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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