OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Monday 22 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Monday 22 February 2021

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JUSTICE COMMITTEE
7th 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:

Danny Boyle (Black and Ethnic Minority Infrastructure in Scotland)
Michael Clancy (The Law Society of Scotland)
Eilidh Dickson (Engender)
Roddy Dunlop (Faculty of Advocates)
Tim Hopkins (Equality Network)
Anthony Horan (Catholic Parliamentary Office of the Bishops Conference of Scotland)
Lucy Hunter Blackburn (Murray Blackburn Mackenzie)
Becky Kaufmann (Scottish Trans Alliance)
Iain Smith (Inclusion Scotland)
Susan Smith (For Women Scotland)
Fraser Sutherland (Humanist Society Scotland)
Dr Andrew Tickell (Glasgow Caledonian University)
Kieran Turner (Evangelical Alliance)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Monday 22 February 2021

[The Convener opened the meeting at 14:30]

Hate Crime and Public Order (Scotland) Bill: Freedom of Expression

The Convener (Adam Tomkins): Good afternoon, everyone, and welcome to the seventh meeting in 2021 of the Justice Committee. We have no apologies.

We are joined by the Cabinet Secretary for Justice, Humza Yousaf, and his officials, whom I welcome to the meeting. We are also joined by a significant number of witnesses. I am grateful to everyone for making the time available to join us at such short notice. I hope that I do not miss anybody out—please forgive me if I do. We have with us Danny Boyle from Black and Ethnic Minority Infrastructure in Scotland; Michael Clancy from the Law Society of Scotland; Eilidh Dickson from Engender; Anthony Horan from the Catholic Parliamentary Office of the Bishops Conference of Scotland; Tim Hopkins from the Equality Network; Lucy Hunter Blackburn from Murray Blackburn Mackenzie; Becky Kaufmann from the Scottish Trans Alliance; Iain Smith from Inclusion Scotland; Susan Smith from For Women Scotland; Fraser Sutherland from the Humanist Society Scotland; Dr Andrew Tickell from Glasgow Caledonian University; and Kieran Turner from the Evangelical Alliance.

We have only one item on our agenda, which is to consider options for amendments to the Hate Crime and Public Order (Scotland) Bill on freedom of expression, which have been proposed by the cabinet secretary. I remind everybody that we are here to talk about only the proposed free speech amendments to the bill. I am not prepared to, and I do not intend to, reopen any other aspect associated with the bill at the moment.

I will say a few words about why we are doing this and what it will lead to.

The bill has completed stage 2 and is therefore no longer formally with the Justice Committee. The stage 3 debate on the bill is scheduled for later in March in the Parliament chamber. Our discussion here is about trying to shine as much light as we can on issues arising with regard to a matter that has been discussed in the chamber and by the Justice Committee many times and in great detail: namely, the impact that the bill will have on freedom of expression and what the bill should say about that impact.

We know that the bill was significantly amended at stage 2 and that among those significant amendments was a suite of amendments that narrow and focus the scope of the offences provided for, particularly with regard to the stirring-up offences. The question is: what in addition to that needs to be said about freedom of expression in the judgment of our witnesses, guests and stakeholders? That is where we are.

The committee does not expect to draw up a report, reach conclusions or make recommendations with regard to today's proceedings. The proceedings are being held in public so that there can be full public discussion of the issues. I hope that members of the Scottish Parliament will draw on that in their own way as we approach stage 3. The meeting is being broadcast live, and there will be a substantially verbatim *Official Report* of what is said in it.

I know that the bill has generated a lot of heat and that people feel passionately about it. So far, in all our deliberations in this committee, we have tried to shine light on the bill rather than to generate heat. All of us who have spoken about the bill in the committee have done so with respect for people who hold different views. I expect that to continue today.

I will invite the cabinet secretary to speak briefly to his proposed amendments. I will then go around the room and invite our guests to reflect on the proposals and on what they heard the cabinet secretary say. If there is time after that, members of the committee will ask questions, and I will ask the cabinet secretary to conclude.

This is an unusual session, in that it is not principally driven by members' questions. We are here to listen rather than to speak, and we want to hear as much as possible from the guests whom we have invited. I reiterate my thanks to them for their time and for all the effort that has been poured in to help the committee to do its job as best as it can, to ensure that Parliament, if it passes the bill, passes the best possible bill.

I invite the cabinet secretary to speak to his proposed amendments.

The Cabinet Secretary for Justice (Humza Yousaf): Thank you, convener. I align myself with your remarks, particularly on how respectful the debate has been.

I thank all the stakeholders who are attending the meeting. As the convener has already said, they are doing so at very short notice. I also thank them for being prepared to offer their views in what will undoubtedly be a constructive and respectful manner. In addition, I thank the

convener and the Justice Committee for agreeing to host this unusual session, as the convener has described it.

We often decry the nature of our politics—and sometimes with good reason—but we have seen a genuine desire to collaborate and reach as much consensus as possible on a number of issues, particularly on a freedom of expression provision in the Hate Crime and Public Order (Scotland) Bill. That is testament to the positive approach that has been taken by those around this table—particularly members of the committee. I hope that it also shows the Government's continued willingness to find common ground where we can.

As my letter to the Justice Committee made clear, it has been very helpful to discuss that with all the committee members, as well as how best a collaborative approach to freedom of expression can be developed. Today's session is intended to broaden out the dialogue in order to inform how best to approach freedom of expression. It is not the only chance that we have had; the committee has received numerous written submissions and, in its stage 1 deliberations, it took evidence from more than 35 witnesses. However, this session will help us to further inform our approach to freedom of expression.

I am clear that protecting members of groups that are targeted by hate crime and protecting freedom of expression are not mutually exclusive. It is also important to state that the inclusion of freedom of expression provisions is not necessary for the bill to be compatible with the European convention on human rights. However, I accept that freedom of expression provisions can cast light on the operation of the stirring up of hatred offences and provide necessary reassurance and clarity. Freedom of expression provisions can also reinforce the boundaries of the criminal law by protecting the right to express views that might be distasteful or offensive to many but, nonetheless, are not and should never be the business of the criminal law.

I have circulated four options to aid our further discussions of the matter. We have all been clear that we wish to ensure that the process is transparent and allows for further consultation with our key stakeholders. I will not talk through each option, because my covering note, which the committee has published, goes into sufficient detail to explain each of the options that are in front of us. However, those around the table will note that I have suggested the formulation of "discussion or criticism" for each of the four options.

It is my strong belief that we need to make it clear that criticising matters that are related to protected characteristics is not subject to criminal sanction under the bill. Equally, I have heard loudly and clearly from sections of our community that can be targets of hatred that they do not wish to be singled out through the freedom of expression provision, because they fear the consequences of such treatment within the bill. Therefore, my proposals seek a common middle ground, and I hope that we can unite around one of the proposed options or a variation of them.

I hope that the amendments that were agreed to at stage 2 on including a reasonable person test, which the convener alluded to, also give comfort to those who had previously been concerned about vexatious complaints being made. The amendments that were made at stage 2 make it crystal clear on the face of the bill that the court must undertake an objective assessment of whether behaviour is "threatening, abusive or insulting" or is likely to stir up hatred.

I am keen to hear the stakeholders' views on a number of issues, but I am particularly interested in whether race, for example, should be covered by a freedom of expression provision, because the arguments on that are very finely balanced. It would be useful if those who argue that there needs to be more specificity for certain protected characteristics could give examples of behaviour that would not be captured by "discussion or criticism".

None of the options that have been circulated is the Scottish Government's preferred option; instead, they set out how Parliament could decide to include freedom of expression provisions. Much like committee members, we are in listening mode. I look forward to hearing the views of all those at today's session, and I commit to continuing to work with everyone—parliamentarians and external stakeholders—to ensure that the bill adequately protects people in our society from hate and adequately protects the important freedoms of expression and speech, which we all hold dear.

The Convener: Thank you very much, cabinet secretary. That is very helpful.

In addition to the witnesses whom I listed earlier, we are joined by Roddy Dunlop QC, who is the dean of the Faculty of Advocates. I would like to hear from him, Michael Clancy and Andrew Tickell before moving on to other witnesses. I invite Roddy Dunlop to respond to what he has heard and read from the cabinet secretary.

Roddy Dunlop (Faculty of Advocates): Thank you for the invitation to the meeting.

Given that the starting point for all the options is "discussion or criticism", my main query, in relation to section 3 of the bill in particular, is about how we can imagine, at a high level of generality, discussion or criticism being threatening or abusive; that is not the purpose of either

discussion or criticism in generality. One has to bear in mind that the overarching entitlement of freedom of expression includes the entitlement to shock, offend or disturb. If, at a high level of generality, one would not expect discussion or criticism to be threatening or abusive, one wonders what the point is of the exception. Equally, if someone were to use supposed discussion or criticism as a cloak under which to engage in threatening or abusive behaviour, why should that, if it were intended to stir up hatred, be a provision that is excepted and supposedly covered?

Therefore, I wonder whether we would get very much out of those options. Leaving aside the carve-outs for race in this respect—as the convener said, those are not in play at the moment—and given that we already have to get over the hurdle of behaviour being intended to stir up hatred and threatening or abusive, I wonder what the options would add.

I know that Dr Tickell, whom the committee will hear from shortly, has an alternative suggestion. There are already four, so you might not want a fifth, but he suggests that there should be an overall emphasis on freedom of expression and the need to have particular regard to freedom of expression. The law is already very familiar with such provision. For example, section 12 of the Human Rights Act 1998 says that, in relation to pre-publication restraint, there must be "particular regard to" the article 10 protections. Therefore, I wonder whether that suggestion makes sense and is worthy of consideration. As Dr Tickell will point out, that is already covered by the overarching effect of the Human Rights Act 1998, but there is nothing wrong with having it front and centre that that is part of the law, rather than having to refer to a different act. I suggest that Dr Tickell's option is worthy of consideration, because I am not sure how much we would get from the Government's four options.

The Convener: That is a very helpful start. Before we come to Andrew Tickell, I invite Michael Clancy from the Law Society of Scotland to speak.

14:45

Michael Clancy (The Law Society of Scotland): Good afternoon, everyone. I was struck by the cabinet secretary's approach to this discussion. I listened to his introduction, and I have read his letter to the committee, in which he talked about broadening dialogue and adopting an inclusive approach to law making. He also asked us to look at the balancing of rights and responsibilities. It is important to bear those features in mind in considering any legislation that would touch on freedom of expression or affect our human rights.

From the beginning of the process, we at the Law Society of Scotland have been strident about ensuring that hate crime is seen as being unacceptable in 21st century Scotland. All victims, of whatever characteristics, should have similar expectations of what amounts to offending behaviour. In a sense, therefore, they should be able to look at the statute and say that they can understand not only what is threatening and abusive but where discussion and criticism act as brackets at either end of the criminal provisions. That gives a sense of understanding and appreciation, and it matches what we would look for as regards good law—in other words, law that is accessible, clear, consistent and practical in its application. That is how we have looked at the bill's provisions. In considering our submission, which I hope the committee will have had time to at least scan if not read in depth, given the speed at which the process is moving, I ask the committee to reflect on how we might get to a position in which our statute law fulfils those objectives.

That brings me to that famed publication of the Scottish parliamentary counsel office, "Drafting Matters!", which contains a motto. I will not torture you all with my pronunciation of the Gaelic, but it translates as

"Say but little and say it well".

In looking at the options that the cabinet secretary brought before the committee, we were struck by the simplicity, clarity and good drafting of option 3, which applies to all the characteristics. It has no particular carve-outs for one aspect or another, which we think is an important feature.

As for the two points that the dean of the Faculty of Advocates raised, on whether we should have something whereby we do not adopt any of the options, we look to the aspect that Dr Tickell will talk about, in terms of the ECHR. One of the features of the legislation was that it was intended to be a consolidation measure that would bring all the law in the area within the bookends of one piece of legislation. We all know about the background law of the convention rights, which underpin the work of the Parliament. Adding that to the equation would be adding something that is already there. However, I think that we would want to hold fast to the idea of getting as much consolidation as we can. That is why we are in favour of option 3.

I hope that that is helpful, convener.

The Convener: Thank you, Michael. That is very helpful.

Andrew Tickell will be next. Andrew, your name has already been cited. Apparently you have a new plan up your sleeve. Can we hear it, please?

Dr Andrew Tickell (Glasgow Caledonian University): Absolutely. It is a great pleasure to be with you again. Perhaps characteristically, "none of the above" was my response to the four options.

It strikes me that the discussion around the bill has reached a point where the free expression provisions are critically important and the flashpoint of controversy, as you elucidated at the beginning, convener. However, it is important, as Roddy Dunlop said, to realise how far we have come with the legislation and for people not to misunderstand the idea that the principal safeguards for freedom of expression in the bill will be found in any of the provisions, because I do not believe that they will. In order for someone to be convicted of the stirring-up offence, it now needs to be established that "a reasonable person" would consider the accused person's actions to be threatening or abusive—so it is not about a subjective take on that but about "a reasonable person"—and that the accused person intended by those threatening or abusive actions to stir up hatred. In addition, the Crown Office and Procurator Fiscal Service now has to establish beyond a reasonable doubt, on corroborated evidence, that the accused person's actions are not reasonable.

The critical defence to charges under this provision has therefore always been the reasonableness defence and not, in fact, the free speech provisions. As you might remember, I had some anxieties even at stage 1 about the way in which the free expression provisions were going, because they seemed to be adopting the logic of a series of specific statements, or types of statement or criticism, that were safe harboured from the definition of threatening or abusive behaviour. Some of the fankle at stage 2 reflected the fact that the logical thing when framing free expression provisions in that way is to add more and more carve-outs and exceptions.

Although it is important that laws are clear, we need to frame them at a sufficient level of generality. What I suggest in my short written submission, as Roddy Dunlop has said, is that there might be another way to look at the matter entirely, so that, instead of creating internal hierarchies around it, we should look to what is already in the Human Rights Act 1998. Sections 12 and 13 of the 1998 act have specific provisions about not only free expression but the other critical dimension of freedom of thought, conscience and religion, which includes philosophical ideas around questions of gender, sex and so forth. The 1998 act establishes, in effect, that in particular legal contexts, the court should have

"particular regard to the importance of"

those rights.

My suggestion, which I suppose is a fifth limb of the committee's scrutiny, is to introduce provisions in the bill that say that, in deciding whether the accused person's actions are reasonable in context—it is challenging, though, as Roddy Dunlop has said, to see how behaviour that is reasonably regarded by the ordinary person as threatening or abusive and can be proved beyond reasonable doubt to be intended to stir up hatred would be reasonable in context—the Parliament could direct the courts to say that they should have particular regard to those questions of freedom of thought, conscience and religion and, on the other hand, freedom of expression. That has the merit of being simple, direct, encompassing and general, as it applies to all the characteristics in question, whether of race, religion or any of the others that have prompted controversy and which a range of witnesses representing their particular interests are here to discuss.

In my submission, that might be a way for the Government, the committee and the Parliament to address the underlying concerns and emphasise to the courts, the public and the police at the early stages of an inquiry that the application of this particular new set of criminal law, which is not so different from others that are already on the books—another detail that is often left out—nevertheless has to be seen within a rights framework that has particular regard to the questions of freedom of expression, freedom of conscience, freedom of thought and freedom of religion. For me, the precedent that we find in the Human Rights Act 1998 is perhaps a more helpful one, to be frank, than any of the four options that are set out by the cabinet secretary. That, in a nutshell, is my fifth route through.

The Convener: Excellent, Andrew. Thank you. That is very helpful, indeed. I thank all three speakers for opening up the discussion. I will now give you a sense of the batting order that I propose to use to bring in other voices. Before we go any further, I want to hear from the organisations that are represented by Danny Boyle, Eilidh Dickson and Iain Smith; then I will go to Tim Hopkins, from the Equality Network, and Becky Kaufmann, from the Scottish Trans Alliance; then to Lucy Hunter Blackburn and Susan Smith, from For Women Scotland; and then finally to Anthony Horan, Kieran Turner and Fraser Sutherland. That is the order in which I invite you to contribute your remarks.

Eilidh Dickson (Engender): Engender indicated in our stage 1 written evidence to the committee that freedom of expression has been vital for feminist advocacy and women's equality, and we remain entirely of that view. We also suggested that the existing freedom of expression provisions that were constituted in the bill at the

time were narrow and that no obvious justification had been made for picking them out over other difficult or controversial aspects of any particular characteristic.

We proposed that a more general freedom of expression provision that restates the approach to hate speech expression in the European convention on human rights—not only article 10 but article 17—should accompany the appropriately high threshold for an offence under section 3 of the bill, with a reasonable balance between the need for reassurance for the public engaging in political or social discourse and the need to protect marginalised groups. That remains our view, although we continue to take no firm view on the best form of wording for such a provision. We think that the threshold for the offence is the most important protection, and that a freedom of speech provision is supplementary. We are concerned that putting in the bill a tacit approval for words that cause upset, although they clearly should not be criminalised, is disproportionate given the actual impact or role of a freedom of expression provision, which, as I said, would be a reassurance or a supplementary to the threshold.

We are also of the view that fixing aspects of current, 2021 social and political debate in the bill runs the risk of the law becoming out of date as new issues emerge and some degree of consensus around others emerges. Because the freedom of expression provisions do not exempt speech from being criminal if that threshold is met, there is a risk that too much may be invested in them and that people believe certain speech is protected because of its subject matter, when that is not the case.

Feminist speech and advocacy for human rights in general need to be protected, but we are not convinced that the best way to do that is to single out particular views or flashpoints in the text of the bill. We are also concerned about how sex may be incorporated into a freedom of expression provision, although we have not seen any proposals of that type so far; we would be concerned about which opinions and views about women and women's rights could be given elevated status or tacit approval by their inclusion. We do not believe that Parliament should be setting out in legislation which opinions may be legally expressed without good reason; unless the freedom of expression provision operates as a defence or an exemption to the stirring-up offence, there is not a good reason to do so.

The Convener: That is very helpful indeed.

Danny Boyle (Black and Ethnic Minority Infrastructure in Scotland): I suppose that what I am about to embark on is a long-winded way of saying, "Could you just leave us out of this, please?"

The Convener: You do not have to be long winded if you want to be brief.

Danny Boyle: I will embellish that point a wee bit in responding to the four options that have been provided and making the case for treating race in a different way. We will not be in a position to endorse any of the options and we appeal to our colleagues, if they end up settling on one of the options, to make sure that race is left out of it. We will not pick any option given that we are essentially asking to be excluded from consideration.

We have heard comments about good law and consolidation, and in relation to the stirring up of racial hatred and its direct relationship with the convention rights, we already have good law, which should be continued in the context of the bill. There was a comment on the perception that race is being treated in a hierarchical fashion and that the legislation should use the same wording for the relationship between the stirring up of hatred and convention rights for all the particular characteristics. From our perspective, the consolidation aspiration of Bracadale is met by containing all the aggravations and stirring-up offences in one place, but we do not believe that it is necessary to treat every characteristic in exactly the same way in so far as freedom of expression is concerned. The characteristics are diverse and different, so bespoke responses are required, and that is reflected in the maintenance of the "insulting" threshold creating a clear distinction between race and the other characteristics, but we do not perceive or intend that to mean that we are at the top of a hierarchy of hate crime; it is only that we are equal but different.

It is a matter of fact that racially aggravated hate crime dominates the annual publication of hate crime figures, but that does not negate the shared experience of isolation, fear and alarm that accompanies all forms of hate crime. The specificity of race was dealt with at stage 1, and we would like to see that being continued as we move forward. We therefore ask that race be excluded from any generic provision on freedom of expression in the bill.

15:00

The Convener: Thank you very much, Danny. That was not long winded at all; it was very clear and helpful.

Iain Smith (Inclusion Scotland): Inclusion Scotland is a disabled people's organisation that is led by disabled people themselves. We are concerned that consideration of the bill has become overly focused on the issue of its

theoretical impact on freedom of expression rather than on the actual impact of hate crime on real people, including disabled people.

There is little doubt that negative portrayals of groups with protected characteristics lead to an increase in hostility towards them and an increase in hate crimes. Disabled people report to us that antipathy, dislike, ridicule and insult form a backdrop to their everyday lives. That impacts on their health, wellbeing and human rights, including their ability to go about their daily lives and participate in society safely without fear of intimidation or harassment and in the same way as everyone else.

We do not believe that the proposals on the offence of stirring up hatred would impact at all on freedom of expression. Rather, they set a limit at the point at which freedom of expression becomes an act of criminality, which the bill defines as that which is threatening or abusive and intended to stir up hatred. Those are very high thresholds, which need to be proved beyond reasonable doubt in a court of law.

In broad terms, we endorse the approach that has been outlined by the Equality Network and the Scottish Trans Alliance in their submissions for this round-table session. The approach that Dr Andrew Tickell has just presented to the committee also strikes us as being a sensible way forward. If there is a justification for having a provision on freedom of expression, we believe that it should be a general one that is based on the approach that is adopted in the European convention on human rights. Dr Andrew Tickell's suggestion seems to be a good way of implementing that.

We think it important that the bill should send out a clear message about what is and is not acceptable. In that regard, we do not think it appropriate that the bill should list behaviour or language that is acceptable. As I have mentioned, expressions of antipathy, dislike, ridicule or insult are not without consequences for those who are subjected to them. They can legitimise prejudice and lead to more serious consequences, even if that is not intended. We ask members of the committee—and the Parliament when it makes its decisions at stage 3—to give thought to the message that they will be sending if they put on the face of the bill a statement that it is acceptable to use antipathy, dislike, ridicule or insult. Nothing in the bill says that people cannot use those things, but do we really want to say that they can? For example, do we want to say that it is acceptable to ridicule a disabled person who finds it difficult to get on to a bus thereby causing it to be late, or who is prevented from doing their daily shopping because they are subjected to expressions of dislike or insult? I do not think that the Parliament will want to say that for disabled people. Why should it want to say so for any other group in society? We ask members to think very carefully about that.

Preventing the stirring up of hatred does not restrict legitimate expression of opinions. To those who feel that establishing an offence of stirring up hatred will restrict their freedom of speech, I say that they should perhaps first ask themselves what they want to say that they believe could be interpreted as threatening or abusive and intended to stir up hatred.

The Convener: Thank you, Iain. That was very powerfully put, if I may say so.

Tim Hopkins (Equality Network): Thanks for inviting me to be part of this session. I would like to make three points briefly. The first is that there seems to be broad consensus that the provision on freedom of expression is not about changing the threshold for the offence as it is now, after stage 2; it is about giving reassurance, as Roddy Dunlop said clearly. Therefore it is about messaging. If we put something in the bill about messaging, it is important that we get the messaging right. In particular, we should not inadvertently undermine the overall messaging in the bill, which is about protecting people who face hate crime.

Secondly, one of the objections to the Government's proposals is that they do not fully cover the scope of freedom of expression. For example, the proposals do not explicitly say that people can say things that are offensive. The problem is that it is very difficult to include the scope of the right to freedom of expression in a few words in a bill. The convention right is, in effect, defined through the jurisprudence of the European Court of Human Rights and the United Kingdom courts.

If we want to include in the bill people's full right to freedom of expression, the only way to do so is by referring to the convention right, which is why we originally suggested doing that. Andrew Tickell has suggested a slightly different way of doing that. We would certainly be in favour of including something like that. I know that the Scottish Government feels that that might not be appropriate in a criminal law bill—perhaps it will say more about that later.

If that is not possible, we think that the Government's approach is the right one. The reference to "discussion or criticism" covers all the things that I have heard people say they want to be able to say about, for example, the debate on trans equality. All those things could be categorised as

"discussion or criticism of matters relating to ... transgender identity".

Similarly, it also covers everything that a church might want to say about the morality or otherwise of same-sex relationships or same-sex marriage. All those things could be categorised as

"discussion or criticism of matters relating to ... sexual orientation".

The Government's proposals are broad enough to capture everything that people have raised concerns about.

Finally, it has been proposed that, in addition to the things that are listed in the Government's proposals, the bill should include examples of discussion or criticism that some people want to be allowed. That is unnecessary, because that is all covered by "discussion or criticism". More than that, I think that including such examples would be actively harmful. Iain Smith gave a good example by saying that including the right to ridicule or insult could be very harmful to disabled people. It could also be very harmful to trans people, who face such behaviour daily and, in some cases, are afraid to leave their house because of it. It is important that the bill does not pick out certain types of behaviour just because some people would like to be able to behave in that way, given that such behaviour is very distressing to some of the people whose protection the bill is fundamentally about.

The Convener: Thank you very much.

Becky Kaufmann (Scottish Trans Alliance): I, too, thank the committee for inviting me. I will not repeat a lot of what Tim Hopkins and the other witnesses have said, but I want to draw a line under a couple of specific—[*Inaudible*.]

First and foremost, I want to drive home what we have said in all our written submissions and what underpinned my stage 1 oral evidence. When we have the conversation about freedom of expression protections in the bill, we should note that the legal protections exist in thresholds, as has been said by a number of—[*Inaudible*.]

The Convener: I do not know whether it is just me, but—

Becky Kaufmann: —to the bill exists to give reassurance to people that the bill is not squashing their rights. That is a fair thing to do, given the toxic political conversation that often goes—[*Inaudible*.]

The Convener: I am sorry to talk over you, but I am losing your sound. I wonder whether broadcasting colleagues can turn Becky Kaufmann's feed to audio only, because that often means that we can hear people whom we would otherwise struggle to hear. If that does not work, I will try to come back to Becky in a few moments.

Becky Kaufmann: Can you hear me now?

The Convener: Yes.

Becky Kaufmann: My apologies. I am working remotely from South Africa because I am caring for an ill relative. Our internet is quite dodgy as there have been storms in the past day.

I am not sure how much of what I just said got caught. I want to underline the idea that we are not talking about—[*Inaudible*.]—changing the thresholds in law. Thresholds exist in the law as written about intent and the reasonable person test. The issue is really about what the social impact is of such protections, as we have said. The one thing that I want to drive home and which I have said previously is that, being a member of a historically marginalised group, I am well and truly aware that there are members of society who say things about me and people like me that I find deeply hurtful and offensive. However, I do not want, nor would I ever want, those acts to be criminalised, as long as they were not done in a threatening, abusive way with the intention to stir up hatred.

What seems to have been lost in parts of this debate is that it is a two-way street. If your organisation wants to say things like, "Trans people are really male predators trying to harm women", or you want to—[*Inaudible*.]—to an international declaration that openly advocates removing my right to legal recognition or excluding me from participating in public life in my lived sex, that is your right under freedom of expression. However, it is also the right of people to then say that they believe that those actions and views are transphobic—both of those are free expression. I strongly believe, as does the STA, that people should be protected and able to say things that other people find uncomfortable; and that, equally, we should be adults about it and accept when people call us out for that.

The Convener: Thank you, Becky. I certainly caught that and I think that others were able to catch it, too. I am sorry for having to switch your video off to enable us to hear you, but I am grateful for what you said.

I hand over to Lucy Hunter Blackburn.

Lucy Hunter Blackburn (Murray Blackburn Mackenzie): I welcome the chance to take part in the discussion. My principal duty as a witness this afternoon is to bring home to the committee and impress on it the need for there to be the clearest points of reference in the bill about the limits and the lines.

I want to take us back to Lord Bracadale's review, because I think that we are drifting quite a long way from that, which, after all, the bill is a response to. He said that we needed to

"make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised."—[*Official Report*, *Justice Committee*, 27 October 2020; c 42.]

Lord Bracadale discussed that point with the committee at some length in its earlier evidence sessions. He was specific in his review—and even more so when talking to the committee—about the models in sections 29J and 29JA of the Public Order Act 1986, which set out in more detail what is not intended and how the line should be drawn.

We have, as a group—as have others—brought to the committee's attention numerous ways in which, and examples of where, accusations of hate and abuse have been directed at women taking part in the debates around sex and gender identity who do not subscribe to the view that gender identity should always supersede sex. That is, in essence, the core point of the dispute.

I draw attention to Professor Sarah Pedersen's written evidence to the committee this week, in which she said:

"it is my opinion that the Hate Crime Bill will afford opportunities for those who wish to silence gender-critical feminist voices to use threats of police reports, the possibility of reputational damage and the need to raise the financial and emotional resources to deal with such reporting."

That is based on her having undertaken a series of interviews around Scotland with women working in the area.

15:15

We have provided the committee with more examples in our written submission. I stress that they are not hypothetical examples—we are not picking them out of thin air. We mention the veteran feminist Lidia Falcón, the president of the Feminist Party of Spain, who spent her 85th birthday in the office of the prosecutor against hate crimes of Madrid because she had been reported for comments that she had made about the reform of gender recognition law in Spain. Last week, she was cleared—all the charges were dropped—because her comments were found to be legitimate political speech, but not until after an investigation had taken place.

As for the atmosphere in which such events take place, members might or might not be aware that, this week, an effigy of Carmen Calvo, the Deputy Prime Minister of Spain, was found hanging in Santiago de Compostela. I am sorry for showing you the image—it is not a good image, but I think that people need to see it to understand it. It is shocking stuff, but it illustrates the atmosphere in which we are working, which is why getting the law clear is important.

We do not think that the provision on discussion or criticism meets the Bracadale test—neither did Lord Bracadale when he met the committee, I would point out. We are joined in that view by numerous other commentators. I know that the police superintendents and the Scottish Police Federation are concerned. The people on the ground are concerned.

In particular, I draw the committee's attention to the submission of Scott Wortley of the law school at the University of Edinburgh, who talks in incredibly useful terms about the nature of legal drafting and the audience for it. In the case of the bill, the audience is not only the courts; it is all of us on the ground. His submission says—I suggest that this is the job of the committee—that we must ensure that the instruction book that accompanies the bill is really clear. He makes the point that any provision must be clear in the law itself, because that is where it all goes back to.

I also note that, a few days ago, police on the Wirral displayed a billboard, which must have been signed off by someone, which said:

"Being offensive is an offence".

The police have now withdrawn the billboard, but that example shows us how important it is to be clear in law about what we do or do not mean in this area.

The cabinet secretary invited us to say what behaviour we thought might not be caught by the provision on discussion or criticism. I will read out examples. I do that with some trepidation, because it is not easy for me, but I have to do so if I am to meet the cabinet secretary's invitation.

We are not clear that the provision on discussion or criticism would cover saying that there are two sexes or that sex is immutable. Would it cover saying that a woman is an "adult human female" and that the word "woman" can be used as a sex-based term? I am not going to stop anyone else from using it differently, but I should be allowed to use it as a sex-based term. Would it cover saying that third-person pronouns can be sex based, and that that is not criminally abusive? I am not sure whether any of those statements amount to discussion or criticism.

Is it discussion or criticism to assert:

"Women have sex-based rights, Only women can get pregnant, A lesbian cannot have a penis, The census should collect data on biological sex."?

That has been described to me as a hateful position to take. The list goes on to include the statement, "No one is 'cis'".

Is it hateful to say:

"Transmen are not men/Transmen are female"?

Is it discussion or criticism to say:

"People who describe themselves as non-binary are still either male or female"?

I will not read the whole list; I will finish with the following examples:

"We should not encourage young people with gender dysphoria to make irreversible changes to their bodies ... Cross dressing is a type of sexual fetish".

I am not absolutely sure by any means that I would say that all those statements fit into what we might call a discussion or criticism box. I would like the committee to consider whether it thinks that such statements should be criminalised in their own right. If it does not, does it feel that the provision on discussion or criticism is enough?

Those are the main points that I want to make. I also want to say a word about the bill process. We feel that this is a very late point at which to be having discussions on these degrees of detail. I appreciate that there has been a lot of generic and high-level discussion on freedom of expression, but the content of the bill has not been closely attended to until now. It feels to me as though we are trying to do an awful lot in a very short time. I commend the committee for having a public process at this point, but it brings out how difficult it is to deal with such matters in the way that we are.

The Convener: Thank you. There is a lot to chew over in what you said, but I shall resist the temptation to do so now. I invite Susan Smith to come in.

Susan Smith (For Women Scotland): I echo what Lucy Hunter Blackburn said powerfully and from the heart. The heart of the issue is that women in Scotland are furious and frightened by some of the implications of the bill not least because, the other week, a series of amendments were proposed, none of which seems to cross a line to being hateful, yet parliamentarians stood up and denounced them as shocking and "transphobic" for including phrases such as

"there are only two sexes".

We have a real issue that, although there are reasonable person tests in the bill, there are also people who are determined to use the bill to enforce compelled speech. There are also people, some of whom are office bearers in political parties in Scotland, who have stated clearly online that they will use the bill to criminalise and attack women. They are openly discussing that and we know that they are doing so.

The Scottish Government has said that the Convention on the Elimination of All Forms of Discrimination Against Women needs to be at the heart of everything that it does, but I am not sure that we will be able even to talk about CEDAW if some of those people report women for having discussions about sex-based rights. Certainly, political parties in Scotland have managed to draw up definitions of bigotry that claim that it is bigotry to talk about people's biology or use the wrong pronouns. Where does that leave a woman who is facing a rapist on the stand and the rapist has decided to identify as a woman that week? People are saying that that will have no effect. They are talking about putting misgendering into the bill; there are also all the definitions that political parties are accepting. That goes hand in hand with those issues.

As Lucy Hunter Blackburn said, we have a situation in Spain in which it is not a hate crime to hang an effigy of a real woman in the town square, but it is a hate crime for a woman, who was tortured under Franco, to say that women should have sex-based rights. That is happening under similar laws. There is no provision in the bill for sex; we now learn that there was never going to be and that the working group will not even consider it.

We have very little trust in this Government and very little trust that the bill will not be used to target, harass and attack women. We need stronger provisions and for women to be protected. As we go into an election and the Government is still determined to push through the GRA, we are very concerned that women who argue against it—and argue for the law as it stands—will be criminalised. We need up-front reassurances now. We need to know that we can talk about women, adult human females and two sexes, and about sex being immutable, because we are not getting any reassurance.

Women are angry. There are thousands and thousands of very, very frightened women. The convener said that he was frightened by the implications of some of the objections to the amendments; consider how frightened women are. I am sorry to be so emotional about it, but it is difficult and traumatic, and it has been a horrific experience for a lot of vulnerable women. Thank you for inviting us back and hearing us. Please remember to listen to women.

The Convener: Thank you. There is no need to apologise for being emotional. A lot of us find it a very emotive subject, because it is a very emotive subject, and we are holding this extraordinary session in order to do as much of the work on the record and in public as we can.

There are three witnesses from whom we have not yet heard. I will invite them to speak before I throw open the meeting to questions from committee members—please indicate that you have a question by using the chat box function. I ask Anthony Horan, Fraser Sutherland and Kieran Turner to share their thoughts with us, in that order.

Anthony Horan (Catholic Parliamentary Office of the Bishops Conference of Scotland): Thank you for the opportunity to participate in today's committee meeting.

I would not say that we have settled on one of the cabinet secretary's options as the ideal candidate. However, the provisions in options 1 and 2 that relate to religion and belief are very robust and are something that we called for from the outset. I commend the cabinet secretary in that regard.

It is important to note that sexual orientation—or sexual conduct and practices, as it was once termed; I think rather appropriately so—ought to be subject to a more robust standard, which is closer to the standard that is expected for religion and belief. In particular, the provisions need to be more specific, to avoid uncertainty and confusion.

These are important issues. For example, transgender identity and sexual orientation get to the very essence of what it means to be human. What does it mean to be male? What does it mean to be female? Is sex binary? Can someone change their sex, or is it immutable? Also, what is the meaning of marriage? What is it for?

On such important issues, people hold positions that are often at odds with the strongly held beliefs, values and opinions of other people—and not exclusively religious people, I might add. Therefore, there is tension and disagreement straightaway in relation to those issues, and there is fertile ground for critique, discussion and debate, in very robust or even offensive, shocking and disturbing terms. With that in mind, we need clarity to help us to distinguish between what is criminal and what is not.

Michael Clancy picked up on that point when he said that the law needs to be clear and consistent. Also, Lord Bracadale said, in his evidence to the committee at stage 1:

"If you are going to use"

freedom of expression provisions,

"they should reflect the approach of the ECHR and, in particular, they should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised."—[*Official Report*, *Justice Committee*, 27 October 2020; c 42.]

That is important not only because Lord Bracadale called for a clear line of demarcation between acceptable and unacceptable behaviour, but because he made the crucial point that offensive behaviour, in and of itself, should not be criminalised. The key point is that there are certain actions, behaviours, discussion points or flashpoints that ought not to be criminalised. That needs to be clear in the bill.

The Convener: Thank you—that was helpful. Fraser Sutherland is next.

Fraser Sutherland (Humanist Society Scotland): Thank you, convener.

I draw the committee's attention to our written submission. The main point that I want to make on religion and belief is that we have already had a discussion, and an amendment has already been agreed that replicates what is in options 1 and 2. There is concern about potentially undoing, just a matter of weeks later, what the amendment did, when there was broad consensus among religious and secular groups that broader parameters are needed when it comes to religion and belief.

There are a variety of reasons for that. In our written evidence, I set out why there is a difference between the religion and belief characteristic and the other characteristics. Religion and belief are, by their nature, philosophical concepts. Therefore, there is wider appreciation of criticism, insult or ridicule when it comes to religion and belief than is the case for, for example, race and disability. That is why the amendment that was agreed to was meaningful. Anthony Horan just touched on the matter when he referred to Lord Bracadale's evidence on the need to set out where we draw the line between what is and what is not an offence.

You will remember that when I gave evidence for the first time at stage 1, I sat alongside representatives from Scottish PEN and David Greig from the Royal Lyceum Theatre Company, who gave very powerful evidence on the impact in terms of self-censorship, for example. There is a particular risk in relation to religion and belief, which often faces ridicule and offence in material in art, theatre, writing and cartoons. If something is just restricted to discussion or criticism, people will self-censor or vexatious complaints will be made against people who produce such material.

We have seen, in other jurisdictions, people bringing vexatious complaints against dissidents, apostates and blasphemers; my concern is that Parliament might be creating a law that would allow a margin of appreciation for people to bring such complaints, particularly against those who have left a closed religious group or who have converted from one religion to another. There is a robust argument to be made that religion and belief should be treated slightly differently; that was done through the amendment that was made just a couple of weeks ago. I encourage the committee to stick to that.

15:30

The Convener: Thank you. That was very helpful. Kieran Turner has been waiting very patiently.

Kieran Turner (Evangelical Alliance): Given that my surname begins with T, I am used to waiting until the end of the line—I know that you will share that experience, convener. One of the benefits of going last is that you get to reflect a little bit on what people have said. I want to make three comments, and will probably reference others as I go along.

As has already been said, we have come a considerable way from where we were when I gave evidence with many others at stage 1. We welcome many of the amendments that have been made, particularly those around the thresholds, the reasonable person test, intent and—which is important for us—deletion of the "inflammatory material" section of the bill. Those were all important aspects for our community.

On comments that have just been made, we have always, including when we appeared before the committee in November, advocated for breadth and depth when it comes to freedom of expression. We welcome breadth; in the four options that are in front of us, option 1 would best reflect that. However, we would advocate for an option 1 plus. I will come on to that in a second. I know that the cabinet secretary talked about race; it is a finely balanced view. On balance, we would go for option 1, rather than option 2, because of the definitions of race in the bill that have been discussed previously—the fact that it includes nationality and citizenship and is a broad definition. There is also the principle of hierarchy that has been discussed already.

On the depth aspect, along with the Roman Catholic Church and the Humanist Society, we welcome and support the new provision on religion and belief. We have consistently argued for its inclusion and certainly do not want to see it being removed. We have always advocated for robust free speech protections.

However, we are concerned that that depth has not been extended into other areas, so at the moment there appears to be a very distinct hierarchy, when we consider options 1 and 2. Our response to that would be to level up rather than level down the free speech protections.

Fraser Sutherland was articulate as ever in his thinking on why religion and belief is separate. What he said might be true for some characteristics, but there are areas of belief that we have discussed this afternoon in which there are deeply held and contested views. There are other areas under discussion that have parallels to religion and belief, therefore we advocate for increased definition, particularly around transgender identity. We thought that the provision in section 12 that was previously in the bill reflected the start of the approach that Lord Bracadale had taken; we argue that that definition should be put back in.

My final comment is around reassurance on further definition, if the committee and Government were to take that approach. As someone who represents a protected characteristic and who has argued for people to be able to abuse, insult, show antipathy towards, dislike and ridicule it, I do not think that other groups should have anything to fear from the approach. The reason why has already been outlined: the threshold of criminality in the bill would catch behaviour that is threatening or abusive to a reasonable person, and behaviour that has the intent of stirring up hatred. Even the enhanced religion and belief provision is not a "Get out of jail free" card for anyone. If people behave in a way that meets the threshold, they will be subject to prosecution.

The deepening and greater clarity allows for what has been talked about: the difference between what is offensive and what is abusive in the bill. We believe that with better definition in some other areas, the bill would be clearer to the police, the courts and, crucially, the general public. As has already been articulated this afternoon, we have seen that there are strongly held views in a number of areas in which there are two sides. We need freedom of expression provisions to protect both sides in such debates, so we argue for greater definition.

The Convener: Thank you, Kieran. That was very helpful, indeed. Five members of the committee wish to ask questions. Clearly, not all our guests and witnesses will be able to answer all questions; only two or three answers to each question are likely. We will finish at 5 to 4, because I want to allow the cabinet secretary to come back in and offer some immediate reflections on what he hears this afternoon. He will probably start by telling Kieran and me that having a surname that begins with "T" is nothing compared with having a surname that begins with "Y". However, let us have less on surnames and more questions. I ask members for short sharp questions and, as always, to direct their questions to one or two witnesses, which is helpful.

Liam McArthur (Orkney Islands) (LD): Kieran Turner finished by talking about the need for greater definition. I am struck that there is an argument around that, which we heard being expressed by Lucy Hunter Blackburn and Susan Smith.

On the other hand, Andrew Tickell talked about taking a much more broad-brush approach—an option 5, if you will. I am interested to hear Andrew's response to the concerns that he has heard being expressed by Lucy, Susan and others about the need for greater detail and precision. I

would then be interested, if there is time, to hear Lucy's response to what Andrew has to say by way of response to those concerns.

The Convener: That would be helpful.

Dr Tickell: The problems with becoming more and more specific about what is not, in and of itself, to be treated as threatening or abusive are the following questions. First, where does one stop and, secondly, to what extent does one end up muddling the field about what is and is not criminal in that context? By incorporating such provision in a general way—which I suggested the committee might want to consider—we would not jettison complexity, but would be saying that it has to be explored in particular cases and circumstances.

A point was raised about vexatious complaints. The uses to which legislation are put are, to a considerable extent, independent of the letter of the law, in this case. The ability to prevent people from making vexatious complaints is limited in such scenarios. The problem with hierarchy and increasing complexity around this is that what is and what is not lawful in any given case does not become more comprehensible to the ordinary person.

Even the formulation that says that doing X, Y and Z or saying certain things is not, in and of itself, threatening or abusive, raises questions about the additional behaviour and what is needed to flip lawful conduct into being unlawful conduct. By incorporating a clear emphasis on the particular importance of provisions on free expression and freedom of thought, conscience and religion, we will at least have a structure to our thinking about how those fundamental values apply to what an accused person is said to have done in an individual case.

I was struck by Engender's point that we would be, in effect, freezing present social controversies into legislation, which would be challenging for courts to contend with in the long term, because the world moves on, disputes move on and understanding changes. Therefore, the tensions about and demands for clarity are important. We need to be clear about the thresholds for criminalisation. In a sense, we do not find demands for very specific provisions in any other area of law. As things stand in Scotland, we already have an offence of threatening or abusive behaviour that would cause the reasonable person to suffer fear and alarm. That offence has been in place since 2010 so it is, to an extent, the context in which this offence has to be understood.

I understand the social context for anxieties, given particular debates that are raging online, but that might make us forget the fact that existing laws very much echo the approach that is being taken to the stirring up of hatred offence. Indeed, that offence will be considerably harder to charge than offences in laws that are already on the books and could already give rise to vexatious litigation. A more general approach might get us over such issues while emphasising in a very simple and direct way how fundamental free speech, free expression and freedom of conscience, thought and religion are in all contexts.

The Convener: I am reluctant to put people on the spot, but if Lucy Hunter Blackburn would like to say anything in response to that, she should feel free to do so.

Lucy Hunter Blackburn: I would very much like to say something in response. I think that Andrew Tickell is being complacent about experience on the ground. He talked about "debates ... raging online", but the issue is truly not just about that; debates are also raging in workplaces and around publishers. This is not just a Twitter fight.

I do not have any objection to Andrew Tickell's proposition, which is helpful in its own right. He is right about beliefs. Kieran Turner made the point well that the issue is not just about religious beliefs; it runs wider, and the bill as amended should recognise that. I do not have any trouble with Andrew Tickell's position, but I do not think that it provides anything like a benchmark for clarity or a reference point. Our experience of being at the sharp end of the debate tells us that something more is needed. I come back to my point about Lidia Falcón and all the others who have been caught up.

On the point about putting specific things in law, Lord Bracadale recommends the approach that was taken in section 29JA of the Public Order Act 1986, which lists two specific things that are known to be flashpoints. People believing in the basic concept of innate gender identity and that it should override sex is not a flashpoint that will go away in a hurry. That debate will not just take place this year; there will be debates on the issue for a long time to come. There should be recognition that that flashpoint, at whatever level it happens, is unavoidable. I do not want the bill to include a list of 27 things; I do think that there is a list of two to four things that will, I am pretty confident, still be troublesome in a decade.

Given that the committee has not been able to consider quite a few of the other characteristics in any detail, our submission recognises that serious flashpoints might turn up. We suggest that you think about an order-making power that would make it possible to deal with something that no one predicted would turn out to be a hot spot, and which is serious enough to need legislation. That should be considered.

The idea that things can change over time is not a good reason for the bill not to recognise that there are flashpoints—not just here, but internationally—around belief in gender identity. Is it compulsory to believe in gender identity and to express those beliefs? Can I go about my business as an ordinary person, stating that I do not think that everyone has an innate gender identity, that I do not think that I have one at all, and that I do not think that policy and law should be based on the principle that such an identity exists and should override sex in all contexts? In some contexts, I think, it is unimportant, but in others it matters a lot.

Those are my comments on Andrew Tickell's proposal. I hope that they are helpful.

The Convener: They are.

I ask Liam Kerr to pick up the questioning. We will need to be very swift from now on.

15:45

Liam Kerr (North East Scotland) (Con): Thank you to everyone who has contributed to a fascinating and thought-provoking session.

My question relates to the one that Liam McArthur asked. Dr Tickell, do you envisage option 5—if we can call it that—standing apart from the other four options, or any combination of those options, or do you envisage option 5 coming in conjunction with option 3, for example, as mentioned by Michael Clancy of the Law Society? If option 5 were to be the only confirmation of freedom of expression in the bill, would any protection for freedom of expression be lost by not having any of the other four options in the bill?

Dr Tickell: That is an interesting question. In principle, option 5 could stand alongside the other amendments. You could have any of options 1 to 4 plus my suggestion as an alternative route. The idea was an immediate, short-notice reaction to the limits of the details as they were proposed by the cabinet secretary.

On the question whether that would limit protection, I am aware that the committee found it congenial to have protections around religion in the bill of the type that witnesses here have supported. It would not be inconsistent with retaining some of the work that the committee has already done on specific provisions about what might not count as threatening or abusive behaviour. That is a possibility.

Whatever the legislation says, it has always been the case that the ECHR will continue to apply. Whichever of options 1 to 4 you pick, they are not likely—given the thresholds of the offence—to have a significant effect on the limits of freedom of expression. I suspect that Lucy Hunter Blackburn and I agree on that.

The Convener: It is always nice when consensus breaks out.

John Finnie (Highlands and Islands) (Green): I share Danny Boyle's concerns that what was meant to be consolidating legislation has brought us to where we are at the moment regarding race. Mr Boyle, you said that we should leave race out. Have you given thought to what the practical implications of not leaving race out might be?

Danny Boyle: There is no appetite in the race equality community or in communities that are protected on the basis of colour, nationality or ethnic or national origin to even consider the possibility of a test case on threatening, abusive or insulting behaviour with regard to the discussion or criticism of race. This is an established body of law that operates well. People understand it, it protects them and it is embedded in the international human rights law system.

We are always hyper-vigilant about the stirring up of racial hatred. Lucy Hunter Blackburn spoke about issues that we cannot foresee that might occur and have an impact on the bill. That is true of race. We do not feel that this is a risk that it is necessary to take. Communities have not asked for their legal protections to be changed; it is sufficient for the different aspects of the legislation pertaining to race to be consolidated in one place.

Annabelle Ewing (Cowdenbeath) (SNP): To pick up on what Lucy Hunter Blackburn and Susan Smith said, committee members and others will be aware that I have spoken in the past about the importance of the debate on the immutability of sexual dimorphism and the importance of not conflating sex and gender.

I do not see, either personally or as a lawyer, that my freedom of expression in that regard is impacted by the bill as it stands. However, I recognise from the evidence that we have heard today that there are genuine fears about that issue. Therefore my question for the cabinet secretary is whether, having just heard at first hand the concerns that have been raised, he can provide reassurance that such exercises of freedom of expression will not be impacted by the bill. I ask that particularly in light of Andrew Tickell's point about the threshold for criminality that the bill sets. Perhaps the cabinet secretary could respond when he comes to wind up his remarks.

The Convener: Before I ask the cabinet secretary to respond to what he has heard, does anyone else want to say anything at all to the committee in the final two or three minutes of our meeting? Anyone who wishes to say anything

either to Humza Yousaf or to the committee should please type R in the BlueJeans chat box.

Lucy Hunter Blackburn: I will keep my comment very brief. It is about the distinction between what is said in the Parliament and what is said in the law. I draw the committee's attention to Scott Wortley's clear advice that, if you think that something matters and needs to be made clear in law, you should do so in the law and not rely on statements made in the Parliament. I want to underline to the committee the importance of not resting on such statements—even those made on the record at stage 3. Those are not what will be looked at by people out on the ground, advisers or even necessarily the courts. That is the only point that I wish to make.

Tim Hopkins: I will be very quick. For the avoidance of doubt, I just want to say that all the statements that Lucy Hunter Blackburn mentioned that people want to be able to say about trans rights should not be criminalised by this offence. She has the right to say those things, but so do other people and we do not want to see them criminalised. However, it was quite a long list—too long, I think, to write into the bill. Even I, as a supporter of trans rights, could come up with additional points that could be added to that list. In fact, there were some in amendment 82A at stage 2, which Lucy did not mention. That is the problem with such lists—where do you stop?

I make one final point. The other danger of writing such lists into law is that it might encourage behaviour that certainly should not be a criminal offence but could be a civil wrong. If some of the statements in Lucy's list were said by a person to a colleague at work, and they were repeated, that could constitute unlawful treatment under the Equality Act 2010. We need to be really careful about—[*Inaudible.*]—writing into the law what appears to be a right to say things that, although they are not criminal, could amount to a civil wrong and are certainly not things that we would necessarily want to encourage.

The Convener: Thank you, Tim. How the bill's provisions would interact with other legislation that is already on the books is an important point to bear in mind. You have talked about that, and Andrew Tickell has also mentioned, although in a different context, how it might affect not only the criminal law but other civil wrongs.

Cabinet secretary, we have reached the point where I would like to invite you to respond briefly to what you have heard and to outline what, at this point, you think the Scottish Government's next steps will be. After that, I will close the meeting.

Humza Yousaf: I again thank you, convener, and members of the committee for dedicating more of your time to discussing the Hate Crime and Public Order (Scotland) Bill. I know how difficult it is, particularly at the tail end of a parliamentary session, to give up more time, although consideration of the bill is important. I genuinely am grateful for that.

I am also grateful to all stakeholders. I agree with the points made by some and disagree with those made by others but, nonetheless, they have all given up their time to help to inform me, in my position in the Government, and no doubt members of the committee.

I want to touch on a couple of points. Each of the three witnesses who you asked to make opening remarks at the beginning of the meeting—Roddy Dunlop, Michael Clancy and Dr Andrew Tickell—and a number of others made a very important point. The threshold of the new offences of stirring up that the bill creates—therefore not that on race, which has been in existence since 1986—is very high. The new offences must be based on intent only. The bill includes a "reasonable person" test, so an objective test is applied to them. Such intent must be proved beyond reasonable doubt. Although there is a great deal of emphasis on freedom of expression—we have focused on that in this evidence session—as I thought Eilidh Dickson from Engender articulated, the real safeguard is the high threshold in the bill for the stirring-up offences. That is exceptionally important.

I reiterate what Tim Hopkins said: there is nothing in the list of statements that Lucy Hunter Blackburn read out or in the written submission from For Women Scotland that would be criminalised under the bill. That is also my understanding of the brief. That is the case for two reasons: first, under the "reasonable person" test, nothing that was said by Lucy Hunter Blackburn would be considered to be threatening or abusive—an unreasonable person might think that, but not a reasonable person—and, secondly, there is very clearly no intent to stir up hatred. Lucy Hunter Blackburn's last point—a very good point—was that the law should provide clarity. That should come not from parliamentarians or Government ministers but from the law, and that is written into the law in the form of the "reasonable person" test and the need to prove intent beyond reasonable doubt, which is something that we all know and understand.

We have heard some very persuasive arguments from both sides of the debate on whether there needs to be more specific detail in relation to some of the protected characteristics. Generally speaking, having heard the debate, I am more inclined towards the view that we cannot draw up exhaustive lists of specific detail. We have done something like that in relation to religion, but we did that with the agreement of the

faith groups that it particularly affects as well as with other organisations. However, on that issue, Iain Smith from Inclusion Scotland spoke exceptionally powerfully about the ridicule, antipathy and insults that a disabled person might have to put up with daily. Although we might not give a green light to that type of behaviour, we could send a wrong signal if we tried to be more specific.

Therefore, I will end by making an offer to those who would like to see more specific detail in the bill. I will continue to engage with stakeholders and members of the committee. The convener asked about my next steps. I have several phone calls lined up over the next two days with most, if not all, members of the Justice Committee and a number of stakeholders. If the Government does not go down the path of putting more specific detail in the bill, I suggest that I engage with stakeholders to see where we might be able to give them some reassurance in the explanatory notes that sit alongside the bill. That detail is not in the bill but, as the name suggests, those notes are there to explain how certain provisions in the bill work.

We might need to insert some more specific examples—perhaps some of the examples that Lucy Hunter Blackburn mentions about the belief of some people that sex is immutable and that people cannot transition from male to female and vice versa. If stakeholders would like some examples in the explanatory notes, I am keen to discuss that with them and with the Equality Network, the Scottish Trans Alliance and others to see whether that might be a common-ground compromise.

I thank you, convener, and all the stakeholders. I am confident that we will get to a position where we can get a freedom of expression provision that gives people the confidence that they need on the bill's impact on free speech and freedom of expression and at the same time ensures that we are not giving a green light to any type of behaviours that I suspect that none of us would like to see happening to protected groups.

The Convener: Thank you for that summary, cabinet secretary. Before I close the meeting, I want to associate myself with remarks made by a number of people over the course of the afternoon that what really matters in the bill is the precision with which the Scottish Parliament defines the criminal offences that it is creating.

The real work that the Justice Committee has done over the months on the bill has been to pore over in great detail how those offences are constructed—not in the explanatory notes but in the legislation. The way in which the scope of those offences has been narrowed and sharpened will do much more to protect and reassure than any formulation of words about freedom of expression, which is not to say that such a formulation of a freedom of expression provision in the bill is unimportant. I do not think that; it is very important. However, although I said that today's conversation would be focused on the four options that the cabinet secretary put on the table, those are options to be inserted into a bill that now looks very different indeed from the one that was introduced to Parliament a year or so ago.

It is clear that the committee's work is not yet done. Formally, the Justice Committee's work on the bill is done, because the bill was passed at stage 2 and is in the hands of the Parliament, which will return to it formally on 10 March, when stage 3 proceedings are scheduled.

I want to express very warm thanks to the cabinet secretary for his time and that of his officials, but also—and even more so, if I may say so—I thank our guests, witnesses and stakeholders for their input. The committee values the way in which the bill has been exposed to the public gaze over the months in which it has been discussed. I wish everyone a pleasant and safe evening. I close the meeting.

Meeting closed at 16:01.

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