The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 20 September 2011

Session 4

Tuesday 20 September 2011

CONTENTS

JUSTICE COMMITTEE
7th Meeting 2011, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*James Kelly (Rutherglen) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (SNP)
*Colin Keir (Edinburgh Western) (SNP)
*John Lamont (Ettrick, Roxburgh and Berwickshire) (Con)
*Alison McInnes (North East Scotland) (LD)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Bill Buchanan (Edinburgh Napier University)
Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Richard Foggo (Scottish Government)
Shelagh McCall (Scottish Human Rights Commission)
Frank Mulholland (Lord Advocate)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 20 September 2011

[The Convener *opened the meeting at 10:03*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the seventh meeting of the Justice Committee in session 4. I ask everyone to switch off their mobile phones and other electronic devices, as they interfere with the broadcasting system, even when they are switched to silent. No apologies have been received.

Agenda item 1 is to decide on taking business in private. The committee is invited to agree to consider in private at future meetings the main themes arising from the evidence received on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill; our draft report on that bill; and our approach to the Scottish Government's draft budget and the spending review. It has been the usual practice to take such an approach. Do members agree to consider those items in private?

Members *indicated agreement.*

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

10:04

The Convener: Item 2 is the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Before we begin our final evidence session, I want to clarify some issues that appeared in news reports at the weekend.

I received a letter from Nil by Mouth that asked why we did not require it to give oral evidence on the bill, but the letter did not come in until Friday at 6.30 pm, when, of course, no one was available to deal with it. It arrived quite late. Nil by Mouth did not indicate to the committee at any point prior to that that it wished to give oral evidence, and the rest of the committee did not hear of its disappointment until they saw press reports. I am sorry that Nil by Mouth was disappointed. That said, its written evidence was substantial, and the whole committee took the view that it was sufficient. However, I wrote to Nil by Mouth yesterday, asking it to make clear whether it wished to provide any further written evidence, which we would be pleased to consider before we report. I hope that it feels that it can do that.

On to business. We have two witnesses to hear from separately before we question the Lord Advocate and the minister, so, as usual, I would appreciate brief, focused questions from members. I will not say that again, as I know that members will provide that. Our first witness today is Shelagh McCall, one of the commissioners at the Scottish Human Rights Commission. Thank you for your written submission.

James Kelly (Rutherglen) (Lab): Good morning and thank you for attending the committee this morning. In your written submission, you express the view that the bill as drafted would be open to challenge under the European convention on human rights. Can you outline your reasons for stating that?

Shelagh McCall (Scottish Human Rights Commission): Thank you for inviting the commission to give evidence to the committee. There are five main areas in which the bill could be improved. I appreciate that, in other evidence sessions, the committee has been grappling with the question of freedom of expression, and I am happy to talk in general terms about what is required of the Parliament in that respect.

First, we recommend that the committee advise the Government to delete section 1(2)(e)—the paragraph about behaviour that a reasonable

person might find offensive. Offensive speech is protected by article 10 of the European convention on human rights. The European Court of Human Rights in Strasbourg and domestic courts have repeatedly said that not only popular speech but offensive, unpopular, shocking and disturbing speech is protected. I appreciate that the word "offensive" is intended to mean something different in the bill, but it is an immediate flag for a challenge under article 10. There are also issues with the clarity of that provision and whether an individual citizen could foresee that his action would be criminal under that section. That raises issues not only under article 10 but under articles 5 and 7. Article 5 relates to whether someone can be deprived of their liberty and article 7 is broadly described as the principle of legal certainty, meaning that the law needs to be clear in advance.

Secondly, subsections (2) to (4) of section 2 could be improved. I recognise that the committee has also been grappling with those subsections, which concern journeys to and from football matches or places where matches are being shown and conduct that occurs at a location where a match is being televised. We recommend that the committee consider clarifying those provisions to avoid unforeseen and unintended consequences. For example, if someone is in a public house or a private members club where a match is being shown and they engage in conduct that stirs up hatred against one of the groups that are protected under the bill but it has nothing to do with football nor is the person at whom that conduct is directed anything to do with the football, that would be caught under the bill. It may be that the matter could be left to the prosecutor's discretion, but the Parliament has the opportunity to get the drafting right and avoid such potential unintended consequences. We therefore recommend greater clarity about that.

The third point that we make in our written submission, to which Mr Kelly has referred, is on section 5(5) in relation to condition B. Section 5 is the section on threatening communications. The point has been made by other witnesses that, at the moment, condition B relates only to religious hatred. In our view, it should cover all the groups that are protected under section 1(4), as there is a danger that a hierarchy of discrimination could be created, which would be inappropriate.

There are two other matters concerning section 5 that do not arise from our written submission. We question why unrecorded speech is not included. If it is intended to exclude private conversations between two individuals, it could be more narrowly drafted. At the moment, it seems also to exclude the streaming of live speech over the internet. It may also exclude a rally run by an extremist group where the speaker is speaking through the microphone but is not being recorded. It may be that the Government intends to catch those sorts of things but exclude private conversations. Further consideration could be given to that point because, in freedom of expression terms, the fact that speech is recorded or unrecorded is not a critical factor.

The other matter relating to section 5 is whether there should be a specific exemption for artistic expression, peaceful preaching and so on, as there is in the equivalent English legislation. I am sorry that my answer was rather long, but I have set out the five areas in which we think there can be improvement and explained why that is.

The Convener: It is right that it is what is in the bill that counts but, notwithstanding that, have the draft guidelines from the Lord Advocate changed your view?

Shelagh McCall: No, they have not. There are two aspects when talking about interfering with freedom of expression. The first is that the lawmakers must get it right as best they can. Secondly, those enforcing the law must get it right. One of the gaps is that the Lord Advocate does not publish his guidelines to prosecutors as a matter of course—he said here that he will not publish his guidelines to prosecutors. Although I can understand the desire of lawmakers to leave that to police and prosecutors, there is an unknown quantity there, and the Parliament should take the opportunity to get it as right as it can at the beginning.

Roderick Campbell (North East Fife) (SNP): I want to return to the first point raised, concerning section 1(2)(e). Obviously, the right to freedom of expression in article 10 is a qualified right. Although the drafting may not be terribly clear, can that provision be construed in connection with section 1(1), so that the behaviour that we are talking about is only behaviour likely to incite public disorder?

Shelagh McCall: You are right that article 10 does not provide an absolute right, but interference with it must be justified by the state. It is not for the individual to defend what he or she did as okay; it is for the state to say why it has criminalised it.

There are three tests for that. First, the law must be sufficiently clear in advance; that is one of the points on which we take issue with this section. Secondly, the measure must be directed towards one of the objectives that is allowed under article 10.2 of the ECHR. Here, the bill is directed at the prevention of disorder, but there are issues to do with whether the section would pursue that aim. Thirdly, the measure needs to be necessary in a democratic society. There must be a pressing social need for the provision and it must be the

minimum measure necessary to achieve the aim sought.

To answer your question in more depth, our concern is that, because of the way in which section 1(1)(b)(ii) is drafted, particularly relating to a situation where there are no people who could be disturbed or offended by the conduct present—not where the police outnumber everyone else but where only like-minded people are in the room—it will be hard to justify the interference with freedom of expression as a necessary measure where the conduct creates no risk to public order. I am not sure that section 1(2)(e) is saved by 1(1)(b)(ii).

Roderick Campbell: However, do you have less of a problem with it in relation to section 1(1)(b)(i)?

10:15

Shelagh McCall: There is less of a problem in respect of pursuing the aim of the prevention of disorder. There may still be issues of foreseeability that someone's conduct will be criminal, and there may also be issues to do with whether the legislation is necessary. As I know that you have heard from other witnesses, there is a concern that much of the conduct is caught by other criminal provisions. Tim Hopkins gave evidence to suggest that the bill might create an additional stigma to the conduct. The Parliament has to be satisfied that the creation of the stigma is necessary in a democratic society and is a proportionate measure in relation to conduct that might otherwise be caught by other criminal provisions.

The Convener: We will hear from Humza Yousaf, followed by Colin Keir.

Humza Yousaf (Glasgow) (SNP): It is okay, convener. My point was precisely the same as Roderick Campbell's.

Colin Keir (Edinburgh Western) (SNP): My question relates to part of your submission. You refer to a possible disturbance in a pub that is showing a football match, and you state that it could not be taken in the context of the bill. Many pubs, particularly on Saturdays and Sundays when the games are shown live, will advertise and get people in to watch the game. It is probably one of their most profitable parts of the week. People generally go there to see the game. What makes you think that offensive behaviour in that context is not to be taken in the same way as offensive behaviour at a match? What makes it different when people go to the pub specifically to watch the match?

Shelagh McCall: I do not think that there necessarily is a difference. We do not generally have an issue with section 2 and the definitions in it, but the point that we make in our submission is that, as drafted, it has the potential to catch people who are not in a pub to see the match but who engage in offensive behaviour entirely separate from those who are there to see the match. We are suggesting that the committee find a way to clarify the language to ensure that the people who are caught are those who are there to see the match and that the offensive behaviour is in some way connected to the football as opposed to being some other gratuitously offensive behaviour towards an individual who falls into one of the categories in section 1. Perhaps that is a question for the minister and the Lord Advocate.

Colin Keir: Therefore, the principle is acceptable—the issue is just the language that is used in the bill.

Shelagh McCall: The principle is acceptable if the Parliament is satisfied that it is a necessary and proportionate measure—

Colin Keir: Okay. What is your own view?

Shelagh McCall: Unfortunately, we are not privy to all of the information that you have. From a European convention point of view, the basis for interfering with people's freedom of expression needs to be evidence and not assertion. If the committee and Parliament are satisfied that there is sufficient evidence that there is a genuine social problem that needs to be tackled in the way outlined in the bill, there is no difficulty with it.

The Convener: I want just to clarify that everything that the committee has received is in the public domain. We have no special routes for information.

John Finnie (Highlands and Islands) (SNP): Ms McCall, thank you for coming along. I want to ask you about the phrase "pressing need", which I think you used earlier.

Shelagh McCall: Yes.

John Finnie: You also referred to sufficient evidence. What do you think would constitute a pressing need or sufficient evidence to introduce legislation of this nature?

Shelagh McCall: The policy memorandum appears to set out a pressing social need, and I think that we are all aware of reports of events last season that came to public attention and resulted in criminal behaviour and behaviour that would be potentially criminal under this legislation. However, we need to think about the issue that needs to be dealt with that is not already dealt with by other criminal law.

The Government may have evidence that there is a pressing need to tackle bigotry and prejudice and its manifestation in violence in relation to football, and it appears from its policy

memorandum that such evidence does exist. What I am saying is that it is not enough simply for the Government to say, "We say there is a problem and therefore we will legislate." If it was challenged, the Government would have to demonstrate why it says that there is a problem. I am not suggesting that that evidence does not exist; I am saying just that Parliament, before it passes the legislation, should be satisfied that there is such evidence.

John Finnie: That said, do you accept that there is such evidence?

Shelagh McCall: I accept, in so far as it has come to my attention, as it has come to the attention of every other member of the public, that there appears to be a problem. It appears that the continuing behaviour is not being addressed sufficiently, but it is important to narrow down precisely what it is that the bill can add to dealing with that problem. That is one reason why we have a difficulty with the offensive behaviour provision in section 1(2)(e). The other provisions in section 1(2) are much more tightly expressed and appear to be directed specifically at what the Government says is the issue.

John Finnie: We have heard from the Lord Advocate and representatives of all ranks of the police that there is a gap in the legislation. Are they incorrect?

Shelagh McCall: I have no basis for thinking that they are incorrect.

John Finnie: Okay. Thank you.

The Convener: As there do not seem to be any more questions, is there something that we have not asked you that you wish we had asked and on which you would like to comment?

Shelagh McCall: I emphasise that, in justifying the bill's interference with freedom of expression, the Parliament has the primary role to play, so it might be interesting for the committee to press the Lord Advocate and the minister on what sort of conduct is intended to be caught by the offensive behaviour provision in section 1(2)(e) that would not otherwise be caught by other criminal provisions. It might be worth exploring that with later witnesses.

The Convener: As well as the issue of unrecorded speech.

Shelagh McCall: Yes—the issue of why that is excluded.

The Convener: Graeme Pearson wants to ask a question. Every time I say that there are no more questions, someone pops up. Roderick Campbell has popped up again, too.

Graeme Pearson (South Scotland) (Lab): It is too good an opportunity to miss.

Is the trend over the past 10 years whereby the number of arrests at games has fallen—it is certainly the case that there were very few arrests among the crowd at the game to which you referred—indicative of a "pressing social need", which you mentioned earlier?

Shelagh McCall: You would have to work out why the number of arrests had fallen. If it has fallen because the number of incidents of potentially criminal conduct has fallen, that would suggest that such a need does not exist. If it has fallen because of an unwillingness or an inability on the part of the police to arrest or to identify people, that does not tell you one way or t'other. It is not a question of how many people are arrested and prosecuted; it is a question of whether the evidence is there on what underpins that.

Roderick Campbell: Do you think that the bill would be improved by a freedom of expression defence?

Shelagh McCall: That is why I suggested that the Government and the committee should consider recommending an exemption, which is how such a provision would normally be described. I am not an English lawyer, but I think that there is a provision in England and Wales that exempts artistic expression, peaceful preaching, peaceful proselytising and so on. Those are legitimate concerns because, on its face, the bill challenges freedom of expression.

Section 5 contains a defence of reasonableness, but that is a Scottish criminal law defence—"What I did was reasonable, so I should not be convicted"—rather than a convention rights defence, if I can put it that way. In an article 10 sense, the test is different because it is for the state to justify the interference with freedom of expression rather than for the individual to defend his speech. Some such provision might be helpful.

The Convener: Would it be of assistance if the bill linked to what the concluded guidelines—the ones that we have are just draft guidelines—said about freedom of expression?

Shelagh McCall: That would be of assistance, but it would not be the answer because the Parliament has the primary duty in justifying interference with freedom of expression.

We are suggesting that there are ways in which the bill could be improved to avoid unnecessary challenges under freedom of expression, because the last thing that the Government and the Parliament would want, if the bill is passed, is for the legislation to be bogged down in challenges in the courts that need not have taken place. We are suggesting ways in which the bill could be improved at this end to avoid subsequent challenge.

The Convener: Would the bill be improved by inserting a section on freedom of expression and importing from the Lord Advocate's draft guidelines the list of what the offence will not criminalise, such as peaceful religious preaching? That list makes it clear that the bill will not

"Criminalise jokes and satire ... depictions of threats"

or

"threats made in jest that no reasonable person would find alarming."

Should we put that kind of stuff into the bill?

Shelagh McCall: Yes. I have not looked at the Lord Advocate's list to see whether it is exhaustive or the right one, but it is the sort of list that we find in other legislation.

The Convener: Yes. The bill could exemplify but not be exhaustive. That is very helpful. Thank you very much.

That concludes questions to Shelagh McCall. I suspend the meeting but ask people to stay put. We are just changing witnesses.

10:25

Meeting suspended.

10:26

On resuming—

The Convener: I welcome William Buchanan, who is professor of computer security and digital forensics at Edinburgh Napier University. I thank him for his written submission. I will not ask any questions in this tranche as the topic is a blur to me. However, I suspect that we have some technophiles on the committee.

Humza Yousaf: Thank you for your submission, which I have found useful. It contains a useful list of difficulties that exist when prosecuting cybercrime. Do they negate the need for legislation on the matter?

Professor Bill Buchanan (Edinburgh Napier University): The proposals are a step forward, but there needs to be some in-depth consideration of what is involved. Some of what the bill says is perhaps slightly naive, in that it maps what happens on a street in the real world onto the internet. We cannot do that well without looking at the basic procedures behind the internet.

We have all posted something on the internet, perhaps as a joke, and had what we said taken wrongly. It is a different space. There is experience and knowledge in relation to cybercrime in Scotland—the Scottish Crime and Drug Enforcement Agency has such knowledge—but I wonder whether the Scottish police have enough at the moment to understand the internet and how people use it.

Humza Yousaf: Will you explain the idea of creating a group of digital experts to assist prosecutors? It is a good idea.

Professor Buchanan: We are worried that the current system of investigation, expert witnesses and prosecutors lack independence and that they are unable to consider all the risks that are associated with, for example, Facebook postings—for example, the probability that someone might maliciously post something about someone else and that that might be taken as real. Therefore, an independent body needs to be set up to assist in prosecution of internet cybercrime cases. It needs to be a wide-ranging but very focused body.

We have a lot of industry and many small and medium-sized enterprises in Scotland working on internet security and there are Dell SecureWorks, Logica and the banks, for example. Edinburgh is probably in a unique position in the world in having the expertise to properly understand the issues and become a world leader. This could be an opportunity for us to build up some excellence in prosecuting cybercrime while looking after the individual and ensuring that things are done correctly. Nothing is ever black and white on the internet and we need to understand the basic risks.

Humza Yousaf: Can I just chip in to take up that point, convener?

The Convener: I will not enforce a two-questions-only rule on you, Humza. On you go.

10:30

Humza Yousaf: I am glad to hear it.

Professor Buchanan—you make the distinction throughout your good submission, and you have reiterated it, that it is not possible to apply the same rules on the internet or in cyberworld as out in the street. Can you elaborate on that? To make a threat on the street to kill somebody is still rash and there might be other factors—the person might be inebriated or whatever. Why is there a distinction between that and a person posting the same threat on the internet?

Professor Buchanan: Things are often said on the internet without thought. People often read something and reply immediately. Once you have pressed the send button, it has gone.

Humza Yousaf: That can also happen in real life. If someone provokes you and you say something rash, you do not have the opportunity to take back whatever you said.

Professor Buchanan: If I was to write a letter and post it in the mail, and you received it, that would be something that I had thought about; it would be something that I wanted to do and everything that I said in it would be correct. The internet is a very responsive system and we cannot take things back. I might say, "I'd like to start a riot", and add a little smiley face, which would mean that it was a joke. I might not mean it, but I might send it to you and you might say, "Bill says we should start a riot." Things are said in jest. In the street, you would see me laughing when I said, "Let's start a riot." You would know that it was a joke and that I did not mean it, but if I were to make the comment in an e-mail, you might say that it is wrong and there would be evidence of what I had said. The context of the comment is removed.

The internet is a free world. Everybody can get into it and can post whatever they want. My signature does not exist on the internet, so how can you identify that it was I who sent you an e-mail? Anybody can spoof my e-mail address, anybody can pretend to have my identity and anybody can take my identity.

Humza Yousaf: Currently, the police do not have the resources to detect whether something has been sent by malicious malware, spam or a bot.

Professor Buchanan: That is right. One defence that a person can use is, "The bot did it. It wasn't me—something on my computer sent it." I worry in this new world that is still evolving and changing, and in which social networks are becoming more and more prevalent: we send text messages and we have phones and can carry around the internet. We could quickly post something without having enough fingers free to type properly, so what we type could be incorrect or misspelt. It is very easy for a word to be taken the wrong way or for the computer to change it for you.

I deal with students a lot. Some students write very nice e-mails to me, which are written carefully using grammar, punctuation and so on. Other students use almost pidgin English and I have to interpret it. We are living in a different world, but it is one that we are all part of.

The Convener: The use of pidgin English or very careful grammar is about one's past. That is a frivolous remark, and I am not known for frivolity.

James Kelly: Good morning, Professor Buchanan. Your submission makes a number of interesting points. Central among them is a point about how we can identify someone who has made a posting that would breach the terms of the bill. When we raised the issue with the minister back in June, she was quite dismissive of it and said, "Oh well, sometimes people put their names to the posts." That happens very rarely.

From your knowledge, if someone posted in Portugal and that post appeared on a website in Scotland, what is the technical process for trying to identify from what computer and from whom it has come?

Professor Buchanan: It is very difficult, in that there are no boundaries or borders on the internet. From a technical point of view, internet service providers in the United Kingdom keep a trace for up to two years of all internet traffic coming from homes. It is therefore possible for the police to go to the ISP to determine whether someone posted something at a specific time. I worry that it is not possible to tell who posted. In my home, four people use the internet; no one could tell which person posted a specific thing because all would come from one network. Identification is possible, but legislation is not the same all around the world. I do not know whether an ISP in Portugal would log the details of communications.

There are details, though. Most servers now record the internet protocol address that posted something and at what time. That is normally done in a log. However, it would be very difficult to trace anything outside the UK. The major problem for the UK police is that it is difficult to prosecute people once borders are crossed.

James Kelly: Just to be clear, if I take my home as an example, we have one router, and three personal computers that log in through it. Is the IP address allocated to the router?

Professor Buchanan: That would be one address—it is almost impossible to find out which computer in that network had sent a particular communication. Identification is possible through profiling, however. Investigators could say that someone used a certain application, such as e-mailing their office or creating a connection to a business network, and that between this time and that time, it is likely that a specific person was present and that no one else was there. However, because it cannot be said that someone in that network definitely did something at a specific time, there is a risk.

James Kelly: If someone reports a posting from a month ago, on a Sunday afternoon, on a particular website, what resources are required to enable the police to trace that to an individual home?

Professor Buchanan: The police have mechanisms to enable them to put a case for contacting a mobile phone operator—if the posting happened through a mobile phone network—or an ISP. The police consider the crime, the risk and so on. In the case of a missing person, the police are automatically given the opportunity to view the

location of someone's telephone or their internet record for the past day. However, if it is a trivial matter, they would not be allowed to do that. The police can ask an ISP for someone's basic record within a certain time window, although whether it would be allowed would depend on the crime that had been committed. However, it takes ISPs some time—normally a few days—to find data on the specific posting.

The Convener: Generally, one cannot go fishing for evidence in law—you have to have a search warrant. Where does that requirement fit in with this?

Professor Buchanan: That is right. It worries me a bit that the bill gives the police an opportunity to go fishing for information when no crime has been committed. The warrant happens, then goes through some arbitrator and then to the ISP or the mobile phone operator.

James Kelly: Obviously, there are legal issues here. You are saying that the resources exist in the UK to track down an individual posting to a specific home, but that if a number of PCs go through a router it is difficult to identify which PC the posting came from.

If the police were trying to track down something that had been posted abroad, the situation is not as clear-cut—the resources do not necessarily exist to do that.

Professor Buchanan: That is especially the case as we are now more and more dependent on US-type law—I am thinking of Florida or the east coast. With Hotmail, Google and Facebook, most of our data is in the cloud. The cloud as an infrastructure does not really exist in the UK in the way that Amazon, Google and Microsoft exist in the US. To get any information from Google or Microsoft requires a warrant, which can take some time.

James Kelly: Where does that leave section 7(2), which deals with communications from persons outside Scotland? Is that an effective section? Is there any way it could be firmed up? Will it be difficult to achieve the intention of that section, given the limitations that exist?

Professor Buchanan: I think that it will be difficult. It is difficult to draw a border around Scotland as an entity, because we really exist on a world-wide basis. Although a communication might be from within Scotland, or from someone from outside Scotland to someone in Scotland, our data is often held outside Scotland. It would be very difficult to get the core data if it were held on systems outside the UK.

James Kelly: From that point of view, do you think it is realistic or practical to include section 7 in the bill?

Professor Buchanan: I think that it is. Section 7 is a good step, but it probably needs to be couched with some sort of guidelines on how to investigate such communications, so that a jury could understand the risks. All that I am identifying is that the situation is not black and white. Police have investigated crime for thousands of years—and more—but this is a new area. We need to understand some of the risks, so that the jury could be aware that something else could have happened; it is up to the jury to understand the risks. The jury could be 95 per cent certain that somebody sent an e-mail that was received by somebody in the UK, but there might be a 5 per cent chance that the e-mail could have been sent by somebody else who was maliciously using that e-mail address to send communications.

The Convener: Thank you. Forgive me, Humza—I want to call other members who have not asked questions yet. I suspect that we will cover much the same business. I call Graeme Pearson, to be followed by Alison McInnes.

Graeme Pearson: I ask this question in the context of the evidence that you have just given. The financial memorandum mentions spending of up to £1.5 million on the new demands that will be created by the bill. You talked about creating an infrastructure. Is the forecast amount sufficient to support the resources that you mentioned?

Professor Buchanan: The spending should be on creating a panel of experts. We find that many people are willing to give up their time and energy to look at such things and to really make Scotland a leader in this area. If you set up a panel with purely police members, it will be biased towards one side. We need to set up a panel that is made up of leading industry people, people from SMEs and people from our banking system, which is one of the best in the world as it has experts in e-crime and cybercrime. The banks are under threat from such crime all the time, so they understand this area. If we could look at setting up a lightweight infrastructure that includes academia—

Graeme Pearson: What kind of costs would be involved in that?

Professor Buchanan: I do not think that a lot of cost would be involved. The panel would probably need to meet twice a year to set the basic guidelines, to review what has gone on and so on. It would probably need to meet once every three or four months to look at major cases and how it can inform legislation. We probably need to set it up on a lightweight, as-per basis. You could probably set up an ad hoc committee at any time using Skype. You do not need people to travel. You say, "These are the six people in Scotland who can give a good independent assessment. They will quickly produce a report that the police can act on." Cyber activity is a minute-by-minute

thing. It could happen on a Sunday evening at 9 o'clock, for example. Not having fixed times for this would be useful for Scotland as a country.

10:45

The Convener: That sounds like a business opportunity.

Professor Buchanan: I would say so, for Scotland. We are a small enough country that we can get people together and work together. In England it is much more difficult to do that kind of thing. In Scotland there is certainly expertise in the area from which we could benefit, and which could lead the world.

Alison McInnes (North East Scotland) (LD): Sections 5 to 7 have not yet had much scrutiny from the committee, partly because witnesses have focused on the earlier sections. Can you advise what they would add to the UK Communications Act 2003? Are there gaps in the 2003 act that would be closed by the bill?

Professor Buchanan: My response to the 2003 act, which was a difficult act, would probably have been the same as my response to the bill. The 2003 act and, certainly, the bill represent a knee-jerk reaction in that they try to scale normal behaviour in the context of the internet.

Thinking can start to crystallise about how to look at the issue in general. In relation to sectarianism and football-related matters, the bill is a good step, but we need to identify the risks and, as a country, to try to consider more generally how to create our own legislation in the area. This might be for Scotland a good starting point that enables us to define how we work in the space, because a lot of what goes on on the internet could be encompassed by the bill. Many things that happen could be prosecuted under the bill, even though they might not relate to football.

Alison McInnes: Are we starting at the right place? You seem to be saying that we have a lot to think about and to learn. However, if the bill goes through the parliamentary process, its provisions will appear on the statute book in the next month or so. Is the approach proportionate? Is there enough clarity for citizens? I sense that you are worried that the bill might create a culture of distrust. People will not be at all sure about what they are able to do and will feel that they are being watched and scrutinised all the time. Is that a danger?

Professor Buchanan: I completely agree that it is. There needs to be a trusted auditor and a trusted infrastructure—people whom we trust to look after us. That is why the committee or panel that I talked about would not necessarily be filled with the police, although it would include police representation. We need people who are trusted in the community. That is where academia can help, because we generally are trusted in the community. The bill is a step in the right direction, but there should probably be some sort of auditing system around the process.

The Convener: I take it from that that you are suggesting that somewhere in the bill there should be a provision that says, "There shall be established such-and-such" or—

Professor Buchanan: —or that there will be review and that risk assessment will be undertaken case by case. The bill could set out the rules for risk assessment and say that in cases of serious abuse an ad hoc committee will be set up to report on the evidence that is presented. There should be some sort of regular review.

John Finnie: You said that thinking about the issue can start to crystallise. Notwithstanding that there are tremendous difficulties in dealing with internet crime—which you talked about and which I think police forces the world over acknowledge—do you accept that the Scottish police service has had considerable success with its interventions on football and, in particular, on gang-related incidents?

Professor Buchanan: I completely accept that. Much of what the police do is work to disrupt and prevent such incidents. In Glasgow there are many good examples of the police working with communities to prevent escalation from low-level to high-level crime. Social workers are working closely with the police in that regard. There is much informal communication—which probably is not written down anywhere—that is good communication. For example, a social worker might say to a police officer, "Fred is at risk of doing something; maybe you should have a word with him." That works. What will not work, however, is the police spending their time not in the community but fishing for evidence on Facebook. On the internet, a lot of what goes on is written down and can be seen—what might be called formal communications—so I am slightly worried that the police will do that. I am sure that that will not happen but the internet is, nevertheless, a source for the preventative type of evidence.

John Finnie: Dr Kay Goodall told us that the law can influence people to reduce overt prejudice and that the mere discussion of this issue, recent disturbances elsewhere on these islands and, indeed, the shocking behaviour against the Celtic manager can act as a preventative.

Professor Buchanan: I am sorry—I missed the last part of your question.

John Finnie: Along with—as you have pointed out—the bill, the mere fact that we are discussing

the issues and the knowledge that there have been successful prosecutions crystallise thinking further.

Professor Buchanan: I completely agree. The great thing about the bill is that it includes internet communications, which is definitely a step in the right direction.

Our use of the internet is changing because, I think, we can see what is and is not acceptable. At one time, everything was possible and allowed on the internet, but now we are starting to say, "This is how you should behave on the internet" or "You shouldn't be saying things like this". The bill is, as I have said, a step in the right direction.

Humza Yousaf: I have a supplementary to James Kelly's question about investigating and prosecuting people outside Scotland and Mr Pearson's point about police infrastructure. Are the police not already dealing with such matters in relation to, for example, child pornography rings? Would they not use similar infrastructure, technology and investigation techniques to tackle these crimes?

Professor Buchanan: I think that they would. We certainly have expertise in Scotland to deal with such matters. As I have said, the Scottish Crime and Drug Enforcement Agency has been at the forefront of all of this. However, it is probably vastly underresourced in this area, particularly given the risk to businesses through cybercrime and so on, and spends most of its time dealing with serious criminal activities.

The general police officer on the beat needs to begin to understand certain internet and social media issues. As we saw with the riots in London, the police do not seem in general to be prepared for the way in which social media internet postings and so on are used. There is a learning process; indeed, we found that our police need to be trained at three levels. Every police officer should at least understand what the internet is and how it is actually used.

Humza Yousaf: In breaking up child pornography rings, for example, police forces in other countries and other continents share intelligence and engage in shared working. How compliant are internet service providers and social networking sites in that respect?

Professor Buchanan: Shared intelligence certainly works, but it could be done better, even within Scotland. We are not that great at sharing intelligence on a regional basis in the UK, and we are probably even worse internationally.

However, there are risks attached to such efforts. On one hand, under the Data Protection Act 1998 you should not share information about an individual unless you state that you are doing so; on the other, RIPA allows the state to log communications and so on. There is always a balancing act between the risk to society—

The Convener: Excuse me—what does RIPA stand for?

Professor Buchanan: It is the—ah— [*Interruption*.]

Graeme Pearson: It is the Regulation of Investigatory Powers Act 2000.

The Convener: There we go. I knew that there was some reason why Graeme Pearson was a member of the committee—and at last I have found it.

Professor Buchanan: The equivalent in the United States is the USA Patriot Act. There is therefore a tension involved in sharing information. For example, someone could say that their personal data should not have been shared just because it was perceived that they were at risk from low-level crime. So, there is a challenge. However, if something becomes a criminal case, the data protection legislation obviously does not apply in the same way. We need to understand how we can share information better. A lot of good research is going on in Scotland on information sharing between the police and their community partners, from which we could benefit. The bill could allow us to invest energy in looking at ways to protect society and the individual, as well as to use information to reduce risks.

The Convener: I want to bring in Colin Keir, then John Lamont.

Colin Keir: My question has been answered.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Professor Buchanan has identified a number of challenges in respect of policing the internet, particularly in relation to the bill. Are you saying that it will be almost impossible to police the internet effectively and that it is more about changing people's behaviour regarding how they post on Facebook and such sites? Are you aware of how other countries have dealt with the issue? Do you know of Parliaments in other parts of the world that have passed more effective acts around what we are trying to achieve? Have they achieved it more effectively by other means?

Professor Buchanan: I am saying that it is not a black-and-white issue. A great deal of corroboration is required in such cases. For example, if we know that someone was at home when there was a particular posting on Facebook, and that their car was parked in their drive at that time, then there is a very good chance that they did the posting. However, if we used the internet as the sole source of evidence, the case would be knocked down. Just because there was a post on someone's Facebook page does not mean that

they did it. We therefore need a whole infrastructure of information. I am not saying that the bill should not go ahead—I am saying that the issue that I described needs to be thought about.

On the international aspect, no country really has control of the internet. However, Scotland might have the opportunity to start to define the proper and polite way in which to use the internet. The bill does not define that and just takes a black-and-white approach to matters, to the effect that if someone does something bad, they will be prosecuted, and if they do not, then they will be okay. The bill does not go into enough detail in that regard. As a country, we probably need to say what kind of things are allowed to happen on the internet and what are definitely not. For example, we all agree that child pornography is wrong and that it is fundamentally a crime. However, for football, we do not know what kind of things we are allowed to say on the internet and what sort of things we are not allowed to say. The bill is a starting point, but we probably need an infrastructure to define what polite use of the internet is.

John Lamont: The danger of being too prescriptive is that there is an evolving process. We could start defining every single phrase or term as being allowed or not allowed, but the situation could change next week because of a new television programme or whatever. The danger in being too prescriptive is that we simply store up problems for further down the line.

Professor Buchanan: I agree. We therefore need high-level guidelines. We need people in Scotland to get together and say what kind of things should happen. It should not be the police but leading industry people who define those things at a high level. For example, whenever someone signed up to or logged into a blog site, bulletin or whatever, they would see a statement regarding what the Scottish Parliament has defined as the correct things to do. Obviously, it would be more difficult to do that for a site that existed outside Scotland and the United Kingdom. In fact, it would be almost impossible to do it, because we are typically bound by US law in many such cases.

The Convener: Thank you very much for your evidence. Is there anything that we have not asked about, or have we prodded sufficiently?

Professor Buchanan: No. Thank you very much for the opportunity.

The Convener: Thank you very much. It has been very useful. I suspend the meeting for six minutes.

10:59

Meeting suspended.

11:07

On resuming—

The Convener: The final panel of witnesses is before us; they are all very welcome. We have with us Heather Wortley, who is from the Scottish Government legal directorate; Gery McLaughlin, who is the bill team leader; Richard Foggo, who is head of the Scottish Government's community safety unit; the Minister for Community Safety and Legal Affairs, Roseanna Cunningham; the Lord Advocate, the right hon Frank Mulholland; and Michelle Macleod, who is head of policy at the Crown Office and Procurator Fiscal Service.

We will move straight to questions.

James Kelly: Good morning.

It is fair to say that the bill process so far has posed more questions than it has provided answers. Many of the submissions have been critical of the bill, and serious questions have been asked during today's witness sessions.

On the guidelines that the Lord Advocate has kindly published and handed to the committee—

The Convener: I am sorry to interrupt, but I understand that the minister wants to make an opening statement. I am terribly sorry. Do you wish to make an opening statement, minister?

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I have been provided with an opening statement.

The Convener: I am sorry; I did not know that. My apologies for that omission.

Roseanna Cunningham: I understood that I was to make an opening statement.

The Convener: I did not know that, but we are all clear now. The minister may make an opening statement.

I also thank the Lord Advocate for providing us with the guidelines, which have been useful.

Roseanna Cunningham: I thank you for the invitation to come back to the committee before it moves on to stage 2, and I am delighted to be here with the Lord Advocate. I hope that, together, we can deal with most of the committee's questions.

I thank everybody who has been involved in the process so far, including the committee and those who have provided written and oral evidence. We are watching and reading with interest, and it is important that the process has taken place.

I will take a few minutes to outline our initial reaction to the discussion and debate. In the spirit of the agreement that was reached in the chamber in June, I am still in listening mode and genuinely seeking to build consensus. However, we need to remind ourselves of the basic assumptions behind the bill. I will address some of the general issues that have been raised about the bill and then offer reaction to a couple of specific comments about the two separate offences.

Some have questioned whether the bill is necessary. It is true that the last football season now seems quite a long time ago. Some have commented that the crisis has maybe passed, but we have all been here before so many times that we must be wary of making that assumption. It is critical that every one of us accepts that there is a significant problem in Scottish football, which we must face up to and which existed long before last season. Some witnesses have suggested in previous committee evidence sessions that there is a collective sense of denial among many who are involved in the debate—denial that there is an issue or denial that they have a problem, although they accept that others do. I agree that that characterises a lot of the discussion around the bill. We need to get beyond that denial.

As a number of matches last season—and over many seasons before that—showed, there is a significant problem with sectarianism and other expressions of hate connected to football. Crucially, while others are unsure, there is no denial on the part of the public: 89 per cent of Scots believe that sectarianism is unacceptable in Scottish football and 91 per cent agree that further action is needed. That is a salutary lesson for everybody to remember.

I have heard many times the accusation that new laws are unnecessary because laws are already in place. We are mindful of that point, although we do not agree that it is the case. What we propose arises out of concerns that the police had earlier in the year. Furthermore, there is a danger that we miss another fundamental point: it is an entirely proper role for the Parliament to use legislation to register public outrage about a particular behaviour even when other criminal offences cover aspects of that behaviour. We have seen that in legislation to protect emergency workers, to outlaw stalking, to criminalise slavery and servitude and to express our abhorrence of genocide—all those matters were already criminal. Right-minded people are as outraged by bombs, bullets and bigotry as they are by those other crimes and will, I am sure, welcome the Parliament's decision to bring this behaviour fully into view.

As part of our own evidence gathering, we have learned that football fans are especially worried about gaining a criminal record and being banned from watching football. That is a huge sanction from their perspective. A conviction for a general offence is, of course, a stain on someone's character, but some offences have been devalued. I want the criminal records of the bigots to show exactly the nature of their offending—not just that they have a conviction for breach of the peace, but that they have a conviction for offensive behaviour at a football match or through threatening communications, so that employers, families and friends know the truth about the character of those individuals.

I believe that the measures in the bill are necessary and justified. I also believe that they will be effective. Since I last appeared before the committee, we have announced a £1.8 million investment, over two years, in a partnership with the Association of Chief Police Officers in Scotland to establish a new national football policing unit. I suspect that members saw some evidence of that at the game on Sunday. The unit has already been deployed more than 30 times to matches throughout Scotland and the rest of the United Kingdom to address directly the concern that exists about a lack of consistency in the policing of football matches.

I acknowledge the extraordinary commitment of the police and stewards to ensuring that Sunday's match passed off safely for most fans. I also acknowledge the fact that there seems to be a shift in behaviour with regard to mass offensive chanting. That is to be welcomed, but there is still a long way to go. It is worth noting that there were still 20 arrests at the match, including some for sectarian offences, and that the impact on the wider community was even greater, with the number of assaults and incidents of antisocial behaviour and domestic abuse up compared with Sundays without an old firm match. With 300 police officers deployed at the match, that wider community impact places a real strain on resources, which we must be mindful of in calling Sunday a great advert for football.

I conclude with a couple of specific comments on the two offences. The first offence concerns behaviour at and while travelling to and from a regulated football match. The critical concept in the offence is public disorder. The offence covers behaviour that does or could lead to public disorder, of which, historically, there has been too much in Scottish football.

Many have suggested that all offensive behaviour at, going to, or coming from a football match would be criminalised, and that the offence would be too wide. However, that interpretation is not strictly accurate. The first offence covers a wider class of behaviour, including threatening and hateful behaviour. Behaviour that would be

offensive to a reasonable person is covered only when it is likely, or would be likely, to incite public disorder. The bill does not make being offensive at a football match, in itself, criminal—I make the aside that, if being offensive at a football match were criminal, we would need many more jails than we have at present. The critical point is the link to public disorder.

11:15

With the second offence, we are seeking to criminalise threatening communications—and the critical concept here is that of threat. The offence does not cover any material that does not contain a threat. We acknowledge concerns about freedom of speech, including concerns that are specific to the context of religious belief. Such freedoms are absolutely protected through the European convention on human rights, to which we must adhere. However, we want to ensure that the balance is correct. I remain of the view that the clarity that is sought will come from remaining focused on the offence being about threats, and from acknowledging that assertion, sermonising, insult and even abuse are not covered. Even so, the offence makes it clear that there is a general defence of reasonableness.

I remain entirely open to constructive criticism and I will welcome any helpful suggestions on how we might improve the measures in the bill. I hope that today's discussion will bring more clarity to the issue.

The Convener: Lord Advocate, do you have anything to add to those opening remarks?

The Lord Advocate (Frank Mulholland): No, I do not have an opening statement.

The Convener: I therefore invite James Kelly to start again. We will rewind.

James Kelly: Thank you.

The Lord Advocate: I remember the first part of the question.

James Kelly: Yes—I will not repeat all the remarks that I made initially, although I will make the point again that it is safe to say that the process has raised more questions than it has provided answers so far.

The bill does not use the word "sectarianism", but the Lord Advocate's guidelines do, in relation to public chanting and offences. If I am a police officer at a game, how do I understand whether public chanting or singing is sectarian?

The Lord Advocate: I will first make a couple of points about the guidelines. They are, of course, draft. Members will accept that it is appropriate that I should place them before the committee in draft form, and that I should take into account any comments or points made by committee members, or other parliamentarians in debate, before finalising them.

Section 12 of the Criminal Procedure (Scotland) Act 1995 allows the Lord Advocate to issue guidelines to chief constables in Scotland in relation to the reporting of offences, and chief constables are required to comply with those guidelines. The chief constables will obviously disseminate the Lord Advocate's guidelines to the police constables of each force in Scotland.

On the implementation of the legislation, as underpinned by the Lord Advocate's guidelines, the Minister for Community Safety and Legal Affairs has made the point about the link between threatening or offensive chants or comments and the likelihood of public disorder. Police officers in Scotland are well trained to look for that and anticipate it, and to gather evidence and apply judgment themselves in the circumstances that they face. It will be up to police constables to apply judgment as to whether a criminal offence has been committed. In all their work, police officers will apply that judgment and, if they feel that there has been a criminal offence, they will gather evidence to prove it in the report to procurators fiscal. Procurators fiscal are well able to understand evidence and whether it amounts to proof of a criminal offence. There are plenty of checks and balances along the way.

I would leave it to the judgment of police constables to decide the context in which the behaviour takes place. There is plenty of guidance in the Lord Advocate's guidelines as to what is criminal and what is not.

James Kelly: I am not any clearer about what, for a police officer at a match, constitutes public singing or chanting that is sectarian in nature.

The Lord Advocate: On hearing a chant or singing, the police officer would first determine whether it is threatening and offensive. They must then determine whether there is a likelihood of inciting public disorder. The police officer then applies his judgment and assesses whether the chanting or singing generated or incited public disorder. On the basis of that judgment, he can decide whether to take the matter further—whether to arrest and charge the person and report the incident to the procurator fiscal.

James Kelly: All MSPs have been lobbied on whether particular songs and chants are acceptable or unacceptable. If I am a police officer who grew up in Aberdeen and moved to central Scotland at 20 years of age, I might never have been to Coatbridge or Larkhall and might not know the nature of these chants. Am I not entitled to some briefing from the match commander on the chants that are covered by the bill?

The Lord Advocate: Section 1(2) defines the behaviour as hatred against a group of persons based on membership of a religious group, a social or cultural group, or a group defined by reference to colour, race, nationality, sexual orientation, disability, etc. That gives the parameters within which a police officer will apply his judgment to the words of the songs that are being chanted or sung, whether they are threatening or offensive and whether they express hatred against a group of persons based on the criteria outlined. He will then assess whether public disorder is being incited.

James Kelly: Will the match commander simply point out the legislation and the guidelines to the officers? Will an individual officer on the ground get any briefing on the particular chants and songs that are covered by the bill?

The Lord Advocate: Match commanders are very experienced—members of the committee who attended the game on Sunday saw that. They have lengthy experience on the matters that are covered by the bill, such as threatening and offensive behaviour that is likely to incite public disorder. We have lengthy experience of seeing enforcement in action, and it seems best to leave it to the match commander to apply his judgment in the context of the behaviour.

The Convener: Does John Finnie have a supplementary question on that subject?

John Finnie: It relates to this line of questioning. I find much of the evidence to be very interesting but I see the issue as being very simple. Is it the view of the Lord Advocate that police officers, prosecutors or anyone else must exercise some new power of discretion that does not already exist in legislation?

The Lord Advocate: I do not think that that is correct. Police officers and prosecutors apply discretion across the board daily. In breach of the peace cases, they are well capable of assessing whether the conduct is such that it causes fear and alarm and threatens serious disturbance to communities, which is the current definition of a breach of the peace. That assessment of evidence requires judgment and professionalism, underpinned by specialist training on what we are dealing with. Football liaison deputes and police officers are being trained, and match commanders and the officers who are involved in policing football matches have been trained. The discretion is not new; it has always existed.

Alison McInnes: I will follow on from James Kelly's point about subjectivity and make particular reference to section 1(2)(e), which says:

"other behaviour that a reasonable person would be likely to consider offensive",

We heard from the Scottish Human Rights Commission that the bill would quite likely be challenged under article 10 of the ECHR because there is not enough clarity to allow a citizen to know in advance what is offensive.

The Lord Advocate: In June, when I first appeared before the committee to discuss the bill, I stated that breach of the peace had been under quite significant challenge in the courts for a number of years. I can update the committee on the position. Breach of the peace is currently under a further challenge, under article 9 of the ECHR, on freedom of thought, conscience and religion, and article 10, on freedom of expression. We are waiting for a decision from the appeal court in a case that relates to protests at Aberdeen airport. We will wait and see what the appeal court says about that.

All prosecutions are subject to article 10. I cannot act in a way that is incompatible with articles 9 or 10 of the ECHR, nor can a court, which is a public authority, act in contravention of articles 9 or 10. Convention challenges are made to a breadth of criminal offences, whether common law or statutory. Those are matters for the courts, once they have heard the arguments of prosecutors and the defence.

What I would say about articles 9 and 10 is that the convention recognises that freedom of speech is not unrestricted. For example, in 2004, the Strasbourg court held that a conviction for displaying a British National Party poster that showed a photograph of the twin towers ablaze and which carried the words "Islam out of Britain" and a prohibition sign on the crescent and star was not a contravention of article 10 and was correct. There is plenty of case law at Strasbourg that recognises that freedom of speech is not unrestricted. The courts are well able to determine whether something is in breach of the convention and have lengthy experience of doing so. If a prosecution is in breach of the convention, the courts will not convict or will not uphold a conviction.

Roseanna Cunningham: It is worth restating that the concept of a reasonable person as the test that is applied when one is considering behaviour has been around for an extraordinarily long time in law and is embedded in a huge number of pieces of legislation, including a number that are highly germane to the area that we are talking about. That is not just the case north of the border—the fact that a reasonable person used to be known as the man on the Clapham omnibus indicates how old the concept is and how widespread the courts' understanding of it is.

When I look around the committee, I see that it includes two former policemen and three former

lawyers, all of whom must be perfectly well aware that the idea of a reasonableness test is by no means unusual in the law. It is well understood by them, by the courts and by all those who work in the law.

The Lord Advocate: I add to that that the definition of breach of the peace has a reasonable person test built into it. In the leading case of Smith v Donnelly, it was held that breach of the peace may occur where the conduct complained of is

"severe enough to cause alarm to ordinary people and threaten serious disturbance to the community."

The conduct must be

"genuinely alarming and disturbing, in its context, to any reasonable person."

With knife crime, provision is made for a reasonable excuse for having a knife. Objective reasonableness is built into proof of, and is an available defence against, a raft of offences.

My other point about freedom of expression goes back to what the minister said. There must be a link to public disorder—the behaviour in question must incite public disorder. That should not be overlooked.

Roderick Campbell: Good morning, Lord Advocate. When you appeared before us on 22 June, you said that you would consider whether section 5(5) could be improved with a reference to the characteristics that are listed in section 1(4). I have a small supplementary on that. Section 1(4) does not include two of the characteristics that are protected under the Equality Act 2010—age and gender. Why is that?

11:30

Roseanna Cunningham: I am sorry—I am not clear about your question. You started by asking about the Lord Advocate's guidelines—

Roderick Campbell: No—I was asking about the evidence that the Lord Advocate gave on 22 June about section 5(5).

The Lord Advocate: I cannot remember precisely what I said on that occasion. However, on the fact that the first offence is broader and the second offence narrower in scope with regard to the characteristics you alluded to, you must appreciate that when I gave evidence to the committee the bill was being expedited in order to become law by the start of the football season. I understand that, because it was being expedited, there was a policy decision not to include those wider characteristics in the second offence. Given that that is a policy decision, the minister might wish to comment on the matter.

Roseanna Cunningham: The Lord Advocate makes a fair point. We kept the terms of the bill relatively constrained because of what we expected at the time to be a short timescale for its consideration.

I have no huge antipathy towards expanding the second offence to cover the same categories as are covered by the first. If the committee feels that such a move would be helpful and useful, it can recommend as much. We will be open to looking at the proposal's practicalities and whether that approach would work just as well with the second offence. We made the exclusion in the early part of the process simply to keep the bill as tightly drawn as possible in light of the short timescale that was originally mooted for its consideration.

The Lord Advocate: I endorse those comments. I am fairly relaxed about broadening the second offence but, of course, that is a matter for parliamentarians and those who deal with the policy side of things.

Roseanna Cunningham: We are open to listening to arguments or looking at evidence if the committee takes the view that categories of age and gender should be added. We are not closing our minds to those suggested changes.

Humza Yousaf: The Lord Advocate's guidelines go into a little bit of detail about freedom of expression, but are you open minded about including in the bill an explicit freedom of expression provision? I realise, of course, that such a provision would have to comply with European standards but one or two submissions that we have received have suggested that such a move might be helpful.

Roseanna Cunningham: I do not have any problem with thinking about that. We will need to work out how it might work in the bill but if the committee is keen on the proposal we will look at how it might work, where it might go and what implications it might have. However, given that the bill does not cover unrecorded speech, it quite clearly does not catch a huge element of freedom of expression that people appear to be concerned about. Nevertheless, I know that the issue of unrecorded speech has been raised in relation to the bill.

Within the confines of the bill and given what we are trying to address, our mind is not closed on a lot of these issues, but we would need to take them away and ensure that we could make them work as law. We are certainly open to looking at the suggestion.

The Lord Advocate: It would have only a declaratory effect because, in any event, articles 9 and 10 of the European convention on human rights would apply. You might also want to look at section 29J of the Public Order Act 1986, which

covers freedom of expression. However, given that articles 9 and 10 again apply, it too is declaratory and unnecessary.

Humza Yousaf: Someone else may follow up the issue of unrecorded speech. I note that when the minister gave evidence back in June, she mentioned the possibility of looking at mechanisms for reviewing the legislation. Of course, that was because it was being expedited, but is the Government still open minded about having some review mechanism? If so, might that take the form of, say, a sunset clause?

Roseanna Cunningham: We took a view that a sunset clause was very problematic in the context of criminal legislation because it causes legislation automatically to fall, which creates all sorts of difficulties, for example if it kicks in at the point at which someone has been arrested and charged but has not gone to court.

A review clause is a slightly different animal. If it is felt that a review clause would be useful, careful thought would need to be given to how far down the line a review would take place. You would probably want to cover at least two full football seasons to give you a real sense of how things have been working. I do not have any strong antipathy towards a review clause—we are fairly relaxed about that.

The Lord Advocate: There is no tradition or history of sunset clauses in legislation on criminal offences. In fact, the only one of which I am aware is section 23 of the Terrorism Act 2006, which extends the maximum period of detention without trial for terrorist suspects.

As the minister said, sunset clauses cause problems in relation to criminal offences. A review clause is a slightly different beast. The difficulty is caused when a sunset clause kicks in after someone has been convicted and, for example, has received a sentence of imprisonment. That person would be serving a sentence of imprisonment for something that, because of the sunset clause, was no longer an offence. As a criminal lawyer, I would be against sunset clauses in relation to any criminal offence.

John Lamont: I will focus my questions on section 2(1)(b), section 7(1) and section 5 in general.

First, the provisions in section 2 concern me because they attempt to render criminal acts that are committed outside Scotland. Secondly, in relation to section 5, the provisions seem to relate to the regulation of internet services. How do those provisions stack up in relation to the Scotland Act 1998, in so far as the Parliament is prohibited from passing laws that extend outside Scotland? Also, schedule 5 to the Scotland Act 1998 prohibits the Parliament from passing laws in respect of the regulation of internet services.

Can the Government share with the committee any advice that it has received on those points to reassure us that the provisions in the bill comply with the Scotland Act 1998?

The Lord Advocate: In relation to your second point, as you rightly say, the regulation of internet services is reserved. However, the criminal law is not reserved. We are making a criminal offence, not regulating internet services. I do not think that the second offence that you mention impinges on the Scotland Act 1998.

In relation to the issue of extra-territoriality, there are already criminal offences on the statute book that have extra-territoriality; for example some sex offending taking place abroad is an offence in criminal law in relation to child pornography and so on. What we are dealing with is the type of behaviour that is covered by the bill, for persons that are resident in Scotland.

Graeme Pearson: The minister will be aware that an awful lot of evidence has been received by the committee indicating concerns about the need for new legislation. I refer to the Racial and Religious Hatred Act 2006 in England and Wales. As of last year, according to *Hansard*, only one person had been prosecuted in connection with that legislation and they were eventually acquitted.

You have acknowledged that there appears to have been some change in the atmosphere, particularly surrounding the old firm meeting, and there has been a review of the part that the football associations should play in looking after football. Is there time, therefore, to think a deal longer about the requirement for new legislation?

Roseanna Cunningham: We did look at the 2006 act south of the border before we introduced the bill. We also looked at the statistics, which are quite startling. As I understand it, one of the issues about the 2006 act in England and Wales is that it is very much tied to the anti-terrorism element, which has created some issues in respect of prosecution. Of course that is not what we are about here. We thought that there were particular issues with the 2006 act that do not apply in respect of our bill.

One could argue, as people have, for our taking another year, another five years or another 10 years, but, sooner or later—I believe we have to do this sooner rather than later—we have to get on and tackle this problem as explicitly as we can, which is why we have formulated the bill in the way that we have.

You will recall the remarks that I made right at the start: there is an enormous benefit in people being named exactly for doing what they have

done. That is important, because we know that there is a developing stigma around being labelled in that fashion, which, in itself, will become a deterrent. If we do not threaten that, we will remove that deterrent effect.

Sometimes what you want to do is prevent and deter, as Graeme Pearson will know from his previous profession. Ideally, we will be in a situation where the prevention and deterrence have been sufficient but, if they are not, we want to ensure that robust criminal law is available to be used in appropriate circumstances. We think that, at the moment, it is right that we proceed with the bill, the parameters of which are deliberately confined. There is a much wider debate to be had about sectarianism in general, which does not relate just to football. That will be for separate committee sessions.

We need to deal with the problem. We cannot allow the situation that we saw last season to develop.

Graeme Pearson: Is it feasible that the labelling that you mention could be done under the current legislation, with criminal records being recorded differently?

Roseanna Cunningham: I do not think that the labelling can be done in as effective a way under the current legislation. One way or another, I have been involved in these labelling arguments—not necessarily about these offences but about previous offences. I seem to recall a debate back in the 1990s about labelling breach of the peace to show evidence of stalking and harassment. At the time, we were struggling to find a way to encompass those offences in the criminal law. There is always an argument that you can somehow label existing crimes appropriately but, in the main, that does not work. We have seen that it does not work and we have resorted to a more specific labelling process. The Lord Advocate may want to come in at this point. I believe that it is important for us to name the behaviour for what it is on the face of it.

The Lord Advocate: As Graeme Pearson will know from his past life, it is very difficult to label these types of offences—breach of the peace or assault—if there is a sectarian motivational element to them. You will know the COPFS database and how it records crimes, and be well aware of how the integration of Scottish criminal justice information systems—ISCJIS—programme operates and the loop that is provided from police, to Crown, to court, to criminal records. I am not an information technology expert but, as I understand it, it is an operational database, so it is very difficult to extract raw statistical data from it. I understand that if an offence is not entered in a particular field in the operational database, it is very difficult for it to be recorded as, say, a sectarian breach of the peace or something of that nature. As Graeme Pearson will know from his experience of criminal records, you get basic information on someone's criminal record, which refers to breach of the peace or assault—it does not tell you about the underlying nature of that particular offence. I understand that, working within the confines of the current IT system, it is extremely difficult for an additional label to be attached to the recording of crime.

11:45

On whether we may wait longer and delay or even suspend the bringing in of the bill as a result of improvements in behaviour, for example, I would look to the professionals in ACPOS. Paragraph 2 of its written submission makes it quite clear that it welcomes the bill. It says that, although

"reverting to the Common Law crime of Breach of the Peace ... allows arrest, there remains uncertainty with conviction and the risk of stated cases impacting on our future reliance of Breach of the Peace. For that reason it is believed that the Common Law crime of Breach of the Peace cannot be relied upon indefinitely and additional legislation should be enacted and that the Bill's provisions should simplify matters for operational officers."

That is a powerful statement. I have also noted the statement from the British Transport Police in support of the bill and what the chair of the Association of Scottish Police Superintendents said. I represent the Crown prosecution in Scotland, and my judgment is that the bill will be very helpful for a number of reasons, including many that the minister has just set out.

Graeme Pearson: I do not mean to be offensive, but necessity is always the plea for any infringement of human liberty and one would always expect law enforcers to seek additional legislation and more powers. The question for us is whether the proposals are proportionate and required at this time. That accounts for our struggle with the evidence that we have received until now, which has significantly questioned whether the bill is required. In particular, the Law Society of Scotland and others have done that.

The Convener: I caution members not to speak on behalf of everybody in the committee, as I do not know whether everybody in the committee agrees with them. It would be unfair of members to say that they embrace everybody's views. I am not sure what they are, and doing that would not be appropriate.

Graeme Pearson: Indeed.

Roseanna Cunningham: It is fair to say that a great deal of the evidence very much supports the bill. Indeed, some of the witnesses have made a call to widen the impact of the offences, which Rod

Campbell spoke about. People at one end of the spectrum would have us do nothing, as they do not think that there is a problem in the first place—I find that extraordinary—while others want us to cover the whole gamut of hate crime in both offences. There is a vast spectrum of opinion and it would be unfair to characterise the weight of it as being opposed to the bill. That is not our reading of the situation.

The Lord Advocate: I cannot really add anything to what I have said about the difficulties that surround breach of the peace and article 7 of the ECHR. My detailed comments on that are already on the record.

The new offence will make it much easier to monitor and measure the issue. I go back to the point that was made about the Scottish Criminal Record Office. Because the offence is a bespoke one that relates to offensive and threatening behaviour which is likely to incite public disorder, the nature of a conviction for it would be instantly recognisable in someone's criminal record. That is one point.

Secondly, I think that ACPOS made the point in its written submission that the offence clarifies the law.

Thirdly, the offence would be the primary offence, as opposed to using breach of the peace, assault or any other offence, whether it be in statutory or common law, and seeking to add an aggravation to the offence.

Finally, it can be seen from reading a number of the written submissions and the transcripts of the evidence that there is symbolism surrounding such legislation. Someone referred to Dr Kay Goodall's evidence to the committee. Legislation can be transformational. We can think back to the problems that we had with racially aggravated conduct, which was, perhaps, acceptable 15 or 20 years ago. Who can remember the social acceptability of drink-driving and the drive to make it socially unacceptable? Graeme Pearson will remember that from his experience as a police officer. There is a transformational aspect to legislation; it can change society's behaviour and its attitude towards behaviour, and that should never be overlooked.

Given the difficulties surrounding breach of the peace and article 7 of the ECHR, the difficulties with the recording of crime, the fact that the new offence will make it easier to monitor and measure such behaviours and the fact that the public will instantly recognise what the offence means and the transformational aspect of it, in my judgment the bill is absolutely necessary and will, I hope, have a significant impact in challenging such behaviours in the future.

The Convener: James Kelly has a supplementary question on the same point, then Alison McInnes will begin questioning on a separate point.

James Kelly: My question is on the labelling of the offences. Minister, you have outlined clearly your feeling that it is important that people should be identified with the offence that they have committed. However, page 4 of the Lord Advocate's guidelines makes it clear that, in respect of the breaches of the peace that occur at football matches, the preference would be to pursue prosecution under the existing legislation

"or as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010".

The guidelines state clearly:

"It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation".

Is it not detrimental to the case that you are outlining that someone could be found guilty of offensive behaviour at a football match without the offence being shown to be aggravated by prejudice against, for example, a particular race or religion?

Roseanna Cunningham: As you are referring to the Lord Advocate's guidelines, do you want the Lord Advocate to respond? He wrote the guidelines; I did not.

The Convener: I am letting you self-select whoever you feel should answer.

Roseanna Cunningham: The Lord Advocate has already stated that we want the offence in the bill to be the primary offence at a football game; however, that does not exclude the possibility of prosecution for other offences, which is what I think the question is about. If there is evidence that the offences that are taking place fall into the category that we are talking about, the primary offence will be the one in the bill. Is that what you are asking about?

The Lord Advocate: If the guidelines are unclear, we will strengthen them. However, as I read it, the statement on page 4 under "Choice of Charges" is quite clear:

"If there is sufficient evidence for the offence of offensive behaviour at a football match, such behaviour at or related to football matches should be reported as that offence"—

that is, the primary offence—

"in preference to a common law breach of the peace or contravention of section 38"

of the Criminal Justice and Licensing (Scotland) Act 2010. I hope that that is clear. If it is not, we can strengthen it to make it crystal clear.

James Kelly: What you have said is clear, but my issue is with the next sentence, which states:

"It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence."

Someone could sing an offensive song at a football match, for which they would rightly be brought to court under the provisions of the bill. However, if we are seeking to tackle specifically songs that create public disorder around, for example, religion, surely the bill is deficient if it is not possible to add a religious aggravation to the offence.

The Lord Advocate: If you look at the definition of the offence, you will see that it contains a religious aggravation—the nature of the offence is the religious aggravation in addition to other aspects of it. I do not think that it would be appropriate in law for a religiously aggravated offence to be religiously aggravated. That would seem slightly inconsistent. That is why that point was made in the guidelines.

Roseanna Cunningham: I am not sure that we are picking up your question clearly. Are you suggesting that the first offence that we propose in the bill should have the capacity to have a tail on it that says that, under the offence, it was the religious bit, the racial bit or the gender bit that was the issue? Is that what you are saying you would want?

James Kelly: My position, minister, is that I agree with your sentiment that people who behave in a certain manner should, in effect, be named and shamed. However, I seek further assurances, because I do not think that someone should simply be told that they have sung an offensive song at a football match. It is also important—for the courts and the public—that if the offence relates to religion, race and so on, we should be able to record that.

The Lord Advocate: That may be a valid point. Let me go away and think about it. These are only draft guidelines, so we will take on board your point and see whether what you suggest is possible within the confines of our criminal history system.

The Convener: I am glad that you have introduced the other categories, because the bill is beginning to be talked about as anti-sectarian legislation, which of course it is not: it is about offensive behaviour. I am pleased that the minister and the Lord Advocate are now speaking in broader terms about the bill. It is difficult for the public to see that other issues are involved, not just sectarianism.

Alison McInnes: Minister, the written evidence from Nil by Mouth expresses concern that the bill deals with only a particular manifestation of sectarianism. How will criminalising the behaviour of one section of society in one particular circumstance and more or less turning a blind eye to other, more insidious examples of sectarianism, whether at gala dinners, sports clubs or marches, help us to tackle what your Government calls Scotland's shame? How can the bill help us deal with sectarianism properly, in a holistic way, if it simply singles out in the way that it does?

Roseanna Cunningham: We have said right from the start that the bill is not a magic bullet to solve the problem of sectarianism in Scotland; it is about a very specific manifestation of that sectarianism that creates a big issue of public disorder. A stream of work is going on alongside the bill so that, when the Parliament has dealt with the bill, a whole strategy will be developed that will deal with the issues that people are talking about that come from different parts of society and are not immediately and necessarily relevant to football.

The problem with the football scenario is that it creates a public disorder issue, which is what we are trying to deal with in this particular context. We all know that sectarianism goes far beyond that and can be very insidious and is often tacitly tolerated by huge numbers of people who would not necessarily consider themselves to be part of the problem. There is a bigger, wider issue for society to deal with, but we need to deal with this one right now and try to lay down a marker in respect of football. As we speak, however, a separate strand of work is going on that is directed to the much wider issues of tackling sectarianism. I expect the committee to come back to those wider issues in due course.

Alison McInnes: Can the minister give us a timetable for that?

Roseanna Cunningham: I do not want to be drawn into that just now. I will talk to the Cabinet this afternoon about the issue and, until the Cabinet makes a decision, I do not want to be drawn into a detailed discussion about what our timetable might be.

The Lord Advocate: I will add just one point to that. We are well aware of the wider aspects outwith football matches. For example, the committee has probably seen reports in the media about the increase in instances of domestic abuse that are reported to the procurator fiscal following a big match. We are well aware of that, as indeed are the police and prosecutors. I have been trying to highlight that as a particular issue, and I did so again on Friday. It is very disappointing to see that there has been another spike in the number of domestic abuse incidents in that regard. We need to be well aware of what we are dealing with and take appropriate action to deal with matters outwith the confines of the football match that are—I suppose—the secondary effects of what we are dealing with. I do not want the impression to

be given that we have a very narrow focus. The bill has a narrow focus, but we are well aware of the wider aspects.

The Convener: Do members have questions on other issues? Does somebody want to touch on the issue of travelling to and from private venues, for example?

12:00

Alison McInnes: My question follows up on the issue of stigmatisation that was talked about. The Government clearly wants to make an example through the legislation. However, a number of the submissions have regretted the lack of clarity on a rehabilitation programme or the possibility of different disposals that might be more effective than a heavy five-year sentence. What thought has the minister given to those issues? We draw attention to the comparison between the £1.8 million that was recently awarded to the national football policing unit and the very small amount of money that is available to organisations such as Nil by Mouth that work through educational means to try to change society.

Roseanna Cunningham: Over the piece, organisations such as Nil by Mouth have received a significant amount of money. Rehabilitation activities already take place. There are programmes in prisons that deal with the question of sectarianism, so it is not the case that such things are not happening.

We are perfectly open to other suggestions in the context of the bill about how disposals might be dealt with. Of course, the five-year sentence is at one end of the spectrum, which starts with a fine at the other end. We are not in the business of everybody automatically getting a five-year sentence, which is a rather mischievous idea. I am not suggesting that you are being mischievous, Ms McInnes, but in some cases a rather mischievous construction has been put on the proposals. That is why it is always important to make it clear what the offence is when we have the capacity to increase the disposal if people rack up a number of offences.

In respect of not just the particular criminal offence in the bill, but the issue across society as a whole, there is still a deal of work to be done in Scotland on the underlying issues that still bedevil too much of our society.

The Lord Advocate: I will come in on the point about the maximum sentence. It might surprise some members of the public, and indeed some members of the committee, that the maximum sentence for breach of the peace is life imprisonment. I have been involved in a case prosecuted on indictment at the sheriff court in which someone received a life sentence for breach of the peace on remit to the High Court. A court would never dream of imposing such a sentence in the majority of breach of the peace cases, but the maximum sentence for breach of the peace is life imprisonment, whereas the maximum sentence for the offence in the bill is five years in prison.

John Lamont: I want to pick up on a point that Professor Devine made last week in evidence to the committee. He referred to the aggravation for sectarianism that already exists under the Criminal Justice (Scotland) Act 2003 and highlighted the fact that only 14 per cent of the offences committed under that provision relate to football. Does the panel have any comments on that?

The Lord Advocate: That reinforces the point that Alison McInnes made about the wider aspects of sectarianism. Professor Devine referred to a study from 2003-04. There were actually two studies. One covered a six-month period—26 June to 31 December 2003—and was an internal Crown Office and Procurator Fiscal Service study following the implementation of the new legislation. The further study was an official Scottish Government study in which a researcher looked at 18 months of cases covering the period 1 January 2004 to 30 June 2005.

Some of the statistics arising from the studies are illuminating. For example, it is said that sectarianism is a west of Scotland problem. Out of 532 cases, 57 per cent of offences were committed within Glasgow and 23 per cent in Lanarkshire, but 30 per cent of the people who were accused of the offences that were committed in Glasgow lived outside Glasgow and Lanarkshire. Of the offences, 28 per cent occurred in the street, and you gave the figure for football stadia. The figures that I have show that 33 per cent of cases were related to football. In 64 per cent of cases, the religion of the person who was the subject of the religiously aggravated crime was Roman Catholic and, in 31 per cent, Protestant. Another very important statistic is that 49 per cent of those convicted were significantly under the influence of alcohol. We should never overlook the connection between alcohol and this type of behaviour.

As I understand it, the Scottish Government intends to repeat the study by looking at cases over a calendar or financial year and comparing the results with the 2003-04 statistics. It is very important to have accurate data in order to measure this type of thing.

John Lamont: The minister and you have referred to the need to send out the message that this behaviour is unacceptable. My concern is that, arguably, such a facility already exists under the 2003 act. I am also concerned that, given that a minority of offences under the 2003 act relate to

football, passing the bill will mean that sectarian behaviour in relation to football is seen as in some way more unacceptable than all other such behaviour. Surely we should be saying that all sectarian behaviour is unacceptable. In agreeing to these provisions, are we introducing a sliding scale of what is and is not acceptable?

Roseanna Cunningham: That is a misinterpretation of what is happening here. I might remind members that, earlier this year, very specific circumstances relating to football resulted in parcel bombs being sent in Scotland. We need to get away from the notion that this is something trivial that we do not have to take seriously.

We have responded directly to that in the bill but, as the Lord Advocate, the First Minister and I have made clear from the outset, we do not regard it as a magic bullet for solving the whole problem of sectarianism in Scotland. A great deal more work needs to—and will—be done. In fact, earlier this year I said that we have not ruled out introducing further legislation if the view is that it is needed. This is not a case of applying any kind of sliding scale; we are simply trying to deal with a very specific and dangerous scenario that was developing earlier this year and which we needed to make clear was absolutely unacceptable. It is part and parcel of a much wider focus that we want to take on the whole issue of sectarianism.

People are in danger of forgetting the vicious and—as a sheriff put it recently—"poisonous" atmosphere in football around March and April. We do not want that to continue in Scotland in any way, shape or form. Unfortunately, such behaviour is seen too often at football matches, which is why we have introduced the bill.

The Convener: I do not think that John Lamont was trivialising the matter. The committee is aware of the seriousness of the background but, nevertheless, I think that it was fair for Mr Lamont to ask his question. Things have quietened down a bit, but it is still early days.

James Kelly: The Law Society has criticised the way in which the bill deals with journeys to and from matches as a bit unspecific. To clarify matters, could you tell me whether the following practical scenarios would be covered?

Someone might leave Cambuslang, say, at 11 o'clock for a football match but go into Glasgow for lunch first. If they participated in behaviour unacceptable under the bill on the train from Cambuslang, would they be caught under the provision relating to the journey to a football match?

Roseanna Cunningham: If the person is carrying a football ticket or wearing football colours and if their intention is to get to a football match, arguably they might well be. That will be a matter of judgment at the time of decisions about arrest, charges or whatever.

The Lord Advocate might want to deal with some of the specifics. Let me make a more general point about this aspect of the bill. We have chosen to replicate exactly the wording in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which introduced football banning orders. The wording is exactly the same. To my knowledge, no enormous difficulty has arisen out of the 2006 act in relation to football banning orders. It is not clear to us why it should be assumed that the bill will suddenly create a difficulty. I do not know whether the Law Society made the same comments in relation to the Police, Public Order and Criminal Justice (Scotland) Bill. You will forgive us for feeling that we were on strong ground in replicating the wording of the 2006 act in relation to the offence that we are considering.

The Lord Advocate: Before I talk about the specifics, let me address a point that the convener made. I would not want anyone to think that we were suggesting that John Lamont does not take sectarianism seriously, because that is not the case. I have had conversations with him about the matter and I know that he takes it very seriously.

On journeys to and from football matches, the minister made a good point. The provision replicates the wording in section 51(8) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which relates to football banning orders. The provision has been law for a number of years and I am not aware that the police, prosecutors or indeed the courts have had difficulty in applying the definition.

In evidence last week, Chief Superintendent O'Connor said:

"we have experience of people who travel about the country with no intention of going to the football match. Many of these individuals who might travel to, say, Dundee, Inverness or Aberdeen do not have tickets, have no intention of going to the match and instead end up in the city centre pubs and clubs, at which point problems quickly manifest themselves. We have to deal with that kind of dynamic."

Another witness from the British Transport Police said:

"The bill not only puts into law offences that relate specifically to religious, racial and other forms of hate crime that are associated with football; it ensures that the legislation captures with no ambiguity whatever those who are travelling to and from the event. From that point of view, we welcome the bill."

He went on to say of the provision that we are considering:

"I do not have any real concerns about it. We have to concentrate on the behaviour of the individual or the group

of people to whom we are referring."—[*Official Report*, *Justice Committee*, 13 September 2011; c 233, 230, 231.]

You will note from page 3 of the Lord Advocate's guidelines on the bill that prosecutors and police constables are given examples of the type of evidence that should be looked for in relation to the provision. It says in the guidelines:

"Examples of evidence that may allow such inferences to be drawn are:

Possession of a match ticket;

Wearing teams colours in proximity of the football ground or on a route to the ground;

Person is a season ticket holder; and

Person is with a group of persons who it can clearly be evidenced are on the way to the match."

Police officers, be they from the BTP or forces in Scotland, are well able to discern the difference between a person who is actively engaged en route to a football match, whether or not it is their intention to attend the match, and innocent bystanders or travellers who are present but are not taking part. I have no problem with the wording of the provision—it has been road tested since football banning orders were introduced in 2006.

Roseanna Cunningham: It is worth emphasising that someone who is not indulging in the kind of behaviour that we are discussing will have nothing to be concerned about.

James Kelly: It is still not clear whether the scenario that I described would be covered by the bill.

Here is another, more straightforward scenario. A person is travelling on a train to a station that is close to the stadium. They are wearing a football shirt, but they are not going to the game. They get caught up with a group of friends in behaviour that is deemed unacceptable. Will they be covered by the bill?

12:15

The Lord Advocate: You use phrases such as "caught up", but I do not know what that really—

The Convener: "Joining in" might be more what was meant.

The Lord Advocate: We apply the law of concert, or art and part, to most crimes in Scotland. We consider the evidence of whether there has been active association and participation in the offending conduct. As I have said, the police are well able to consider what is evidence of active participation, as opposed to what is evidence of someone being an innocent bystander. I have no particular fear or concern that the police, prosecutors and, ultimately, the courts will not be able to distinguish an innocent bystander from someone who is actively involved in the types of behaviour that we are considering.

James Kelly: I would like us to be precise. Let us say that five people are singing something that we would all agree is unacceptable—and something that would be unacceptable under the bill. Those five people are going to the game, but somebody who is not going to the game joins in. Would that person be liable for prosecution?

Roseanna Cunningham: That is our intention—as long as they have joined in.

James Kelly: Yes—I am trying to be absolutely clear that the person has joined in with the unacceptable behaviour. However, if they are not going to the game, are they covered by the legislation?

The Lord Advocate: Are they actively participating?

James Kelly: Yes.

The Lord Advocate: Then yes—they would be covered.

The Convener: I wanted to ask about evidence in internet crime and about fishing expeditions. What evidence would there have to be to allow the police to access an e-mail account or to confiscate a computer?

The Lord Advocate: As to the confiscation of a computer, if someone is convicted of a criminal offence, and if they were using a computer to commit the criminal offence—

The Convener: I was thinking about what happens before and about how evidence is obtained. What evidence does there have to be for authority then to be given to someone to follow the trail back? You could be doing a lot of fishing around to find out who posted something or whether something was posted by someone other than it appeared. I am concerned about data—

Roseanna Cunningham: In police investigations, such considerations apply right now to any internet crime.

The Convener: Indeed—fishing—

Roseanna Cunningham: You call it fishing, but investigations will generally be carried out into specific allegations, and people's computers may be taken in order to assess what is on them. That happens right now. It is not—

The Convener: Forgive me, minister. I am certainly not a technocrat, but it is quite easy to camouflage or conceal your identity on the internet, or even to point the finger at other people. The trail of inquiry to find out who is behind something may be quite long. What leave do the police have to look around and try to find

something? They may find some innocent people en route. Internet crime is different from paper crime or physical crime.

The Lord Advocate: In any investigation, the police will receive information and they will try to evidence that information. If they consider that there are reasonable grounds for suspecting that a crime has taken place with a conduit of, for example, a computer and the internet, it will be open to the police to apply for a warrant before a sheriff. The sheriff will then have to consider whether there are reasonable grounds for granting a warrant to enter someone's home and seize a computer. If there is evidence to persuade a sheriff that he or she should grant a warrant, the sheriff will grant the warrant.

The Convener: I am talking about the preliminaries—before one gets to a sheriff for a balancing view. The preliminaries might involve detailed investigations into quite innocent people, whose communications will be accessed even if, in the end, they are discounted from the investigations. The internet is a very different world.

The Lord Advocate: That question is probably better directed at a police officer, because they are conducting such investigations. As I understand it, they will have a specific piece of information about a specific possible crime committed by a specific person. As a result, they will then seek to evidence that to the point where they consider that they have reasonable grounds to apply to a sheriff for a warrant.

Roseanna Cunningham: The police are already quite heavily regulated. They already have to deal with this scenario in respect of other crimes. The Regulation of Investigatory Powers (Scotland) Act 2000 and the equivalent UK act already provide the regulatory framework with which the police have to conform. The bill would not introduce anything different to the way that the police operate in respect of other crimes that may or may not take place through the conduit of electronic communication.

The Convener: I understand. The other question on evidence relates to corroboration. I should really know this, but I do not. Is Lord Carloway looking at corroboration in relation to internet crime?

The Lord Advocate: I think he is looking at corroboration in general, which would apply to internet crime, too.

Alison McInnes: We have heard a fair bit of evidence from witnesses that the clubs, the Scottish Football Association and the Scottish Premier League could do more to put their own house in order. From my experience at the match on Sunday, the crowd dynamic is an important part of what goes on. The crowd is volatile and reacts to what is happening on the pitch, so we need the utmost professionalism from the clubs. Will the minister comment on the evidence that we have heard about the need for the clubs to do more?

Roseanna Cunningham: We would all want the clubs to be as fully engaged in this process as we are. There is evidence that they are trying to deal with the scenario as it develops. Although it does not relate directly to the bill—it does, however, arise out of the same set of circumstances—the joint action group, which was set up after the football summit earlier this year, has been continuing its work, which involves the clubs as well as the SFA, the SPL and so on. The group is still meeting regularly and is dealing with actions that are outside the scope of the bill. Everybody who is involved in that is taking it very seriously indeed. From the clubs' perspective, the intervention of the Union of European Football Associations earlier this year is also very salutary—it is a concern that they have to deal with. As well as what is happening with the bill, a considerable degree of work is being done directly with the clubs and by the clubs. It would take too long to go into all the details of the commitments that have been made, but they are there.

The Convener: We have written to the SPL, given the evidence that the SFA gave about, as it were, retrieving some of its quasi-judicial powers back from the SPL. We have written to ask how the negotiations are going.

Roseanna Cunningham: Richard Foggo is directly involved in the joint action group. I do not know whether he can tell us anything.

Richard Foggo (Scottish Government): I am the secretary of the joint action group. I can inform the committee that the SPL and the SFA have agreed to be part of a working group this autumn precisely to look at that. That agreement was made before the appearance of Mr Broadfoot and Mr Niven at your committee. I just want to offer you some reassurance—in addition to your inquiries—that a process is in place that will look at the involvement of the football authorities.

Graeme Pearson: Can I ask a supplementary?

The Convener: I do not know whether Alison McInnes has finished.

Alison McInnes: I have another, separate question, but Graeme Pearson can ask a supplementary.

The Convener: Thank you for chairing. According to Alison, you may ask your supplementary, Graeme.

Graeme Pearson: Thank you. The establishment by the SFA of a judicial panel for

the beginning of this season was indicated. Was that achieved?

Richard Foggo: Are you asking me?

Graeme Pearson: Yes. You are the secretary.

The Convener: That sounded like something out of "The Godfather"—"Are you asking me?"

Richard Foggo: I wish that I had not opened my mouth.

Graeme Pearson: It is not "The Godfather"; it is "Taxi Driver."

The Convener: It is "Taxi Driver", not "The Godfather." You see, Graeme is so valuable. Thank you.

Richard Foggo: Just to differentiate, Stewart Regan has undertaken transformational work on his core business that includes the introduction of a judicial panel, which I understand is in place, although I cannot fully confirm that. The group that I am talking about is a separate committee that will consider the role of the football authorities in tackling unacceptable supporter conduct that is not currently covered by the SFA in relation to SPL matches.

Alison McInnes: Due to time constraints, we have not had as much time as I would have liked to examine the second offence in the bill, which is making threatening communications. Can the Lord Advocate explain in more detail what that offence covers that is not covered by the UK Communications Act 2003 and how it helps to take things forward?

The Lord Advocate: First, with the common-law crime of making threats, we require evidence that someone intended to carry out the threat, whereas the offence in the bill does not require that and is therefore an improvement in that regard. Secondly, on threats that incite religious hatred, that is a crime in every other part of the United Kingdom and—I think—the Republic of Ireland, but it is not currently a crime in Scotland. That, too, is an improvement.

The Convener: I am not going to say that I see no other hands up. I will just mumble it so that hands do not go up. Do the minister and the Lord Advocate want to address anything that we have not addressed, or are they content?

The Lord Advocate: I have just one point to add to the answer that I gave to Alison McInnes, which is in relation to penalties. Currently, the Communications Act 2003 is only prosecutable summarily, so I think that the maximum sentence is six months' imprisonment. The bill will increase the sentence for that type of offending to five years' imprisonment. It also deals with what I consider to be a particular problem with the 2003 act by including posting on a website as opposed to sending a communication.

Roseanna Cunningham: It is important to say in regard to the second offence that it is not confined to the internet but is about any form of communication. In a sense, that also deals with the concern that was raised earlier about electronic communications being a reserved matter. The offence is not so much about electronic communications as it is about any delivery mechanism for the threat. Apart from that, I cannot think of anything else. No doubt something will dawn on me at 3 o'clock this afternoon when we are not here. However, I cannot think of anything else at the moment.

The Convener: Thank you very much. I now have some guidance for committee members. We are not particularly looking for stage 2 amendments, but if we get any and the committee decides that further evidence is required, we can take that, but only with the leave of the Parliamentary Bureau, which would have to extend the time. I am not encouraging amendments; I am just noting that information because we have heard that there might be amendments. Some but not necessarily all members will know that it would be a matter for the bureau to extend the time.

I thank the Lord Advocate and the minister and their team.

Subordinate Legislation

International Criminal Court (Libya) Order 2011 (SI 2011/1696)

Damages (Scotland) Act 2011 (Commencement, Transitional Provisions and Savings) Order 2011 (SSI 2011/268)

Act of Sederunt (Rules of the Court of Session Amendment No 4) (Miscellaneous) 2011 (SSI 2011/288)

Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No 2) 2011 (SSI 2011/289)

Act of Adjournal (Criminal Procedure Rules Amendment No 5) (Miscellaneous) 2011 (SSI 2011/290)

Act of Sederunt (Rules of the Court of Session Amendment No 5) (Causes in the Inner House) 2011 (SSI 2011/303)

Act of Sederunt (Regulation of Advocates) 2011 (SSI 2011/312)

12:28

The Convener: Item 3 is subordinate legislation. There are seven items of subordinate legislation for the committee to consider. It is explained in paper 4 that the instruments are not subject to parliamentary procedure.

Roderick Campbell: Can I declare an interest?

The Convener: Is it with regard to all the instruments?

Roderick Campbell: It is with regard to the one that deals with the regulation of advocates.

The Convener: Your declaration of interest in that regard is noted.

An unintended consequence of recent standing order rule changes is that, until the Parliament agrees its next round of rule changes, committees are required to consider these instruments. Committees are now also required to consider any non-compliance with the laying requirements set out in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. Of the seven instruments that we are considering, the Subordinate Legislation Committee has drawn our attention to one instrument—the International Criminal Court (Libya) Order 2011—as breaching the laying requirements. The Subordinate Legislation Committee is content with the reasons given for the breach. If members have no comments are they content simply to note this breach and the reasons for it in the minute?

Members *indicated agreement.*

If members have no comments on the other six instruments, are they content to note the instruments?

Members *indicated agreement.*

The Convener: The committee's next meeting is on Tuesday 27 September, when we will consider themes for our draft report on the bill and our approach to budget scrutiny, which we have agreed to do in private.

Meeting closed at 12:30.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Members who wish to suggest corrections for the revised e-format edition should e-mail them to official.report@scottish.parliament.uk or send a marked-up printout to the Official Report, Room T2.20.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by RR Donnelley and is available from:

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

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

e-format first available
ISBN 978-0-85758-782-4

Revised e-format available
ISBN 978-0-85758-796-1

Printed in Scotland by APS Group Scotland