The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 22 November 2011

Session 4

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CONTENTS

JUSTICE COMMITTEE
15th 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)
*Alison McInnes (North East Scotland) (LD)
*David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Humza Yousaf (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Patrick Harvie (Glasgow) (Green)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 22 November 2011

[The Convener *opened the meeting at 10:01*]

Interests

The Convener (Christine Grahame): Good morning. I welcome everyone to the 15th meeting of the Justice Committee in this session of the Parliament and I ask everyone to switch off their mobile phones and other electronic devices, because they interfere with the broadcasting system even when they are switched to silent. No apologies for absence have been received.

I welcome David McLetchie, who has joined the committee. I invite him to declare interests relevant to the committee's remit.

David McLetchie (Lothian) (Con): Thank you, convener. It is a pleasure to be a member of the committee. As you might be aware, I was formerly a solicitor in private practice for nearly 30 years. Although I no longer hold the practising certificate, I remain a member of the Law Society of Scotland and of the Society of Writers to Her Majesty's Signet. I have no other interests to declare.

The Convener: Thank you.

Decision on Taking Business in Private

The Convener: Item 2 is a decision on whether to take item 6 in private. Does the committee agree to do that?

Members *indicated agreement.*

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Stage 2

10:02

The Convener: We move on to item 3. This is the first day of stage 2 proceedings on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I hope that we will be able to complete our consideration today, but if we cannot do so, I will stop at an appropriate moment and we will continue at next week's meeting.

There are members of the committee who have not sat through a stage 2 before, so it might be helpful if I explain some of the processes. We have amendments to amendments—if I confuse everyone on this, it is not my fault. The committee must first decide whether to accept an amendment to an amendment before taking a decision on whether to agree to the amendment itself.

That was lesson 1; lesson 2 is on pre-emption. When an amendment pre-empts another amendment, that means that it is seeking to remove text that the succeeding amendment is seeking to amend. If the first amendment is agreed to, the succeeding amendment cannot be moved, because the text that it seeks to change no longer exists. It is therefore pre-empted.

I can feel headaches coming on, but I will go on to direct alternatives. When two or more amendments are described as direct alternatives, that means that they are seeking to remove and replace an identical piece of text, usually but not always a single word or a number. If two or more amendments are described as direct alternatives, the decision on the last of the direct alternatives will stand, regardless of whether previous alternatives were agreed. If you agree to amendment A and then to amendment B, it is amendment B that will stand.

I should point out that there is an error in the groupings document, which describes amendments 12 and 37, which would amend section 6, as direct alternatives. They are not; amendment 12 pre-empts amendment 37. I apologise for any confusion, on top of the confusion that I have probably already caused.

For the benefit of members who have not sat through a stage 2, I will take the process slowly rather than at my usual breakneck speed, so that we ensure that everyone follows what is going on.

I welcome the Minister for Community Safety and Legal Affairs, and I also welcome a non-committee member, Patrick Harvie. Members should have copies of the bill, the marshalled list and the groupings of amendments.

Section 1—Offensive behaviour at regulated football matches

The Convener: Amendment 22, in the name of Patrick Harvie, is grouped with amendments 23 to 26, 33, 34A, 34B and 37. I advise members that amendment 33 is a direct alternative for amendment 10 in the group with the heading "Section 5 offence: Condition B: grounds of hatred". I repeat that amendment 12 pre-empts amendment 37.

Patrick Harvie (Glasgow) (Green): This group of amendments seeks to achieve one change throughout the bill—replacing the term "hatred" with the term "malice and ill-will". Before I explain why, I will give members a wee bit of background. I was keen to see the groupings of amendments for today's meeting but, when I opened the file, I was slightly disappointed that a wider range of amendments had not been offered for the committee to consider. The bill has been substantially criticised by the Opposition parties, and I expected the committee to be offered more options.

I felt that it was important to lodge amendments for three broad reasons: first, I wanted to suggest serious changes that I felt were important; secondly, I wanted to give the committee options; and thirdly—with this particular group of amendments—I wanted to explore the reasoning behind the way in which the bill is drafted. On a couple of occasions, I have asked why the term "hatred" has been used instead of the term "malice and ill-will", but I have not really been given a reason.

As members will know, during the previous session of Parliament, I introduced a bill on hate crime—relating specifically to aggravated offences. That worked as a hand-out bill, and I worked closely with Government ministers and officials to try to get the drafting right. We considered at some length the various terms that could be used, and it was pretty widely accepted that "malice and ill-will" was the term used throughout other pieces of hate crime legislation. After the Offences (Aggravation by Prejudice) (Scotland) Bill was passed, some members thought that a consolidation bill would be the next step but, without such a bill to square off all the different elements of hate crime legislation, we should stick to the form of words that is currently used—"malice and ill-will".

When responding to the debate on this group, I hope that the minister will be able to explain whether the two different terms will have different meanings in practice. If so, I hope that she will

explain what the differences are and why they are appropriate. If there is no difference in meaning—and I cannot see a reason for introducing one—why are we using a different term in this bill, and will we then need to make retrospective changes to all other pieces of hate crime legislation already on the books, to reflect the new wording? The word "hatred" is obviously simpler for people to understand but, if using the word introduces the possibility that courts will interpret the terms differently, it seems to me that we should change all the legislation at one time, rather than doing so in a piecemeal manner.

For the purposes of debate, I suggest that members ignore the fact that amendments 34A and 34B amend a later amendment of mine in a different group. I simply wanted to ensure that the committee, regardless of its decisions on future groups, had the option of replacing "hatred" with "malice and ill-will" throughout the bill.

If other drafting matters arise, we can return to them at stage 3, but I hope that the minister, as well as discussing the amendments specifically, will be able to discuss in general terms why a change in language has been introduced, and why the change has been applied to this bill only, rather than to hate crime more widely.

I move amendment 22.

James Kelly (Rutherglen) (Lab): I note Patrick Harvie's comments—as ever, he made them in a cogent manner.

The Labour position on all substantive amendments will be to abstain. It seems to me that, when the Scottish Government paused back in June, which was welcomed by all, the process was frozen. It also seems to me that the Scottish Government has not interacted with the process, has not listened to the concerns that have come through in the evidence and has, therefore, adopted a take-it-or-leave-it approach on the bill.

I think that everyone agrees that we must support all practical attempts to oppose sectarianism. We must support the authorities and the existing legislation, including the Criminal Justice and Licensing (Scotland) Act 2010, under section 38 of which there have been 99 prosecutions, even though it came into force only recently.

I firmly believe that the Government has failed to build a consensus in the Parliament and in the country. Therefore, even at this late stage, I appeal to the Government to put the bill on hold, to work with the other parties and with groups in the country to support practical measures to tackle sectarianism and, if it genuinely feels that there remains a case for introducing legislation, to make that case and to build support for it. If that case is proven, we will certainly be prepared to look at it, after a period of reflection.

The Convener: You have stated the Labour Party's position.

We will hear from Humza Yousaf, followed by Roderick Campbell.

Humza Yousaf (Glasgow) (SNP): I do not think that I had my hand up first—I think that it was Alison McInnes who did.

The Convener: Oh, sorry.

Humza Yousaf: I will let Alison go first, of course.

The Convener: Thank you for chairing. I always feel that there is some kind of a coup coming from your direction—I will be ready for it.

Alison McInnes (North East Scotland) (LD): To respond to Patrick Harvie's comments, during stage 1, I gave serious consideration to whether it would be possible to lodge amendments that would fix the bill. I came to the conclusion that the bill raised so many concerns that it would be impossible to amend it effectively. The minister's amendments are broadly cosmetic and she has not addressed some of the deep-seated criticisms that have been made of the bill. The bill is so deeply flawed that any attempt to amend it would compound the problem. Some of the more complicated amendments that we will look at today raise further issues to do with consultation.

The Convener: Rather than call you each time, should I take it that that was a broad statement about the position that your party is taking, such as the declaration that the Labour Party made?

Alison McInnes: I intend to abstain on almost all the amendments. There is one amendment that seeks to give the minister greater powers, which I will oppose.

Humza Yousaf: On amendment 22, I, too, would like to know whether there is a legal difference between "hatred" and "malice and ill-will". I appreciate the fact that, regardless of what Mr Harvie's views on the bill are, he has engaged with the process by lodging amendments that are in some respects constructive. I think that those who do nothing and say nothing will be judged for that.

Roderick Campbell (North East Fife) (SNP): I have some sympathy for Patrick Harvie's views, but the bill is directed at offensive behaviour at football, so I think that it should be consistent with the part of the Police, Public Order and Criminal Justice (Scotland) Act 2006 that introduced football banning orders, which used the term "hatred".

10:15

David McLetchie: Patrick Harvie's amendments raise interesting issues to do with what the boundaries are between "hatred" on the one hand and "malice and ill-will" on the other. I suspect that the use of the latter term represents a slight softening and broadening of the offence.

We should also look at the issue in the context of trying to define the boundaries of the offences that the bill seeks to create. Later, we will debate an amendment on the protection of freedom of expression, in which we learn that it is all right to dislike, ridicule, insult or abuse someone. We have an interesting situation in which, on the one hand, a distinction is being made between "hatred" and "malice and ill-will" with regard to what is or is not prosecutable while, on the other, it is being suggested that all manner of other conduct that many would regard as offensive will be covered by freedom of expression. That simply demonstrates that the boundaries of these offences are very difficult to define. It might be that Patrick Harvie's use of the term "malice and ill-will" is no better than the minister's use of the term "hatred", but the fact is that, in this area, some very difficult boundaries need to be policed. Indeed, as far as I could divine from the committee's report, that issue is at the root of many of the general concerns about the bill that were raised in evidence.

Graeme Pearson (South Scotland) (Lab): In view of Humza Yousaf's remark that there needs to be positive engagement with the bill and that silence will be judged afterwards, I feel that I need to comment. I had no intention of saying any more than James Kelly has already said, but I will associate myself with some of David McLetchie's comments.

I feel that I cannot offer any help through amendments because I think that the current approach is defective and ill advised. I concur with everything that James Kelly has said about taking a more positive approach to engaging with the various elements that might contribute to an outcome that we would all desire. Given the absence of proper statistics or any picture of what we are trying to resolve, given the publication of statistics only in the past week, which further mires the whole issue, given the now consistent use of banning orders, with more such orders being given out in the past six months than in the past couple of years, and given the creation of an anti-sectarian unit, which has been in operation for six months and seems to be enforcing legislation that is already defective but is working in a positive sense to put people through the courts and convict them, I feel that we are in danger of producing legislation merely to be seen to be taking action. Indeed, I fear that that action has already contributed to a very negative climate. Temperatures are rising among the various members of the public who are engaging on this matter and it seems to me odd that there is a focus on those who watch football to the exclusion of the rest of Scotland's population. It does not seem to be a modern way of dealing with these matters.

I was not going to make this final comment, but now I feel duty bound to. I thought that Humza Yousaf's recent comments in the press about the confusion—

The Convener: I would prefer it if members did not refer to other members. Please make your point.

Graeme Pearson: A committee member's comments this week on the committee's confused position and lack of clarity did the committee no service. I have made my position clear right from the outset and thought that in doing so I had used straightforward language. We might disagree on the way forward, but my position all through the process has been clear and consistent. I would much prefer it if there were no disinformation—it does not help the situation.

The Convener: I do not want to deal with that matter in the meeting.

John Finnie (Highlands and Islands) (SNP): Given that Graeme Pearson has been dealing with legislation for decades, it should be very clear to him that the bill is targeted at aspects of behaviour at football giving rise to public disorder and threatening communications. There is clearly public support for the bill—indeed, people thought there was parliamentary support for it—and, with regard to Graeme Pearson's comment on the need to be seen to be taking action, I believe that the Government absolutely needs to be seen to be acting to deal with assaults on people at their place of work and the mayhem that happened just a few short months ago.

The Convener: This has been more like a stage 1 debate than a debate about stage 2 amendments. I have allowed members to have their say but, from now on, I suggest that we will deal with the specific amendments. I felt it only appropriate to let members put their feelings on record—although Colin Keir should not feel the need to do so if he does not want to—and we will now move on. I ask the minister to deal with the specific amendment.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I will attend to Patrick Harvie's comments. I thank him for the explanation of his intention in lodging amendment 22 and the other amendments in the group. I hope that he will feel more relaxed once he has heard my response.

Patrick Harvie's amendments seek to replace the term "hatred", where it occurs in the bill, with the term "malice and ill-will." I am aware that the term "malice and ill-will" has been used in legislation concerning statutory aggravations, such as the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and section 74 of the Criminal Justice (Scotland) Act 2003, which provides for an aggravation by religious prejudice. However, the drafting of the bill reflects the football banning order provisions in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which also use the term "stirring up hatred". The use of the same term in the bill means that the two pieces of legislation are aligned. There is little difference in meaning between the terms "hatred" and "malice and ill-will" but, in the context of the bill, we think that it is more appropriate to follow the plainer approach of the football banning order provisions, which we are trying to be consistent with in other respects.

Members will note that the two approaches—the use of the term "malice and ill-will" in the 2003 act and the use of the term "hatred" in the 2006 act—were taken by the Labour-Lib Dem coalition. I suspect that the use of the plainer language in the football banning order provisions was to make it much more easily understood by those who might be impacted by that legislation but, obviously, I was not as closely involved in the discussions at that time.

I assure Mr Harvie, if he is concerned about this, that the difference in wording will not have any adverse read-across for the operation of the statutory aggravations. With that explanation and assurance, I hope that he will withdraw amendment 22 and not move the others, because I feel that the Government's position is perfectly reasonable.

I listened with care to David McLetchie's remarks. I think that he ignores the fact that the section 1 offences have all to be connected to public disorder, which is the difference between those and the second offence.

Patrick Harvie: I can assure the minister that I am always relaxed, particularly when I am moving amendments at such a consensual committee.

The Convener: We are consensual even when we disagree with one another.

Patrick Harvie: One or two members have suggested that my amendments are not necessary, because the bill is essentially unfixable. I am open to being persuaded of that case, as I do not know whether the bill is fixable, but I think that it is important to air some issues and to explore the reasons why it has been drafted in a particular way.

It has been suggested, particularly by David McLetchie, that the boundaries of either definition—"hatred" or "malice and ill-will"—are unclear. I would probably agree with that. I lodged the amendments not to suggest that one term should, in all circumstances, trump the other but to explore the reasoning behind their use. The minister says that, although there is little difference in meaning between the terms, the reason for using "hatred" in the bill is to be closer to the football banning orders legislation than to the statutory aggravations. The question, for me, is the character of the bill—what kind of bill is it? The bill is not specifically about football. Some aspects of it are specifically about football, but the second offence is not. Even the first offence, which is about football, brings in, in section 1(4), a much wider range of hate crimes than the sectarianism issue, which often characterises the debate on the bill. The bill is not a football bill or a sectarianism bill; it is a hate crime bill.

Many aspects of the bill, particularly the provisions on incitement to hatred, seem closer in character to existing hate crime legislation than to legislation governing football and, specifically, football banning orders. There seems to be a case for saying that we should be using hate crime legislation as the template and as the source of language and definitions. I recognise that that might not be the committee's view, but I press amendment 22, simply so that the matter is on the record. If amendment 22 is not agreed to, I will not move the other amendments in the group.

The Convener: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 6, Abstentions 3.

Amendment 22 disagreed to.

Amendments 23 and 24 not moved.

The Convener: Amendment 16, in the name of David McLetchie, is in a group on its own.

David McLetchie: One of the weaknesses of the bill is its failure to define sectarian behaviour,

although addressing sectarian behaviour, particularly in the context of football matches, is the motivation behind it. As I have said several times in debates in the Parliament on the subject, sectarian behaviour in Scotland cannot be viewed solely in the context of religious hatred directed towards Roman Catholics. It also manifests itself in loyalties and affiliations that arise from the history of Ireland, where religious divisions between Catholics and Protestants certainly play a part but there are also strong and secular republican and loyalist traditions. Regrettably, conflicting desires to bring about constitutional change or defend an existing constitutional order have been reflected not just in political debate but in the activities of paramilitary and terrorist groups on both sides.

I welcome the fact that the broader perspective on sectarianism and sectarian behaviour is shared by the Scottish Government and is reflected in the guidelines that the Lord Advocate has published. The guidelines indicate that section 1(2)(e)—

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

will encompass

"Songs/lyrics in support of terrorist organisations"

and

"Songs/lyrics which glorifies or celebrates events involving the loss of life or serious injury."

It is not clear to me why such offensive behaviour manifests itself only in songs and lyrics, according to the guidelines. Could not offence also be caused by the exhibition of banners and flags that do the same thing or the wearing of T-shirts or other articles of clothing that carry offensive slogans or offensive symbols? The minister might explain that.

Be that as it may, the intention behind amendment 16 is to incorporate a specific provision in the bill, alongside the religious hatred provisions, and at the same time to remove from the bill the paragraph (e) offence, which was the subject of much adverse comment in the evidence that the committee received and reflected in its report to the Parliament, which we recently debated. Amendment 16 would define terrorism and terrorist groups by reference to the organisations that are on the proscribed list that is compiled by Her Majesty's Government under the Terrorism Act 2000, which embraces the Irish Republican Army and its various derivatives and splinter organisations, as well as loyalist paramilitary groups.

The problem with the statutory aggravation that the Parliament enacted in section 74 of the Criminal Justice (Scotland) Act 2003 is that it is one-sided, in that it focuses solely on religious hatred rather than on wider forms of sectarian behaviour and, as such, has been rightly resented as an unbalanced piece of legislation. We risk making exactly the same mistake in the bill. It will not be sufficient to throw a catch-all section into the bill and leave the definition of behaviour that will or will not be prosecuted to the Lord Advocate's guidelines.

If one is going to take that approach, logically all unacceptable behaviour could be covered by the generalised offences of paragraphs (d) and (e) of section 1(2), leaving all specifications—including those relating to religious and other hatreds—to the guidelines for prosecutors issued by the Lord Advocate.

What we have at present is a half-and-half approach to the problem. It is likely to satisfy no one, and it has been born of an unwillingness and reluctance to firmly grasp the sectarian nettle.

10:30

The Convener: While you are grasping that nettle, will you move your amendment please?

David McLetchie: Ouch! I move amendment 16.

The Convener: As no other committee members appear to wish to speak to the amendment, I invite the minister to respond.

Roseanna Cunningham: Amendment 16 would, as David McLetchie said, narrow the coverage of the

"Offensive behaviour at regulated football matches"

offence by deleting section 1(2)(e). That would mean that the offence would no longer catch

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

I cannot agree with the view that the existing section is too wide or is unclear. The notion that it is too wide fails to take account of the fact that the offence applies only where there is a risk of public disorder. A failure to note the link to public disorder has characterised the debate all the way through. We should keep that in mind.

The "reasonable person" test is well known and understood, in both civil and criminal law. It is not sufficient simply for an individual or individuals to be, or claim to be, offended. The behaviour would have to be deemed offensive by a reasonable person, and it must risk causing public disorder. That is spelled out in the Lord Advocate's draft guidelines on the bill.

The Lord Advocate's guidelines also provide examples of behaviour that might fall into the category of other offensive behaviour. The guidelines make very clear that it will cover the

behaviour provided for in amendment 16, including support for terrorism. The Government's position is therefore that amendment 16 is unnecessary, as it would narrow the bill's coverage of other offensive behaviour, and because the provisions that it seeks to add to the bill are already covered.

David McLetchie referred to other possible acts of offensive behaviour, such as displaying certain banners and wearing certain T-shirts. His points may be ones for the Lord Advocate to consider in his guidelines. However, Mr McLetchie has raised this matter in Parliament's debates on the bill, and he has raised it with me personally, so I thank him for the way in which he has approached the issue. In that spirit, I am happy to give an undertaking that the Government will actively consider Mr McLetchie's points before stage 3. I therefore urge Mr McLetchie to withdraw amendment 16 at this stage, and to continue dialogue with me and the Lord Advocate.

David McLetchie: I welcome the minister's comments, in light of which I will seek to withdraw amendment 16 and not press it to a vote at this stage.

Amendment 16, by agreement, withdrawn.

Amendment 25 not moved.

The Convener: Amendment 17, in the name of David McLetchie, is in a group on its own.

David McLetchie: Amendment 17 is derived from the Lord Advocate's guidelines, to which we referred in the debate on amendment 16. With reference to both the offence created under section 1 and the offence created under section 5, the guidelines stipulate that it is not appropriate to add an aggravation on the grounds of religious or other hatreds and prejudices when prosecuting those offences. I believe that that instruction should be incorporated into the bill. The Government's position is that new laws are required in order that free-standing offences relating to offensive behaviour at football matches are defined and prosecuted. If that is the case, I see no need to charge a person with a statutory aggravation in respect of behaviour that, in itself, is directed towards exactly the same end.

It would be particularly absurd to add a statutory aggravation under section 74 of the 2003 act to an offence under the bill, given the unsatisfactory and unbalanced nature of section 74 in the first place.

I move amendment 17.

Roseanna Cunningham: The substance of the offence is concerned with hatred in a way that makes it inappropriate also to libel an aggravation that an offence under section 1 was motivated by prejudice. That is spelled out in the Lord Advocate's draft guidelines on the bill, which clearly state:

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

The Government's position is that amendment 17 is unnecessary as the provisions that it adds to the bill are already covered by the Lord Advocate's guidelines.

Having discussed the matter with David McLetchie and the Lord Advocate, I know that David McLetchie is aware that the Lord Advocate is considering the points that he has made. I thank him again for bringing the matter to our attention at an earlier stage. In view of the on-going consideration, I ask him to treat the amendment as he did amendment 16 and withdraw it so that we can continue those conversations prior to stage 3.

David McLetchie: I welcome the minister's remarks and look forward to further discussion and dialogue with her and the Lord Advocate. In the light of what she has said, I am happy to withdraw the amendment.

Amendment 17, by agreement, withdrawn.

Section 1 agreed to.

Section 2—Regulated football match: definition and meaning of behaviour "in relation to" match

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 3 and 7. I draw members' attention to the pre-emption information in the list of groupings.

Roseanna Cunningham: I will be brief, as amendments 1, 3 and 7 are minor technical amendments. They will ensure greater consistency in the references in section 2 to a "regulated football match".

It has been suggested that section 2(1)(b) applies to any football match involving a team playing in a Scottish league, including amateur teams, and not only to "regulated football matches". Amendment 1 clarifies that only regulated matches involving the Scottish national team or our Scottish Premier League and Scottish Football League clubs are covered by the provision. The Law Society of Scotland, which was the originator of the concern, appears to have misread the bill's provisions. The amendments make no substantive change to the bill but are minor drafting amendments to ensure consistency.

I move amendment 1.

Amendment 1 agreed to.

The Convener: Amendment 2, in the name of the minister, is grouped with amendments 4 to 6 and 8. I draw members' attention to the pre-emption information in the list of groupings.

Roseanna Cunningham: Formally moved—oh, sorry. I thought that we were still on group 4, but we have moved on to group 5.

The Convener: That is perfectly all right.

Roseanna Cunningham: I reassure new members that it is not just new members who make mistakes at stage 2.

There is no doubt that some of the worst manifestations of offensive behaviour that provokes public disorder occur when fans are travelling to or from a match. I welcome the support in the committee's report for the bill's coverage of such problematic behaviour. The Government's response to the committee's report confirmed that we would respond to the committee's recommendation that the journey provisions should be clarified by lodging amendments at stage 2.

Amendments 2, 5, 6 and 8 are consequential to amendment 4, which makes it clear that the

"Offensive behaviour at regulated football matches"

offence can be used to prosecute people who are not on a journey to or from a football match but who either join in with offensive singing or other behaviour by people who are on such a journey or engage in offensive behaviour that is directed at such people. That underlines that no one can hurl sectarian abuse at groups of supporters or willingly join in with offensive behaviour that is likely to cause public disorder, even if they individually have no intention of going to a football match.

I urge the committee to support the amendments in the group. I move amendment 2.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 2 agreed to.

Amendment 3 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 18, in the name of David McLetchie, is grouped with amendments 4A and 20. I draw members' attention to the pre-emption information in the list of groupings.

David McLetchie: The purpose of the amendments is to remove journeys to or from a regulated football match from the environments in which an offence under section 1 can be committed. They are exploratory amendments to seek further clarification from the Government of its approach in light of the concerns that the Law Society of Scotland raised in its recent submission to members.

We all know that public disorder can arise in the context of journeys to or from a football match, but it is arguable that the Government is trying to spread the net too widely, raising concerns as to the provability and enforceability of the offence. It is a lot more difficult when one considers that a journey to or from a football match includes a journey to or from an establishment or place where a match is being televised, which could be a public park or square with a big screen or, more typically, a pub or club.

The Government has sought to amend the journey provisions in line with its undertaking in response to the committee's report, but I argue that there is much to be said for dropping the provision altogether and relying on the existing laws in relation to breach of the peace and public disorder for acts committed in the circumstances in question. That would avoid our getting tangled up in knots as to whether such acts can be brought within the terms of the specific offence.

The problem is that, in such circumstances, it will be far easier to gain a conviction for breach of the peace than a conviction under section 1, so for safety's sake, the prosecution will libel both offences but still have to spend a great deal of time and energy trying to secure a conviction under the new provision, whereas a guilty plea may well have been tendered to a simple breach of the peace charge. For that reason, I would welcome a further explanation from the minister of why the offence is essential, in view of the practical difficulties that it may occasion.

I move amendment 18.

Humza Yousaf: I appreciate what Mr McLetchie is saying, and if it was not for the reassurance that the British Transport Police gave the committee, I might not have been content with the provision.

I was disappointed that during the committee's investigations there were no submissions from transport companies. I wonder whether the minister has had discussions with ScotRail, Strathclyde partnership for transport or other travel companies, and what their feedback was on the

enforceability of the offence that covers journeys to or from a match.

Roseanna Cunningham: The Government's view is that the bill should apply to any sectarian abuse or other offensive behaviour related to football that is likely to cause public disorder, including in relation to journeys to or from matches. As I have indicated, amendments 4A, 18 and 20 would mean that such behaviour on the way to or from matches would not be caught by the bill.

The comments that I made on the previous group of amendments also apply to this group, as it is clear from the committee's report that it supports the bill's covering journeys to and from matches. The previous set of amendments were calculated to provide some clarification in respect of some of the committee's comments.

Superintendent David Marshall of the British Transport Police gave evidence to the committee on 13 September, and I think that it is important that I read back into the record what he said:

"football-related disorder with a sectarian or religious connotation is a problem. As I said at the very start, this is core business for British Transport Police. It certainly happens every week; indeed, it seems to happen every other day ... I make it very clear, though, that this is not just a Rangers and Celtic issue; we police Scotland's national railway network and this type of behaviour is manifested by football supporters of every single club in the country.

As for the scale of the problem, the fact that British Transport Police has the third highest record for successful applications for football banning orders might give the committee a flavour of our operational activity with regard to policing football supporters."—[*Official Report*, *Justice Committee*, 13 September 2011; c 233.]

10:45

For our part, the bill's provisions relating to journeys reflect the drafting of section 51(8) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which relates to football banning orders. The football banning order provision has been law for a number of years and I am not aware that the police, prosecutors or the courts have had any difficulty in applying the definition. We believe that the same will be true of the bill.

On the enforceability of the legislation, Superintendent Marshall said:

"Does the bill provide us with additional powers? Yes. Does it provide greater clarity around travel to and from a regulated football fixture? Yes. Does it provide us with additional legislation to which officers can refer? Absolutely ... We welcome the bill."—[*Official Report*, *Justice Committee*, 13 September 2011; c 229-30.]

That is a fairly unqualified statement by the officers whose job it is to deal with travel to and from football matches. The importance of the bill covering journeys to and from matches was underlined by the statistics that we published last week on the scale of religious hate crime across Scotland. They show that around a third of such crimes that related to football occurred at football stadia, so the vast majority of such football-related offences take place away from football grounds, including on journeys to or from matches.

Regarding Humza Yousaf's comments, none of the train or bus operating companies has approached us directly. In the case of trains, the enforceability of the bill is a matter for the British Transport Police, so it is its comments that we have taken on board.

I urge the committee to reject amendments 4A, 18 and 20.

David McLetchie: Superintendent Marshall's comments should be viewed in the context in which he and his fellow officers operate, which is journeys to and from football matches conducted on a train, whereas the bill is not confined to journeys to and from football matches but includes journeys to and from a public house or a public park, most of which will not be undertaken on one of the trains that are policed by Superintendent Marshall. I respect his comments on the bill, but they do not prove the point or address the specific concerns that have been raised. In fact, one might read into his comments that he and his officers deserve congratulation for their zealous use of the existing legislation relating to football banning orders. In some respects, it simply proves the point that diligent application of the existing law might achieve much the same effect without the need to wander into new legislative territory. I press amendment 18.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 18 disagreed to.

Amendment 4 moved—[Roseanna Cunningham].

Amendment 4A not moved.

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 4 agreed to.

The Convener: Amendment 19, in the name of David McLetchie, is grouped with amendments 21 and 27. I draw members' attention to the pre-emption information shown on the groupings paper.

I call David McLetchie to move amendment 18 and to speak to the other amendments in the group.

David McLetchie: You mean amendment 19, convener.

The Convener: I beg your pardon. I mean amendment 19. I need new glasses. This will happen more than once today.

David McLetchie: Amendments 19, 21 and 27 are probing, exploratory amendments on issues arising from the report of the committee—in particular, on the scope of the offence under section 1, as it applies to televised football matches.

In its response to the committee report, the Government expressed the view that the bill should tackle all sectarian and other offensive behaviour related to football, including at televised matches and highlights that are shown in public places. The Government went on to say that it recognised the need to assist the public in understanding the scope of the offence and would seek to ensure greater clarity on the matter as we take the bill forward and implement it. However, that response is not reflected in any amendments that have been lodged by the Government, which suggests that it is satisfied with the drafting of that aspect of the bill, notwithstanding the criticisms of it that have been voiced in evidence to the committee. The purpose of amendment 19 is to seek further explanation of why the Government believes that further clarification is not necessary, regardless of those concerns.

I move amendment 19.

Patrick Harvie: Like David McLetchie, I seek to explore with amendment 27 what the Government intends to cover in terms of places where the offence could be committed. Section 2(3), which David McLetchie seeks to delete, mentions

"a reference to any place (other than domestic premises) at which such a match is televised".

Amendment 27 would amend a later part of the bill, which defines "televised". At the moment, section 4(4) says that a televised football match is one that is

"shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise."

I suggest that the committee consider changing that to mean specifically a match that is viewed

"by means of the broadcast transmission of pictures"

and not by other means. The current definition is extremely broad; it covers not only the scenarios that most people would expect ought to be covered, such as a pub with a big screen showing a football match live to a bevvying group of fans, but, for example, someone whipping out their mobile phone and playing a clip that is being streamed live over the internet or a highlight that they have stored previously.

Over the next few years, particularly once 4G networks and public wi-fi are much more available in towns and cities, we will see a proliferation of such devices. Under the bill, a park or a train in which a small group of fans gather round to watch a clip or a live broadcast on a mobile device would become venues in which everyone would be subject to the provisions, regardless of whether they were aware that the clip was being broadcast. It seems to me that the offender or the person who is committing the behaviour that would be regarded as an offence would not even need to be aware that a transmission was being shown on a screen, and that the owner of the premises or the organiser of the event would not need to be taking responsibility for the screening for the provision to kick in.

We are talking not only about large, organised screenings but about situations in which someone showed a clip of a regulated football match on any screen at all. The wording might have been appropriate five years ago, when the proliferation of mobile devices and screens was not anticipated, but we should now be extremely cautious about creating a situation in which

anyone, simply by whipping a mobile phone out of their pocket, can create the circumstances in which what is intended to be a fairly tightly defined set of offences can suddenly become active.

I hope that members will recognise that restricting the provision to "broadcast transmission of pictures" would catch most situations that people would, according to common sense, think ought to be covered, but exclude many other situations that will become increasing likely in years to come.

John Finnie: The important point is that the size of screen would not affect the nature of public disorder that could result from the offensive behaviour that arises from viewing the screen. Patrick Harvie is right that the situation is evolving, but we have to deal with the present situation. The size and location of the screen seems to be immaterial; it is the offensive behaviour that the public expects us to respond to.

Humza Yousaf: Mr Harvie raises some very interesting points. It seems that internet transmission, for example, would be covered by the definition that he proposes in his amendment. It would be good to get clarification of that, because nowadays a lot of public houses where I go to watch matches broadcast them using internet transmission.

Patrick Harvie: Is the member able to take an intervention?

The Convener: Yes. I am happy to let him do that. I was going to let you sum up at the end after we have heard the minister—in fact, you will not get to sum up, because David McLetchie has the lead amendment in the group, so he will sum up.

Patrick Harvie: Can I intervene?

The Convener: Of course you can.

Patrick Harvie: My understanding is that "broadcast" does not cover the internet, because it is not available through the airwaves—"broadcast" refers to transmission of television.

Humza Yousaf: Thank you for that clarification. I would be quite worried if the definition was narrowed down not to include internet transmission because, as I said, a number of public houses show games—be they past games or live games—via internet streaming. It would be good to hear whether the minister has had any advice on that point.

Roseanna Cunningham: This is the kind of interesting debate that can happen if we forget that the key part of the offence is about joining in and taking part in activity that is likely to cause public disorder. It is important that we keep it in mind that anybody who is not joining in or not taking part in any activity that is likely to cause public disorder will not be affected by any of the provisions.

Amendments 19 and 21 would remove televised matches from the scope of the offensive behaviour at regulated football matches offence. I know that the committee carefully considered the scope of the offensive behaviour offence. The Government's response to the report welcomed the committee's conclusion that it is

"appropriate that it cover televised matches."

The Scottish Government is trying to remove unacceptable songs, chants and other behaviour from football in Scotland where those cause, or are likely to cause, public disorder. We know that that type of behaviour takes place not only in football stadiums, but in pubs, clubs and elsewhere that matches are broadcast. We know from recent experience that matches that are broadcast in public places can cause real problems.

However, amendments 19 and 21 would give individuals the freedom to take their poisonous singing and chanting into pubs and clubs across the country when there are football broadcasts. That cannot be tolerated. Chanting and other offensive behaviour that are likely to incite public disorder are unacceptable at the match, watching it in the local pub or, indeed, on a screen in the centre of Manchester.

I urge the committee to resist amendments 19 and 21.

I thank Mr Harvie for his explanation of the purpose of amendment 27. It would narrow the definition of "televised" so that it covers only matches being televised

"by means of broadcast transmission of pictures".

It might be helpful if I explain that the inclusion of a reference to matches being televised other than by means of broadcast transmission of pictures is intended, deliberately, to put it beyond doubt that matches that are televised using new technologies, such as internet streaming, are televised matches for the purpose of the offence. We do not want to be in a position whereby the offence is rendered ineffective because technological changes mean that televised matches can no longer be said to be "broadcast" in the traditional sense.

I therefore ask that Mr Harvie withdraw amendment 27 and that, if he does not, members vote against it.

The Convener: He has not moved it, so you do not need to do that.

Roseanna Cunningham: I am sorry.

The Convener: I made a mistake as well. We are all making mistakes today.

11:00

David McLetchie: It has been an interesting debate. In relation to this group and other amendments, the minister has made a great deal of the qualification about inciting or occasioning public disorder, but the problem is that public disorder does not need to have taken place. The provision relates to conduct that is "likely to incite" public disorder. Indeed, as we see from the bill, there might be no public disorder if an event is well policed. There could also be no one present to be incited to public disorder. We are making a judgment as to whether, if people were present, such conduct would incite them to public disorder, assuming that there were no police officers in the vicinity to restrain that disorder. Too much reliance is being placed on the public disorder qualification, because it is not an absolute qualification relative to what actually happens; it is, rather, a judgment in relation to things that have not happened, but which are then coupled with other aspects of the offence.

In relation to the section 1 offences, we must remember that three elements have to be proven. The first is that the offence must have taken place at a football match. Secondly, there is the content of the offence itself, and thirdly, there is the public disorder aspect. We cannot simply say, "About the qualification of what goes on in the middle, the other aspects don't matter because it is all qualified by the third one", particularly when the third one is, in many instances, highly theoretical and just as much a matter of judgment as what might or might not be offensive to the public.

The Convener: I take it that you are pressing amendment 19 to a vote.

David McLetchie: Yes.

The Convener: I point out that, if amendment 19 is agreed to, I cannot call amendments 5, 6 and 7 because they will be pre-empted.

The question is that amendment 19 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 19 disagreed to.

Amendments 5 to 7 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 20, in the name of David McLetchie, has already been debated with amendment 18. If amendment 20 is agreed to, amendment 8 will be pre-empted.

Amendment 20 not moved.

Amendment 8 moved—[Roseanna Cunningham]—and agreed to.

Section 2, as amended, agreed to.

Section 3 agreed to.

Section 4—Sections 1 and 2: interpretation

Amendment 26 not moved.

The Convener: Amendment 21, in the name of David McLetchie, has already been debated with amendment 19. If amendment 21 is agreed to, amendment 27 will be pre-empted.

Amendment 21 not moved.

Amendment 27 moved—[Patrick Harvie].

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

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 27 disagreed to.

Section 4 agreed to.

The Convener: Before we go any further, I point out that it is my intention to have a five-

minute break at about 11.15. Do members want a break?

Members *indicated agreement.*

The Convener: Right. We will have a break for the minister's and my sake at about 11.15, and I can get my other glasses.

After section 4

The Convener: Amendment 9, in the name of the minister, is in a group on its own.

Roseanna Cunningham: Amendment 9 will create an order-making power to modify and add groups against whom it is an offence to express hatred under the first offence. I note the committee's support for the inclusion of categories beyond sectarian hate in relation to the first offence, and the invitation to consider the inclusion of age and gender. I note also the committee's conclusion that the threatening communications offences should not be widened without consultation. The Government's view is that we should take equal concern in relation to the first offence. I also note the detailed and thoughtful consideration in the previous session of Parliament by the Equal Opportunities Committee and Justice Committee of the same issues in the context of the Offences (Aggravation by Prejudice) (Scotland) Bill, and the fact that that bill was not so amended.

Given the committee's views and the complex arguments that were presented in consideration of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, we need to take a middle course. I have therefore lodged amendment 9 to allow for the extension of the bill to cover additional characteristics at a later date. That will permit proper consultation and full consideration of the evidence. The fact that the power will be subject to affirmative procedure will mean that any changes will happen only after proper consultation and if Parliament votes in favour of them. I urge the committee to support the amendment.

I move amendment 9.

Roderick Campbell: I welcome the minister's comments. When we discussed the issue in preparing our report, most members took on board the fact that two of the protected characteristics under the Equality Act 2010 are missing from the bill. However, I have heard what the minister has said and I think that the middle way is probably the best approach.

Alison McInnes: I understand the minister's reasoning and she appears to be well-intentioned, but I feel some disquiet about amendment 9 because it would mean that the offences in the bill could be extended without proper consultation. We have warned against adding other groups without proper consultation because we would then not be aware of the impact of that. The amendment will allow ministers at the stroke of a pen—by order, rather than after discussion—to add or remove any behaviour or vary the description of the behaviour or the list. The amendment will allow ministers to redefine the offence, which is a dangerous piece of lawmaking. I oppose it.

John Finnie: I might have misunderstood, but I thought that I heard the minister say clearly that any changes would happen only if Parliament voted in favour of them.

Roseanna Cunningham: There are a variety of ways of amending legislation. The most common is by negative instrument, with which committees are perhaps most familiar. However, in this case, we are suggesting that any changes would be made using the affirmative procedure, which means that the Parliament as a whole would have to vote on them and it would not be done simply

"at the stroke of a pen".

I am saying that I will consult, if it is in my remit to do that. It is the intention to consult and to consider the evidence fully. We take that view because of the balance of the debate in relation to the 2009 act, when neither the Justice Committee nor the Equal Opportunities Committee could come to a confirmed view on whether such extensions were necessary.

Indeed, if I read rightly even some of the organisations, such as those that deal with the aged, were not certain that it would be greatly helpful. It may help if I quote the Justice Committee report of 2009, which says at paragraph 135:

"the Equal Opportunities Committee ... recommended that the Bill should not be amended to include a gender aggravation".

The Equal Opportunities Committee took the same view in respect of an age aggravation.

All I am saying is that there is clearly more to the matter than meets the eye and that before any changes are made in respect of age and/or gender, we should consult properly and have Parliament vote on it. It is not intended that that would be done by the stroke of a ministerial pen.

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)

Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against

McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)

Abstentions

Kelly, James (Rutherglen) (Lab)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 5, Against 2, Abstentions 2.

Amendment 9 agreed to.

Section 5—Threatening communications

The Convener: Amendment 26—I am sorry; it's these glasses again. Amendment 28, in the name of Patrick Harvie, is grouped with amendments 29 and 31. I draw members' attention to the pre-emption information that is shown on the groupings paper.

Patrick Harvie: The offence of threatening communications evokes some of the same concern that I have in relation to other offences, which is the ambiguity and lack of clarity about what would be regarded as an offence and what would not. The test in relation to threatening communications in section 5(2)(b) and (c) is for

"a reasonable person to suffer fear or alarm".

My concern is that that is not a tough enough test and not a high enough bar. It could be—I suggest it is—subject to fairly loose interpretation. I can say that from experience of the one time that I was charged with breach of the peace following a demonstration at Faslane, when two great big burly police officers testified that they were caused great fear and alarm by the fact that I was sitting quietly in the road.

"Fear and alarm" is often used in a loose way and I am concerned that this will happen in relation to this offence. We are talking about a serious offence that can attract a sentence of up to five years in prison. For an offence of such seriousness we should be making it clear that we are talking about serious and credible threat, not something trivial, unintentional or, perhaps, something that is said in jest. I draw members' attention to the experience of Paul Chambers south of the border, of which many people will be aware. The scenario is generally described online as the "Twitter joke trial". Nearly two years ago he sent a message by means of Twitter, which would be covered as an electronic communication within this section.

The Convener: What are you doing? You are not playing tunes or something, are you?

Patrick Harvie: No. Wi-fi is switched off; I am reading from the screen, if that is all right.

The Convener: That is fine. I thought that you were texting or something, while we were sitting.

Patrick Harvie: Thank you. I apologise, for the purposes of the *Official Report*. The message that was sent was this:

"Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!"

It was a joke—a bad joke, in very bad taste and it probably should not have been done, but it should not have been treated as a serious criminal offence. The gentleman was, in the end, only fined about £1,000, I believe, but as a result he lost his job and was subjected to nearly two years of legal process. The offence in section 5 is much more serious and could attract a sentence of five years in prison.

If we are to create such an offence, we should be clear that there must be a serious and credible threat. Therefore, I suggest that, rather than talk about the likelihood that a reasonable person would "suffer fear or alarm", we should talk about the likelihood that a reasonable person would

"believe that the threatened or incited act, given the circumstances, was likely to be carried out".

11:15

I ask members to consider amendment 28 together with amendment 30, which is in the next group and which would remove recklessness as a condition for the offence. If we expect to subject people to a criminal process that could lead to a sentence of up to five years in prison, we should be talking about serious, intentional and credible threats. Taken together, amendments 28 to 31 would replace the "fear or alarm" condition with a requirement for a realistic expectation that a threat was serious, and would remove the recklessness condition from section 5.

I hope that members will accept that if we create a serious offence, it ought to be for serious threats and not for something trivial. Trivial matters have been taken seriously and have prompted overreaction by the criminal justice authorities south of the border. We do not want the same thing to happen here. If it did, I suspect that it would bring this entire area of legislation into disrepute.

I move amendment 28.

Roderick Campbell: Am I right that we are dealing at the moment with "fear or alarm" and not recklessness?

The Convener: Yes.

Roseanna Cunningham: As Patrick Harvie said, amendments 28, 29 and 31 would remove from condition A of the threatening

communications offence the requirement that a communication

"would be likely to cause a reasonable person to suffer fear or alarm",

and replace it with a requirement that the prosecution prove that a reasonable person would believe that the threat

"was likely to be carried out".

That would significantly raise the threshold for an offence to be committed. I accept that, in a sense, that is what Patrick Harvie wants to do, but it does not pay regard to the fact that a threat of serious violence can cause real fear and alarm to a victim without the victim having to believe that it is likely that it would be carried out. I am unclear as to how a victim would be able to make that assessment, anyway. If we proceeded in that way and it was then proved that it was never intended that the threat be carried out, I wonder whether the fear and alarm would be dismissed. I find it difficult to understand exactly what Patrick Harvie wants, because it seems to me that if someone sends messages that terrify the living daylights out of people without their thinking that the specifics in the message might be carried out, that should be taken every bit as seriously as a situation in which it can be proved that a specific threat is intended to be carried out.

A drawback of existing legislation is the requirement to prove that it was intended that something be carried out. Care needs to be taken, because we might exclude from the offence people whose behaviour is, in my view, unacceptable. Even the small possibility that a threat of serious violence or murder might be carried out could seriously disrupt the life of the recipient.

I hear what Patrick Harvie says about joke communications, but I rely on good sense in the decision-making process in the criminal justice system in Scotland when it comes to prosecuting offences. However, I ask members to remember the situation earlier this year and what we saw on the internet and in other places. I therefore urge the committee to reject amendments 28, 29 and 31.

Patrick Harvie: I confirm that my intention is to raise the bar and to exclude certain behaviour from the offence. I repeat that, in creating a serious offence with a serious penalty attached to it, we should reserve it for serious circumstances. We should be clear that more trivial issues are not covered by the offence. That is very much my intention. The minister says that real fear and alarm can be caused without a realistic expectation that the threat would be carried out. I do not doubt that and I am sure that it can be. The question is whether that is serious enough to attract a penalty of up to five years in prison. I do not think that it is. There is no doubt that some of the behaviour that my amendments would exclude from the offence is bad behaviour and not very nice, but the question is whether it is serious enough to be covered by the criminal offence.

After I was elected in 2003, one of the first things I had to do was deal with proposed antisocial behaviour legislation. In making criticisms of the penalties, whether criminal or otherwise, for being too broad or for being applied in response to public expectations rather than what was the best thing to do in the circumstances, I got tired of hearing the reply that we should just have faith in the system, that people would only ever use the legislation proportionately and sensibly and that the law did not need to clarify what would be appropriate situations in which to use various penalties. However, I believe that the law should be clear. When we create a serious criminal offence that could result in someone losing their job, home or family, we should be clear that that is reserved to very serious circumstances. At present, the bill does not reserve the offence to serious circumstances and runs the risk that trivial matters will be treated as though they are serious. We should seek to limit the offence. Therefore, I will press amendment 28.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 5, Abstentions 4.

Amendment 28 disagreed to.

Amendment 29 not moved.

The Convener: This is a good point at which to have a short break.

11:22

Meeting suspended.

11:31

On resuming—

The Convener: Amendment 30, in the name of Patrick Harvie, is in a group on its own. I draw members' attention to the information on pre-emptions that is given with the groupings.

Patrick Harvie: I have removed my coffee cup from the table and I apologise for being unaware of the convener's expectations in that regard.

The Convener: I set high standards, Mr Harvie.

Patrick Harvie: High standards indeed.

I will not speak on amendment 30 for very long; I have already covered most of the arguments. By removing the recklessness element, amendment 30 would seek to raise the bar somewhat on the offence covered by section 5. As I suggested, the offence that is being created is serious enough that it should apply to intentional threats rather than to threats when an accused person has been suggested to have been reckless as to whether they caused fear or alarm in a reasonable person.

I move amendment 30.

Roderick Campbell: If we were to agree to amendment 30, it would put us out of step with section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, under which there have been 99 prosecutions, as was said earlier. Section 38(1)(c) of the 2010 act contains the wording

"intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm."

We risk backtracking from the 2010 act, which would be the wrong way to go.

The Convener: There are too many lawyers on this committee, Patrick.

As no one else seems to wish to comment, I invite the minister to respond.

Roseanna Cunningham: I am not sure that I agree with the comment about there being too many lawyers.

The Convener: Neither do I. I was just stirring it up.

Roseanna Cunningham: If there are, it seems perfectly appropriate.

As Patrick Harvie has suggested, amendment 30 would delete section 5(2)(c)(ii), with the effect that the offence of communicating material that consists of, contains or implies a threat or an incitement to carry out a seriously violent act against a person would be committed only where the accused intends, by making the communication, to cause fear and alarm.

The recklessness test to which Mr Harvie refers is another fairly well-known test in criminal law. It is not an unusual test to apply. Although I accept that he makes a reasonable and legitimate point here, I think that it will be obvious to him that the Government does not agree with it.

I ought to make one or two comments on the disposals available in respect of the offences. Mr Harvie and Mr McLetchie both commented on the limit of five years. We should be a little clearer, on the record, that the potential for a jail sentence of up to five years, or a fine, is available only if there is an indictment. On a summary complaint, the limit is up to 12 months, or a fine.

Our expectation is that the vast majority of these offences would be brought by a summary complaint, rather than on indictment, although we cannot preclude an indictment from being drawn up on occasion. While it is certainly true that a charge on indictment carries the potential for a jail term of up to five years, everybody on the committee will know that raising complaints on indictment is reserved for only the most serious offences. I hope that everybody will accept that.

Amendment 30 would mean that the fear and alarm caused to a victim by someone recklessly making threats would simply be ignored and I therefore urge Mr Harvie to withdraw the amendment.

Patrick Harvie: I note the minister's response. I continue to believe that an offence of this seriousness should be related to intentional threats, rather than to—let us face it—accidental threats. If somebody intends to cause fear and alarm, it is clear that we should treat that seriously, but if they are simply reckless as to whether the relatively low bar of the fear and alarm test is reached, it is probably only too likely that very trivial incidents will be treated as serious and covered by the offence. We must bear in mind not only that the sentence handed down to an individual accused is important, but that being put through that legal process for what could be a very trivial matter can impact on someone's livelihood, their family relationships and their standing in the community. Therefore, I will press amendment 30.

The Convener: I point out that if amendment 30 is agreed to, I cannot call amendment 31, which will be pre-empted.

The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and

Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 5, Abstentions 4.

Amendment 30 disagreed to.

Amendment 31 not moved.

The Convener: Amendment 32, in the name of Patrick Harvie, is grouped with amendments 10, 34, 36, 12, 38, 39 and 13.

Patrick Harvie: When the Government and I discussed in the previous session of Parliament the contents of the hate crime bill that I brought to Parliament, which turned into the Offences (Aggravation by Prejudice) (Scotland) Act 2009, we considered incitement to hatred. There was substantial controversy and debate at Westminster when the proposals on incitement to religious hatred were introduced there, and there was clearly a legitimate space for debate about whether Scotland should go down the same route and create incitement to hatred offences. Fairly quickly a strong consensus appeared across the political parties and other interested organisations that that was not the way Scotland wanted to go. I was therefore slightly surprised that, in a few lines in the bill that we are considering now, a very broad incitement to hatred offence is created—I refer to condition B in section 5, on threatening communications.

I am still concerned about the inclusion of incitement to hatred in the bill. Obviously, there will be debate later about a free speech defence. I worry that no free speech defence will ever be watertight enough to satisfy me that including incitement to hatred in the bill is the right way to go. However, if such provision is to be made—if the Government is determined to continue developing incitement to hatred as part of this legislation—I am really unclear as to why it relates only to religious hatred.

The first sections on offensive behaviour relate to general hate crime grounds and include a wide range of categories of hate crime. Condition A, in section 5, on threatening communications, also relates to a wide range of characteristics that can be grounds for hatred. I am puzzled about why condition B in relation to threatening communications—the incitement to hatred aspect—is limited to religion alone.

Amendment 34 expands condition B to include a list that is the same as the list elsewhere in the bill—my other amendments in the group are consequential on amendment 34. The amendment leaves religion in, so the religious hatred aspects are still included in the legislation, but it broadens out the provision to include the other categories.

Members will be aware from correspondence from their constituents and from academic research that those other forms of incitement to hatred take place in relation to race, nationality, ethnicity, sexual orientation and transgender identity, and that many such incidents are very serious.

I am not entirely convinced that a provision on incitement to hatred is the right way to respond to those problems of behaviour, some of which I would be the first person to find unacceptable and to view as needing some kind of response. However, if incitement to hatred is the way that the Government is going, I am unclear about why the provision is limited to incitement to hatred on one ground and does not include others.

I am keen to hear the views of members and the minister on the matter and to hear what the minister has to say on the other amendments in the group. I will respond to her comments on those when I sum up.

I move amendment 32.

Roseanna Cunningham: Amendments 10, 12 and 13 have been lodged to allow for a power to modify groups that are in, add groups to or remove groups from section 5(5)(b) and section 6 against which it is an offence to make threats that are intended to stir up hatred.

Amendment 13 is the main amendment. It allows for additional groups to be added to the scope of the threatening communications offence. That responds to the recommendation in the Justice Committee's report, which suggests that any widening of the threatening communications offence to cover hatred of other groups should proceed on the basis of wide engagement and consultation. Based on appropriate evidence and debate, the power would allow the offence to be widened in the future. Some of the comments that I made in our discussion about age and gender again apply.

The Scottish Government proposes to amend the bill to provide for an explicit provision covering freedom of expression. As indicated by Patrick Harvie, we will discuss that.

Amendments 10, 12 and 13 provide for a power to make appropriate consequential changes related to the freedom of expression provision as a result of the addition of any new grounds of hatred. The power will require to be exercised through an order under the affirmative procedure. I restate that that will give Parliament the

opportunity to have its say. In advance of any use of the power, we will consult further—as recommended by the committee—to allow evidence to be gathered.

Amendment 13 supports the committee's recommendation and I urge the committee to support it.

The first bit of the bill relates clearly to football and football-related offences. The second offence arose out of, in particular, the widely publicised internet communications that we saw earlier this year, and we looked at such communications in respect of religion and sectarianism.

Amendments 10 and 12 are technical drafting amendments that adjust the current wording to fit better with the new power that is proposed in amendment 13. They make no change of substance.

Patrick Harvie's amendments seek to widen the scope of condition B of the threatening communications offence to cover colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability.

I note that the Justice Committee's discussion during its consideration of the bill focused overwhelmingly on religious hatred and sectarianism. We therefore agree with the committee's recommendation that, if we were to go down the road that Patrick Harvie suggests, we would require to hold a proper consultation and to take proper evidence on any extensions.

We are not convinced that sufficient evidence has been presented to justify widening the scope of condition B, but we do not preclude that from happening in future. With that in mind, we lodged amendment 13, which will, should sufficient evidence be presented, give us the power to extend by affirmative order condition B to include threats that are intended to stir up hatred against other groups. In line with the committee's recommendations, I urge members to resist the amendments in the name of Patrick Harvie and to support the Government's amendment 13 and the amendments that are consequential on amendment 13.

11:45

Roderick Campbell: I have a lot of sympathy with Patrick Harvie's amendments, having referred to the issue at stage 1. I do not want to speak for the whole committee but, at the end of the day, although we might all have felt the same, we took the technical view that sufficient evidence had not been presented to warrant his amendments. The Government's position is reasonable in the circumstances.

Alison McInnes: Not only did we think that we did not have sufficient evidence, but we did not have enough time to explore the ramifications of extending the scope of condition B. Given that there are already serious concerns about the religious hatred part of the bill, it would be folly to extend it further without more discussion.

Notwithstanding the minister's earlier comments about amendment 9, I have the same reservations about amendment 13, and my disquiet remains. I oppose the extension of powers. The matter is complex and the affirmative procedure is a flimsy protection against a quite significant shift. I therefore oppose amendment 32.

Humza Yousaf: My points largely echo those of Roderick Campbell. My gut feeling is that the offence should be widened, but I am not keen to do that without more consultation and hearing more evidence on the matter. As Patrick Harvie said, when Westminster discussed religious hatred, there was a substantial debate and controversy that lasted almost a year. We have not had or taken the time to explore the matter.

On Alison McInnes's point about the affirmative procedure, I am keen to hear the Government's summing up. The minister says that any order would come before Parliament—

The Convener: It is for Patrick Harvie to sum up, although I am happy to let the minister come in again if she feels that it is necessary.

Humza Yousaf: Perhaps the minister could come in again, either now or later. I am not too familiar with affirmative orders. I know that Parliament gets a say in such orders but does the committee get another chance to have a say?

Roseanna Cunningham: Yes.

The Convener: Yes, it would depend on the Parliamentary Bureau but any order would probably come to the committee.

Minister, do you want to say anything before I call Patrick Harvie again?

Roseanna Cunningham: No, I am content with what I have said. I reassure Humza Yousaf that the committee could do what it wanted with the investigation of an affirmative instrument.

Patrick Harvie: I have to say that I am still pleased to have lodged the amendments, which has allowed the discussion to take place. The minister indicated that making such a change would require broad engagement and consultation, and other members, including Humza Yousaf, have said that we should not create such legislation without broad engagement and consultation. That makes my point about the bill itself and the creation of offences relating to incitement to hatred or the stirring up of religious

hatred. Such legislation requires care to be taken and detailed consideration to be given, and I do not think that the bill has had that care and consideration. I am afraid that the discussion of my amendments in the group has reinforced my view that a strong case has not been made for including provision on incitement to hatred in the bill. I will come back at stage 3 with an amendment to remove such provision altogether. On that basis, I seek the committee's permission to withdraw amendment 32.

Amendment 32, by agreement, withdrawn.

Amendment 10 moved—[Roseanna Cunningham]—and agreed to.

Amendments 33, 34, 34A and 34B not moved.

The Convener: Amendment 35, in the name of Patrick Harvie, is in a group on its own.

Patrick Harvie: We are getting there, eh?

Amendment 35 stands on its own and seeks to introduce a defence in relation to artistic performance. Section 5(6), says

"It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable."

I am seeking to add to that. My amendment says:

"It is a defence for a person charged with an offence under subsection (1) by virtue of Condition A being satisfied to show that communication of the material took place in the course of a theatrical or other artistic performance or a rehearsal for such a performance".

The minister might argue that the existing defence is broad enough and covers that circumstance. It would be useful if that could be made explicit on the record.

I thought that it was worth highlighting that situations that are otherwise covered by the offences that are created in the bill arise as a result of entirely consensual participation in intentionally scary entertainment. I am not talking about the typical ghost train, but more adult forms of entertainment—

The Convener: The clerk has just said to me that stage 2 of this bill is scary entertainment. I do not think that it is.

Patrick Harvie: You could be talking about so much of our job.

There are slightly more adult forms of entertainment—

David McLetchie: My God.

The Convener: You have engaged Mr McLetchie's interest, Mr Harvie, but I do not want any illustrations. Just pursue your point.

Patrick Harvie: I am glad that Mr McLetchie is still with us.

There are forms of entertainment whose intention is to provoke genuine, real fear, rather than to deliver a slight scare. I think that it is perfectly legitimate for people to engage in that on a consensual basis. I would like the minister to say whether she regards the existing defence as covering all circumstances in which an artistic performance is the context of something that could otherwise conceivably be considered an offence under the legislation.

I move amendment 35.

The Convener: If no one else wishes to come in on the subject of scary entertainment, I invite the minister to respond.

Roseanna Cunningham: I am grateful to Mr Harvie for his explanation. As he indicated, amendment 35 would seek to add an additional defence to the threatening communications offence. It would add to the existing defence of reasonableness, although the additional defence would apply only to an offence under condition A.

The additional defence is that the communication took place

"in the course of a theatrical or other artistic performance or a rehearsal for such a performance."

I reassure Patrick Harvie that that was one of the main things that we were thinking about when we drafted the existing defence. It would be part and parcel of a reasonableness defence that the act was undertaken in the context of artistic expression, which can go wider than simply theatrical performance. There is some precedent for that sort of defence in existing United Kingdom legislation in relation to the supply of imitation firearms and knives, so, again, it is an area of the law that is relatively well understood.

The Government's view is that the additional defence would not provide any additional protection. Artistic and theatrical performance will be covered by the defence of reasonableness.

We have some questions about the drafting of the amendment, in particular whether a specific defence in relation to theatrical or artistic performance would cast doubt on the generality of the reasonableness defence, for example, in relation to journalism.

In law, when one begins to define these things, the things that have been left out become subject to scrutiny and people wonder whether they should be treated differently. We do not intend that to be the case. A reasonableness defence should apply across the board and people should feel able to avail themselves of it in areas other than artistic expression or whatever. I hope that Mr Harvie accepts those reassurances and I am grateful to him for bringing the matter up in the way that he did. I give him an absolute

reassurance that artistic expression is precisely what the reasonableness defence is designed for.

Patrick Harvie: I thank the minister for her response. It is useful to get those comments on the record and I seek the committee's permission to withdraw amendment 35.

Amendment 35, by agreement, withdrawn.

Section 5, as amended, agreed to.

After section 5

The Convener: Amendment 11, in the name of the minister, is grouped with amendment 11A.

Roseanna Cunningham: Amendment 11 seeks to recognise explicitly that the threatening communications offence does not adversely impact on the rights of individuals to discuss and debate religion and religious beliefs. The committee's report indicated that committee members would welcome a provision that provides assurance that section 5 does not inhibit free, open and potentially critical expression of views on religious matters.

The fact is that any legislation that is put before the Scottish Parliament must comply with the European convention on human rights. Our view was that the bill was compliant and that the convention rights applied in it—and, indeed, the bill was already signed off in that respect—but it was clear that some areas of Scottish civic society were agitated and concerned about the issue. As a result, we have agreed simply to restate the position in the bill.

By adding the section proposed in amendment 11, we are providing reassurance that we are not affecting individuals' right to discuss and criticise religion or voice

"expressions of antipathy, dislike, ridicule, insult or abuse"

towards religion or the beliefs and practices of those who adhere to a religion. That includes an individual's right to try to convert people to their religion or religious beliefs.

The intention of the offence is not to prevent legitimate religious discussion and debate but to prevent the kind of communications that we saw during the last football season when individuals were threatened with serious harm. It is important to remember what the provisions are about. Given that the amendment responds to the committee's recommendations, I urge members to support it and accept that the Government is responding to real concerns that have been expressed outside Parliament.

Amendment 11A seeks to extend the provisions in amendment 11, which provides assurance that

"discussion or criticism of religions or the beliefs or practices of adherents of religions, ... expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, ... proselytising, or ... urging of adherents of religions to cease practising their religions"

are protected in relation to condition B in section 5, to cover both offensive behaviour at football under section 1 and threats of serious harm under section 5(2).

We do not believe that such a measure is necessary. We have not been made aware of any concern that the offences in section 1 are capable of being read in such a way as to interfere with the rights of persons participating in discussion or criticism of religion, even in harsh or offensive terms, and we would resist the amendment on those grounds. Accordingly, I urge the committee to resist amendment 11A and to accept amendment 11.

I move amendment 11.

Patrick Harvie: The minister fairly describes the intention behind amendment 11 as introducing a means of protecting freedom of expression. One of the most serious criticisms of the bill is that it contained no such provision when it was introduced.

I must admit that, after the extent of the debate at Westminster when comparable legislation was introduced and the months of debate—which Humza Yousaf mentioned earlier—on the introduction of the free speech defence into that, I find it startling that no such provisions were incorporated into the bill before it was introduced. However, one is now being introduced.

12:00

If we want to have certainty around the free speech defence, we should ensure that it covers the whole bill. In the first sections, which introduce the offence of offensive behaviour at football matches, the offence includes comparable behaviour such as

"expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of",

among other groups,

"a religious group"

or

"a social or cultural group with a perceived religious affiliation".

I find it odd that, if a free speech defence is required for condition B behaviour in section 5, we will not apply the same defence in relation to section 1, which deals with very similar behaviour, albeit in different circumstances. The minister will point out that section 1 deals with the likelihood of

public disorder and not the actuality of it, but the same behaviour is identified as the source of an offence. If the same behaviour is identified, it would be reasonable to have the same defences available.

I also take issue with the minister's suggestion that regulated football matches are not places where criticism or discussion of religion—

"expressions of antipathy, dislike, ridicule, insult or abuse ... proselytising, or ... urging of adherents of religions to cease practising their religions"—

are likely to happen. I think that they can happen there, and the same defence ought to exist in relation to that behaviour as exists in other circumstances. I therefore think that it is important to use amendment 11A to broaden out the defence to cover the whole bill.

I move amendment 11A.

David McLetchie: Particularly Patrick Harvie's amendment 11A but also the minister's amendment 11 are interesting in their broadening of freedom of expression, as they get to the heart of the issue of the boundaries of the offences that we are discussing.

The minister suggests that the proposed section is, arguably, unnecessary because all our legislation is governed by the European convention on human rights. If that is the case, the convention will apply equally to the section 1 offence and the section 5 offence. We must therefore ask ourselves whether section 5 is a broader expression of freedom of speech than is provided for in the ECHR or whether it is simply a statement of the same. If it is simply a statement of what is encompassed by the ECHR, it will apply to an offence under section 1 as well.

Patrick Harvie says that

"expressions of antipathy, dislike, ridicule, insult or abuse"

towards adherents of a particular religion may take place at football matches in Scotland. They certainly do take place at football matches in Scotland, as we are all well aware. That raises an interesting issue. If the proposed section simply states in full what is encompassed by the ECHR, section 1 becomes virtually a dead letter.

Section 1 is all about hatred. Most expressions of hatred that I have heard, in 40-odd years of watching football matches in Scotland, have taken the form of

"expressions of antipathy, dislike, ridicule, insult or abuse".

That is what one hears. However, if that is now a statable ECHR defence, does it not undermine the validity of section 1 in the first place? If not, why does the freedom of expression provision not extend to cover section 1, as Patrick Harvie suggests? That raises some fundamental issues about the offences that we are in the process of creating.

Roseanna Cunningham: For the offence of offensive behaviour at football to be committed, it is not enough that a person express hatred of a person based on their membership of a religious group; the behaviour must be such that it is, or would be, likely to incite public disorder. Our view is that it is perfectly legitimate to seek to prevent the expression of hateful views in the context of a football match where there is a risk of public disorder.

If committee members care to look at the European convention on human rights, they will see that that is precisely the extent to which the freedom of expression right is limited—the public disorder issue is precisely the qualification used in the European convention. Freedom of expression, as always in our society, carries with it a qualification about public disorder, which is clearly stated in the European convention.

Patrick Harvie: David McLetchie is right when he says that amendments 11 and 11A address some of the seriously contested areas of the bill. I do not think that anyone would deny that many of the things mentioned in the Government's amendment 11 would be offensive to many people—for example, subsection (1)(b) of the proposed new section refers to

"antipathy, dislike, ridicule, insult or abuse"—

but the question is whether we wish to criminalise those things. In relation to condition B in section 5, the Government does not wish to criminalise them.

Despite the discussion on the matter, I am still unclear why it is not possible to use the defence proposed in amendment 11 in relation to the offence created in section 1. It is unclear where the limits of the offences lie and how much offence is to be allowed in cultural expressions and activities. Those are some of the most serious problems with the bill. There is a lack of clarity about what is and is not acceptable. I accept that it is unlikely that I will convince the committee on amendment 11A, but I will press it.

The Convener: The question is, that amendment 11A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)

Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 11A disagreed to.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 11 agreed to.

Section 6—Section 5: interpretation

Amendment 36 not moved.

The Convener: I remind members that amendment 12 pre-empts amendment 37.

Amendment 12 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 38, in the name of Patrick Harvie, has already been debated with amendment 32. Patrick, are you moving or not moving amendment 38?

Patrick Harvie: I am not moving it. I was expecting to not move amendment 37.

The Convener: It was pre-empted.

Patrick Harvie: I beg your pardon.

The Convener: I am glad that somebody else has made a mistake. We are sharing the mistakes today.

Amendments 38 and 39 not moved.

Section 6, as amended, agreed to.

After section 6

Amendment 13 moved—[Roseanna Cunningham]—and agreed to.

Section 7 agreed to.

After section 7

The Convener: Amendment 14, in the name of the minister, is grouped with amendments 14A and 14B.

Roseanna Cunningham: Amendment 14 seeks to meet the Government's commitment, made in response to the committee's report, to provide a review clause. Although we support the introduction of a review provision, we must ensure that any report is carried out after allowing a sufficient amount of time for the act's impact to be judged. We believe that such a report can only be worth while following two full football seasons.

Amendments 14A and 14B seek to make it a statutory requirement that any review of the legislation's operation sets out the objectives intended to be achieved by the legislation, the extent to which those objectives have been achieved and whether and to what extent those objectives remain appropriate. I feel that those amendments do no more than state the obvious with regard to what a review of the legislation's operation would involve. As a result, I do not think that they are necessary. I am happy to give a commitment that a review of the legislation's operation will consider the extent to which it has been effective in addressing football-related disorder and will not simply be a statistical bulletin detailing the number of people arrested and convicted. I urge the committee to reject amendments 14A and 14B.

I move amendment 14.

David McLetchie: As the minister has indicated, amendments 14A and 14B seek to amend her amendment 14, and she has correctly identified that their purpose is to ensure that the reports envisaged in the principal section proposed in amendment 14 are more wide-ranging in scope than is apparent from the amendment's strict construction.

Such reports must be more than statistical tabulations of charges, prosecutions and convictions in relation to the offences that the bill creates. I firmly believe that operation of the legislation must be reviewed in the much wider context of standards of behaviour at football matches and in related environments. We must examine the extent to which the legislation is being used successfully instead of existing crimes and offences being used to prosecute behaviour, how the legislation is tackling the policing of offensive internet communications, and the Government's overall programme for tackling sectarianism in Scotland, of which the bill is just one aspect.

Although I accept that another construction is not intended by either the minister or the Government, and I welcome the minister's assurances in that respect, I think that if the bill contained a wider requirement it would be improved for the benefit of both the present Government and Parliament and future Governments and Parliaments, which will be looking at the legislation for many years to come.

I move amendment 14A.

The Convener: Minister, do you wish to wind up?

Roseanna Cunningham: I have nothing further to say.

The Convener: The question is, that amendment 14A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)

Against

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 14A disagreed to.

Amendment 14B not moved.

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 14 agreed to.

Section 8—Commencement

The Convener: Amendment 15, in the name of the minister, is in a group on its own.

Roseanna Cunningham: Amendment 15 seeks to replace section 8. When the bill was first introduced, the intention was that the powers would be available to the police ahead of the 2011-12 football season. In view of the tight timescale for achieving that, provision was made in section 8 for it to come into force immediately on royal assent. As the bill is no longer being treated as emergency legislation, the Government considers that the provisions should follow the normal procedure for criminal offences and be brought into force by ministerial order.

I move amendment 15.

The Convener: The question is, that amendment 15 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions

Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 15 agreed to.

Section 8, as amended, agreed to.

Section 9 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Thank you, everyone. We got through that with just a few little slip-ups—including some of my own, for a change. I thank Patrick Harvie for his contribution.

I suspend for a few minutes to let the minister leave.

12:15

Meeting suspended.

12:16

On resuming—

Subordinate Legislation

Double Jeopardy (Scotland) Act 2011 (Commencement and Transitional Provisions) Order 2011 (SSI 2011/365)

The Convener: Item 4 is consideration of subordinate legislation. The Subordinate Legislation Committee has drawn the Parliament's attention to the order on the basis that its meaning could have been clearer. If members have no comments, is the committee content to make no recommendation on the order?

Members *indicated agreement.*

Act of Sederunt (Rules of the Court of Session Amendment No 6) (Miscellaneous) 2011 (SSI 2011/385)

The Convener: The Subordinate Legislation Committee has not drawn the Parliament's attention to this instrument, which is not subject to any parliamentary procedure, on any of the grounds within its remit. If members have no comments, is the committee content simply to note the instrument?

Members *indicated agreement.*

The Convener: As agreed earlier, we will now move into private session.

12:17

Meeting continued in private until 12:18.

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