OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

# Justice Committee

**Tuesday 27 October 2020**

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

# Tuesday 27 October 2020

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## JUSTICE COMMITTEE
**25th Meeting 2020, Session 5**

**CONVENER**

*Adam Tomkins (Glasgow) (Con)

**DEPUTY CONVENER**

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Rt Hon The Lord Bracadale QC
Philip Lamont (Scottish Government)
Humza Yousaf (Cabinet Secretary for Justice)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)

# Scottish Parliament

## Justice Committee

*Tuesday 27 October 2020*

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

## Hate Crime and Public Order (Scotland) Bill: Stage 1

**The Convener (Adam Tomkins):** Good morning, and welcome to the 25th meeting of the Justice Committee in 2020. We have no apologies this morning.

Agenda item 1 is stage 1 consideration of the Hate Crime and Public Order (Scotland) Bill. I welcome the Cabinet Secretary for Justice, Humza Yousaf, and his various officials, some of whom are joining us in the room and some of whom are joining us remotely online. You are all very welcome.

Before we get under way, I want to explain that it is very unusual to start a stage 1 inquiry with evidence from the responsible minister—normally, we take evidence from the responsible minister at the end. In this inquiry, we will do that, but the cabinet secretary indicated to Parliament earlier in the autumn that he wished to propose amendments to aspects of the bill at stage 2, and the committee wants to understand exactly what the implications of those amendments are before we get under way with our stage 1 evidence from external stakeholders. That is why the cabinet secretary will appear at the beginning of the inquiry and at the end of it.

Cabinet secretary, do you want to make any opening remarks before we get under way?

**The Cabinet Secretary for Justice (Humza Yousaf):** Yes, I will make some brief opening remarks.

As you say, convener, it is unusual for a cabinet secretary or minister to attend at this stage, so I thank the committee for being so accommodating and allowing me to give evidence on the bill. I will talk about the proposed amendments that I announced to Parliament on 23 September, but it is worth giving the briefest of overviews of the purpose of the bill and its background.

Effective hate crime legislation makes it very clear to victims, perpetrators and wider society that offences that are motivated by prejudice are completely unacceptable and will be treated seriously. I am committed to taking this opportunity to shape the legislation so that it is fit for the 21st century and, most importantly, affords sufficient protections to those who need it but at the same time continues to give people reassurance around their important freedoms of expression.

Legislation on hate crime has evolved over time in a quite fragmented manner, and it is not as user-friendly as it could or should be. The bill provides for the modernising, consolidation and extending of hate crime legislation in Scotland and is very much based on the independent review by Lord Bracadale and further consultation following his recommendations.

In short, the bill seeks to modernise and extend hate crime legislation by including age as an additional characteristic; creating new offences relating to stirring up hatred that will apply in relation to each of the characteristics; updating the definition of transgender identity, including removing the term “intersexuality” and creating a separate category for variation in sex characteristics; and including a power to enable a characteristic of sex to be added to the list of characteristics at a later date, if for example that is recommended by the working group on misogynistic harassment.

The group that I have just mentioned will be established to consider how the justice system currently deals with misogyny. The group will specifically consider whether a stand-alone offence to tackle misogynistic behaviour is required in our criminal law and whether the characteristic of sex is required in the hate crime legislative framework. The appointment of the working group chair will reflect the expertise that those important issues demand and will ensure that gender equality, human rights and of course the law are given equal weighting.

A participative approach will be integral to that work, and I am committed to ensuring that membership of the working group reflects a wide breadth of opinion, diversity, knowledge and experience that reflects the complexity of the issue at hand. Appointment arrangements for a chair are currently in train. I will update Parliament on that and the group’s terms of reference very shortly.

In relation to the amendments that I proposed on 23 September, I do not propose to make adjustments to the threshold for the stirring up of racial hatred offences, which have been part of our criminal law in the whole of the United Kingdom for decades, in the form that is provided for in the bill.

The decision on the proposed change to the operation of the new stirring-up offences is not one that was arrived at lightly. I listened to and discussed the matter with a number of stakeholders, politicians and political parties, with the aim of seeking to strike a more appropriate balance between respecting freedoms of expression while protecting people who are

impacted by those who deliberately set out to stir up hatred.

I am pleased that a broad range of organisations, including the Faculty of Advocates, the Law Society of Scotland, the Humanist Society of Scotland and the Catholic Church, have welcomed the change whereby only the intent to stir up hatred will apply to the new offences and the "likely" limb will be removed.

That change will affect consideration of ancillary issues, such as the operation of the "reasonable" defence and areas of the freedom of expression. Those provisions were included in the bill in the context of offences that could be committed where hatred was "likely" to be stirred up. As the bill undergoes the scrutiny process, I will engage with Parliament and stakeholders to consider whether it would benefit from further changes.

I reassure members that I will seek common ground, consensus and, where necessary, compromise. Since the bill was introduced, I have met more than 50 organisations from a broad range of sectors to discuss its implications. It is, of course, for the Parliament and primarily the Justice Committee to scrutinise the bill and to decide exactly where the appropriate balance lies between effectively tackling hate crime to protect the people who are targeted from its insidious effects and protecting people's legitimate right to freedom of expression. I believe that those two aims are not mutually exclusive.

I am happy to take questions.

**The Convener:** Thank you very much, cabinet secretary. I want to start where you left off. As the minister who is responsible for the bill, how do you think that Parliament should seek to legislate in an area that touches on the fundamental human right of freedom of expression? I do not want to put words into your mouth, but would you agree or disagree with the proposition that rights such as the right to freedom of speech should be interpreted and applied generously, and that restrictions to the exercise of those rights should be legislated for narrowly and only where that is shown to be necessary in the public interest?

**Humza Yousaf:** Broadly, I agree with the statement that you make. It is important to remember—I know that you are very aware of this, and I am certain that members of the committee are, too—that we will look to ensure that any bill that we pass is compatible with the European convention on human rights. A variety of articles of the ECHR are important; in particular, the article on freedom of expression is vitally important.

I agree with your general premise, which is why decisions that are taken in this area are not taken lightly. I think that the changes that I proposed on 23 September get that balance just about right.

**The Convener:** Therefore, where there is reasonable doubt about whether the balance has been appropriately struck or inappropriately struck—with regard to not just the Hate Crime and Public Order (Scotland) Bill but any bill that touches on fundamental human rights such as that of free speech—Parliament should err on the side of giving protection to the right rather than curtailing it, because the right should be interpreted generously and the restriction on it should be applied only where that is necessary.

**Humza Yousaf:** We should also remember that people have the right to live their lives without having such prejudice or hatred directed towards them. I speak as somebody who has often been the target and the victim of hatred, whether racial or religious. The criminal law must protect people from such hatred.

Notwithstanding all the disagreements that we have around the bill, I think that most of us will agree with the principle that hate crime legislation is required. Therefore, in my opinion, it is necessary to balance rights. We must balance people's right to freedom of speech with the right of people who are often the target of hatred to be protected from that hatred. As a society and as a Parliament, we must get that balance right. I do not think that those two things are mutually exclusive. I think that we can ensure that we get the balance between them right.

**The Convener:** I absolutely agree that the two are not mutually exclusive, but it does not follow from that that getting the balance right between them is easy—you are, of course, not implying that it is easy.

What is the Government's view, and your view, on how far the right to freedom of speech extends? In your opening remarks, you mentioned the Faculty of Advocates and the Law Society of Scotland. In its evidence, the Law Society cites with approval the well-known dictum from Lord Justice Sedley that

"Freedom only to speak inoffensively is not worth having".

In its evidence, the Faculty of Advocates cites the equally well-known dictum from Lord Rodger, who said that freedom of speech applies to

"'information' or 'ideas' that ... offend, shock or disturb."

Do you accept that the right to freedom of speech in European human rights law extends to the right to offend?

**Humza Yousaf:** Yes. That is why there is not a word in the bill that deals with offence. People should have the right to be offensive and to express controversial views. The bill does not intend to deal with people who have offensive views.

The stirring-up offences, which are the most controversial part of the bill, seek to criminalise behaviour that is threatening or offensive and that also is intended to stir up hatred. That applies to the new offences; I have to be clear that the stirring up of racial hatred offence continues to have the threshold that has been in place for the past 34 years. For the new offences, however, the behaviour must be threatening or abusive with the intent of stirring up hatred. That does not deal with offence.

It is helpful to note that, since the announcement that I made on 23 September, the bodies that the convener has quoted have said that they support the proposed change. The Faculty of Advocates said:

"The Scottish Government has listened to"

the concern about freedom of expression,

"which was voiced by many others, and proposes to amend the Bill so that a crime will be committed only where the stirring up of hatred is intentional. Faculty welcomes that amendment."

The Law Society said:

"We are pleased ... that the Cabinet Secretary is actively seeking common ground and compromise to ensure Scots Law is fit for the 21st century and there are sufficient protections for those most vulnerable to prejudice in our society. We welcome proposals to strengthen the Bill in relation to the new 'stirring up' offence to include the requirement of intention."

**The Convener:** Even with your amendments, is it not still the case that the bill goes further than Lord Bracadale recommended? Section 3(1)(a)(i) provides that

"A person commits an offence if ... the person ... behaves in a threatening, abusive or insulting manner"

with regard to stirring up racial hatred. Lord Bracadale recommended that we omit the word "insulting", and that recommendation was supported by the Faculty of Advocates and the Law Society of Scotland. Why is the Scottish Government not listening to that advice?

**Humza Yousaf:** It is interesting that the one group that you have not mentioned is, of course, those who are most impacted by the stirring up of racial hatred. I live by the principle of listening to such groups when making legislation. I have been a minister in the Government for eight years, and I have always thought that the famous principle, "That which is about us without us is not for us", is a very important one to live by. I suspect that the convener agrees with that.

Therefore, although I put a great degree of weight behind the reflections, advice and expertise of the Faculty of Advocates and the Law Society, I will be very interested to hear the committee's evidence from groups that represent those who are most targeted by racial stirring-up offences and by racial hatred. I do not know for sure which groups will give evidence—that is a decision for the committee. However, those groups will tell you that they do not want any perceived dilution or weakening of the current stirring up of racial hatred offence, which has existed for 34 years with, as far as I can see—feel free to challenge this—barely any controversy whatsoever.

I reflected on Lord Bracadale's recommendation, but—I am not suggesting that the convener is doing this—those who are experts, particularly in the drafting of legislation, should not and must not discount the real life experiences of the victims of such crimes.

**The Convener:** Absolutely. In the course of our stage 1 inquiry, the committee will, of course, hear from a broad range of witnesses who will encapsulate and cover all that and much more.

This will be the last question from me, cabinet secretary. You have already explained that the right to freedom of speech includes the right to express yourself offensively. You have also said that you think that it should be a criminal offence for somebody to speak in a manner that is insulting.

10:15

There is not much of a difference between being offensive and being insulting. Can you explain what would be captured by the criminalisation of insulting speech in section 3 of the bill that would not be captured if we took "insulting" out and made it a criminal offence only to speak in a threatening or abusive way?

When we consider the scope of the criminal law in this Parliament, we must be careful not to undercriminalise. That is the point that you are making. We want to make sure that all of the harms and wrongs that we want to capture by the criminal law are captured by the words on the page. However, we also want to guard against overcriminalisation, and we must make sure that we are not inadvertently making criminal that which we think we ought to be free to do.

Can you give an example of a wrong or a harm that is criminalised by that word "insulting" in section 3 and that needs to be criminalised and would not be criminalised if we made the threshold, or the ingredients of the offence, "threatening and abusive" behaviour?

**Humza Yousaf:** You are again referring only to the stirring-up offence in relation to race. It is important to again reiterate that none of the other thresholds include the word "insulting". It is only included for the issue of race. It is included not only in Scotland: the English and Welsh legislation for the racial stirring-up offence also includes

"insulting", as does the Northern Irish offence and, for interest, the Republic of Ireland offence. It is not a new approach: it has existed for 34 years with barely any controversy.

I could flip the question and ask where you think that it would be acceptable for somebody to insult someone else due to their race, and to do so with the intent or likelihood of stirring up hatred, which is the crucial second part of the test. Where do you think that the criminal sanction should not apply?

It may be, as you imply, that there is not much difference between somebody being abusive and being insulting. I suspect that this is why Lord Bracadale, in his recommendations, asked us to consider removing "insulting". However, there could be examples where somebody could racially insult another person by referring to racial stereotypes. We must remember that there must also be the intent to stir or the likelihood of stirring up hatred. If it does not do so, it is not an offence under the legislation.

**The Convener:** You talk about the offence having been on the statute book for 34 years. That is true, but there are important differences between this offence in the Public Order Act 1986, which is in force now, and the version of the offence that appears in the bill. A number of members want to ask you about those differences.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** Good morning, cabinet secretary. I was going to ask you to expand on the reasons for not including the stirring up of racial hatred in the bill, but that has been covered. How do you respond to concerns that not including it in the bill creates a hierarchy of characteristics, so that, if a hate crime involved race and another characteristic, it would be set apart?

**Humza Yousaf:** That is a fair question. I suspect that we will come back to that and that people will keep asking it. If I remember correctly, the Law Society of Scotland was particularly exercised about the issue. It is worthy of consideration and discussion. However, there is a justification for treating the offence of racial hatred differently from offences relating to the other characteristics. There is no getting round the fact that we are treating it differently and that there is a different threshold in the law that we are proposing.

One justification for that is to do with the statistics. Crown Office and Procurator Fiscal Service data shows that, in 2019-20, there were 3,038 racial stirring-up offences; 660 offences relating to religion; 1,486 relating to sexual orientation; 387 relating to disability; and 41 relating to transgender people. Therefore, with regard to the aggravator, offences relating to racial hatred are the most common by far—more so than all the others combined. Those offences make up about 54 or 55 per cent of the total. The most recently published police figures are starker still, showing that about two-thirds of hate crimes relate to racial hatred.

The approach can also be justified on the basis of the nature and severity of the crimes and the fact that structural racism has existed for years and continues to exist. For all those reasons, a justification can be made for treating racial hatred slightly differently from other offences.

**Rona Mackay:** The figures that you have given demonstrate the need not to dilute the law for that offence, which would probably have been the effect, had it been included.

**Humza Yousaf:** There is potential for a perception that the law would be diluted, which is a serious concern for those affected. I should have said to the convener, as I will say to Rona Mackay, that our minds are not closed on considerations relating to that offence. However, it will be crucial to listen to the voices of those who are impacted the most.

**The Convener:** Annabelle Ewing has questions on that area.

**Annabelle Ewing (Cowdenbeath) (SNP):** On the section on stirring up hatred, I want to touch on the issue of the defence of reasonable behaviour. The cabinet secretary will be aware that there have been calls for that to be fleshed out in the bill to provide clarity. What are the cabinet secretary's thoughts on that?

**Humza Yousaf:** I thought long and hard about the reasonableness defence before proposing changes to the bill. Now that I have proposed those changes, I am thinking about it even harder, because there are some compelling arguments around the reasonableness defence.

One proponent of considering a non-exhaustive list of factors to which the judiciary should have regard in relation to a reasonableness defence is Dr Andrew Tickell, for whom I have a great deal of time. I have spoken to him about the bill on a couple of occasions recently. Now that we are moving to intent only, I struggle with the idea of a non-exhaustive list of factors. Putting aside the offence of stirring up racial hatred for a second, with the new offences of stirring up hatred, which will be based on intent only, I find it difficult to envisage a situation where behaviour could be threatening or abusive and with the intent of stirring up hatred, and yet be justified as reasonable. If somebody can work out a scenario where that would be the case, I am all ears. I have yet to find one, but there are people who are, no doubt, smarter than me who are considering the

bill. I would be interested to hear examples of such a scenario.

I am still considering the reasonableness defence. I am all ears, and I have a lot of sympathy for those who think that it is worth having a non-exhaustive list. However, as a point of practice or operation, I cannot envisage behaviour that would be threatening or abusive with the intent of stirring up hatred and yet be reasonable.

**Annabelle Ewing:** I am aware that the reasonableness test exists without exhaustive or non-exhaustive definitions in statute. However, we are considering this particular bill.

I have a further question on the broad area of defences. The issue of private dwelling house conversations has attracted a number of comments under freedom of expression concerns. What further thought might the cabinet secretary give to that specific issue? He will be aware of concerns that have been raised that what people say in their homes should not be the subject of engagement with criminal law. That is one view that is being put across, although I imagine that there are others. It would be interesting to hear the cabinet secretary's thoughts.

**Humza Yousaf:** As always, I will caveat this by saying that we will listen to the evidence as it comes forward. I met with the Christian Institute, which is one of the organisations that is at the forefront of asking the Government to consider a dwelling defence. It argues that the dwelling defence exists in the 1986 act and that its removal would weaken protections. That argument somewhat goes to what the convener said about erring on the side of caution when it comes to freedom of speech.

My concern with the dwelling defence is on a point of principle and of policy. With the new stirring-up offences that are being created, as a Parliament or even as a society, are we comfortable with giving a defence in law to somebody whose behaviour is threatening or abusive and that is intentionally stirring up hatred against, for example, Muslims? Are we saying that that is justified because it was in the home? The reading of the dwelling defence is that it applies so long as such behaviours are not witnessed by those outside the dwelling. It does not say that the dwelling cannot have X number of people inside it.

The effect that threatening or abusive behaviour with the intent of stirring up hatred could have on other family members—children in particular—is insidious. Are we saying that, as a society, we are comfortable with no criminal sanction being applied to people because that is being done in the confines of their dwelling, whereas if they stepped on to the street outside their house, that would be a criminal offence? I am not convinced as a point of policy or principle that I agree with that defence, but I will continue to keep an open mind.

**The Convener:** I will ask a follow-up question on that issue. The bill is called the Hate Crime and Public Order (Scotland) Bill. It replicates aspects of offences that currently exist in the Public Order Act 1986. How can a person commit an offence against public order in private?

**Humza Yousaf:** When it comes to the public order element, that largely refers to the abolition of the blasphemy law. However, I will take your question as read. The point of stirring-up offences and the reason why we need them is because the effect of that behaviour is, or could be, to motivate people to carry out acts of hatred, which include violence, assault and so on against people who belong to particular communities. Now, you may—

**The Convener:** All of those would themselves be criminal offences.

**Humza Yousaf:** Let me finish the point.

If a person behaves with the intent of stirring up religious hatred against, for example, Jews, in their private dwelling with their children in the room or friends that they have invited over for a dinner party, and those people then act on that stirring up of hatred and commit offences, you are right that they would then be prosecuted by the law, but should the person who had the intent of stirring up hatred and who behaved in a threatening or abusive way not be culpable? Should that person not receive some sort of criminal sanction?

Your answer to that might be no, because that was done in a private dwelling. My answer is that the criminal law should look at that stirring up of hatred because the person had the intent to do so. We should remember that intent must be proven beyond reasonable doubt and if that is the case—if it was the person's intention to stir up hatred against Jews to ensure that those who listened to their words went out and stirred up hatred and committed offences against Jews—that deserves criminal sanction.

**The Convener:** Liam Kerr wants to ask a supplementary question before I bring in James Kelly.

10:30

**Liam Kerr (North East Scotland) (Con):** I want to follow up Annabelle Ewing's question about the reasonableness defence. The question was interesting, and I listened carefully to your answer, cabinet secretary. The burden is on the accused to bring forward enough evidence to avail themselves of that defence. The Sheriffs Association and the Crown Office have said that

clarification on the extent of that burden is needed. Notwithstanding your point about the introduction of intent, is that clarity still required to enable the defence to know what it will have to adduce?

**Humza Yousaf:** That is a reasonable point to make, and that is why I am not dismissing the idea of a non-exhaustive list of factors. There are two things that we have to consider in relation to whether that should be in explanatory notes or something else. First, with the "likely" limb removed from the new stirring-up offences, do we need that? Is that still required? Secondly, are we aware of the potential unintended consequences?

Let us assume that we move to stirring-up offences that involve intent only and we give a list of factors that have to be considered, one of which is journalistic expression, which is commonly asked about. We would not want to give the likes of Tommy Robinson a defence by saying that he is a blogger who writes for the Patriot Times, so his reasonable defence is that he is a journalist. It would not be as simple as that, of course—contextual factors and so on would be looked at—but now that the "likely" limb is to be removed, we have to consider whether a non-exhaustive list of factors that sheriffs predominantly should have regard to is needed and ensure that there are no unintended consequences. However, Liam Kerr has made a reasonable point that is worth consideration.

**James Kelly (Glasgow) (Lab):** I want to come to the issue of legal clarity. We all accept that hate crime legislation is important and that it is important that it offers robust protections. For it to work effectively, members of the public, legal practitioners and members of the police force must understand what the end product means and what is an offence under it. It is fair to say that the bill as drafted is not clear enough with regard to those categories. How will the amendments that you will lodge address issues to do with a lack of legal clarity? For example, the Scottish Police Federation thought that its members were being put in a position in which, if someone made a complaint about what they regarded as an offensive remark that was stirring up hatred, they would have to make a judgment, and it did not think that the bill as drafted was clear enough. How will your amendments address those concerns?

**Humza Yousaf:** Obviously, I read carefully what the Scottish Police Federation had to say about the bill as introduced, and I spoke to it after my amendments had been proposed. I do not speak for the federation, which the committee might call to give evidence, but it would be fair to say that it thought that the proposed change was welcome. The proposal certainly provided some reassurance to the federation. I am sure that it will have other questions about the bill and potentially maybe even other concerns about it but, without putting words into its mouth, I spoke to it after the proposed change was announced, and it was certainly reassured to an extent.

Most of the concern about uncertainty in relation to the bill was focused on the "likely" limb of the stirring-up offences. People were unsure about whether their behaviours would inadvertently be captured by the bill as introduced. Although I could give a multitude of reasons why I do not think that that would have been the case, that was clearly the perception. Furthermore, I do not want there to be any self-censorship. I do not want people to be unsure and start censoring their behaviour, particularly those in the artistic field, or journalists.

You said that there is not legal clarity. The proposed change to intent only will provide that clarity. At the very least, there is a triple lock in relation to the new offences: they must be proven beyond reasonable doubt; the behaviour must be threatening or abusive; and, importantly, the behaviour must have the intent behind it—there must be mens rea. If we maintain the reasonableness defence, you could potentially argue that there is a quadruple lock. If you want to include the freedom of expression provisions for certain stirring-up offences, you could even say that there is a quintuple lock. I hope that removing the "likely" limb will give the most reassurance and clarity to people who were concerned previously.

**Liam McArthur (Orkney Islands) (LD):** I want to return to some of the issues that the convener raised about freedom of expression. You will be aware of the concerns that have been expressed and the comparisons that have been made with the protections under the law in England and Wales. You have also made comparisons between those protections and what is contained in the bill. It seems to be that those protections are more narrowly drawn and generic. I would be interested to know whether you have looked at the protections as they apply under English and Welsh law and whether they can be applied to the bill.

I note that the minutes of various meetings that you have had on the bill have been published, including the discussion that you, your officials and I had, in which I recall you referring to potential legal difficulties in applying freedom of expression protections. Will you outline in a bit more detail what those difficulties are? That might be helpful for the committee.

**Humza Yousaf:** That is a really good set of questions from Liam McArthur. As I mentioned to the convener, we all know that our freedoms are protected under the ECHR, so whatever is in the bill is supplementary to that. I think that that is the way to look at this, first and foremost. However, that is an important issue, because people are

looking for additional reassurances when it comes to freedom of expression, particularly in a bill of this nature.

I am considering the breadth and depth of the provisions on freedom of expression. What do I mean by that? On the breadth, a number of people have argued that the freedom of expression provisions should not be limited to the two areas to which they are currently limited but should cover other protected characteristics. I am open to that suggestion, which I am considering.

On depth, could the current freedom of expression provisions go further? The member referenced the legislation in England and Wales. On the freedom of expression on religion, for example, the protection under the Public Order Act 1986 includes

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

Again, I can confirm that I am looking into that, perhaps with the exception of abuse because, as you know, the offences in Scotland would be for threatening or abusive behaviour, whereas some of the stirring-up hatred offences in England cover only threatening behaviour—it would not make sense to have freedom of expression to cover abuse if one of our thresholds is threatening or abusive behaviour. With that exception, I am certainly happy to consider expressions of antipathy, ridicule, dislike and insult for the current freedom of expression provisions.

On legal difficulties, I do not want to stray into the legal advice that we take, so I will make a general point. We have to be aware of some of the concerns that might be expressed were we to have a generic freedom of expression provision. Would that be specific enough to give people the reassurances that they need or they require?

We are looking at all those issues in the round and I anticipate some further change to the freedom of expression sections, which will probably come at stage 2 from members or possibly from the Government. It is an area that is under active consideration.

**The Convener:** I know that a lot of members want to ask about statutory aggravation and the hate crime characteristics, which we will come to but, before we move on to other areas of the bill and leave the stirring-up offences, I will ask a further question about the difference between the way in which the bill seeks to legislate against stirring-up offences and the way in which the Public Order Act 1986 already does that. You have said many times here, in the chamber and elsewhere that all you are doing is putting on a fresh statutory footing offences that have been in existence for 34 years.

However, there is a critical difference between the way in which the stirring-up offences are legislated for in section 18 of the Public Order Act 1986 and the way in which you are proposing to do it in section 3 of the bill. The 1986 act makes it plain that, when someone does not intend to stir up racial hatred, they are not guilty of an offence if they were "not aware" that their behaviour might be threatening or abusive. There is no equivalent to that provision in the bill and, as far as I recall, there is no reference to it in the policy memorandum that accompanies the bill—forgive me if I have got that wrong. Why do you not want to have an equivalent to that provision in the bill?

**Humza Yousaf:** I am more than happy to look at that but, again, it might come back to a question of whether that would be covered by a reasonableness defence—that is, whether it would be a reasonable defence if somebody stated that they did not know that their behaviour was threatening or abusive in relation to the racial stirring-up offence, where there is still a likelihood limb. If we think that there is a gap there in relation to how the offences translate from the 1986 act—there are differences and I have already touched on the dwelling defence and why I think that that difference is justified—let us look at that with an open mind.

**The Convener:** James Kelly wants to ask a question about section 4, which is on theatres and plays, and then we will move to other areas of the bill.

**James Kelly:** You will be aware that the Law Society of Scotland offered criticism of section 4 in relation to plays and performances being captured by the bill. Plays and performances by their very nature can, as you acknowledged earlier, be provocative, and people attending those performances are aware of that, so why did you feel that it was necessary to introduce that section and do you feel that it leads to further confusion?

**Humza Yousaf:** I will turn to my officials behind me, because I am sure that there is a section on performances and plays in the 1986 act in relation to the offence of stirring up racial hatred—Philip Lamont indicates to me that that is correct. We are considering similar provisions for the new stirring-up offences, but that provision is not particularly new, because it exists in the 1986 act.

**The Convener:** I am sorry to interrupt, but the provision in the 1986 act is in a quite different form from the one in your bill.

**Humza Yousaf:** Sure, and I will come to that in a second. I understand why there has been some questioning of why that is in the bill; in fact, I met a group of organisations that represent artists and performers and so on, and their concern was largely around the likelihood limb. They wanted to

understand better the rationale for having a section of the bill that targeted performances and plays. The reason why it is in the bill is for issues of culpability. For example, if a director of a play who himself or herself does not speak the words that are threatening or abusive with the intent of stirring up religious hatred—this is included in the bill, of course—they should very much be culpable of that offence, because they had a part in it. Even though they may not have spoken those words or acted that behaviour, it is right that they are culpable.

10:45

If a performer is playing a racist character or a character exhibiting religious hatred, that behaviour is not likely to be threatening or abusive with the intention of stirring up hatred. That has been suggested, but that is not the case. Both parts of the two-part test must be met for someone to be prosecuted for that offence. That is very important.

Although the convener was right to interject to say that there are differences between how the bill and how the Public Order Act 1986 are written, in the past 34 years there has been a multitude of performances, plays and broadcasts that have included racist characters and, to my knowledge—I am happy to be challenged on this—there has not been a prosecution that has caused concern in the artistic community.

When I proposed these changes, I was pleased that Scottish PEN, which raised some of the concerns that James Kelly raises, said:

"Scottish PEN welcomes today's announcement … that key changes will be made to the proposed Hate Crime and Public Order (Scotland) Bill, including a requirement that intention to stir up hatred is proven beyond a reasonable doubt before an offence can be prosecuted."

I hope that that provides an element of reassurance.

**James Kelly:** I am not totally convinced, to be honest. Can you give an example in recent Scottish history of a play or performance that caused an issue that would be captured under this provision and for which people would have been legitimately prosecuted?

**Humza Yousaf:** No. I do not think that people put on plays often with that intention. However, where there is an intention by a far-right group to put on a performance for a limited audience of their supporters, where the behaviour is threatening or abusive with the intention of stirring up religious hatred, that should result in prosecution, not just of the performer but, for example, of the director, who did not speak any words but who directed the play that was threatening or abusive with the intention of stirring up religious hatred. If that was done, it would be important that those involved were prosecuted. The commission of the offence must involve the consent or connivance on the part of the person or be attributable to neglect on the part of such a person. There is a fairly strong argument from those in the performance sector with regard to that second limb. Now that the offences are intent only, is there a need for the inclusion of "attributable to neglect". I am happy to look again at that to see whether it is needed. To flip the question around, if a director consented or connived to put on a play that was threatening or abusive, with the intent—remember that that is the crucial part—to stir up hatred against those with a disability, would James Kelly suggest that they should avoid culpability? My argument is that they should not.

**James Kelly:** I am trying to understand your motivation for introducing section 4. You have not been able to cite an example in recent Scottish history of a performance that would be covered by the section to demonstrate why we require its inclusion.

**Humza Yousaf:** Should we not have the reassurance that, if there were such a case, those involved would be culpable? My answer would be yes. The protections that exist for somebody such as me, because of my race, should also apply to people in relation to the other protected characteristics.

**James Kelly:** I think that the issue will continue to play out, convener.

**The Convener:** Cabinet secretary, you indicated that you are open minded about the structure and wording of defences elsewhere in the bill. One of the key differences between section 4 of the bill and the existing provision covering theatre performances, which is section 20 of the Public Order Act 1986, is that the latter contains a series of defences, none of which has made it into your bill. Are you open minded about including some defences to the section 4 offence, or is there a reason for not including defences?

**Humza Yousaf:** In short, I would be open minded about doing that. My concern, which is similar to the one that I referenced to Liam Kerr, is about unintended consequences, particularly when we move to the intent-only offence.

If it is okay, I will bring in Philip Lamont to talk in a bit more detail about the differences between the 1986 act and this bill. However, in short, the answer to your question is yes—there is no close-mindedness here. Even when I object to particular defences, such as the dwelling defence, when it comes to the policy principle I am still keeping an open mind.

**The Convener:** Before your official speaks, I will specify what I meant. In section 20 of the 1986 act, it is a defence if the person

"did not know and had no reason to suspect"

that the

"offending words or behaviour were threatening or abusive"

or if he or she

"had no reason to suspect that the circumstances in which the performance would be given would be such that racial hatred would be likely to be stirred up."

Those seem to be to be reasonable defences, and they are not in your bill. That must have been a conscious decision, because section 4 is essentially the transcription of a current offence from section 20 of the 1986 act into the bill, and yet all of those defences are missing. There must be a reason why you thought that those defences were unnecessary.

**Humza Yousaf:** Yes, but—again, I go back to my previous point—that might well be what is potentially covered by the reasonableness defence. I will double-check that with my officials. Any court or sheriff would take contextual factors into account; they would take into account any of those factors as they relate to a person's intent or otherwise.

**The Convener:** The reasonableness defence is not in this section; the reasonableness defence pertains to offences in sections 3 and 5 but not those in section 4. It is a big omission.

**Humza Yousaf:** What I am saying now is similar to what I said in my answer to Liam Kerr, which is that any sheriff or judge would take a range of contextual factors into account. If your argument is that those contextual factors should be in the bill, as they were in the 1986 act, I am not close minded about that. However, as a matter of principle, I think that any sheriff or judge would consider the contextual factors.

I am unsure whether Philip Lamont wants to add anything further.

**Philip Lamont (Scottish Government):** I do not have too much to add. Section 4 says that culpability applies only if an offence is also committed under section 3. Therefore, a person—most likely the performer—would have to commit a section 3 offence to open the door to a section 4 one, and there is a reasonableness defence in section 3. However, as the cabinet secretary said, it is right that we are open minded about considering whether something further is needed. That could be done either with some prescriptive defences or by applying the reasonableness defence, which we think captures the type of defences that are in the 1986 act already in a general way, more directly to section 4.

**The Convener:** That is a very helpful clarification.

Part 1 of the bill is on statutory aggravation. John Finnie has the opening question on that.

**John Finnie (Highlands and Islands) (Green):** Good morning, cabinet secretary and officials. Cabinet secretary, you mentioned the relationship between the extensive piece of work that Lord Bracadale did and the bill that we have in front of us to scrutinise. I would like to ask about the statutory hate crime of aggravation.

Lord Bracadale recommended that statutory aggravation should continue to be the core method for prosecuting hate crime in Scotland. Do you agree, and are you confident that the proposed expansion of stirring-up offences will not undermine that?

**Humza Yousaf:** It is undoubtedly going to be the case that, regardless of the expansion of hatred offences, statutory aggravators will still be the way in which the courts will choose to prosecute crimes involving hatred. That will not change with the offence of stirring up racial hatred, which has a lower threshold than the other stirring-up offences that we have proposed. That offence has been used to prosecute a handful of times during the past seven or eight years in comparison with the statutory aggravator, which has been added to an offence thousands of times during the same time period. I do not think that a particular difference will be made, because the new stirring-up offences have a high legal threshold to meet of proving beyond reasonable doubt that someone was being threatening or abusive with the intent of stirring up hatred. I suspect that most prosecutions will still happen via statutory aggravators.

**John Finnie:** I will move to another point. The bill says that, when an offence is proven to have been aggravated by prejudice, the court must make clear what difference the aggravation has made to the sentence that is imposed. Lord Bracadale recommended removing that requirement, and the senators of the College of Justice have described it as "a somewhat artificial exercise". It is self-evidence that transparency in sentencing is important, but will that provision help to achieve it?

**Humza Yousaf:** To go back to an earlier point, I disagreed with Lord Bracadale's recommendation because it is important to engage with victims of hate crimes. Organisations that represent victims broadly—not just racial equality groups, although they support the Government's proposed action—feel that it is important for victims' sake to know the additionality to the sentence from the statutory aggravator. That is an important factor for the victim. Having listened to evidence from victims organisations and various equality groups, we

decided not to proceed with Lord Bracadale's recommendation.

**John Finnie:** Are you gilding things a little? Surely any judicial sentencing has due regard to the aggravator, as it is a factor that has been considered. That is perhaps why the senators of the College of Justice describe the proposed statement as "a somewhat artificial exercise".

**Humza Yousaf:** That is an opinion and a perspective but, as I said, we must not forget the perspective of victims, which is that they want to know the additionality to the sentence. Victims have vociferously challenged the perspective that you present. I suspect that the committee will hear from a number of organisations that represent victims of hate crimes and I would be interested to hear their responses to the question.

**The Convener:** Does Shona Robison have questions on the same area?

**Shona Robison (Dundee City East) (SNP):** I will come on to terminology, but I have a question on John Finnie's previous point. Is the provision intended to achieve more consistency and transparency about aggravation being a factor in a judgment? Some judges explain that an aggravating factor existed, but is there inconsistency in explanations? Will the bill achieve more consistent explanations for victims about what the aggravation meant for sentencing?

**Humza Yousaf:** I certainly hope that the bill will have that effect. I have spoken to a number of people who have been victims of crimes that were aggravated by hatred—I have been one of those people and my case went to court—and they have often said that they want such clarity and consistency. The bill says that the court must

"state on conviction … that the offence is aggravated by prejudice, and … record the conviction in a way that shows … that the offence is aggravated by prejudice, and … take the aggravation into account in determining the appropriate sentence, and … state … where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated".

That will provide the consistency and clarity that victims want.

**Shona Robison:** That is helpful—thank you. You have previously expressed a willingness to reconsider some of the terminology that is used in the bill, including the phrase "evinces malice and ill-will". What is your current thinking on that?

11:00

**Humza Yousaf:** That is challenging, because words and terminology matter, particularly in law. Although I completely respect the view that "evinces malice and ill-will" is not the most easily understood terminology, there was a bit of a concern that if we moved to adopt Lord Bracadale's recommendation on the matter, that could well weaken the threshold slightly.

Notwithstanding that, I am open minded. A hybrid that could perhaps be considered is the wording "demonstrates malice and ill-will towards the victim". If that wording were used, the "malice and ill-will" part of the provision would not be lost, but the term "evinces"—which, I suspect, is probably not well understood by most people—would be replaced.

The issue is under active consideration at the moment. I have not come to a final judgment, and I will be interested in the oral evidence that the committee takes on the matter.

**Shona Robison:** Thank you for that. My view is that, where possible, we should seek to modernise language and terminology, not least to aid the public's understanding. Therefore, I think that a change of the kind that you mentioned would be welcome.

**The Convener:** Annabelle, if you want to ask any further questions on the statutory hate crime aggravation, please feel free to do so, but I know that you also have questions on the subject of hate crime characteristics.

**Annabelle Ewing:** Thank you, convener. I have a brief follow-up question on the issue that Shona Robison raised. As a lawyer, I know that we like arcane language, so I take her point.

In that regard, I had understood that the Crown Office and Procurator Fiscal Service believed that it would be possible to adopt Lord Bracadale's suggested formulation, or something like it, without really changing the test that would be applied, and I note that you indicated, cabinet secretary, that you would engage further on the matter. What stage have you reached in the process of further engagement on the issue?

**Humza Yousaf:** Those conversations are continuing. The Crown's thoughts on the matter are, of course, pivotal to our consideration of it. I am committed to looking at the issue. As I said, there is probably a strong argument for the word "evinces" to be replaced with language that is better understood. I am keen to test whether, if we were to move away from the use of the phrase "malice and ill-will", that would have any practical legal effect—in particular, I would not want there to be a weakening of part 1 of the bill. I am seeking such assurances as we speak.

**Annabelle Ewing:** I thank the cabinet secretary for that answer.

I will move on to the next part of our discussion. My question concerns the non-inclusion in the bill as it stands of the characteristic of sex. I understand that, in addition to Lord Bracadale's

recommendation that the characteristic of sex be included in the bill, support for that position has been expressed by, among others, the Convention of Scottish Local Authorities, the Faculty of Advocates, Police Scotland and the organisation For Women Scotland.

It would be helpful if you could clarify the rationale for the approach that you have taken thus far on the matter, despite the fact that many others have expressed the clear view that that is not the optimal approach.

**Humza Yousaf:** That is a good and very important question. I am sympathetic to listening to the arguments on the issue, and I have done so. I engaged with a number—but not all—of the organisations that Annabelle Ewing mentioned in the run-up to the bill's introduction.

When Lord Bracadale made his recommendations, I was keen to speak to the largest national organisations that represent women. Those organisations are well known to the committee, and I suspect that they will be invited at least to supplement their written evidence in some way.

I think that I am correct in saying that Engender, Zero Tolerance, Scottish Women's Aid and Rape Crisis Scotland all oppose the introduction of a gender or sex aggravator. I am happy to correct the record if I am wrong. Engender in particular has led the campaign against it, producing a briefing and publishing a report on its reasons, which I think that it distributed to every MSP. From its perspective, there are some compelling arguments not to introduce a sex aggravator, particularly as that does not take note of the gendered nature of violence against women. It is worried, as is Scottish Women's Aid, that a sex aggravator could be used by perpetrators of domestic abuse to further cause challenge and difficulty for victims of domestic abuse.

There is a range of reasons—and, as I said, there is a whole report on those—why a number of national organisations do not want a sex or gender aggravator to be introduced. I decided to meet some organisations that represent and work with women at the coalface at a local level. Again, we can provide details of those organisations. We met on a couple of occasions, and it is fair to say that the views of a number of them—not all of them—align with the view of Engender and those other organisations.

It is a live debate, and that is why the misogynistic harassment working group will be very important. It should look at the issue. An enabling power is a good idea because, after detailed consideration, if a sex aggravator is wanted and seen as needed as part of the solution to tackle the issue, it allows for that to be brought forward. However, it is not clear cut that a sex aggravator would have the effect that some people think that it would have.

**Annabelle Ewing:** Yes, there is always an interesting debate to be had on most worthwhile things in life. However, I am worried. We have an opportunity in the bill, but I do not know where going down a side route will take us, time-wise. It seems that it will take us some years down the line to another position. That is surely one of the factors in the balance, in addition to all the things that the cabinet secretary has said and, indeed, to all the opposing views that other organisations have raised. Presumably, we just need to ensure that we do not leave any gaps.

**Humza Yousaf:** I agree entirely with Annabelle Ewing's summation of the issue. The order-making power leaves open the ability to add sex as an aggravator. If, after consideration of the oral evidence from a range of groups, members lodged amendments to include an aggravator on sex, the Government will keep an open mind, as we will on all these matters.

**Rona Mackay:** On the stand-alone offence of misogynistic harassment, you said in the chamber that the proposed working group, which you have mentioned today, would be set up in October. We are coming towards the end of October, so where are we with that?

**Humza Yousaf:** In truth, I would have liked to have been a bit further down the line. Undoubtedly, the challenges of Covid-19 impacted on the work, even before my statement to Parliament. However, the process of the appointment of a chair is under way, which is positive. Once the chair is appointed, it will be hugely important to work through the remit with her—or with that individual. In broad terms, there is a real need for the group to address the lack of administrative data that might provide quite detailed information to fully understand women's experiences of misogynistic harassment.

As a second phase, the group then has to look at the legal context and potential gaps in the existing law. That includes the issue that we have just discussed about the potential for a sex aggravator and whether a stand-alone offence of misogynistic harassment could fit within a legal framework and be an effective tool.

Those are the broad areas of work. I hope to be able to update the Parliament in relatively short order on the appointment of a chair, and we will then work with the chair on the remit. I should say that the membership of the working group should be very broad and include representatives of women's organisations, academics and those who have an expertise in law—our legal stakeholders will be incredibly important as well.

**Rona Mackay:** What timescale will you give the group to produce its remit? Are there any deadlines?

**Humza Yousaf:** I have to be careful on that. There are a number of pressures on us, but the appointment of the chair is under way, so I hope that, within a matter of weeks, I will be able to confirm to Parliament the appointment of the chair. The remit will flow from that, as will the membership. Although we have a broad idea of the membership, we obviously want the chair's input on that.

**Rona Mackay:** Is there any end date for the work that the group will carry out? When will it come to conclusions?

**Humza Yousaf:** It is important to include the chair in that. The work plan will be one of the first things that the group considers. I do not want the plan to be dictated by me and the Government; it should be set by the chair and the members of the group. It is important that they are comfortable with what we are asking them to do and the phases of work that they will do. Therefore, I cannot give you an exact timetable, as it is for the working group to come forward with that.

**The Convener:** On the timing of that group's work, we are set to take evidence on the issue on 24 November. Is there any prospect of the group reporting and finalising its views before then?

**Humza Yousaf:** No. It would be unrealistic to suggest that. Given all the work that I have just described, the lack of administrative data and the need to consider the legal context, I would not expect the group to do that. It will take some months to work through the issues in considering a stand-alone offence. The reason why we have introduced an order-making power is so that, if the bill is passed, it would be possible to add the sex aggravator at any time, if the working group and, ultimately, parliamentarians were convinced that it was needed. That would be done through an affirmative order.

**The Convener:** So it is more likely that the committee's evidence on the issue will feed into the work of the group rather than the other way round?

**Humza Yousaf:** Potentially. I am certain that the group will have an interest in the committee's deliberations and the evidence that it takes.

**The Convener:** Fulton MacGregor has questions in the same area.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** I want to ask about the hate crime characteristic of race, which covers

"race, colour, nationality ... or ethnic or national origins".

Will you confirm that the definition includes some groups that might also be covered by the characteristic of religion? Will you expand on your thinking in that area of the hate crime characteristics?

**Humza Yousaf:** Some religious groups, or groups that we tend to think of as religious groups, also describe themselves as groups that would be covered under the characteristic of race. For example, I think that the Sikh community was pushing to be recognised under the race characteristic in the census. If that is not correct, I am of course happy to be corrected on that. I think that the issue also applies to the Jewish community, which, under the current rules in the census, is categorised as a race, and that community absolutely has its reasons for that.

It is for the court and not for me to decide which statutory aggravator applies in the circumstances. I see no reason for such groups to be concerned that the aggravator as drafted would not be able to include crimes against them, but ultimately it is for the court to determine that.

11:15

**Fulton MacGregor:** Thank you for that clarification. I will move on a wee bit from your answer. As you will be aware, we have had suggestions for adding to the proposed hate crime characteristics to cover Gypsy Travellers, asylum seekers and refugees. What are your views on that? To what extent might they be covered by the characteristic of race?

**Humza Yousaf:** The feeling from Lord Bracadale was that the current definition of race covers a number of groups. I know that some groups—such as those in the Gypsy Traveller community—are concerned about whether they are covered, but Lord Bracadale's view is that they are. We are reflecting further on the issue, but I think that such groups are covered by the fairly broad definition of race.

**Fulton MacGregor:** I have no further questions. I thank the cabinet secretary for intending to attend this Thursday's meeting of the cross-party group on racial equality, which I chair. The topic will be the bill. The cabinet secretary mentioned the importance of speaking to stakeholders, including people who have been impacted by hate crime. The cross-party group has a large membership and its members are eager to speak to the cabinet secretary about such issues and how they have been impacted. I thank him for taking the time to do that.

**The Convener:** I always welcome a plug for a cross-party group's forthcoming meeting, especially when it is on such an important issue.

**Liam McArthur:** I return to the sex aggravator, which the convener, Annabelle Ewing and others referred to. We all understood and welcomed the announcement of the misogynistic harassment working group, but the concern is that time is passing, which leaves us in an incredibly difficult position. As the convener said, the risk is that the process will be reversed and that we will feed into the group's deliberations rather than it feeding into our deliberations. The bill contains an order-making power, but the concern is that, even under the affirmative procedure, the Parliament would have inadequate time to scrutinise what would probably be sensitive and detailed legislation. Is the Government taking that concern as seriously as it should?

**Humza Yousaf:** I completely understand the concerns that you articulate. With the establishment of the working group, when you see its chair and membership, I think that we will all agree that they have expertise in issues in the legal landscape that affect women.

If the bill is passed with the amendments that I propose, it will contain the power to make an order under the affirmative procedure, as you said. Parliament would not consider such an affirmative statutory instrument blind; it would consider it with the weight of the evidence that the working group submitted on whether the instrument should be made. I hope that such weighty consideration would happen, whenever that might be—I respect your point that the committee might feed into the group's considerations.

I take on board the point, which is why the order-making power is important. There is nothing to prevent a member lodging a stage 2 amendment to not include an order-making power but a sex aggravator. A member would be free to do that after considering the evidence from women's organisations, and the Government would consider such an amendment. As I have said about other issues, I am not closed-minded on that.

**Liam McArthur:** I do not know who the members and chair of the working group are likely to be, but I do not dispute for a second that it will have a broad base of relevant expertise in the area, which is reassuring. However, ultimately, it is for the committee and the Parliament to make and scrutinise legislative proposals, and it feels as though our ability to do that is somewhat compromised by the process that we are now locked into. We will see what happens with the evidence, but it is important to put on record my concern, which I suspect other members share to a greater or lesser extent.

**Humza Yousaf:** I am happy to reflect on that concern.

**The Convener:** A number of us might also have a general concern about the creation of criminal offences by a secondary instrument. There is a very strong presumption that the scope of the criminal law should be a question of primary legislation and not secondary instruments. However, these are all issues that we will consider. Liam Kerr wants to come in on that before we go back to John Finnie.

**Liam Kerr:** I want to pick up on exactly that point. I find that to be a particularly interesting area, as I know that the cabinet secretary does. Much earlier, Rona Mackay asked about the provisions on stirring up hatred having the potential to create a hierarchy of characteristics. It might be argued that that is what part 1 of the bill would do around sex. By omitting a sex aggravator, you would almost establish a hierarchy of characteristics that enjoyed legal protections over those that did not. Do you see that as a risk? What is your view on the Faculty of Advocates' suggestion that it is more appropriate for MSPs to look at that area than a working group?

**Humza Yousaf:** There is nothing stopping MSPs looking at the area in detail, if the Justice Committee or individual MSPs want to do that and urge the Government to bring forward the affirmative SSI to create a sex aggravator. We can think about ways in which MSPs might be able to participate or take evidence from the likes of the misogynistic harassment working group.

I am interested in the addition of an aggravator and the perception of a hierarchy, in the sense that I can understand why the omission of a sex aggravator in the list of characteristics could be concerning to a number of women. I have heard that view expressed since the introduction of the bill. The oral evidence that the committee will take and the various publications from the likes of Engender and others are important because they contain a level of nuance and detail that a number of us would find interesting, particularly in relation to the fact that a sex aggravator would, to all intents and purposes, apply to men and women. Therefore, a number of stakeholders have concerns, which we all respect, that even if a prosecution did not take place, such an aggravator could be used to make claims about or accusations against victims of domestic abuse. There is concern about that, and other concerns have been raised.

I take Liam Kerr's point about the perception of omission, which is why I commit to the Government keeping an open mind on how that progresses. However, it is hugely important that evidence is taken on that, and that the views of those who have a genuine concern about a sex

aggravator are listened to. I know that the committee will do that.

**The Convener:** John Finnie wants to ask about racially aggravated harrassment, which is another aspect of hate crime legislation that we have not yet touched on.

**John Finnie:** Cabinet secretary, Lord Bracadale recommended repealing the offence of racially aggravated harassment, and the Scottish Government did not accept that recommendation. If such an offence is thought to be necessary in relation to race, why is it not considered to be necessary for other characteristics?

**Humza Yousaf:** I take the point that Lord Bracadale made about the repeal of section 50A of the 1995 act. My initial consideration was that we should repeal that section, for all the reasons that Lord Bracadale gave. I changed my mind about that because of strong representations from a variety of racial equality groups.

Lord Bracadale and I attended a conference organised by Black and Ethnic Minorities Infrastructure in Scotland. A number of racial equality groups were there. It is fair to say that at that meeting, there were strong representations about why those groups would not want to see section 50A repealed. At the very least, they saw it as weakening the current protections for racial minorities.

That goes back to the point that I made earlier to Rona Mackay. If we look at the numbers of those who are affected by racial hate crime, there is a justification for treating racial hatred slightly differently to how we treat hatred of people with other protected characteristics. There will be a live debate on that as we continue considering the bill and I will keep a close ear and eye on it.

**John Finnie:** Given that the bill consolidates and tidies up other legislation, is this an opportunity to address the concerns of BEMIS and others? I share those concerns and would not want any dilution, but does the bill not end up looking a bit cluttered?

**Humza Yousaf:** I did not get the last part of what you said.

**John Finnie:** I wonder if not repealing the offence of racially aggravated harassment leaves the legislation looking a bit cluttered and confused.

**Humza Yousaf:** The argument could be made for that. As you rightly say, the bill looks to consolidate. Hate crime is quite fragmented around the legal landscape at the moment. There could be an argument that retaining section 50A would mean that, in some regards, there is still an element of fragmentation.

The counter to that is the argument that I just talked about. The racial equality groups that are most affected by racial hatred, and those who represent them, would argue that that does not outweigh their concerns that there could be a weakening of protection for them.

**John Finnie:** I am struggling a bit here, cabinet secretary. Why not reflect those concerns in this brand new legislation that is going to be all-encompassing?

**Humza Yousaf:** We could look to do that. I would be interested to see ways in which we could perhaps subsume section 50A into the legislation. At the moment, a number of racial equality groups argue that we should leave section 50A as it is. If there is an argument to subsume it within the legislation, I will take that away and consider it.

**The Convener:** John Finnie's line of questioning makes me think of a different but related question. The bill does not just seek to consolidate legislation; it will significantly extend the scope of criminal law in Scotland. The extension of scope can be seen by contrasting section 50A with some of the provisions in the bill that we have already talked about in depth.

The offence of racially aggravated harassment in section 50A can be prosecuted if the person who is alleged to have committed it

"acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress."

That sort of language—fear, alarm or distress—is a common feature of public order legislation and has been for decades. It is another one of those common features of past and present public order legislation that is to be omitted from the bill. Do you accept that, although there is an element of consolidation in the bill, it does much more than merely consolidate existing offences? It extends the scope of the criminal law so that, for example, it will criminalise threatening and abusive behaviour where no evidence exists of either fear, alarm or distress being caused. I am not saying that it is inappropriate to criminalise that behaviour; I am asking whether you accept that that is what the bill seeks to do, which is not a consolidation of existing offences but a significant extension of the scope of criminal law in Scotland.

11:30

**Humza Yousaf:** The bill extends the protections that are afforded to some members of society from being victims of hatred to other groups in society, who also are often the victims of hatred. As I have often said in the chamber—I might have repeated it already today—I am afforded certain protections because of my race, as you are because of yours, but those protections are not afforded to people

who are the victims of hatred or of its stirring up because of their religion and other characteristics that the bill proposes. I consider the bill as an extension of existing protections, as opposed to the way in which you have characterised it.

You mentioned "threatening or abusive behaviour"—I think that you actually said "threatening and abusive" but, trust me, I know that one for good reason. The bill ties that behaviour into intent, so the offence is not just about threatening or abusive behaviour: one also has to be able to demonstrate beyond reasonable doubt that there was intent.

There is already a 2010 offence of threatening or abusive behaviour and we can discuss it if you wish. The bill wants to ensure that there is intent behind the new stirring-up offences—for the racial stirring-up offence, I accept that there must be "intent or likelihood". Those are important contextual factors in that discussion.

**The Convener:** The cabinet secretary is absolutely right. There is an existing offence in the Criminal Justice and Licensing (Scotland) Act 2010 of behaving in a threatening or abusive manner, but a critical ingredient thereof is that the criminalised behaviour is likely to cause a reasonable person to suffer fear or alarm.

That particular element of the offence is in the statute book now, but is not in the bill that is in front of us today. I conclude therefore that the bill does not merely consolidate existing offences—although it does do that—but also significantly extends the scope of the criminal law by, as the cabinet secretary puts it, offering protections to a range of characteristics that the scope does not currently protect.

**Humza Yousaf:** I do not want to dance on the head of a pin, but you use the words "significantly extends" and it depends in what context you mean "significantly". We know that racial hatred is by far the largest category of hatred, that the racial stirring-up offence has a lower legal threshold than the other stirring-up offences, and that it has been prosecuted in Scottish courts fewer than 10 times in the past seven or eight years.

If that is the effect of the racial stirring-up offence—with its lower legal threshold—do we really think that, by extending protections to other characteristics, the bill will "significantly extend" the scope of the law, with relation to the frequency and volume of prosecutions or its effect on members of the public? That is a question for debate.

With regard to fear and alarm, if the argument is that the bill affords a particular protection to individuals, the inclusion of intent—only for the new stirring-up offences—probably provides people with even more significant safeguards.

**The Convener:** Liam Kerr wants to ask wrap-up questions, which will be the last questions unless somebody else catches my eye.

**Liam Kerr:** I would like to go back to James Kelly's earlier question about the performance of plays. I am musing on this question: if I produce or record something in England or Wales, which is then published, recorded or reproduced in Scotland, can I be convicted of an offence under the current bill, and if so, how will you prosecute me?

**Humza Yousaf:** Do you mean under the part 2 offence? If a stirring-up offence is committed in Scotland—for example, if a leaflet that a person was communicating or distributing was produced by the English Defence League, in England, but was distributed in Scotland—the offence would still have taken place if that behaviour was threatening or abusive with the intent of stirring up religious hatred. Philip Lamont might want to add to that.

**Philip Lamont:** It would depend on the facts and circumstances. However, it is possible that offences might have been committed in both jurisdictions, in which case prosecution authorities would need to speak to each other. However, it would depend on the exact facts, circumstances and behaviour that gave rise to the offence.

**Liam Kerr:** Quite clearly. My next question relates to James Kelly's question about plays. Presumably, I could write a play in England that is then staged in Scotland. If it does not constitute any form of hate crime in England but would do so in Scotland, would I be prosecuted and, if so, how could I be if I never set foot in the jurisdiction?

**Humza Yousaf:** The bill says that culpability involves "consent or connivance" in the commission of the offence, and there is also a provision about neglect. I am happy to look at the bill again in that regard. In the situation that you describe, if it could be proven that the commission of the offence involved the director's consent, that might well be a matter that prosecuting authorities would consider.

**Liam Kerr:** I have been musing on that issue since James Kelly raised it. Perhaps we could speak more about it at another time. Has there been any conversation between the jurisdictions about the interaction between the differing legal systems and how they would interplay?

**Humza Yousaf:** As you would imagine, Police Scotland regularly deals with the issue of cross-border crime and issues where law might be different in our separate jurisdictions and legal systems. I have not had any particular discussion with my UK Government counterparts on that issue. We have been dealing with a variety of other issues, but not that one, because it is very much an issue for the Scottish legal system to

deal with. My officials might be able to give you an update on conversations that they might have had with UK Government officials.

**Philip Lamont:** In England and Wales, there are stirring-up hatred offences for three characteristics, but there is only one in Scotland. Therefore, the scenario that you mention is relevant, but is already the case and has been since offences involving stirring up religious hatred and stirring up hatred on the basis of sexual orientation were brought in in England and Wales in the 2000s.

**Liam Kerr:** I understand that. I was curious about whether there had been conversations about an interplay between any new legislation here and what is place elsewhere.

I will move on. I want to ask you specifically about the financial memorandum. I have seen several examples—as all members probably have—of bills' financial memorandums that, no doubt inadvertently, have not accounted for all of the costs. You will have seen reports today that the Scottish Courts and Tribunals Service did not see the final draft of the bill and its financial memorandum until they were published, and that its officials have said that they were disappointed that they were not provided with sufficient opportunity to fully contribute. Why was that the case, and were there any other groups that, in hindsight, should have been consulted and have had input on the financial memorandum but were not?

**Humza Yousaf:** That is a reasonable question to ask on the back of the letter from the SCTS. I will point to a few things. First, I slightly disagree with the premise that there has not been consultation with the SCTS; there was a fair degree of consultation with it, and it would have seen the intention that the Government had for the bill way in advance of us drafting legislation, because of the review by Lord Bracadale, the consultation by the Government and also through official engagement. Although SCTS officials might not have seen the final product, with the i's dotted and t's crossed—it was right for us to introduce the bill so that Parliament would see it first—they would have been well aware of what the bill proposed.

I was surprised by the nature of the letter when we received it in the summer. However, on reading the concerns that were raised, my officials immediately picked up the phone to the SCTS—I speak to the SCTS every couple of weeks—and we are working through its concerns about implementation. During the committee's evidence taking, I suspect that you will question the SCTS, and I hope that it will be able to confirm that good progress has made in that regard.

**Liam Kerr:** The letter came in June and, at that time, the SCTS said that it will need to assess the costs, and that

"If these costs are significant, we are of the view that these could not be met from current budgets."

You said that meetings were held around that time to address concerns. What were the conclusions? What if the bill is passed and the SCTS cannot meet the costs from current budgets?

**Humza Yousaf:** I have a couple of things to say about that. I hope that our further conversations since June have acted as reassurance to the SCTS about the way in which it interpreted the bill and the additional costs that it thought might be required, and that we have mitigated some of its concerns. The committee is of course free to ask the SCTS about that.

I have been a minister for eight years and taken numerous bills through Parliament, and I know that financial memorandums often need to be changed and tweaked, for example when amendments are passed at stage 2. We will keep it under regular consideration.

On the broader point, discussions about the SCTS budget are on-going, as members would expect. I recently had a meeting with the Cabinet Secretary for Finance, the Lord Advocate and the Lord President to discuss the finances of the SCTS, which is a matter that is kept under regular consideration.

**Liam Kerr:** I think that the other potential cost will be around policing. Presumably the training of 17,000-odd police officers will need to be done, for example. Given what the SCTS has said, the obvious question to ask is whether the police were consulted. If so, was that in a different or similar way to the consultation with the SCTS? Would the police service say the same thing as the SCTS said in its letter?

Perhaps a more important question at this stage is, what planning has been done with the police to ensure not only that they can enforce the provisions but that they are sufficiently resourced to, for example, take officers away from the front line for training?

**Humza Yousaf:** That is not an unreasonable question to ask. I have just been looking through the financial memorandum, various parts of which talk about Police Scotland, which we obviously took a view from. Police Scotland is referenced throughout the financial memorandum and the costs are reflective of the conversations that we had with it. In paragraph 86, for example, there is discussion of the training element of the costs. It says:

"The training will be undertaken by officers in-house and will have a notional cost".

That has been done in conversation with Police Scotland. I think that Liam Kerr has raised the issue before, perhaps in the chamber.

Other policing stakeholders such as the Scottish Police Federation might take a different view and say that more training will be required and that the Government needs to consider X, Y and Z. From my recent conversation with representatives of the SPF on the bill—I hope that I am not putting words in their mouths; they can speak for themselves—I think that moving to intent only for stirring-up offences has given the SPF a degree of reassurance about the training element. However, I am sure that the SPF will continue to push on that and our conversations will continue.

The long and short of it is that conversations with the police have taken place, which is why they are referenced in the financial memorandum. Those conversations will continue. I will leave it to the committee to question Police Scotland on its views on the financial memorandum and to hear its expansive thoughts on the bill in general.

**The Convener:** Thank you for your time this morning, cabinet secretary. We have kept you here for a long time, which is a reflection of the importance of the bill that you have introduced to Parliament and the seriousness with which we take our scrutiny of it. We look forward to taking evidence from a range of stakeholders, after which we will have you back before we publish our report at the end of stage 1.

We will suspend for five minutes to allow for a changeover of witnesses.

11:45

*Meeting suspended.*

11:51

*On resuming—*

**The Convener:** I am delighted to welcome to the committee Lord Bracadale, who I understand wants to make a few opening remarks before we ask questions.

**Rt Hon The Lord Bracadale QC:** Yes. Thank you, convener. I welcome this opportunity to meet the committee. In my introductory remarks, I shall say a little bit about the format of my review and some of the principles that underpinned my approach.

In 2017, Annabelle Ewing asked me to conduct a review, which I completed in 2018. I think that it is important to bear in mind the difference between a review of this kind and a project that is undertaken by the Scottish Law Commission. The commission has the assistance of a draftsman and will typically prepare a draft bill. The review dealt more with points of principle and practice, and made recommendations that could, if accepted, be developed in legislation.

I commissioned Professor James Chalmers and Professor Fiona Leverick of the University of Glasgow to prepare an academic report examining the underlying principles and setting out the current law in Scotland. They also carried out a comparative exercise to analyse the approach in other jurisdictions. That comprehensive paper was issued along with my consultation paper.

I also appointed a reference group of people with relevant knowledge, experience and expertise. They came from different backgrounds; they included people with a practical criminal justice background in the police, in prosecution and in defence, and sitting sheriffs. In addition, I included members with a human-rights background, a representative of Victim Support Scotland, an academic and a former Minister for Justice. Although I take full responsibility for the terms of the report, the assistance of that powerful group was invaluable.

The review gathered evidence and consulted widely. I travelled from Lerwick to Dumfries to meet people, and I met a number of members of the Scottish Parliament, some of whom are on this committee. I spent a lot of time listening to representatives of stakeholder groups and gained a good understanding of the profound impact of hate crime on individuals and communities.

I will turn to the underlying principles of the review. I explored why hate crime legislation is necessary. From the evidence in the literature, it was clear that hate crime legislation—not on its own, but with other interventions including education and attitudinal shift—could contribute to addressing the mischief.

I identified a number of functions that make hate crime legislation necessary. It marks and undermines the additional harm that hate crime causes to the victim, other members of the protected group and wider society. It has an important symbolic function in sending out a message that such behaviour will not be tolerated.

There are also practical benefits, including establishment of a simple and easily understood scheme, achievement of consistency in sentencing, and maintenance of records to produce good-quality annual statistics to inform future policy. I reflected on those tests when I was considering what the best scheme would be.

When I was looking back at my report in anticipation of coming here, I noticed that in the introduction I said:

> "My report is intended to enable Scottish politicians to debate the issues involved and to encourage public discourse."

To that extent at least, I might have had some success.

**The Convener:** Thank you very much for that introduction, Lord Bracadale. Will you outline where you think the principal differences are between the bill and what you recommended it should do?

**Lord Bracadale:** I think that the important aspect of the bill is its bringing together of a number of disparate provisions, which is why part 1 is enormously important.

The most significant aspect in which the Government has not followed my recommendations in relation to part 1 is the approach that it has taken to gender. I can explore that with you in detail in due course, if you wish.

**The Convener:** Yes—other members will explore that issue with you in some detail in a few moments.

What do you understand to be the relationship between parts 1 and 2 of the bill? In paragraph 5.15 of your report, you said:

"I recognise that almost every case which could be prosecuted as a stirring up offence could also be prosecuted using a baseline offence and an aggravation".

Why do we need both? Why do we need stirring-up offences in addition to statutory aggravations?

**Lord Bracadale:** That is because the stirring-up offences are designed, in my view, to address the most egregious cases in which, generally speaking, the attack is not on individual members of a group but on the group as a whole. That is the difference. That is a relatively rare occurrence; the statistics on stirring-up racial hatred demonstrate that. I expect that the number of cases in relation to the other protected characteristics would also be relatively small. The stirring-up offences would address the particularly egregious situation in which the attack is on a group as a whole.

**The Convener:** In your view, the stirring-up offences are designed to capture particularly egregious situations. I am trying to understand whether they are particularly egregious situations that would already be captured by part 1. You said that part 1, on statutory aggravation, is the core method of prosecuting hate crime in Scotland. What would we lose if that were the only method?

**Lord Bracadale:** We would lose the ability for society to mark a particularly insidious offence addressed against a group as a whole. I am fortified in that by the approach that has been taken in other jurisdictions—England and Wales, and those that we looked at abroad. It is about society saying that the particular offence against the group as a whole requires to be marked in a particular way.

12:00

**The Convener:** You said that it

"requires to be marked in a particular way."

That is a very interesting way of putting it. I do not want to put words in your mouth, Lord Bracadale, but that suggests that part 2 of the bill is not really about effective prosecution and that it is, rather, about fair labelling and the Parliament legislating, almost symbolically, to address itself to particular egregiousness in hate crime. That suggests that there is a bit of a divide between what will be used in how the police and the prosecuting authorities will do their jobs on the ground, which will rely overwhelmingly on part 1, and much of the political argument with regard to the bill having been about the scope of part 2. Is that a fair characterisation, or am I missing something?

**Lord Bracadale:** One has really only to look at the examples of prosecutions under the Public Order Act 1986 or section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. For example, in one case under section 6 of that act, a person stated on Twitter that he hated Shia and Kurds and called for them to die

"like the Jews did at the hands of Nazi Germany".

It is the nature of the attack on groups as a whole that cries out there. It seemed to me—as I have said, I think that this is done in every jurisdiction—that those particular offences call for a particular way of dealing with them.

**Rona Mackay:** Good afternoon, Lord Bracadale. In your opening statement, you made it clear why you believe that hate crime legislation is necessary—I think that the whole Parliament agrees on that—and you have spoken about an area in which the Government has not taken forward your recommendations. In broad terms, do you believe that the bill demonstrates that your most important points have been implemented? Are you happy with the bill, at this stage?

**Lord Bracadale:** In broad terms, the Government has implemented the main thrust of my recommendations. It is not for me to analyse particular sections of the bill in terms of how it has done that; that is for others. However, in broad terms, the Government has adopted my recommendations, but with some exceptions.

**Rona Mackay:** Do you see the bill as a consolidation and strengthening of existing laws? Was your aim to bring things together and clarify certain aspects?

**Lord Bracadale:** Consolidation was undoubtedly a hugely significant aspect. The law on hate crime in Scotland has developed in a piecemeal way over decades, so bringing it all together in one act is a useful thing to do. That

should allow a better and clearer understanding of what the law is.

**Rona Mackay:** You said in your opening statement that it was quite evident that the bill had sparked debate. Were you surprised by the amount of debate that it created in the media and elsewhere?

**Lord Bracadale:** When I consulted, I received a lot of responses, and a lot of concern was expressed about freedom of speech, so I addressed that. After my report was issued, the Government conducted another consultation in which it received responses on freedom of speech. However, in neither of those consultations was there anything like the reaction that the committee has had in its consultation. As you know, there is a wide range of responses. For example, the likelihood threshold did not feature in the responses to my consultation as a specific issue; it was freedom of speech generally that became an issue.

However, by the time of the committee's consultation, there had been much more analysis—for example, by the legal bodies. There is also quite a bit of misunderstanding in some of the criticisms that have been made. That underlines the importance of understanding that the bill should not, in my view, be about behaviour that is offensive.

**Annabelle Ewing:** Good afternoon, Lord Bracadale, and welcome to the committee. To pick up on an issue that you referred to in your opening statement concerning the characteristic of sex as far as aggravated offences are concerned, I do not know whether you had the opportunity to watch the session that we just had with the cabinet secretary. I asked him why he had not included the characteristic of sex in the bill, and he gave a very full answer. He is obviously willing to listen.

The answer, at its heart, involved concerns that have been raised that such express inclusion could, in some way, involve unintended negative consequences, particularly for women in abusive situations. Why did you propose the express inclusion of the characteristic of sex in the bill?

**Lord Bracadale:** I found, in the evidence, that there had been an increase in the harassment and abuse of women, both in the physical world and online. There had also been a cultural shift in the sense that women were not prepared to tolerate behaviour that they might have put up with in the past. I had regard to the requirements of the UN Convention on the Elimination of All Forms of Discrimination Against Women and the requirements of the Istanbul convention, and there was strong support in the consultation for some provision in this area.

Many of the consultees supported the introduction of a statutory aggravation, but some of the organisations representing the interests of women, including Engender, Scottish Women's Aid and Rape Crisis Scotland, were opposed to that approach and favoured instead taking more time to develop a stand-alone offence of misogyny. They advocated a participatory approach—taking, if necessary, years—and they had a philosophical objection to the definition of hate crime that I was using, which was that of Chakraborti and Garland, which underpins statutory aggravations.

The organisations wanted to follow the definition advanced by Barbara Perry, which is that hate crime is designed to reaffirm precarious hierarchies and characterise a given social order. They pointed to the lack of evidence of significant prosecutions in other jurisdictions, and they pointed to the example of New Jersey. In their view, there was a lack of capacity of police and prosecutors to recognise and respond to gender-based hate crime, and they compared the approach in the Equality Act 2010, which they felt had given rise to a highly generic approach that spanned all protected characteristics and diminished the focus on the needs of particular groups.

I have a lot of respect for those organisations, and I have considered their arguments carefully. However, it seemed to me that there was no gap in the law that required to be filled by an offence of misogynistic harassment, because threatening or abusive behaviour under section 38 or communications under the Communications Act 2003 could have a statutory aggravation attached to them. Therefore, I considered that it was not necessary to introduce a new offence, as that could cause confusion. It was also extremely difficult to pin down a precise definition of misogyny laws, and I found that different groups had different understandings of what the term meant.

An aggravation would be in keeping with the general approach to the scheme that I was suggesting, and it would meet the requirements that I mentioned in my introductory remarks of undermining harm, sending a message and having practical benefits.

I also recommended that a stirring up of hatred offence be extended to gender or sex. It is instructive to note that the Law Commission in England and Wales has very recently issued its consultation on hate crime. It is proposing a number of radical measures—when we come to discussing stirring-up offences, I can perhaps point to its proposals—but, in relation to sex or gender, it has rejected the concept of misogyny

and is recommending consulting on its proposal to add sex or gender as a protected characteristic.

Against that background, my own view was that this was an opportunity to introduce a statutory aggravation.

I apologise—that was rather a long answer.

**Annabelle Ewing:** Thank you for your comprehensive answer, Lord Bracadale. Your rationale and methodological approach to the issue are interesting.

In your view, issues to do with misogynistic harassment are arguably covered by current law. However, sex as a characteristic is not expressly mentioned in the bill in terms of aggravations. Would that represent any gap in protection?

**Lord Bracadale:** In my remit, I was asked to consider whether additional protected characteristics should be added. Both gender and age were specifically mentioned, so I was required to explore that. The evidence led me to say that there should be a statutory aggravation in relation to sex or gender.

**Annabelle Ewing:** Okay. I am just reading that response.

Lastly, you will be aware that the cabinet secretary's intention is to set up a working group on the issue of misogynistic harassment. I assume that, if you were invited to give your views, you would be willing to engage with that working group.

**Lord Bracadale:** Certainly. If the group wishes to have me, I am more than willing to speak to it.

**Liam Kerr:** I will stay on the same topic as my friend Annabelle Ewing.

In your answers, you talked a couple of times about sex or gender. Very briefly, do you use those terms interchangeably to mean the same thing, or am I misunderstanding?

12:15

**Lord Bracadale:** My remit related to gender, so my report talks about that. The Government has chosen to use the term "sex", and, if it introduces a protected characteristic in that area, it will use that term. That is for technical reasons, but, in essence, I think that we are talking about the same thing for the purposes of hate crime.

**Liam Kerr:** Annabelle Ewing asked about the working group and the approach that the Scottish Government has decided to take. That obviously differs from the conclusion that you came to in your report. Do you take a view on the Government's approach? Do you think that that is a deviation that makes a material difference, or is your view that you concluded one thing and the Government is taking the issue down a different route but there will be no material difference in the round and in the outcome?

**Lord Bracadale:** In the face of the quite formidable organisations that represent women's interests arguing for that approach, I can fully understand why the Government would go down that road.

**Liam Kerr:** Thank you.

This is my final question. Do you take a view—you might have heard the convener allude to this earlier—on the desirability of such a provision being introduced in primary or secondary legislation, or would there be no material difference in either approach?

**Lord Bracadale:** Not including such a provision in the bill is perhaps a missed opportunity. I think that the women's groups would argue about that, but so be it. They would rather wait for a number of years to get a different outcome.

**The Convener:** Before we turn to John Finnie, Rona Mackay has a brief supplementary question.

**Rona Mackay:** Do you agree that, if sex were included as a protected characteristic and as an aggravation, it would not exclusively protect women, because it could be men or women who are affected?

**Lord Bracadale:** Yes, I do accept that.

**The Convener:** John Finnie wants to ask questions about statutory aggravations.

**John Finnie:** Thank you, Lord Bracadale, for your report, which has got us to this point. I have one brief question, because I know that Shona Robison has a related question. Will you clarify an issue that has been touched on? You recommended that

"Statutory aggravations should continue to be the core method of prosecuting hate crimes in Scotland."

Does the bill, as it is presently configured, effectively provide for that approach?

**Lord Bracadale:** In the sense that it has brought together in one place the existing statutory aggravations—the Government has introduced an additional one—I think that it does. The importance of part 1 of the bill, as I see it, is that it will allow statutory aggravations to be, as I said, the core way in which prosecutions are conducted. What emerges from that is that, although they can attach to any offence, they will most likely attach to offences such as assault, to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 or to section 127 of the Communications Act 2003.

**The Convener:** Thank you, John—that was quick. As you mentioned, Shona Robison also has

questions in that area. We will then hear from James Kelly.

**Shona Robison:** On the statutory hate crime aggravation, when an offence is proved to have been aggravated by prejudice, the bill states that the court must make clear what difference the aggravation has made to the sentence that has been imposed. As you know, that is in line with existing legislation, but it appears to be contrary to your recommendation on that point. What is your thinking on that matter?

**Lord Bracadale:** I thought that it was important that an aggravation be taken into account in sentencing and that an aggravation attach to the previous convictions of the convicted person. It is important that the court would state in sentencing that the offence was aggravated and that that should be recorded. I found evidence that the recording was uneven. For statistical purposes, it is important that recording is done well. However, when it came to the requirement to state what the sentence would have been but for the aggravation, I was told by a number of practitioners and sheriffs that, because sentencing is a complex exercise that takes into account a lot of considerations—for example, a reduction might be based on a guilty plea or the contents of a social inquiry report—it was quite difficult to specify precisely what the difference was between what the sentence would have been and what the sentence ended up being. Indeed, the point was made to me by some that the victim of the crime might feel let down if there was not a sufficient difference expressed between the two.

That was my thinking. I thought that it was important that the aggravation be recorded and noted on the previous convictions but that it was just too difficult to specify the convictions in the context of sentencing.

I fully understand and accept the point that you are making, that that element can be measured, and I can see the argument that it should be recorded. However, on balance, I came to the view that that particular aspect should not be continued.

**Shona Robison:** Just to be clear, it sounds as though you are saying that you are not opposed to the principle but that you have practical concerns about how that element could be extracted from all the other elements that would be taken into account in sentencing. Is that a fair summary?

**Lord Bracadale:** Yes.

**Shona Robison:** Is there anything else that you would like to say about the approach to statutory aggravations in terms of what is in the bill and your own recommendations? Do you have anything else that you would like to put on record?

**Lord Bracadale:** I thought that the statutory aggravations scheme had worked effectively. It makes for simplicity and consistency. Prosecutors told me that the use of aggravations was an effective means of prosecuting hate crime and that the annual statistics were building up into good-quality data. For those reasons, I did not make any radical recommendations in relation to statutory aggravations. I suggested, as you alluded earlier, that “evincing malice and ill” will might benefit from being re-expressed as “demonstrating hostility”. The concept of evincing malice and ill will is well known to criminal lawyers with experience over the years, but I think that the phrase “demonstrating hostility” would be more readily understood generally.

I recommended that the category of protected persons should include not only those who are presumed to have a characteristic but also those who have an association with a particular identity. That would include, for example, advocates who advocate on behalf of protected groups. That has been included in the bill.

**The Convener:** Lord Bracadale, we are now going to move to some questions about part 2 of the bill and the offences of stirring up hatred. James Kelly will lead on that area.

**James Kelly:** First, can I deal with the issue of freedom of expression? It has been the subject of some debate around how the bill seeks to protect freedom of expression against potential prosecution for stirring up hatred offences. As drafted, the bill protects on the basis of sex and religion. Others have argued that that is too minimalist an approach, that protections around freedom of expression should be extended to more characteristics and that further offences should be allowed. What is your view on that?

**Lord Bracadale:** Any stirring up of hatred offence would have to meet the requirements of the European convention on human rights. There are two approaches that can be taken to the protection of freedom of expression clauses. One is not to use them at all and to rely purely on the court applying the ECHR. If you are going to use them, they should reflect the approach of the ECHR and, in particular, they should make clear where the line is drawn between offensive behaviour that has not been criminalised and the type of behaviour that is being criminalised.

The formula that was used in the Public Order Act 1986 and in section 7 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 had more strength about it than the formula that is used in relation to religion in the bill. I recommended that there should be freedom of expression clauses, and I would have expected them to extend across all protected characteristics, because I was trying

to avoid any kind of hierarchy of protected characteristics.

**James Kelly:** That is very clear. I also want to ask about how things such as plays and performances have been dealt with in sections 3 and 4 of the bill in relation to stirring up hatred. Again, as drafted, both sections have caused some anxiety among performing groups, because they feel that their ability to perform could be constrained. That has been reinforced by the Law Society, which feels that the proposals in the legislation go further than the Public Order Act 1986, that they are more stringent and that they would threaten freedom of expression. Do you have a view on that?

**Lord Bracadale:** The cabinet secretary's amendment has a significant impact here, because the legislation will require intention to stir up hatred. In the light of that restriction, I find it difficult to understand that the performer would require to behave in a threatening or abusive way and intend to stir up hatred. I do not understand how the concept of neglect on the part of the director fits easily with that, and I note that the cabinet secretary has understood that. That point requires to be revisited in the light of his amendment.

The existing Public Order Act 1986 defences become less significant if we have to prove intention, although defences of that kind might still be required in relation to race, because the two versions of the threshold will be retained. With regard to intention, it becomes more difficult to argue that there needs to be a defence that the person did not know that a behaviour might be stirring up hatred. The Crown would have to demonstrate that there was intention, which might be difficult.

12:30

**The Convener:** I take Lord Bracadale back to his answer to James Kelly's first question about the free speech provisions in sections 11 and 12 of the bill. You compared those provisions with those in section 7 of the now repealed Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 and section 29J of the Public Order Act 1986. I think that you said that both those sections offered greater protection for freedom of speech—that they were both stronger—than sections 11 and 12 of the bill. Can you clarify what you mean by that? While you do so, can you also reflect on what the cabinet secretary said earlier—that he was minded, although he did not commit himself, to consider amendments that both broaden and deepen the protection of free speech in the provisions in sections 11 and 12?

The cabinet secretary explained that to broaden the protection of free speech would mean that protection would apply to all the characteristics and not just to two of them, and that to deepen the protection of free speech would imply that it should not only pertain to discussion or criticism, which is what the bill says at the moment, but extend to the expression of antipathy, dislike, ridicule or insult, which are words that are used elsewhere in other statutes. I invite you to reflect on those comments.

**Lord Bracadale:** My recommendation was effectively that the protection of freedom of speech would mirror precisely what you have described, although the reference to abuse in some of the earlier legislation would obviously have to come out. Such amendments to the bill would be an expression of the kind of line that we want to identify between "offensive behaviour" on one side and "threatening and abusive behaviour" on the other, with whatever other threshold there is.

**The Convener:** In the law of England and Wales, the extension of the stirring-up offences to cover religion and sexual orientation requires that the expression or behaviour be "threatening"—not "threatening or abusive". Do you think it appropriate to extend the scope of the criminal law to criminalise not only that which is threatening but also that which is abusive in those contexts?

**Lord Bracadale:** It is quite important to refer to what the Law Commission says in England and Wales. It proposes a radical change in relation to stirring up of hatred offences, namely to apply the legislation across all characteristics, including race, and to have the same approach in relation to all characteristics.

Although it proposes to keep the two thresholds of intention and likelihood, in cases wherein intention can be demonstrated, the Law Commission's intent is to remove the earlier threshold of "threatening" so that any language that stirs up hatred or intends to do so—whether or not it is threatening or abusive—will constitute an offence.

On the other hand, in cases wherein the Crown is only able to prove likelihood, the Law Commission proposes to strengthen the "threatening" threshold to "threatening and abusive" so that likelihood becomes more difficult to prove. It is sticking to the two thresholds but is adopting exactly the formula that I suggested for the likelihood threshold and going for "threatening and abusive". Comparisons with England have to be understood in the light of that consultation.

**The Convener:** That is very helpful, but the core point remains. I do not want to put words into your mouth, but I want to be sure that the committee fully understands the exact implications of what you are saying. Your view is that the depth

of the free speech protections in sections 11 and 12 should be extended to capture antipathy, dislike, ridicule and insult in addition to discussion or criticism. Was that the force of your recommendation, and is it the case that you have not changed your mind on that?

**Lord Bracadale:** I have not changed my mind.

**The Convener:** That is helpful. Thank you.

Liam McArthur also has a supplementary in that area, and then we will have a question from Rona Mackay.

**Liam McArthur:** Good afternoon, Lord Bracadale. I thank you not only for your work on the area but for your willingness to engage with those of us in the Parliament who have an interest in it.

Earlier, the cabinet secretary alluded to concerns about the legal difficulties that might be involved in enhancing the protections for freedom of expression. He was a little more coy about the nature of those difficulties. I wonder whether you foresee them or are reasonably comfortable that, as the convener has explained, that process could be done relatively straightforwardly.

**Lord Bracadale:** The test is really whether the protection reflects what is in article 17 and article 10 of the European convention on human rights. I think that the formula that we have discussed does that. I do not know what are the legal difficulties to which the cabinet secretary alluded.

**Rona Mackay:** In answer to a question from James Kelly, you said that you had tried to avoid having a hierarchy of characteristics. The bill retains the possibility of liability for stirring up racial hatred based on insulting behaviour. Do you think that that creates such a hierarchy?

**Lord Bracadale:** I recommended the removal of the word “insulting”. I come back to the line, which I mentioned previously, that divides offensive and abusive behaviour. On the face of it, insulting behaviour seems to me to lie on the non-criminal side of that line, which is why I thought that it was inappropriate to retain it.

On the question of a hierarchy of characteristics, there is now more difficulty with retaining not only insulting in the offence of stirring up of racial hatred but the likelihood threshold. As of now, the position is that there is a significant difference between the approach to race and the approach to the other characteristics. If insulting were to be taken out, there would be similarity at least at that threshold level.

**Rona Mackay:** The cabinet secretary gave us quite stark figures that would possibly justify doing that. Would you say that that that would support allowing it to stand?

**Lord Bracadale:** When I looked into the issue I asked the Crown Prosecution Service in England for assistance. The word “insulting” has been deleted from section 5 of the Public Order Act 1986, which relates to a harassment offence. The CPS told me that it had been unable to find any case that could not be characterised as abusive as well as insulting. It took the view that, from the perspective of the prosecution, the word “insulting” could safely be removed from that legislation.

**The Convener:** Unless any other member wants to come in—in which case I ask them to indicate that, either on the BlueJeans system or in the committee room—I have a couple of final questions.

I would like to hear your views on a couple of the other differences between the way in which the stirring-up offences are currently legislated for in the Public Order Act 1986, as amended, and the way in which it is proposed that they will be legislated for in the bill that we are considering.

One of the ingredients in the current law that is absent from the bill that is before us is that, according to section 18 of the 1986 act, no offence of stirring up racial hatred can be committed in a private dwelling, where there is no public order element to the occurrence. Do you have a view as to whether that exception should be omitted from the bill, as is the case at present, or whether we should include it?

**Lord Bracadale:** I did not recommend the removal of the dwelling exception, although I anticipated an exercise to rationalise what is in my view the somewhat cumbersome structure of the Public Order Act 1986. No suggestion had been made to me that the existence of the exception had inhibited the use of the provision. That said, I hear what the cabinet secretary said.

It is instructive to note what the Law Commission in England has said about that, which may lead to a change in the 1986 act. The Law Commission has suggested that, if the aim is to ensure that the criminal law does not intrude on purely private matters, the dwelling exception is poorly targeted, because it would include a meeting in a large private house but would exclude a private conversation in an office. The commission also makes the point that I think the cabinet secretary was seeking to make that other incitement offences can be committed in a house. The Law Commission now proposes the removal of the dwelling exception.

**The Convener:** Given your experience of the operation of criminal law, do you have any reflections on that? The suggestion from the Law Commission would move what have been understood to be public order offences into a purely private setting. Are you relaxed about that

and should we be relaxed about it, or should we be alert to some danger in it?

**Lord Bracadale:** Your concern is well founded, and you probably should do some further work on that.

**The Convener:** I am not sure what further work we can do, other than ask questions and lodge amendments—that is all that we can do from here.

My final question is on that same subject of differences between the construction of the stirring-up offence in the current law and the construction of it in section 3 of the bill. They are perhaps subtle differences of drafting, but they might have significant unintended consequences. There is an absence in the bill of any provision equivalent to section 18(5) of the Public Order Act 1986, which provides that, where someone does not intend to stir up hatred, they are not guilty of an offence if they were not aware that their behaviour might be threatening or abusive. As I said, there is no equivalent of that in the bill. Should we reflect on that?

**Lord Bracadale:** If it were not for the cabinet secretary's proposed amendment, that would be an important issue. In relation to the protected characteristics that he is amending to require intention, it is already a defence that where there is no intention there is not an offence. However, maybe the issue needs to be looked at in terms of stirring up racial hatred.

**The Convener:** Yes. The offence of stirring up racial hatred in the current law contains that element. It is not so much a defence; it is part of the definition of the offence, or the actus reus. No offence is committed if there is no intention and if the individual was not aware that the behaviour might be threatening, abusive or insulting. However, under the bill, that would appear to become an offence.

**Lord Bracadale:** Yes, I think that that requires to be addressed.

**The Convener:** Should it be addressed by amending the bill?

**Lord Bracadale:** By amending it.

**The Convener:** As no other member wishes to ask a question, I thank you very much, Lord Bracadale, not only for your time this morning but for all the work that you have done over many years on this very important aspect of Scottish criminal law.

# European Union (Withdrawal) Act 2018

## Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020

12:44

**The Convener:** Because of the time, we will move on directly to the next item of business, which is consideration of a proposal by the Scottish Government to consent to the UK Government legislating using powers under the European Union (Withdrawal) Act 2018 in relation to a United Kingdom statutory instrument proposal. As the committee's papers note, the Scottish ministers believe that the changes in the proposed regulations are necessary to ensure the continued effective operation of the law. Members are asked to consider the statutory instrument notification and to consider whether we agree with the Scottish Government's view that it should consent to the relevant changes being made by the United Kingdom Government.

As no member is indicating that they wish to comment, are members content not to make any comments on the instrument to Parliament?

**Members** *indicated agreement.*

**The Convener:** Are members content to delegate the publication of a short factual report to me, which means to the clerks?

**Members** *indicated agreement.*

## Justice Sub-Committee on Policing (Report Back)

17:46

**The Convener:** Our final item of business is to receive a report on meetings of the Justice Sub-Committee on Policing that took place on 17 September and 5 October. I do not know whether the convener of the sub-committee, John Finnie, wants to add anything to the written report that we have all read and absorbed.

**John Finnie:** I am content to leave it at that, but I am happy to take any questions.

**The Convener:** You will be glad to know that it appears that members do not have any burning questions to ask you about the report. Thank you, John.

That brings the public part of our meeting to a close. Our next meeting will be a week today, on Tuesday 3 November, when we will continue to take stage 1 oral evidence on the Hate Crime and Public Order (Scotland) Bill.

12:47

*Meeting continued in private until 13:03.*

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