OFFICIAL REPORT
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Justice Committee

Tuesday 17 November 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 17 November 2020

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JUSTICE COMMITTEE
28th 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:

Amy Allard-Dunbar (Intercultural Youth Scotland)
Danny Boyle (BEMIS)
Oonagh Brown (Scottish Commission for Learning Disability)
Paul Dutton (Klinefelter's Syndrome Association UK)
Dr Jennifer Galbraith (Coalition for Racial Equality and Rights)
Claire Graham (dsdfamilies)
Tim Hopkins (Equality Network)
Lucy Hunter Blackburn (Murray Blackburn Mackenzie)
Kevin Kane (YouthLink Scotland)
Becky Kaufmann (Scottish Trans Alliance)
Colin Macfarlane (Stonewall Scotland)
Adam Stachura (Age Scotland)
John Wilkes (Equality and Human Rights Commission)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Virtual Meeting

Scottish Parliament

Justice Committee

Tuesday 17 November 2020

[The Convener opened the meeting at 09:00]

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

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the 28th meeting in 2020 of the Justice Committee. We have no apologies.

Our first item of business is to continue our consideration of the Hate Crime and Public Order (Scotland) Bill. This morning, we will take evidence from three different panels of witnesses. Our first panel comprises seven witnesses, all of whom I welcome and warmly thank for joining us. We have with us Adam Stachura from Age Scotland; John Wilkes from the Equality and Human Rights Commission; Tim Hopkins from the Equality Network; Oonagh Brown from the Scottish Commission for Learning Disability; Colin Macfarlane from Stonewall Scotland; Kate Wallace from Victim Support Scotland; and Kevin Kane from YouthLink Scotland. Thank you all very much for giving up your time to help the committee with our inquiries. You are all very welcome.

Because we have such a large panel, we will not be able to take opening remarks from you all. Instead, I will launch straight in with the questions. You might all want to respond in turn to the questions, but if you do not have anything to add, please do not feel that you need to. Members will endeavour to address their questions to particular witnesses, at least to start with, so that we do not all speak at once and confuse the broadcasters, on whom we are all relying, as usual, this morning. I would like to direct my first question to Tim Hopkins from the Equality Network and then to John Wilkes from the Equality and Human Rights Commission.

As you know, the expansion of hate crime that is contemplated in the bill has attracted widespread criticism on human rights grounds. In response to that criticism, the Cabinet Secretary for Justice announced in September that he proposes to amend the bill. What is your reaction to the cabinet secretary's proposed amendments? Do you welcome them? Do they go far enough? Do they go too far?

Tim Hopkins (Equality Network): Thank you for inviting me to give evidence this morning.

Yes, we support the cabinet secretary's suggested amendments to the offence of stirring up hatred. I should say that, for us, part 1 of the bill is by far the more important part, but we support the extension of the offence of stirring up hatred to the other protected characteristics.

I will give an example of the kind of thing that I think that the offence should cover. In England, the offence of stirring up hatred on grounds of sexual orientation has been used to prosecute people three times in the past 10 years. One of those prosecutions involved three men who distributed leaflets to houses in the locality. On one side of the leaflet there was a cartoon of a gay man being hanged, and on the other side of the leaflet it said, "The only question about homosexuality in classical times was the method of execution to use." Those leaflets were clearly intended to stir up hatred and they were threatening.

It is that kind of wrong that the offence of stirring up hatred is targeted at. I do not think that we should assume that the rise of far-right activism could not happen here in Scotland. I think that, in such cases, the court can infer from what has been happening that there is an intention to stir up hatred, so I think that the justice secretary's proposed amendment does not diminish the utility of the offence.

It is important that the offence covers threatening or abusive behaviour. The materials that were produced by the Nazis about Jewish people included horrible, horribly abusive cartoons of Jewish people that were clearly intended to stir up hatred, but which were not necessarily in themselves directly threatening. We think that it is important that such behaviour would also be caught by the offence.

We strongly support freedom of expression. We think that there is an issue with sections 11 and 12 of the bill, because they cover only two of the protected characteristics and only certain behaviours. We would prefer a freedom of expression provision in the bill that covers all the protected characteristics and is more general in terms. In our supplementary written evidence we made one suggestion for that, but I am sure that there are other possibilities.

The Convener: That is helpful. I ask the same question of John Wilkes.

John Wilkes (Equality and Human Rights Commission): Thank you for allowing us to give evidence. Yes, we broadly support the amendments. As the bill proposals were introduced, we followed with interest the debate and the reactions to it from some sections of society. We are supportive of the proposed amendments on the issue of stirring-up offences

and, for consistency, we believe that they should apply across all characteristics. However, we acknowledge that racial hatred is the most commonly reported hate crime and note that there are no proposals to change that. In some of our publications, we discuss how to balance freedom of expression and stirring up. I am happy to go into more detail if that is helpful.

The Convener: Thank you. Do any witnesses disagree? Does anybody not support the cabinet secretary's amendments and think that they are mistaken, or are all seven witnesses unanimous in supporting the amendments? Nobody is disagreeing so I will not pursue that line of questioning.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I want to ask about the different approach to race hate crime in the bill. My questions are addressed to John Wilkes, Kate Wallace and Kevin Kane. If anyone else wants to add anything they should indicate that.

Race hate constitutes two thirds of all reported instances of hate crime, so it is clear that it is a huge issue. Unlike other proposals in the bill, insulting behaviour might be the basis of liability and not require intent to stir up racial hatred. As we know, stirring up of racial hatred has been a crime in England and Wales since 1986, but there have not been many prosecutions for that crime or the crime of possessing racially inflammatory material. Should race crime therefore be treated differently? Should we take a more robust approach to it, given its prevalence, and does it in effect create a hierarchy of characteristics, being different from the other issues in the bill?

John Wilkes: We broadly agree with Lord Bracadale's view that the existing provisions on stirring up racial hatred should be revised so that they are formulated in the same way as other offences of stirring up hatred. [*Inaudible.*]—where possible helps to provide wider understanding of hate crime and how it is dealt with.

We were also persuaded by Lord Bracadale's evidence that deletion of the word "insulting" did not undermine the ability to bring prosecutions. However, we acknowledge that racial hatred is one of the most commonly reported crimes in Scotland. That is where we stand on the issue at the moment.

Rona Mackay: Thank you. Kate Wallace? We are not hearing or seeing Kate so we will move on to Kevin Kane until that is sorted out.

Kevin Kane (YouthLink Scotland): I trust that everybody can see me.

Rona Mackay: Yes, we can see you.

Kevin Kane: It has been mentioned that the provision on race has been on the statute books since 1986 and has rarely been used. A thought process flows from that, which is to ask: where is the issue? However, we are in the game of education, information provision, training, working with young people in the community and education settings and taking an informal approach, so for us it is important that any legislation is clear for the people who are impacted by the law and for those in the game of education.

It is difficult to envisage a scenario in which using words that are not threatening or abusive would result in criminalisation—I have read some of the previous responses to the question. Therefore, if what is said is not insulting, but meets the threshold for threatening and abusive behaviour, it renders "insulting" null and void anyway.

In our written response, we said that we cautiously shared the Scottish Government's view that the threshold should be retained as "threatening", "abusive" and "insulting". However, we also said that we understood Lord Bracadale's argument for the removal of "insulting" if it is about streamlining legislation. It is also important to say that streamlining does not mean doing things like for like.

Therefore, the main thing for us is that we need to continue to listen to the affected groups—black, Asian and minority ethnic groups. The view from many of those groups within our youth work equality forums was that the removal of "insulting" would weaken the proposed legislation. Similar to the justice secretary, we believe that we need to keep discussion going on that part of the bill and continue to listen to the views of that community.

I take the point about the potential for creating a hierarchy of protected characteristics. However, being mindful of the justice secretary's comments about the nature of racial abuse, the structural and historical dynamics and the sheer number of people affected by it in Scotland—which he laid out in his submission last week—there is a case for a slightly lower threshold, perhaps on symbolic grounds.

I can understand why that argument might not hold any weight with a solicitor or a sheriff. However, I was thinking before this session about the Black Lives Matter movement and the great strides that we have made this year. The world is shining a light on racism and taking steps to combat it. Therefore, if I can speak freely, who would want to be the person that would remove something from the law that acts as a key protection for those communities? I can see why the justice secretary would be a little circumspect in his comments.

Unless there is a clear majority from the affected communities that backs its removal, we would not

be prepared to take that step. However, it does seem rational and logical to streamline the legislation.

Rona Mackay: That was very helpful. It does not look like Kate Wallace is able to see or hear us. If anyone else wants to comment, they should put an R in the chat box.

The Convener: I will move to Liam McArthur, who wants to pick up on some of the questioning about free speech and related matters.

Liam McArthur (Orkney Islands) (LD): Shona Robison is going to pick up on the issue of strengthening the provisions on freedom of expression protections that Tim Hopkins referred to. I will return to the point about the thresholds of "abusive" and "insulting".

Mr Hopkins, you quite reasonably set out an argument about some of the early Nazi propaganda, which might not initially have been threatening although it was highly abusive. Is there not a legitimate concern that the terms "abusive" and "insulting" can be fairly subjective? Therefore, although they might capture things that a reasonable person would, appropriately, seek to be captured by the bill and criminalised, they might also—in the minds of those who are on the receiving end—capture things that, although we should not condone them, we should not criminalise.

The point that Kevin Kane made about the way in which the legislation is understood by those it is seeking to protect is important. If there is a heightened expectation that the provisions cover abusive and insulting behaviour, we run the risk of criminalising things that we really should not. Mr Hopkins, do you agree that that is a concern?

09:15

Tim Hopkins: Yes, I do. It is important that the term "abusive" is interpreted in an objective way, so that we are not saying that, because one person finds something offensive, it will fall foul of the legislation.

The convener has suggested previously that one way to do that might be for the bill to require that the abusive behaviour should be likely to stir up fear or alarm. However, that is not quite the right solution, because it mixes up two offences: the offence in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which is the offence of threatening or abusive behaviour that is likely to cause fear or alarm, and the offence in the bill of threatening or abusive behaviour that is intended to stir up hatred, which is a different thing.

I therefore suggest a different solution. If we want the bill to say specifically that the term "abusive" should be interpreted objectively, I suggest using the solution in section 60 of the Sexual Offences (Scotland) Act 2009, which ensures that the word "sexual" is interpreted objectively for the purposes of that act. If we copied that across to the bill, we would have a provision that said that behaviour or material is abusive if a reasonable person would, in all the circumstances of the case, consider it to be abusive. That would ensure that the term "abusive" was interpreted by everybody in the criminal justice system in an objective way and would allay the concerns that people are going to be investigated or prosecuted because one person said that they found something offensive.

Liam McArthur: That is helpful. I will come to Colin Macfarlane in a second, but first I want to come back to Mr Hopkins on that issue. With any change in the law, there is a tendency for it to be probed and pushed to test the limits to which it extends. Do you envisage a risk that the provision might be a focal point for testing and that cases will be brought that are perhaps not mischievous but are likely to cause anxiety about freedom of expression simply because the police and Crown Office are asked to get involved?

Tim Hopkins: Yes. The answer to that is to ensure that training is done with the police and procurators fiscal before the legislation comes into effect. The pushing of the boundaries that you mention happens anyway, and it could happen with a number of new criminal offences. Therefore, it is important that the police in particular are trained in advance of the legislation coming into effect so that they can be clear to people about the boundary of the offence.

The threshold of threatening or abusive behaviour that is intended to stir up hatred is a high one, and it is important that the police understand that.

Liam McArthur: I ask Colin Macfarlane to go next. If anybody wants to come in on the back of that, they should indicate in the chat box.

Colin Macfarlane (Stonewall Scotland): I honestly do not have anything much to add. I agree with Tim Hopkins. It is crucial that there is clarity for those who will be expected to prosecute or take up the issue. Training will be absolutely central to the understanding of the thresholds. On your point about pushing the boundaries, Tim Hopkins is right that people want to test any new legislation, but the crucial aspect of that will be the training, learning and understanding of those who are expected to implement the legislation. I have nothing further to add.

Liam McArthur: Mr Wilkes, do you want to come back in and say whether the Equality and

Human Rights Commission has concerns in this regard?

John Wilkes: Broadly, I endorse the comments of Tim Hopkins and Colin Macfarlane. Clearly, this is one area where the legislation needs to be drawn up very carefully. We need to get the balance right to protect freedom of expression. Obviously, that is not an absolute right, and it depends on the circumstances and context. It is always the circumstances and context that determine whether something amounts to threatening or abusive behaviour or is protected.

In a previous evidence session, a witness from the Faculty of Advocates said that the term "abusive" is clear and understood and that there is "an objective test" in Scots law, so that might bring some comfort.

It is an area that is discussed in many different fora, and we discussed it in our legal framework, which we published in 2015, on hate speech and the limitations of freedom of expression as defined under the International Covenant on Civil and Political Rights. We also note that work has been done by the Office of the United Nations High Commissioner for Human Rights on the Rabat plan, which looks at these divides, and could be a useful guide in looking at these areas of interest.

Liam McArthur: If no one has anything to add, I will hand back to you, convener.

The Convener: That is very helpful, Liam. I am afraid that we have lost our connection to Kate Wallace from Victim Support Scotland because of technical issues that we have been unable to fix. Therefore, she has withdrawn from the evidence session. If we want to take up anything with Kate or Victim Support Scotland, we will have to do that in correspondence after today. Shona Robison will pick up the questioning now.

Shona Robison (Dundee City East) (SNP): Thank you, convener. We have received a lot of evidence arguing that the bill's provisions on a general defence of reasonable behaviour along with the protection for freedom of expression in relation to specific issues need to be strengthened. I want to seek the witnesses' views on that. Tim Hopkins referred to that earlier, so I will go to him first to see whether he has anything to add. If anyone who has not come in so far wants to respond on that, please type R in the chat box.

Tim Hopkins: Our supplementary evidence suggested a possible improvement to the bill, which might help to allay fears about freedom of expression. It is similar to what happened with the equal marriage legislation in 2014. Concerns were expressed that introducing same-sex marriage could inhibit people from continuing to say, if it was what they believed, that marriage should be between a man and a woman only. We were very clear that that should not be the effect of the legislation, so a section was inserted into that bill—section 16 of what is now the Marriage and Civil Partnership (Scotland) Act 2014—that says that, for the avoidance of doubt, nothing in the act affects your rights under articles 9 and 10 of the European convention on human rights with regard to freedom of religion and freedom of expression. Therefore, in our supplementary evidence, submitted jointly with a number of other organisations, we suggest that a similar provision could be included in the bill. The ECHR applies anyway, because it applies to prosecutors and courts, but putting it in the bill in those terms might give people some reassurance on that matter.

The other issue is that sections 11 and 12 of the bill cover only two protected characteristics with regard to freedom of expression—religion and sexual orientation—and cover only certain behaviours within those protected characteristics. For example, section 11, on religion, does not cover criticism of non-religious belief, even though the protected characteristic in the bill for religion covers non-religious belief. Section 12, on sexual orientation, is different from the English version in that it does not cover criticising same-sex marriage. Where do we draw the line? The problem with provisions such as those in sections 11 and 12 is that, if you include a list of things that it is okay to say, something will always be left out. Therefore, the more general provision would have the benefit of covering all the protected characteristics, but, being couched in more general terms, it could also cover a wider range of behaviour.

The Law Commission for England and Wales has considered that in its consultation paper on hate crime law in England. In paragraph 18.274 of its paper, it points out that the provisions in English law that are similar to sections 11 and 12 have a general purpose: first, to clarify

"that the law applies to hatred against persons, not against institutions or belief systems";

secondly, to clarify

"that criticism of behaviour is permitted";

and, thirdly, to maintain

"a space for discussion of public policy on potentially controversial issues".

It seems to us that that should be the purpose of a freedom-of-expression provision in the bill. It would be more useful if it could be couched in general terms like that.

Shona Robison: That helpful and detailed response is something on which I certainly think that we as a committee should reflect.

Does anyone else want to add to Tim Hopkins's comments?

Kevin Kane: We were supportive of section 16 of the Marriage and Civil Partnership (Scotland) Bill. The reference to equal marriage is a good one—the wording is framed well—and I would commend it to the committee to consider.

To pick up on Tim Hopkins's comments, some of our organisations in our youth work network are keen to extend the freedom of expression sections across all the protected characteristics. I say that to get on public record that we are open-minded and keen to listen to partners—many of whom are with us today—on that.

However, as has been mentioned in previous evidence-taking sessions, the bill should be convention-ready anyway. Arguably, there is a case for there not being a non-exhaustive list. The defence of reasonableness is a mainstay of Scots law, and it is important to listen to legal opinion on that. It is hard to fathom a situation in which behaviour that is threatening or abusive and has the intent of stirring up hatred could be viewed by the reasonable-minded person in any way, shape or form to be reasonable.

I am agreeing with Tim Hopkins on the one hand but, on the other, I am saying that protections, including on freedom of expression, are laid out in any legislation via the convention.

Shona Robison: Thank you—that is really helpful. That is all from me, convener.

The Convener: Does Colin Macfarlane have anything to add on the issue? I am picking on you—and I am sorry if you think that I am being unfair—because I was struck by the written evidence that Stonewall submitted to the committee, which seems to be pointing in quite a different direction from the one that Tim Hopkins is pointing in. Paragraph 27 of your submission says:

"We remain unconvinced as to the benefits provided to hate crime legislation by protections of freedom of expression with respect to sexual orientation ... Stonewall opposes the equivalent section in England and Wales".

I want to give you the opportunity to put a view that is different from the one that we have heard from Tim Hopkins—if you do not want to, please do not feel compelled.

Colin Macfarlane: We were one of the organisations, along with the Equality Network and other lesbian, gay, bisexual and transgender and equalities organisations, that put in supplementary evidence on freedom of expression. We consider that replacing sections 11 and 12 with a more general freedom of expression protection would answer and, I hope, allay some of the concerns that some people have with the bill.

Again—I am sorry to repeat myself—we support what Tim Hopkins is saying; there is no difference between us.

The Convener: Thank you very much—that is really helpful to know. When we have evidence that is as strongly written as yours, and the oral evidence points in a slightly different direction, we just want to understand exactly your position. That is a very helpful clarification.

Liam Kerr (North East Scotland) (Con): I will put my first question to Tim Hopkins of the Equality Network. I will also put it to Oonagh Brown, because she has talked about solutions to the question that I am about to ask.

The committee has heard concerns that the stirring-up offences could be used by some to label opinions as hate speech. We have also heard that, even if that does not ultimately lead to prosecution, the fear of that label or of a police investigation could ultimately lead to people self-censoring. Is there a danger of that happening? If so, what might be the solutions to that problem?

Tim Hopkins: I referred to that in part earlier, when I spoke about training for the police and fiscals.

There is also an issue of publicity. It is important that, when the legislation comes into effect, if Parliament passes the bill, there is publicity about what the offence is and what it is intended to be used for. I gave some examples of that earlier.

I think that threatening or abusive behaviour that is intended to stir up hatred is a high threshold in itself. If that is made public, with examples, I think that that would mitigate the concern that you mention.

That said, a great deal is said, especially on social media, with claims being made that virtually any contribution on any subject could be hateful or wrong. That is not going to stop; unfortunately, abuse on social media is big problem that needs other solutions.

However, my answer would be that the solution is to provide information about what the offence is intended for and proper training of the police and fiscals.

09:30

Liam Kerr: Oonagh Brown, is your view different or similar?

Oonagh Brown (Scottish Commission for Learning Disability): I echo some of the earlier points. SCLD supports the offence of the stirring up of hatred and is mindful that the right to freedom of speech in article 10 of the Human Rights Act 1998 is not an absolute right, and that we have to be responsible and respect other

people's rights by not stirring up hatred, violence and discrimination.

Although we are supportive of the offence, we would welcome consideration of a number of areas, particularly explicitly including learning disability within the category of disability, in order to ensure that people with learning disabilities are protected from hate speech.

The other suggestion that we made in our initial consultation response concerned producing guidance for media outlets on what would be considered to be the stirring up of hate speech in relation to protected groups, including people with learning disabilities.

We believe that that would be critically important because we know that, in the past, the media have, to an extent, created hatred of and discrimination against disabled people. That was clearly seen in media dialogue surrounding austerity, when we saw discussion of disabled people as being dependent. More recently, the way in which disabled people have been discussed during the Covid-19 emergency has included a discriminatory discourse emerging from the media that coronavirus would not impact most people and would affect only the vulnerable. That kind of statement devalues the worth of people with learning disabilities and creates the idea that they are expendable. Given that we know that, on average, people with learning disabilities die 20 years earlier than the general population, we at SCLD feel that such dialogue is not appropriate.

Therefore, with regard to how we manage people's expectations and understanding of what they can and cannot say, we think that guidance should be provided to media outlets about what kind of dialogue is appropriate. That is not about completely limiting what people can say; it is about the need to take into consideration how views are put across. I highlight that that approach is in line with the general comment from the Committee on the Rights of Persons with Disabilities, which says that state parties

"should undertake measures to encourage, inter alia, the media to portray persons with disabilities in a manner consistent with the purpose of the Convention and to modify harmful views of persons with disabilities, such as those that portray them unrealistically as being dangerous to themselves and others, or sufferers and dependent objects of care without autonomy who are unproductive economic and social burdens to society."

Liam Kerr: That is helpful.

Tim Hopkins and Colin Macfarlane, I will direct my next question to you, because you have both talked about training for the police and courts, and Tim talked about publicity.

To pick up on something that was raised in a previous evidence-taking session, do you have a view on whether that training and/or publicity have been adequately factored into the financial memorandum or the Government's thinking about implementation?

Tim Hopkins: I read the financial memorandum and, if I remember rightly, there are two sums of £50,000 in there for things such as training. I cannot remember whether either of those applies to the police. I have a feeling that the financial memorandum says that police training is being done regularly anyway, so issues would be dealt with as part of that.

Our view is that there is something to be said for improving and extending police training on equalities. I know that the police are under huge pressure and that any time spent on training is time taken away from the front line, but about four or five years ago, we were involved in a project that was funded by the Equality and Human Rights Commission, as part of which we helped to train 70 police officers, who then became experts in lesbian, gay, bisexual, transgender and intersex equality in their local areas. However, as I say, that was a number of years ago, and many of those officers have since moved on. It would be helpful to do that again.

We are in favour of more training for the police around equalities generally, part of which could focus on the legislation that we are discussing, but we recognise that there are resource limitations.

Colin Macfarlane: It might not surprise the committee to hear that I agree with Tim. Training and awareness raising are absolutely key for a wider understanding of the communities that are affected. In relation to the bill, I agree with Tim that, if resources are available, they should be used to ensure that our police are trained across the equalities characteristics.

There is an issue about education more generally being used as a tool to change hearts and minds. That is why we are supportive of the work of the LGBTI-inclusive education working group. We hope that the Government and Parliament will continue to support the implementation of that work, because learning about identity and yourself in an education setting changes hearts and minds and goes some way towards changing how people react to and treat those with different characteristics. The training aspect is key, but education is also key, by which I mean in school, college and further and higher education settings.

Liam Kerr: I see that Kevin Kane wishes to respond to the question, convener. Then I will go to John Wilkes.

Kevin Kane: We work with youth groups that work with young victims of crime through every step of the criminal justice process, so I can

confidently say that we know that victims do not always get the support that they require from the police and that the majority of them do not seek support. We know that victims feel that support, particularly in relation to hate crime, is inadequate. If strengthening the suite of laws is to be effective, we need that renewed discussion on identifying and addressing the barriers to reporting, access and support. To pick up Oonagh Brown's point, that could be made clear as part of any support, information and promotion work around the legislation in 2021.

It will not come as a surprise to the committee that I will talk up the youth work sector. We can harness a lot of power, because we are in communities and in schools. The youth work industry is a massive contributor to the crime prevention agenda. We work with two sides of the same coin—perpetrators and victims—so when it comes to education, community building and intergenerational work, our proximity to young people and all the issues that they face is what makes us strong. We are already well positioned to utilise that infrastructure to provide targeted and holistic support to all young people. I flag that point as part of my answer to the question but also in relation to the financial memorandum and what needs to be done. There is a role for youth work here.

Liam Kerr: I will press you on that, because it was an interesting answer. Do I take it that you feel that the financial memorandum does not adequately provide for the various things that need to happen?

Kevin Kane: The financial memorandum could be more explicit.

Liam Kerr: Grand.

John Wilkes: I want to underline our support for the comments that have been made. For the legislation to be effective and build on the development of the existing legislation over the past 20 years or so, it is really important that the people who make judgments about what is going on in real life—in the real world—do so with confidence.

In another life, I served on Dr Duncan Morrow's advisory group on hate crime, which the Scottish Government commissioned back in 2015. When we heard evidence from the police, there was a sense that we place a lot of responsibility on the police—often on front-line officers—to be absolutely confident on issues of law that can be daunting. That is a really important point. I was also on Lord Bracadale's advisory group, and that was a theme that came up there, too.

In terms of making the legislation a success—and it is important that it is a success—it is important that everybody who is involved in the identification and prosecution of offences does that with full understanding and support, and that support has to be on-going.

The Convener: Although our focus in the first few questions has been on part 2 of the bill, on the stirring up of hatred, Tim Hopkins said at the beginning of the session that part 1 of the bill, on statutory aggravation, is the most important part of the bill in practice. We will turn to that in a moment, but before we do, I want to make sure that all our witnesses have had the opportunity to say what they want to say to the committee about the stirring-up offences. I am particularly conscious of the fact that Adam Stachura from Age Scotland has not contributed to this part of the conversation. Adam, would you like to add anything before we move on?

Adam Stachura (Age Scotland): A lot of really good points have been covered, and I do not have a huge amount to add. However, we definitely think that more needs to be said about the training that will be involved with regard to people's expectations of the bill, particularly when it comes to part 2, and how prosecutors can act on that. As time goes on, I think that there will be greater understanding of what the provisions mean.

The issues around part 2 have been well covered by the other witnesses.

The Convener: Thank you very much. I hand over to John Finnie to take us in a slightly different direction.

John Finnie (Highlands and Islands) (Green): Good morning. The continued use of statutory aggravations as the core method for prosecuting hate crime in Scotland has been broadly welcomed.

I would like to pick out some elements of the evidence that has been submitted to the committee, beginning with the Equality Network, whose submission makes the interesting remark that

"The aggravation model removes the incentive not to prosecute by separating the burden of proof of the two elements."

There is more to it than that. Could you say a little about that, please?

Tim Hopkins: Yes. I think that that sentence in our submission made a comparison between the statutory aggravation model and the stand-alone offence model, such as is found in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, which provides for the racially aggravated conduct and harassment offence. In the latter case, it is necessary to prove with corroborated evidence both the aggravation and the conduct or harassment in order to prove the offence. With the statutory aggravation, as with aggravations in

common law, corroborated evidence is not required—only one source of evidence is required to prove the aggravation. The underlying offence—whether it be common assault, abusive or threatening behaviour or whatever—obviously needs corroborated evidence.

Secondly, in the case of the stand-alone offence, if there is a failure to prove that it was racially aggravated, it is not possible to convict at all, whereas with the statutory aggravation, even if there is a failure to prove the aggravating factor, it is still possible to convict for the underlying offence. Therefore, the system of statutory aggravations is more flexible than using stand-alone offences.

We completely agree that the use of statutory aggravations is the core of hate crime law. Prosecutions for aggravated offences are hundreds of times more frequent than prosecutions for the stirring-up offence. In the most recent year, nearly 1,500 sexual orientation aggravated offences were reported to fiscals in Scotland, with 40 or 50 transgender identity aggravated offences being reported in each of the past four years.

An illustration of how flexible statutory aggravations are is the fact that they cover offences such as abusive or threatening behaviour and assault right up to the most serious offences. In the 10 years since the Offences (Aggravation by Prejudice) (Scotland) Act 2009 came into effect, Scottish Government figures show that there have been seven homophobic homicides in Scotland. The aggravation is absolutely crucial in identifying that all those offences were motivated by prejudice, and in ensuring that they are recorded in that way and dealt with by the whole of the criminal justice system in an appropriate way, including sensitive handling by the police right the way through to appropriate sentencing. The recording of that enables, for example, repeat offenders to be identified.

09:45

John Finnie: I have a question for Mr Wilkes. The Equality and Human Rights Commission is supportive of the approach of using statutory aggravators. Its submission says:

"This achieves a consistency of approach which can potentially be extended by listing new characteristics for the statutory aggravations if required in the future."

The submission then mentions one of the potential new characteristics, which is misogyny. That is not a statutory aggravator yet, so I will not ask you to focus too much on the detail. The submission says:

"Specific deterrence of aggravated offending against women by adding the characteristic of sex has symbolic significance, but in itself may not ensure adequate or appropriate protection".

Can you help me to understand the EHRC's support? Is it qualified in relation—[*Inaudible*.]

John Wilkes: I am sorry, but I missed the very last part of what you said.

John Finnie: You support the principle of aggravations, but you express some reservations in relation to one aspect. Could you cover that?

John Wilkes: Yes. That aspect was about sex. You were talking about gender.

John Finnie: Yes.

John Wilkes: We are very supportive of the aggravations approach to hate crime for the reasons that Tim Hopkins listed, including that it is more easily understood.

The issue of sex and misogyny was debated quite a lot in Lord Bracadale's group. There was recognition that there is clearly an issue relating to hate crime that is targeted at women. The debate was about whether having an aggravator in relation to sex would address that issue—there was recognition that men would be included in that broader definition—or whether something more specific should be done in relation to women and their experiences.

We support the inclusion of sex as an aggravation in the bill, but we recognise and welcome the proposal to set up a working group to look in more detail at the issues relating to misogyny. Our 2019 report on the Convention on the Elimination of Discrimination against Women called for further investment in research on misogyny and violence against women and girls. We will look to the outcomes of that group, which might help with clarification. Fundamentally, we support the inclusion of sex as an aggravation.

John Finnie: The Equality Network has joined BEMIS and others in calling for

"a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland, and any other relevant duty bearers to develop a bespoke system of hate crime data collection and disaggregation across all characteristics covered by the ... Bill."

Would Mr Stachura like to comment on that?

Adam Stachura: Data collection is hugely important—that is a good point, and it has been made elsewhere. At times, it is difficult to get good-quality data from Police Scotland about the level of—[*Inaudible*.] When we get the data and information, the numbers often do not seem particularly high. However, when the committee is considering the bill in the round, it should note that the positive things that the bill might do to increase reporting of offences or incidents might give us a better understanding of what is going on across

the country, and it will also give people the confidence to report incidents that happen to them, because such incidents have been more publicised.

As with everything in the public sector, there is an absolute need to have far better data collection. We should be able to do that—there is no reason why we should not—but, across the justice sector and the health service, it is often very difficult to get useful data that can help us to look for solutions to the problems that are presented.

John Finnie: Does Ms Brown wish to comment on that?

Oonagh Brown: We covered the issue in our initial consultation response. We want learning disability to be explicitly included in the list of characteristics in the bill. Although we understand that learning disability will be included under the characteristic of disability, it is important that we outline that that includes learning disability and physical impairment.

We also called for a duty on public bodies to record disaggregated disability data on hate crime. We believe that such information can be self-declared by individuals. There are several reasons why we believe that to be important. First, people with learning disabilities experience hate crime. Just last week, the SCLD was informed of a serious case of such hate crime. We know that, between 2014-15 and 2018-19, disability-aggravated crime increased by 64 per cent in Scotland.

We believe that, without separate identification, people with learning disabilities might not recognise the bill as helpful to them and would not report crimes. For example, when we met a group of people with learning disabilities at the fortune works service in Drumchapel, we were told that they had real uncertainty regarding reporting hate crime.

Such a duty should be included in line with article 31 of the United Nations Convention on the Rights of Persons with Disabilities, which is on statistics and data collection, and article 33, which is on national implementation and monitoring. Without the duty, the invisibility in published statistics will impede the evidencing and appropriate implementation of policy measures to ensure justice for that group. It will leave people with learning disabilities as an invisible population that we do not talk about.

John Finnie: That is very helpful.

I have a brief question for Mr Macfarlane. In line with existing legislation, the bill states that the court must make clear what difference an aggravation has made to the sentence that is imposed. Lord Bracadale recommended removing that requirement. Is the retention of that requirement helpful in increasing transparency in sentencing, for example? Do you have a view on that?

Colin Macfarlane: It is important that the offence is named as such, and aggravations help in giving a clear distinction between potential crimes. Seeing the offence named as such gives a sense of closure, in some respects, to victims of hate crime. That is an important aspect of the justice system in allowing people who have been victims of hate crime to get justice.

John Finnie: Does Mr Kane want to comment?

Kevin Kane: In the absence of Kate Wallace from Victim Support Scotland, I point out that I was involved with Victim Support Scotland in the independent review on hate crime, so I will bring that experience to bear alongside my work with the voluntary sector, local authorities and youth groups that work with victims and survivors of all crime. I am aware that sheriffs have highlighted the complexity around the recording and explaining of decisions that are made in court.

The most important thing is that young people tell us that they feel let down. If we take hate crime seriously, by ensuring that the aggravating part of the behaviour is highlighted as a distinct and key feature of the offence, we will not let them down. They feel that it is necessary that the judge should include an explanation of that in his or her deliberations on sentencing. That is important for validating that particular crimes have taken place, and it is also extremely important in relation to recovery.

We need to think about that as part of the wider package of rehabilitation and support, and about how the bill can contribute positively to society. That might seem like a small thing, but it is very important for a lot of people. There is possibly work to be done with statutory bodies in relation to training.

Colin Macfarlane: To back up what Kevin Kane said, I hope that that would lead to better reporting. Obviously, Stonewall supports LGBT people, and we know that there are low levels of confidence in reporting in the system, so the aggravator is critical. If it were to be removed, we might see less confidence in the system, with LGBT people being less confident in reporting.

To completely back up what Kevin Kane has just said, and what Tim Hopkins said earlier, I consider that it is really important for victims that that aspect of the crime is named, and it will also give people confidence to report when they have been the victim of a hate crime.

John Finnie: Many thanks.

The Convener: I move to Fulton MacGregor, who has questions about hate crime characteristics.

Fulton MacGregor (Coatbridge and Chryston) (SNP): As we know, the bill seeks to add age to existing hate crime characteristics. Does that offer the right balance? It has been suggested to us that it might be more helpful if the exploitation of vulnerability, including what is sometimes referred to as elder abuse, was highlighted through a statutory aggravation linked to the perceived vulnerability of the victim. Is that the right way to proceed? Do we need both?

John Wilkes: The commission does not consider that age should be a listed characteristic, as it thinks that there will not be sufficient evidence to meet the threshold for statutory aggravation. We agree with Police Scotland's response in relation to the perceived vulnerability of older people in that respect. We note in our written evidence that the Scottish Sentencing Council is developing guidelines that will set out factors that might make a particular offence under consideration more serious.

Adam Stachura: As you would imagine, in the first instance, we are supportive of age being included as a statutory aggravation. That is for a number of reasons, which slightly go against what has just been said.

There are three important parts to that. First, as has been mentioned, age is missing as a protected characteristic, and this exercise tidies up hate crime legislation. Secondly, the provision will give older people more confidence in reporting crimes. As others have said in relation to different areas, there is either underreporting or a lack of confidence in reporting, and it is a big challenge for people to report.

Thirdly, it will give prosecutors more tools to progress cases. As has been mentioned, corroboration is not necessary for a statutory aggravation. It will be a helpful element in pursuing things, and it will mean that things are taken more seriously. I have said before that it could be quite an important tool in preventing offences in the first place.

It is also important to mention that the provision is not just about older people, because there is no age threshold—there is no upper or lower age limit; it applies to all ages. If a crime has been committed as a result of hostility towards someone's age—many things could fall under that—the provision would add more weight to either the sentencing or the prevention part.

Separately, we are also supportive of including a vulnerability element. However, after discussions with the Cabinet Secretary for Justice, we are conscious that the Scottish Government considered the issue but found that even the threshold for vulnerability would be incredibly difficult to gauge. It was an interesting conversation, because it highlighted that vulnerability could be used in almost any circumstance. I am not suggesting that that element could not be included, but I think that the issue warrants additional exploration.

I have discussed previously at a committee the issue of elder abuse. We are supportive of more measures on that, whether that is a statutory aggravation or a stand-alone crime. Elder abuse is hugely underreported, and there is nowhere near enough support for people who are subjected to it. In fact, people tend to be removed from a bad situation rather than being protected in the first place, which is different from lots of other elements. Far more can be done in that area. It might not be possible to do something at this juncture, but it is definitely worthy of further work and consideration.

On vulnerability, I took at face value the justice secretary's view that that could be applied to any circumstance and could make the legislation even more difficult to do.

10:00

Fulton MacGregor: Thank you—that is helpful.

Tim Hopkins: On the issue of the age characteristic in particular, I defer to Adam Stachura's and Kevin Kane's expertise. It is widely agreed that crimes that are motivated by vulnerability are different from crimes that are motivated by prejudice. I support further exploration of whether there should be a general aggravation that relates to vulnerability, but that is outwith the scope of the bill, I think.

Fulton MacGregor: The Victim Support Scotland submission says that there should be

"a zero tolerance approach to hate crime".

I was going to ask Kate Wallace to expand on that but, in her absence, I ask Oonagh Brown to comment on the concept generally. Do you agree with it, given your previous answer to John Finnie about the group that you work with and represent?

Oonagh Brown: I agree with that approach. For us, it is important that such behaviour against people with learning disabilities is criminalised. People with learning disabilities tell us that, at the moment, when hate crimes are committed against them, they are referred to adult and support protection processes. The focus is often on the people with learning disabilities protecting themselves, and the dialogue becomes, "You have not protected yourself." That often leaves people with learning disabilities feeling that they are to blame.

Instead, we need to tackle the societal issues that cause hate crimes and enable them to happen, and we need to address the actions of the perpetrator. In addition, we need to see the bill in the wider context of societal and systemic cultural change, which involves looking at how we value people with learning disabilities. In regard to the Covid response, I mentioned that we hear a lot of dialogue that undervalues people with learning disabilities. We need to create a society in which people with learning disabilities are supported to thrive and live the lives that they choose.

Fulton MacGregor: Colin Macfarlane, the Stonewall Scotland submission suggests that it considers that the liability for criminal offences should be even lower than that proposed in the bill. Will you clarify whether that is the case, and elaborate on that view for the committee so that it is on the record?

Colin Macfarlane: I think that that would be our view. Our submission states that, and that is pretty much our position. I do not have much to add, I am afraid.

Fulton MacGregor: That is fair enough—thank you.

I will ask a final question. I see from the chat box that John Wilkes wants to come back in, so this might give him the opportunity to do so. Do the witnesses have any concerns about the way in which the various hate crime characteristics are defined in the bill? My colleague Annabelle Ewing will come in later to deal with the sex characteristic, so perhaps that could be left for now. Are there any concerns in relation to any of the other characteristics? I will go to Kevin Kane first, and then back to John Wilkes.

Kevin Kane: I do not have anything further to add on that point.

John Wilkes: I wanted to come back to the age aggravation. I totally understand the issues, and sympathise with protecting people who are targeted due to their vulnerability. That is really important.

The other issue about the age aggravation is that one of the important things about hate crime legislation is that there should be absolute public understanding of its import. Part of our difficulty with age is that we are not sure that the public will understand the issue around age. People might not equate it to hate crime against other groups, which they might understand better.

We support the definitions and proposals for the other characteristics that are being included in the bill. As the discussion on sex is a separate question, I will leave that aside for now.

There are other groups that might need to be considered for inclusion. In particular, the issue of asylum seekers and refugees has cropped up again and again, including in the Morrow report on hate crime and the Bracadale discussions. The issue is whether the shoring up of the definitions will cover such groups, given that there is evidence that they are being targeted. We consider that the definition of race in the bill would definitively include colour, nationality and ethnic origins and would therefore draw in groups such as Scottish Gypsy Travellers, but case law relating to the Equality Act 2010 is less supportive of an assumption that the characteristic of race would cover refugees and asylum seekers. That is something that the committee might want to consider.

Tim Hopkins: We strongly support the adjustments that the bill makes to definitions of some of the protected characteristics, particularly those that are LGBTI-related. As Oonagh Brown said, it is important that people can see themselves in the bill. We know from our research that, although two thirds of LGB people and 80 per cent of trans people have experienced hate crime and 90 per cent of them have experienced it more than once, 71 per cent have never reported those crimes to the police. Encouraging people to report hate crimes is crucial. One way of doing that is to ensure that people can see that the legislation applies to them.

In particular, the definition of transgender identity has different wording from the definition that was used 10 years ago. It does not change the scope of the aggravation. Similarly, the aggravation relating to variations in sex characteristics does not change what the law covers, because intersexuality was covered in the Offences (Aggravation by Prejudice) (Scotland) Act 2009. However, the language used in the definitions in the bill makes those categories much clearer and is much more acceptable to trans people and, from what people have told us, to people with variations in sex characteristics. That is why we are supportive of the changes to the language that is used.

The Convener: Annabelle Ewing wants to pick up on some of those questions.

Annabelle Ewing (Cowdenbeath) (SNP): I want to pick up on the non-inclusion of, at this stage, the characteristic of sex. I think that John Wilkes indicated in a reply to John Finnie that sex as a characteristic was included, or that he supported its inclusion, in the bill. Could you clarify your comments? The bill does not include that characteristic; it includes a provision allowing for, in due course, the adoption of secondary legislation to include sex.

John Wilkes: I am sorry if I was not clear earlier. We understand that sex is included in the sense that it could be activated as an aggravator

at a later date. We support that—or, indeed, the inclusion of gender, depending on how the secondary legislation is framed.

Annabelle Ewing: Thank you for that answer. Sex is the protected characteristic under the Equality Act 2010, so I presume that that would be the appropriate term.

I turn to Adam Stachura, who made the case for the inclusion of the characteristic of age, as is currently proposed. In that regard, he seemed to be missing part of the puzzle, because sex is a recognised protected characteristic but it is not currently included. I wonder whether Adam has any comments on that.

Adam Stachura: I do not have anything particularly constructive to add on that. Our main focus has been on part 1 and on the introduction of age as a result of the discussions around the Bracadale report and since then. The issue has been well debated—[*Inaudible*.]—are missing or not strong enough. However, to be slightly long winded, I am afraid that I am perhaps not as well informed about that question as I could or should be.

Annabelle Ewing: That is an honest and succinct answer. Adam Stachura referred to the importance of people understanding the bill as the issue, and, in the written evidence, we certainly read that the non-inclusion of the characteristic of sex might send a bit of a confusing signal, albeit that we understand that there will be the working group on misogynistic harassment. Does Kevin Kane have any thoughts on the subject?

Kevin Kane: I will try to follow in Adam Stachura's succinct footsteps. My comment is about the working group on misogynistic harassment. Given the variation in views, the strength of feeling involved and the complexity of the issues, the youth work sector is keen to make representations to that group. The fact that the bill has an enabling power to revisit the issue of a statutory aggravator is positive and is a good place to be at the moment.

It is right and proper that we discuss the issue in relation to domestic abuse and other areas affecting the female sex. That has been raised by Engender, Scottish Women's Aid, Rape Crisis Scotland and a few other organisations. We certainly would not want to rush in with an aggravator that is designed to protect women but which has an unintended consequence that undermines the female sex. We know that that is a concern. The provision would apply to men and women equally, and there is real potential for it to be misused and to create misunderstanding. We know that very few men suffer abuse on account of their sex. We are nailing our colours firmly to the misogynistic harassment working group mast.

Annabelle Ewing: I have one last brief question, which is for Tim Hopkins. He mentioned in passing the support that there is for the current approach in the bill in relation to intersex people and variations in sexual characteristics. We have a panel of witnesses later this morning who will discuss that in a bit more detail. He will recognise that the support for that approach is not by any means universal. For example, dsdfamilies, which will be giving evidence later, takes an entirely different view.

Tim Hopkins: I have a couple of points to make on that. First, I know that in some of the written evidence that the committee received, including in the evidence from dsdfamilies, it was suggested that intersexuality was somehow put into the Offences (Aggravation by Prejudice) (Scotland) Act 2009 by mistake. We were involved in the development of that legislation and in the discussions in the Parliament as the bill went through, and that was certainly not the case. It was put in deliberately because, back in 2008 and 2009, intersex people in Scotland were asking to be covered. However, it was put in the wrong place. It should never have been put under transgender identity, because intersexuality is a completely different characteristic from transgender identity. Therefore, we think that the right thing is being done in the Hate Crime and Public Order (Scotland) Bill by separating it out.

On whether people with variations in sex characteristics should be covered by hate crime law, I do not have lived experience of that, although the committee will hear from two people who have that experience later this morning. However, I can say that we have consulted organisations that are run by people with variations in sex characteristics and we have surveyed people with variations in sex characteristics in Scotland, and there seems to be wide support for including the provision in the bill. At least a significant minority of people in our surveys on the subject told us that they had experienced hate crime because of their variation in sex characteristics—the figures varied from 29 per cent in one survey to 50 per cent in the other.

Those numbers are small, so the exact figures are not statistically significant. However, they point to at least a significant minority of people with VSCs who are experiencing hate crime because of those characteristics. We argue that it should be covered because of that and because it has been covered since 2009. We should tread carefully before taking away protections that already exist.

10:15

Annabelle Ewing: That issue will be explored further. Having read the submissions, I see that dsdfamilies has concerns about the consultations,

or lack thereof, and its participation not being sought in that process. We can put those questions to the organisation later.

The Convener: We will hear from dsdfamilies and others later. Liam Kerr will ask a supplementary, and I will then move to James Kelly.

Liam Kerr: I am enjoying this evidence session immensely. I thought that Kevin Kane raised some interesting points in his response to Annabelle Ewing's questions about the working group. I took from that that you are, in principle, in favour of the working group, you can see how it could work and you would want to provide input to it. I understand that. However, I presume that, because it is a working group, it will be constituted of particular bodies and not everybody can be part of it. As the bill proposes a working group as a mechanism—which, I presume, will take evidence—how would you respond if, for example, the group did not come to you for evidence? If that is a possibility, does that not suggest that it would be better for MSPs—perhaps through the committee's consultation—to lead that process, rather than to do so through a working group model?

Kevin Kane: People on the working group should be those who are invited, such as the police, legal or bill-writing teams and those with the right experience. However, in my view, it would be preferable to include people who have lived experience and those who are advocates for particular groups and can talk to the issues. They could perhaps work alongside MSPs and elected representatives to bring that experience to bear.

Given that we could not get agreement on whether that particular aggravation should be in the bill, I put the question back to Liam Kerr: can the issue be dealt with appropriately by parliamentarians? There is also a bigger question about what, generally speaking, is dealt with by the Parliament and what can be achieved more meaningfully via a working group that presents its findings to the Parliament and works with it to get the desired outcome.

To be clear, I am not convinced that we should hand that hot topic over to parliamentarians.

The Convener: I will resist the temptation to get involved in what are and are not appropriate questions for parliamentarians. I will bring in James Kelly, who is an experienced parliamentarian, to ask the final set of questions for this panel.

James Kelly (Glasgow) (Lab): I will concentrate on the issue of support for victims of hate crime. First, I will bring in Oonagh Brown, and then I will ask Kevin Kane a question. However, I am happy to take contributions from anyone else.

Does Oonagh Brown have any views on what more needs to be done to support victims of hate crime? I am particularly interested in your views on the need for additional reporting or legislation.

Oonagh Brown: As I mentioned earlier, the key issues for people with learning disabilities with regards to exploitative crime and hate crime are about being taken seriously and the onus of their having experienced those crimes not being placed on them.

We must look at how we ensure that we do not remove human rights from people with learning disabilities when they are harmed through unnecessary adult support, protection and guardianship. Instead, in wider consultation, we need to ask people with learning disabilities who have experienced hate crime about the support that they need. In a discussion with the Scottish Learning Disabilities Observatory on research that it had recently conducted about hate crime, I heard a story in which a person who might have experienced hate crime was interviewed publicly about that. People who live in residential settings should be offered the opportunity to report crimes in private, especially where there might be people who are aware of certain things.

To go back to my earlier point, wider than that, we need to ensure that people with learning disabilities are considered valuable members of society, whose evidence as witnesses is taken seriously and valued. In addition, we want the consistent use of the appropriate adult system, where appropriate, to be looked at; we also want advocacy to be examined.

To again go back to my earlier point, we need to make sure that, through adequate data collection, people with learning disabilities do not remain invisible in those discussions. Finally, it would be immensely helpful to provide funding for police awareness and training on learning and intellectual disabilities.

James Kelly: Thank you; that was comprehensive. Your points on talking not just to disability groups but to others about what more needs to be done, and on data collection, are particularly relevant.

The final point was about training and raising awareness among the police. I go back to Kevin Kane. In response to Liam Kerr's question, you said that more needed to be done to support victims of hate crime and the example that you gave related to the police. What measures could be introduced to the bill that would help raise awareness in relation to supporting victims of hate crime and how the police deal with those crimes and with the victims?

Kevin Kane: I will leave the point about the police and how they deal with that sitting for a

minute. I have scribbled a couple of notes, because I had a minute or two to think about the question.

I will pick up on the research point first. We all agree that understanding lived experiences of hate crime would benefit everyone. Because we support thousands of youth workers, it is important for us to have an in-depth understanding of the issues, so that, when we are working alongside young people and statutory bodies, we can drive up standards, affect culture positively and talk about the impact on communities. That understanding also enables policy people like me to demand the right changes.

Earlier, a second point was made about underreporting, which I thought was important. The police run third-party reporting services. The provision has been patchy and there has been talk of renewing the services or starting them afresh. I am not aware of any update on what is happening with such reporting, but, having worked for a third-party reporting service, I know that there were issues about people understanding that the service was available. People do not need to report the crime; they can come to the service, get the support that they deserve and have the option of that organisation reporting the crime directly to the police. I am getting feedback that that is not happening.

I mentioned restorative justice in our written submission. We are interested in discussing how that fits in with hate crime and across the Government's other objectives. We appreciate that that would need to be done carefully with victims, so that it does not lead to further victimisation.

A number of years ago, pilots on restorative justice were undertaken. Local authorities' pilots showed mixed results, and there was limited take-up in schools. I wonder whether the bill is an opportunity to kick-start some of those activities again. Because the youth work sector is in the unique position in schools and communities of dealing with both perpetrators and victims of crime, we could benefit the offender and the victim and contribute to that community cohesion that we talk about so much. I would like the bigger picture to be discussed more.

Colin Macfarlane: I primarily want to back up something that Kevin Kane said about third-party reporting. Those services are underresourced and patchy but, from an LGBT perspective, they are crucial. There are LGBT people who will not report their experience of hate crime because they fear that doing so might out them. Many LGBT people are not out in their families, or out in their communities, particularly in rural areas, where the communities are smaller. Third-party reporting provides a way by which LGBT victims of hate crime can report without potentially outing themselves to their wider community. I do not think that that is acutely understood. From our perspective, it is crucial that the third-party reporting system is properly resourced.

James Kelly: Thanks. That is an important point to make.

John Wilkes: I want to add the Equality and Human Rights Commission's huge support on that point—it is so important. We are talking about the need to get the bill absolutely right and to get in place the right checks and balances so that we have a platform of hate crime legislation whereby victims can get justice and perpetrators will understand that hate crime is not acceptable in Scottish society. In all the groups that I have ever worked in that have dealt with the issue, what always comes through is the absolute devastation that those crimes can cause to individuals who are targeted because of their identity and the corrosive nature of such crimes on community cohesion. Alongside getting the law right, we absolutely must ensure that victims of that insidious issue are fully supported.

Tim Hopkins: I totally support those points, to which I will add two things. First, one way to encourage people to feel that they can report hate crime is through public awareness campaigns. We really like the fact that the Scottish Government does an annual public awareness campaign on hate crime. When people see an advert at a bus stop on Princes Street that says that there is no place for hate crime in Scotland and, in particular, they see targeted adverts on race hate crime, transphobic hate crime and homophobic hate crime, for example, they really understand the message and feel that they can report such crime.

Secondly, it is important that people have a good experience when they report a crime. The work that we have done certainly indicates that people's experiences of the police are getting better. In fact, in our surveys, the majority of people now say that they have had a good experience of the police, although a minority do not.

People find that the system is less satisfactory at the prosecution and court stages. In fact, a significant majority say that they were dissatisfied with their interaction with the fiscal and with the court process. A lot of that seems to be to do with a lack of communication and information. I know that that issue goes wider than hate crime, because people say that about all sorts of crime, but there is an issue about ensuring that the fiscal's office communicates well with complainers and that the courts communicate what the process is and what is going on better than they currently do.

James Kelly: I thank the panel for a comprehensive set of views on what needs to be done to give more support to victims.

The Convener: I echo and endorse James Kelly's comment. The committee is very grateful to all the witnesses for their evidence and, in particular, for getting us to think a little beyond the bill. For understandable reasons, the committee has been focused on what is in the bill for the past few weeks. Getting us to think about what the Government, society and the Parliament need to do to tackle hate beyond that has been really helpful. I thank all the witnesses very much.

I will suspend the meeting for around five minutes to enable broadcasting to ensure that all the witnesses on our next panel are with us.

10:29

Meeting suspended.

10:36

On resuming—

The Convener: Welcome back, everyone, and welcome to our second panel: Danny Boyle from BEMIS, Dr Jennifer Galbraith from the Coalition for Racial Equality and Rights, and Amy Allard-Dunbar from Intercultural Youth Scotland. Thank you for joining us. This is not a formally declarable interest, but I remind members of the committee that during this session of Parliament I have been associated with the cross-party group on racial equality chaired by Fulton MacGregor. Everyone should bear that appropriately in mind.

Rona Mackay: Good morning, panel. I want to ask about the different approach to race hate crime in the bill, and everything that surrounds that. We know that two thirds of all hate crime is race related. Do you believe that race hate crime should be treated differently? Should we be taking a more robust approach to it, given its prevalence, and does that create a hierarchy of characteristics?

In your answers, please also address a couple of points that were raised by the previous panel. Kevin Kane said that removing the term "insulting" from the bill would dilute its meaning, educationally and otherwise, because we know that insulting behaviour does not require there to be intent to stir up hatred. Do you agree that removing it might risk diluting the bill? The other point was raised by John Wilkes from the EHRC, who said that race characteristics would not include refugees or asylum seekers. I would appreciate it if you would address that point as well.

Danny Boyle (BEMIS): Thank you for that comprehensive question. Good morning to the committee and thank you for having us. I will make the case for why race has to be treated in a very specific function. That does not reflect a hierarchy but the reality of the prevalence of contemporary and historical racial hatred. I will place that in the context of why the definition of racial discrimination is what it is and also respond to the point about the term "insulting" and race and John Wilkes's point about asylum seekers and refugees.

First, the committee and many of the witnesses thus far have already identified that racially aggravated hate crime dominates, far and away, in the whole issue of hate crime in Scotland. It is a pervasive issue and every year since devolution it has been reflected as a significant issue.

When we are talking about race and racism, it is important to highlight why that is so important. In recent times, the issue of race and institutional racial discrimination has, globally, been put much more in the public spotlight. I will set out the context for committee members, members of the general public who are watching the meeting, police officers and anyone who is taking an interest in this piece of legislation.

First, where does the definition of

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

come from? It comes from the desolation of the second world war, the development of the UN monitoring system and the creation of the first international treaty—the International Convention on the Elimination of All Forms of Racial Discrimination—to deal with racial discrimination. That treaty came off the back of a moment of international clarity following the Sharpeville massacre in apartheid South Africa in 1960. Within a decade, the international community had come to an understanding and a recognition that race and racism was such a prevalent and significant issue that we needed to take significant action on it. Race has particular importance not only globally but in Scotland specifically, which is reflected in the significant number of racial hate crimes that occur here.

Rona Mackay referred to the word "insulting" in relation to the stand-alone offence of stirring up racial hatred. That term is pertinent because we are linking the international system to our domestic challenges. We have incorporated a broad definition from the international system into our domestic legal regime because we know that the issue of racism and race is ubiquitous around the globe. However, each jurisdiction has to have the ability to respond to the variations in racism that occur within it at any given time, which will continually evolve.

The reason that the Public Order Act 1986 contains an offence of stirring up of racial hatred is because at that time, there was in the UK a significant increase in the manifestation of far-right groups targeting people based on the colour of their skin, their ethnicity, nationality and so on. The reason that the threshold of "insulting" is in the bill is because we hear warning bells from history over a significant period of time that tell us that insulting behaviour can escalate into significant human rights violations.

Perhaps later in the session we will come on to discuss the issue of data gaps and why that is so incredibly important, but I will not go there just now.

With regard to John Wilkes's comments about refugees and asylum seekers, our position is that they would be covered by the aggravation aspect within a stand-alone offence or the stirring-up charge on the basis of their

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

We would take a slightly different view, but we would seek clarity from the EHRC on why it feels that way and whether there is a vulnerability in the law, given that refugees and asylum seekers are currently targeted consistently.

I will leave it there for the time being, but it is important to outline the historical context for the UK and for Scotland, and I hope that we can elaborate on that as we go through the session.

Rona Mackay: Thank you—that is useful. I turn to Jennifer Galbraith.

Dr Jennifer Galbraith (Coalition for Racial Equality and Rights): Regarding racism, I will flip the question. Essentially, we are saying that race should be treated differently—it should not be treated in the way that it has been treated for the past several decades. The cabinet secretary said recently at the cross-party group on racial equality that we cannot treat an imbalanced situation as balanced. We have already heard that the statistics on hate crime with regard to race are significantly higher than for other characteristics and that they make up the majority of charges and convictions over the past several years.

Regarding the term "insulting", the Scottish Government communicated in its equality impact assessment that the removal of the term could lead to people thinking that it was permissible to insult people on the basis of their race. We, too, have significant concerns about that—we agree that its removal would dilute those protections, even outside the legal context. In reality, with regard to people's everyday lived experience, it could have a potential harmful effect on black and minority ethnic communities in Scotland.

With regard to the point about refugees and asylum seekers, it is hard to imagine a circumstance in which someone is going to engage in insulting, threatening or abusive behaviour towards someone while knowing their immigration status. Although immigration status is not specifically mentioned in the bill, it would be hard for someone to know someone's immigration status before they committed an offence, so we believe that such behaviour would be adequately covered by the current provisions.

Rona Mackay: That is helpful—thank you. I turn to Amy Allard-Dunbar.

10:45

Amy Allard-Dunbar (Intercultural Youth Scotland): I do not know whether the committee can hear my audio okay. I can switch off my video if you cannot hear me—please let me know.

Rona Mackay: It is fine.

Amy Allard-Dunbar: That is fabulous. Thank you for having me—it is nice to be here and to see people I have worked with, such as Danny Boyle from BEMIS.

I will address the questions that you posed. First, race definitely needs to be dealt with separately, to echo what others have said, primarily because of the historical and institutional nature of racism. When race is hidden among other equality groups—[*Inaudible*.]—it tends to be the protected characteristic that is left behind and ignored. Progress has been made on lots of protected characteristics and groups over the years, but we cannot seem to take a lot of steps with race and race relations, because it is difficult to tackle and is so institutional.

There are problems with the current structures under which race is dealt with. A main issue relates to adopting for the consolidating bill a framework of intersectionality, which allows multiple identities to be considered in one instance—so that, for example, the experience of a black transgender man is understood as having two levels of discrimination that involve gender and race. Such a framework is difficult for reporting bodies and other people to take into account. It is an idealistic way to deal with hate crime, but we do not see the potential for it to be taken up correctly and for its operation to be understood.

For race to be understood properly, the approach needs to be separate. As things stand, institutions do not have a good understanding of racism. It is so institutional that there is so much unlearning to do. It would not be able to be tackled correctly if it was with the other protected characteristics.

On the word "insulting" in relation to race, I agree with everyone else that a big problem is microaggressions and the level of understanding of non-overt racism. Microaggressions are daily instances of racism that add up to cause significant racial trauma. A lot of them come under the term "insulting", and it would be hard to understand their impact if the term was not included in the bill. That provision needs to be kept.

I do not know whether many members have heard of the pyramid of white supremacy. The bottom level involves covert acts of racism; at the top, the pyramid goes all the way up to genocide. When insults are continually allowed at the bottom level, the discrimination and violence can escalate to the point at which people can be vilified and at which violence is accepted. As I said, the pyramid goes all the way up to genocide. There is not a point at which action should start—everything must be included.

As for including immigration status, we see that people understand race as a clear thing, as it is a protected characteristic. It would be understood if race was dealt with differently, and we think that it adequately covers immigration status in a broad and general sense.

I hope that that covered everything. I am sorry about my video and audio issues.

Rona Mackay: That is fine. We heard the second part of your response a bit better when you were on audio only.

Can more be done on race? Are we being robust enough? I know that we will flesh this out in further questions from my colleagues, but what do you think about it?

Amy Allard-Dunbar: Race has definitely not been dealt with robustly enough; otherwise there would have been significant improvements that were easy to measure. It is quite disheartening that so many other groups with protected characteristics have made significant progress, over the years, and it seems that race just does not make any significant improvement.

I know that it seems like a very small thing, but, for example, a Christmas advert showing a black family went out yesterday, and it received so many complaints and insults, and so much hatred and racism in comments on social media. The tiniest things, such as a Christmas advert that features a black family, receive so much backlash. Clearly, if something so tiny is such a problem for the Scottish population, race is not talked about enough or understood correctly.

I think that the main problem is that people are afraid of getting it wrong. I know that it is really difficult to talk about and to tackle if you are not a person of colour—if you are not black—but that really needs to be done now, because the people who are suffering most are young people of colour, in particular, and their communities in general. It is really difficult to advocate for yourself and do all that work by yourself. We really need people in positions of power, like yourselves, to be able to elevate the discussion, provide equitable support and start making lots of real headway when it comes to race, because it is just not getting there.

Rona Mackay: Okay. Thank you, Amy; you made a very strong point.

I think that Danny Boyle wants to come in. I am not sure whether Liam McArthur wants to come in.

The Convener: Rona, if you will bring in the other two witnesses, I will bring in the other members.

Rona Mackay: Sure. Danny, do you want to come back in?

Danny Boyle: Thank you very much. I will be as brief as I can.

Amy Allard-Dunbar has raised a number of critical points. One of the big challenges, not just for the committee but for Parliament and society more broadly, is to find where the responses to the challenges that Amy has identified are most appropriately situated.

Amy raised issues about microaggressions and the experience of being a young person of colour or of an ethnic nationality or origin. In Scotland, the reality is that those microaggressions are very unlikely to meet a criminal threshold—either for a stand-alone offence or, certainly, for an offence of stirring up racial hatred. That is where the question lies, to us as a society and to the committee in whatever deliberations you progress: how do we challenge the microaggressions, while also using the—[*Inaudible*.]

Rona Mackay: I think that Danny may have frozen.

The Convener: He has just dropped off the connection, so we will try to reconnect with him.

Jennifer Galbraith wants to come back in on this, and then we will move on, if that is all right.

Rona Mackay: Sure.

Dr Galbraith: I want to add a point of clarification on refugees and asylum seekers. If there was any doubt on that, it would be worth doing a review of evidence of existing cases, to see if there was indeed a gap. Having said that we believe it would be covered, we would need a review as well, just to make sure.

Rona Mackay: Thank you.

Liam McArthur: My question is probably directed most at Danny Boyle so, if he has dropped off the call, the point may be moot. I will ask it of Jennifer Galbraith and Amy Allard-Dunbar as well.

Danny Boyle made the point that there can be an escalation in terms of insults, abuse and more serious behaviours, and that, if the issues are not addressed early enough, the risk of escalation only increases. I think that we all accept that. I also accept the point about the differing nature of hate crime in relation to different protected characteristics.

My concern, which we have also heard from other witnesses, is that, if we set the criminal threshold too low, we risk capturing things that we should not criminalise but address through other means, whether that is education or other interventions. Perhaps we could start with Amy and Jennifer. It would be unfair to ask Danny Boyle to respond, if he has not heard the question.

Amy Allard-Dunbar: I am happy to start. That segues nicely on to what I wanted to ensure that we covered next, which is alternatives to the current systems. Although it seems a very idealistic notion, it would be great to defund and restructure the current systems in a way in which all protected characteristics in society and all groups that have faced significant oppression would adequately be supported by the systems in place. Our organisation has produced a number of reports—they are available online—that look at the relationship between young people, the current justice system and the police and the level of distrust. We find that the ability to understand and have trust in those systems is not there at all. We agree that moving to alternatives would move away from the need to criminalise everything when it comes to this bill.

If we move to alternatives such as restorative justice and a community support network that is run by people with lived experience of hate crimes, the benefit would be that, as well as not criminalising everything, we would pick up on everything, rather than ignoring the microaggressions, for example. We could work on it through education, and we have found that peer education works really well for incidents of racism because it enables people to understand and to put themselves in the victim's shoes. We think that those means would deal with a lot of the issues that have been brought up with regard to that.

I hope that that answers your question.

Liam McArthur: That was helpful. Does Jennifer Galbraith want to say anything?

Dr Galbraith: Regarding the lowering of the thresholds, I can only speak about race and not the other characteristics, but insulting has in essence been part of the legislation for decades. If there was an issue with it, I am sure that we would have found out by now. With regard to the other characteristics, I meant to add earlier that, if other groups want the protections to be extended and there is evidence that they are needed, we would have no objection to that.

Liam McArthur: I see that Danny Boyle is back with us. My question was in response to something that you said earlier, Danny. Amy Allard-Dunbar picked up the point about the risk of escalation of the microaggressions that you talked about and where those can potentially lead if they are not addressed. My question was whether the criminal justice setting needs to engage with that or whether there should be other interventions that we hope would reduce the risk that you talked about, perhaps through education or, as Amy said, restorative justice options.

Danny Boyle: I am happy to respond to that. I do not know when I got cut off before so I will be brief. I am competing with my 18-month-old, who is doing a TinyTalk signing class at the moment, so I apologise for that.

The point about microaggressions is that we cannot completely ignore the issue. I clarify that I was not saying what Liam McArthur suggests. However, for the purposes of the committee and the bill, it sits separately from considering what our interventions need to be. As Liam McArthur summarised nicely, Amy Allard-Dunbar picked up on some of the non-traditional interventions that require to be taken forward.

I highlight two parallel issues, which are currently under review by the international United Nations Committee on the Elimination of Racial Discrimination and pertain specifically and directly to Scotland. There is a point about education and a point about racially aggravated hate crime data disaggregation. We need those two things to happen concurrently in order to have an understanding of where non-judicial interventions need to be prioritised and taking place.

On the curriculum, as the committee has identified, the acceptability of individuals' behaviour with regard to microaggressions derives to a degree from a perception that is based on the experiences of communities—historically, past and present, in other jurisdictions as well as here in Scotland and the rest of the UK—of British colonialism, imperialism, the slave trade and other grave human rights violations. Those building blocks have enabled people over a sustained period of time to view people of colour or of different nationality or ethnic or national origin as somehow worthy of disdain based on those characteristics.

The on-going point in the Scottish education system is to unpick the legacy of colonialism in our devolved areas of governance and in education in order to understand the impact of that global vision on the different communities that exist in Scotland and the microaggressions—or other prejudice or inequalities—that might flow from it, which come from that hierarchy of understanding of different communities.

A full disaggregation of data on the nature of racist hate crime has to happen alongside that process. We need to know which people—black, white, Asian and other—are the targets of racially aggravated hate crime in Scotland in order to inform those non-judicial interventions, and a lot has to happen around that issue.

11:00

Liam McArthur: I know that others want to come in, but I will leave them to do so at a later stage.

The Convener: The other witnesses want to come in, but Shona Robison can invite Jennifer Galbraith and Amy Allard-Dunbar to say what they want in addition to a response to her questions.

Shona Robison: I want to pick up on the provision in the bill for a general defence of reasonable behaviour along with protection for freedom of expression in relation to specific issues. We have received a fair amount of evidence that argues that those provisions need to be strengthened. What are the witnesses' views on that point?

Dr Galbraith: With regard to freedom of expression, our view is that there will never be a situation wherein abusive or threatening language that is based on someone's race is appropriate. I cannot address the other characteristics—I know that the bill largely discusses religion and sexual orientation.

What was the first part of your question?

Shona Robison: It was about the general defence of reasonable behaviour and your views on whether the provisions need to be strengthened.

Dr Galbraith: I am looking into that question at the moment, so I would be happy to send something to the committee afterwards if that would be useful.

If I am allowed, I would like to jump in on the point that I wanted to add earlier about other interventions. It is a two-way process: we need interventions to stop low-level racism—if we want to call it that—and also robust legislation to deal with the actual hate crime in order to communicate to society that that behaviour is not tolerable.

Amy Allard-Dunbar: With regard to the reasonable behaviour provision, I do not have much to add. Intercultural Youth Scotland was brought late into this process, so I did not have time to adequately prepare to give you our perspective on the issue.

On your other point, I agree with what Jennifer Galbraith has said on ensuring that every level is adequately covered in the bill. Nothing should be excused at this point.

Danny Boyle: I will make two brief points. We are not aware of the general defence of reasonable behaviour having been a problem in past years in relation to the prosecution of offences involving the stirring up of racial hatred.

However, I will make a general point about ECHR compliance. Although we can see no problems coming down the line as regards the bill's provisions on stirring up racial hatred, there will have to be consensus on the other characteristics. Those will have to be watertight, because there is such significant interest in the legislation from so many different areas. We would not want to see the beneficial and positive aspects of consolidating hate crime law, which will make it much easier for people to access remedies, to be undermined by an ECHR compliance case that would put the bill's whole approach in jeopardy. We therefore appeal for consensus in relation to the other stirring-up offences in the future.

The Convener: Liam Kerr will wrap up our questioning on that aspect of the bill, after which we will move to questions from John Finnie.

Liam Kerr: Several of our witnesses, including those on the earlier panel, have made points about training, especially for the police and for court staff. We have also talked about restorative justice and wider public education. Does any of you have a view on whether the bill's financial memorandum or, more generally, the resources behind it make adequate provision for what needs to be done to make it work? I put that question first to Danny Boyle.

Danny Boyle: Thus far, we have not had an opportunity to review the full financial memorandum. However, I will make general points about what we would like to happen on resources.

I know that the Scottish Police Federation has identified concerns about the retraining of officers to cover all the different circumstances that might prevail, given the bill's provisions. However, our position is that that is a fundamental responsibility of those who are here to serve law and order, be that the Crown Office and Procurator Fiscal Service or Police Scotland. Individual police officers should be given adequate training, and the financial support to progress it, to enable them to

have a comprehensive understanding of the definitions for the different statutory aggravations.

I would like to think that we could support such aims not only for the police but for society more broadly. The story that I put forward earlier about where the whole approach derives from, such as the United Nations system that emerged at the end of the second world war and the global consensus on apartheid, is very interesting and is one that we should know, anyway. Why our hate crime law—

The Convener: I am sorry to cut across you but, with the greatest respect, we do not have time to go through all of that story this morning. You have already mentioned those aspects. Mr Kerr asked a specific question about the financial memorandum. I ask you to stay focused on that, which would very much help the committee in its deliberations.

Liam Kerr: Unless Danny Boyle has anything else to say, I will put the same question to Jennifer Galbraith.

Dr Galbraith: I do not have anything to say on the financial memorandum. I simply reiterate that we need additional investment in training, and more BME recruitment for the police force and for agencies in general. I would be happy to write to the committee on those aspects. I am aware that Her Majesty's inspectorate of constabulary in Scotland is currently carrying out a thematic review of hate crime, which should also cover aspects of the subject.

Liam Kerr: Would Amy Allard-Dunbar like to comment?

Amy Allard-Dunbar: I also have not had time to go through the financial aspect adequately. I simply echo everyone else's analysis that the police currently do not have adequate training. They do not have significant levels of anti-racism or cultural proficiency training; neither do many other people in our institutions that would deal with the processing of hate crimes. Therefore, currently, such institutions are not adequately prepared to deal with racism as a hate crime.

Liam Kerr: That is helpful—thank you.

John Finnie: As I did in the earlier evidence session, I want to ask about the aggravation of offences by prejudice. The continued use of aggravations as the core method of prosecuting hate crime in Scotland has been broadly welcomed. If any panel member has a specific comment on that approach, I would welcome it.

If not, I would like to come to Mr Boyle. If you were watching the previous session, you will know that I mentioned the call by BEMIS, which other organisations have joined,

"for a legal requirement to be integrated into the Bill that places a duty on the Scottish Government, Police Scotland, and ... other relevant duty bearers to develop a bespoke system of ... hate crime data collation and disaggregation"

across all characteristics that are covered by the proposed legislation. Will you comment on that, please?

Danny Boyle: I would be happy to. When the regional police forces were amalgamated into Police Scotland—it was in 2014, if memory serves me correctly—we lost the ability to have any disaggregation on the nature of the victim, complainer or witness of racially aggravated hate crimes and incidents in Scotland.

As I have mentioned, we have international oversight of that. In order to have a coherent response to disaggregated data on hate crime, rather than getting block figures of 4,500 in 2017-18 or whatever it might be, we need to know which ethnic groups are being targeted. As an example, the figures that we have available, which we have provided to the committee and which are from 2004-05 to 2013-14, show that, whenever there was an international terrorist incident, we saw a significant spike in victims, witnesses and complainers being of Pakistani ethnicity, which was likely linked to Islamophobia.

It is incredibly important that we have the data on a rolling basis, because the nature of racially aggravated hate crimes evolves in different circumstances and in different times. I will give an example of an issue on which we are dealing with Police Scotland and the community involved. As a result of the perceived origin of the coronavirus pandemic, we have seen an upsurge in racist incidents and hate crimes affecting east and south-east Asian communities.

It is important that we have an annual disaggregation of data not only to inform non-judicial interventions but to forecast potential vulnerabilities for different groups due to geopolitical situations.

John Finnie: Would either of the other two witnesses like to comment on that, and particularly on the benefit of the data for non-judicial interventions, as Mr Boyle highlighted?

Amy Allard-Dunbar: I echo what Danny Boyle said about the data allowing us to map which groups are being disproportionately targeted at particular times. As he highlighted, since the coronavirus, there has been significant increase in racism towards south-east Asian and Asian communities. In addition, particularly after Brexit, there was a big increase in hate crime towards people who are—or are even perceived as being—from other parts of Europe. It is really important to map that, because that helps us to understand how society responds to events,

which, in turn, reflects their general perceptions and views about those groups. As Danny Boyle said, it is important to understand that, not as one large number, but in terms of its individual parts.

Dr Galbraith: We included in our submission a proposal that there should be a reporting requirement on ministers, which was based on the provision in the Domestic Abuse (Scotland) Act 2018. We want an annual report to be produced, which would include a breakdown of statistics and disaggregated data on the ethnicity of the accused and victims, using the census categories.

I believe that having a requirement to produce data alone might not work in practice, because that requirement is already in place for the public sector equality duties and we already see that that does not work in practice. If there was to be a data requirement, it would have to be strict.

John Finnie: I recognise the wider benefits that could be delivered if that were included.

In line with existing legislation, the bill states that the court must make clear what difference an aggravation has made to the sentence that has been imposed. Lord Bracadale has recommended removing that requirement. Is the retention of that helpful, perhaps with regard to the transparency of sentencing?

Dr Galbraith: We believe that it is helpful, and we agree with keeping the transparency around additional sentencing that aggravation adds on, because it gives validation to victims that their complaints have been heard and that racism is being treated appropriately. It provides an important support for victims and gives them more confidence in way in which the criminal justice system tackles racism.

11:15

Amy Allard-Dunbar: Could you repeat the question? I think that I misinterpreted it slightly.

John Finnie: In line with existing legislation, the bill states that the court must make it clear what difference an aggravation has made to the sentence that has been imposed. Lord Bracadale recommended removing that requirement, and my question was whether you believe that the retention of the requirement is helpful, perhaps with regard to transparency and sentencing.

Amy Allard-Dunbar: Yes, and I would add that the retention of that requirement is necessary. As Jennifer Galbraith pointed out, it is essential to helping people understand that racism is being taken seriously and is being covered adequately. Additional provisions are always necessary when it comes to dealing with matters of race. Retaining the provision would provide a lot of clarity and transparency. I hope that that answers your question.

Danny Boyle: I concur with my colleagues. Someone in the previous panel talked about how important it is that individuals see themselves in the implementation of this legislation. For those reasons, we support the retention of that aspect.

Liam Kerr: Fulton MacGregor and Annabelle Ewing have questions about hate crime characteristics.

Fulton MacGregor: I have a general question. Do you have any concerns about the way in which the various hate crime characteristics are defined in the bill, and are there any other characteristics that you think should be added? I would like Dr Galbraith and Amy Allard-Dunbar to answer that before Danny Boyle, because I have a wee additional question for him.

Dr Galbraith: This might be quite a predictable answer, but I can comment only on the race provisions. We are happy with how race is presented in the bill, and I cannot really comment on other characteristics, and there are no other characteristics that I can think of that should be added.

Fulton MacGregor: It is helpful to have that on the record.

Amy Allard-Dunbar: The issue of how age is understood in this regard is quite interesting. I think that, in terms of who is in a vulnerable group, that characteristic is usually understood to relate only to older age groups. I think that, if the issue of age is to be understood fully in this regard, it needs to be understood from the perspective of young people as well, because a lot of young people do not know their rights and it is difficult for them to have the necessary confidence to report or to feel supported when doing so. If age is to be included as a characteristic in the bill, the perspectives of older people and younger people should be considered.

Fulton MacGregor: We heard something similar in relation to young people from a witness on the previous panel.

Danny Boyle, I would like to ask the same question of you, but I would also like to give you an opportunity to put on record your view about whether sectarianism should have been addressed in the bill. Obviously, it has not been. Do you think that it should have been defined, or do you feel that a statutory aggravation or stand-alone offence relating to sectarianism should have been created and added? I asked panel members that question last week. I do not know whether you were following that discussion, but I thought that you might like to have an opportunity to address the issue of sectarianism.

Danny Boyle: I do not have anything to add to what my colleagues outlined in response to the first part of your question. On sectarianism, our position, based on the available statistics, is that the community most likely to be targeted as victims of what, in Scotland, we understand to be primarily the traditional issue of inter-Christian sectarianism—although that is evolving continuously and there is a link between ethnic and religious identities—is the Catholic community. That has been the case, by far, since devolution. There are also anti-Protestant issues as well as Islamophobia and antisemitism.

To take the Catholic example, as we said in our written submission, there is obviously a close link between the multigenerational Irish community and the Catholic community. There is case law on that. For example, the case of William Walls v procurator fiscal, Kilmarnock, reflected the issues of the singing of the lyrics

"the famine is over, why don't you go home",

as well as calling someone "a fenian" b-word. That was successfully prosecuted as both religious and racial aggravation. Therefore, we see no need to create a sectarianism aggravator, because the existing statutory aggravators cover the dynamics at play and give us clearer sight of what is going on. BEMIS is a membership organisation, with members from all these communities, and, from what we have heard from them, there is zero appetite for a sectarianism aggravator. That is the long and short of it.

Fulton MacGregor: It was helpful to give you the chance to put that on the record. I am happy with that, convener.

The Convener: Annabelle Ewing is next, before James Kelly wraps up the questions.

Annabelle Ewing: Thank you, convener. My question is directed to Danny Boyle, given the breadth of the background of the organisation that he represents. Do you have any comments on behalf of BEMIS on the issue of the non-inclusion thus far of the characteristic of sex in the bill?

Danny Boyle: I can respond to that only in the context of the intersection of race and sex. We see from a number of examples of individual cases that there is a misogynistic element that is linked to the racial aggravator. There will be a working group on misogynistic harassment, which will look at the nature of that hate crime. We agree with other witnesses that the work of that group should continue. We also agree that there should be clear parliamentary oversight and participation in that group and that a human rights-based approach would ensure that women's groups are front and centre in that debate and in discussion in society more broadly. Our ask is that women from BME communities, who are protected on the basis of their colour, their nationality and their ethnic national origin, must be part of that conversation.

Annabelle Ewing: To clarify that, some people have suggested that the fact that, regardless of whatever is going to happen on any potential stand-alone offence of misogynistic harassment down the line, the lack of inclusion of the characteristic of sex now might risk sending a rather odd signal to the public. Do you have a response to that concern, which has been raised—[*Inaudible*.]

Danny Boyle: I missed the last part of your question as you cut out slightly. Could you repeat that, please?

Annabelle Ewing: I am sorry. Some people have raised concern that the lack of inclusion now of the characteristic of sex might risk sending a rather odd signal to the public. Do you have a particular response to that, in light of your previous comments on the issue?

Danny Boyle: We would need to consult our membership before I could put forward a definitive position on that.

Annabelle Ewing: Thanks, Danny. I have finished my questions, convener.

The Convener: Thank you, Annabelle—that was quicker than I had anticipated; you caught me unawares. James Kelly has the last set of questions for this panel.

James Kelly: I will concentrate on the issue of support for victims of hate crime, starting with a question for Jennifer Galbraith. Can any additional measures be taken in education or reporting in order to provide more support for victims of hate crime?

Dr Galbraith: Quite a few additional measures could be taken. CRER has previously called for the formation of advocacy groups to support victims all the way through the reporting process to prosecution. That ties in with the issue of underreporting.

In our submission, we advocate the inclusion in the bill of a duty on ministers to promote the reporting of hate crimes, similar to the duty in the Social Security (Scotland) Act 2018 to promote social security take-up. Such promotion could include the formulation of strategies to address specific areas of the hate crime reporting system, such as the provision of support, where improvement is needed.

James Kelly: Does Amy Allard-Dunbar have any comments?

Amy Allard-Dunbar: Your question segues nicely into what I had hoped to bring up. It speaks to the need for alternatives to the current system, because support for victims of hate crimes is not

adequate at all. That applies in particular to victims of racial hate crimes. Much of the black and minority ethnic community does not have much trust in the criminal justice system, so people do not want to get involved in the first instance. If someone chooses to report a crime and follows the process through, it will often be an uncomfortable and mistrustful process in which they do not really want to be involved.

A way to better support victims would be to set up a community support and engagement network to act as a consultation space. People could go there to seek guidance and support when they had experienced a racist hate crime or incident, and from that consultation they would get help to determine what further support they might want. The network would run primarily on the basis of a restorative justice approach. It would also function as an education centre to educate the perpetrator on the harm that their crime has caused and look to continue their education along the way. The perpetrator of the offence might carry out peer education work with others if it is clear that the restorative justice process with the victim is not working. We would also need a helpline to allow people to call in with any concerns.

One of the main problems—and the main reason why race needs to be viewed separately, to summarise all the points that have been discussed—concerns the question of who is currently in charge of determining whether an incident is a hate crime. IYS believes that it needs to be people from the communities who determine whether an incident is in itself a hate crime. The only people who are able to make that determination are those with lived experience. It is not adequate for us to think that people who have no lived experience of racism have the right training, understanding or knowledge to understand the impact of hate crime and the trauma and racial trauma involved, and to determine the impact of what was said in an incident. That happens a lot with microaggressions. A considerable number of significant steps must be taken in order to better support victims. From the IYS perspective, that would look like a complete restructuring of how hate crimes are dealt with.

James Kelly: Thank you for laying out those steps. It is vital that we build trust and confidence at a community level in order to support victims.

Can I get Danny Boyle's thoughts on that area?

11:30

Danny Boyle: I would largely reiterate what has been said, and I will add one extra thing. We have done conferences over recent years on tackling prejudice that is motivated by racial and religious hatred, and the remedy of last resort that is provided by the law is incredibly important, but it is also about advocacy groups—as Dr Galbraith mentioned—education and restorative justice.

We have missed out something. I spoke earlier about the on-going conversation that is being conducted by Amy Allard-Dunbar from Intercultural Youth Scotland and some other brave young people who have experienced the sharp end of the wedge when it comes to racism in our schools. That dialogue is being held among institutions, duty bearers and society more broadly about the issue and its impact, and the International Human Rights Committee has also picked up on colonialism and imperialism and their impact on young people.

We as adults—and as political parties, the Scottish Government and society more broadly—also have a responsibility to take this discussion on. We have a national performance framework outcome in the Scottish Government to create an inclusive national identity. What does that actually mean, though, in the context of attending to all those issues?

An interesting observation was made earlier. During the first panel discussion, Rona Mackay asked why the stirring up of racial hatred offence has not been seen to be used as much in Scotland as it has in other parts of the UK. I offer three quick observations on that. Given the legislation, we may find that groups such as the National Front and the British National Party, which have a foothold across the UK, will be prosecuted in England or Wales, even though some of their activity might be taking place in Scotland. We are aware that there seems to be more of a prevalence of the use of counterterrorism legislation to tackle some of that activity. One of the groups that we have seen manifesting most recently is Generation Identity, off the back of National Action. It was targeted using that legislation.

We have not quite got to the point of really discussing Scottish far-right activism. We are good at identifying where it is manifesting in England, but we are not so good at identifying its Scottish-specific trends. We know about all the UK groups such as Combat 18, the National Front, the BNP and the Scottish Defence League—sorry; SDL is Scottish-specific. There are other examples, however, of where the far right coalesces in Scotland, but Scotland is not quite yet at the position of having a grown-up conversation about where and why that is taking place.

All the points that colleagues have raised and we have reinforced are incredibly important, but it is high time that Scottish society figures out for itself what we mean by an inclusive national identity. We should start to identify far-right

organisations in Scotland and what they are orbiting around. It is not always football; actually, that is the least of it. Some of the best and most anti-racist actions are being taken by football clubs. The activity is occurring in different dynamics of society, be it through marching-band culture or whatever it might be. We are not quite there yet when it comes to having that discussion and those issues continue to manifest.

James Kelly: Thank you, Danny—those were points well made.

The Convener: I thank Danny Boyle, Amy Allard-Dunbar and Jennifer Galbraith for their evidence this morning. You have very much helped to put the specifics of the bill in a much broader context, which raises a whole host of questions, not only for the committee but for the Parliament and Scottish society generally. We are very grateful to you all for that.

As before, we will suspend the meeting to enable a changeover of witnesses.

11:34

Meeting suspended.

11:38

On resuming—

The Convener: I welcome our third and final panel today. With us are Claire Graham from dsdfamilies, Paul Dutton from the Klinefelter's Syndrome Association UK, Lucy Hunter Blackburn from Murray Blackburn Mackenzie and Becky Kaufmann from the Scottish Trans Alliance. I welcome all four witnesses to the committee to help us to continue our consideration of the Hate Crime and Public Order (Scotland) Bill.

I open the questioning by asking our witnesses to reflect on the amendments that the Cabinet Secretary for Justice has already proposed to make to his bill. Are they necessary? Are they sufficient? Do they go too far or, indeed, not far enough? I will start with Lucy Hunter Blackburn and then bring in the other witnesses in turn.

Lucy Hunter Blackburn (Murray Blackburn Mackenzie): Thank you for inviting us to give evidence today. I understand that there is only one amendment that it is absolutely clear that the Scottish Government has proposed, and it would remove likelihood so that there has to be intent. I know that the cabinet secretary has suggested that other provisions may need to be amended as a consequence—I think that he mentioned freedom of expression and reasonableness—but I am not sure that we have yet seen the detail on those aspects, so I cannot comment on them. I can comment only on intent.

The proposed amendment would improve the bill. We have highlighted our concerns about likelihood. However, as I will say later in my evidence, we have much bigger concerns about the long shadow, if you like, that the legislation will cast. By removing likelihood, you will slightly reduce the long shadow over freedom of speech, which we worry about, but it will remain. The proposed amendment represents an improvement—it would be wrong for me not to say that—but it far from answers all our concerns.

The Convener: What does the cabinet secretary need to do in addition to that, in your view?

Lucy Hunter Blackburn: If this is a chance for me to say up front where we are starting from, I want to make it clear that, for us, the issues are mainly around part 2 of the bill and the extent of the stirring-up offences. We are concerned that the extension of stirring up is underscoped. There is much work still to be done to make it work safely around freedom of expression.

We are comfortable with the precedent that we see in England for the extension to religion, belief and sexual orientation, because we know that that model has not caused trouble for freedom of expression there. We would support something that sticks closely to that, but we are concerned about the extension of stirring up beyond those characteristics.

Becky Kaufmann (Scottish Trans Alliance): We broadly support the cabinet secretary's proposed amendment to require intent. We feel fairly comfortable that the ability to prosecute something depending on evidence that a person intended to stir up hatred or be threatening or abusive is an appropriate and useful threshold, and we feel that it represents an appropriate protection for freedom of expression.

The Convener: Thank you, Becky. That is very clear.

Claire Graham (dsdfamilies): We believe that a change to require intent is important, but we have reservations about who defines what is hateful in general for people who are intersex and the impact that it will have on our freedom of expression to talk about ourselves, but also to help to educate people. The issue for us is freedom of speech and how education regarding differences of sex development will be affected.

The Convener: I know that members will want to pick up on what you mean by the issue being freedom of speech, but we will come to that in due course.

Paul Dutton (Klinefelter's Syndrome Association UK): We broadly support the proposed amendment. I think that intent should be

shown, as opposed to merely likelihood, so that will be an improvement to the bill. I have no further comment on that.

The Convener: Okay—thank you. I ask Rona Mackay to pick up the questioning.

11:45

Rona Mackay: As I did with the previous witnesses, I will ask about the different approach to race hate crime. The proposals do not require intent to stir up racial hatred, and they include insult. In relation to your issues, do you think that that is how it should be? Does that approach create a hierarchy of characteristics? Are you happy that race crime is being treated separately in the bill?

Claire Graham: I am sorry, but I do not really understand the question.

Rona Mackay: Race crime accounts for two thirds of all hate crime, and the bill treats it differently in that it does not require intent, and insulting behaviour is the threshold. Do you agree with that? Does that approach set race crime apart from the issues that you are concerned with? If so, are you satisfied that that should be the case?

Claire Graham: I listened to the panel that discussed race, and the witnesses seemed to welcome that. Obviously, that is not really relevant to intersex issues. I do not think that it would be helpful for that approach to be extended to us because, even within intersex charities, we do not have an agreement on what is considered to be insulting.

Rona Mackay: That is absolutely fine. I ask Paul Dutton whether he has a view. You do not have to have a view, Paul, but, if you do, speak up about it.

Paul Dutton: I have to say that my main concern is that intersex and variations in sex characteristics are included. I understand that, if race accounts for two thirds of the reports, it probably requires a higher profile, but I would like to ensure that all the other characteristics are included.

Lucy Hunter Blackburn: I think that we said in our written submission—we have certainly said it since then—that we see exactly why race is being treated separately. It has a much longer history as a protected characteristic. The previous witnesses set out in detail the origins of that. It is not my area of expertise at all, but I can see why race is treated differently. To us, treating race separately, which includes deciding to stay where we are and to have stirring-up offences that are only for race and nothing else, seems justifiable, because of the scale and history of the issue and the political circumstances around racial hatred.

Becky Kaufmann: Although we broadly support the concept of a consolidated hate crime bill and we feel that it is the most effective improvement to the law, we recognise that historically marginalised groups are not homogeneous and that the experiences of hate crime within groups can vary from group to group. As was put forth far more eloquently by the race organisations, the current structure around race seems appropriate. Similarly, we think that the proposed stirring-up offences as they apply specifically to LGBT people, including trans identities, is appropriate for our needs as a community. We do not see anything particularly problematic in the fact that race is treated differently.

We are strong in our belief that we do not want anything in the law that would be an actual or perceived rolling back of protections that any community might have had in the past. Public confidence in hate crime legislation is particularly problematic, so it is really important that the bill does not give the impression that any previously existing protections are being taken away.

Rona Mackay: Thanks very much—that is helpful.

The Convener: Liam McArthur and Shona Robison have follow-up questions about those aspects of the bill.

Liam McArthur: I think that Shona Robison will touch on some of the points around freedom of expression, but I want to ask Lucy Hunter Blackburn about the broader concerns that she talked about in relation to part 2.

Obviously, the changes in relation to intent allay some of the concerns, but I think that Lucy Hunter Blackburn is on record as saying that the provisions as a whole are not necessary and that the approach that has been taken through legislation recently adopted in England and Wales might provide more of a blueprint, in that it provides the protections that Becky Kaufmann and others referred to, but in a way that perhaps impinges less on freedom of expression.

Lucy Hunter Blackburn: I will quote Lord Bracadale in relation to the fundamental principle that needs to be looked at. He said:

> "In most cases it is likely to be quite obvious that the conduct is stirring up hatred of a group rather than contributing to meaningful public debate".

That starting point—that there is a consensus around what is hateful—is very important. If you are going to legislate for stirring up hate, you really have to have a social consensus around what is and is not hateful, which has come up in earlier discussions today. We would suggest that it is very far from clear that there is anything like a public consensus around some of the extended characteristics. For example, today's panel has

been asked to talk about transgender identity. It is therefore very problematic to legislate around stirring up hate in that context. I can talk about our experiences there later; I will not do so now.

If you are going to legislate, the reason to look at what has been done south of the border is that there is a model whereby legislation has been taken forward with protections that have managed to form a reasonably consensual picture in the way in which they are framed. However, as soon as you start doing new legislation here, it is a new ball game in relation to how solid the consensus is around what it is that you are, in fact, trying to do. Some of the earlier witnesses talked a lot about relying on the training of the police and of prosecutors, but that is no democratic exercise. Parliament needs to know what exactly it thinks people should not be able to say and what counts as stirring up. If you start relying too much on extra-legal stuff such as training, you move out of that world. You need to be very clear—as the English legislation tries quite hard to do—about what is inside and what is outside of what counts as stirring up hate. Does that answer the question?

Liam McArthur: It does, although it perhaps raises another question—which we have heard from a number of witnesses—about the difficulties that can arise when you start to try and itemise what it is that you are trying to protect, discourage or even criminalise—not just on that issue, but more broadly. I suppose that the question is, in the absence of that social consensus around what is hateful, how do you try and grab a hold of it so that, in a legislative sense, you have something that is clear to the public, police, prosecutors, and everybody who will be touched by the legislation?

Lucy Hunter Blackburn: I would strongly suggest that, in the absence of that social consensus, you do not legislate, because you cannot compensate for the absence of the consensus.

The Convener: I will ask a follow-up question on that, because I am interested in the idea that there needs to be social consensus on a matter such as this before Parliament legislates. Stirring up racial hatred was first put on the statute book in the 1960s, and the offences that we currently have in the Public Order Act 1986 are consolidation offences from legislation that was passed in the 1960s. Do we really think that there was social consensus in the 1960s about race relations? Do we not rather think that Parliament was trying—perfectly appropriately, I would say—to reshape society so that there could become consensus, rather than responding to a consensus that existed? What do you think about that, Lucy?

Lucy Hunter Blackburn: That is a fair point; I would not dispute that there are points when the political world leads. However, it depends on the nature of the fractured consensus. The sort of things that are being raised as being hateful or transphobic around transgender identity particularly are things such as how we use the word “woman”, how we use the word “man” and whether you can talk about whether people can change sex, which are fundamental points.

The nature of the dispute around those elements at least seems to be quite different from the nature of the dispute you might have seen or the argument about race in the 1960s. The kind of things that I have positioned as hateful statements in the debate about sex and gender identity are very different in their nature. The argument around how we can describe what is real underpins an awful lot of that debate and the examples, and our experiences, are very much around that. For example, the accusations by MSPs that other MSPs have used the Parliament as a platform for transphobic hatred are about people coming in to talk about women as a sex class in terms of sex-based rights. Those are very different sorts of a lack of consensus.

A lack of consensus can operate in different ways and the tensions around the speech about race in the 1960s and 1970s are different from the tension that I am observing now, particularly around transgender identity. That is an important point, so I am not saying that there is no role for politics in giving a lead; I would not want to give that impression.

The Convener: Okay, thank you. Sorry, Liam—I cut across your questions there.

Liam McArthur: That is your prerogative, convener. On the back of that, it might be helpful to hear from other witnesses, starting with Becky Kaufmann.

Becky Kaufmann: It is really important that we focus the conversation on the fact that we are talking about a piece of legislation that talks about the tiny subset of behaviour that elevates to being something criminal. We have often shifted this conversation to a broader philosophical conversation about how different groups feel about the existence of other groups. There has been robust political debate for years and years about the roles that different groups play in society and we would never, ever support any legislation that would put any damper on those discussions.

What we are specifically talking about in the bill is behaviour that clearly elevates to the level of generating hatred or encouraging others to threaten or abuse other people. Those are widely accepted principles. The Law Society of England and Wales is reviewing the current legislation down there and one of the principles that it is looking at is about making sure that the legislation

sufficiently captures threatening and abusive behaviour to different groups.

We submitted supplementary evidence in which we suggested a broad-based approach to reassuring the public. Let us be very clear that the parts of the bill that update the protections around freedom of expression are very important for the purpose of reassuring the public but the actual legal thresholds are established in other parts of the bill and those thresholds are, rightly, very high. For behaviour to be criminal, it would have to cross those thresholds.

I have been subject to a fair bit of debate that makes me extremely uncomfortable and which is often very disrespectful of my identity, yet I would not encourage that behaviour to be made criminal. What we would like to see—what we believe that the current structure, with the amendment to intent that has been proposed by the cabinet secretary, does—is for the legislation to capture the behaviour motivated by prejudice that is elevated to the level of threatening and abusive behaviour. That is where we think that the law belongs.

Liam McArthur: That is very helpful, Becky, thank you. I ask Paul Dutton to respond next.

Paul Dutton: As a society, we all understand that there are some limitations to our freedom of expression. Certainly, the law in England and Wales is very much predicated on what the person in the street would think, so there is a lot of reference in that legislation to a "reasonable person". I think that a reasonable person would see that humiliation, ridicule, bullying and prejudice are all things that are, in effect, hateful. I am not necessarily advocating prosecution, but we as a society need a way to re-educate people that those behaviours are unacceptable, and I think that protecting people in law is a first step to that particular aim.

12:00

Claire Graham: I want to go back to the comparison with race in the 1960s. We might not have understood what racial hate crime was, but we understood what we meant by different races. We have no clear understanding of what we mean when we talk about intersex. For example, the Scottish Government's equality unit website describes intersex as being male, female, in-between or neither. There are intersex people who would find that offensive. Until the Government has a real, solid understanding of what intersex is, there cannot be an understanding of what hate crime or insulting behaviour towards intersex people might look like. I am worried that the bill so far and the people who have been spoken to have not addressed that and that there is no clear definition.

Liam McArthur: Thanks. That is very helpful.

Shona Robison: I want to focus on the general defence of reasonable behaviour along with the protection for freedom of expression in relation to specific issues. The committee has received a lot of evidence that those provisions need to be strengthened. What are the panellists' views on that?

Lucy Hunter Blackburn: I do not have a great deal to say about the reasonableness defence. We said in our written submission that, for an ordinary member of the public reading that, it is not necessarily very straightforwardly worded, but I do not have a great deal to say about it.

On freedom of expression, I think that Lord Bracadale argued to the committee that everything that is included in section 1(2) and that is new compared to where we are now should be covered by freedom of expression. Earlier, people touched on the tension between having provisions in the law, as there are in England, that set out in detail what is not covered versus generic provisions. Generic ones are really hard to frame in a way that gives people immediate comfort and something to which they can point to say that what they have said is not hateful. I would like to come back at some point and explain why that matters so much in particular contexts.

I agree that the strengthening of freedom of expression protections should be part of any improvement process to the bill as introduced.

Claire Graham: On reasonable behaviour, I go back to the fact that variations in sex characteristics are badly understood. People might often say things just because they do not know. How do we judge what is reasonable? Who decides what is offensive? We would like people to be able to talk about variations in sex characteristics. If they have misconceptions, we could help to educate them. I am not sure how the reasonable person on the street would be able to judge that, because the issue is so complex.

Shona Robison: The term "reasonable" is used in other areas of the law. You are saying that, because of the complexity, using it in this context might be challenging. Is my understanding right?

Claire Graham: Yes. Because there is so little information out there and it is such a badly understood demographic, we do not know what reasonable behaviour is or what a reasonable person would be expected to understand.

Becky Kaufmann: Oftentimes, when we go off into discussions about the philosophical nuances of these things, we lose sight of the fundamental reason for having hate crime legislation. It is not about making sure that somebody meets a standard to fit into a category of victim; it is about

categorising the sorts of prejudice that motivate people who commit such crimes. It is important that our understanding is framed in such a way that we do not create unnecessary loopholes.

The reasonableness defence is a very well established principle in law across the board. Basically, it is a requirement for the proof of intent. If a reasonable person would not have intended to stir up hatred or to motivate others to behave threateningly or abusively, the threshold for proving intent would not be met and, therefore, it would not be a criminal act under the bill. It seems to me that the reasonableness defence is an integral part of how a prosecutor would approach prosecuting intent.

Shona Robison: Thank you—that was very clear.

Paul Dutton: A reasonable person does not need a huge knowledge of intersex or variations of sex characteristics. We know that ignorance of the law is generally not a defence in prosecuted cases, but the reasonable person should know that their behaviour in society must meet certain standards. Although the information on intersex and VSC is not necessarily in the public domain, standards of people's behaviour are in the public domain, and a reasonable person must know how to treat other people and what standards of behaviour are unacceptable.

If I set out to bully or humiliate somebody, or simply ridicule them because of what they look like, because they do not meet my standard of male or female, surely that would not be the behaviour of a reasonable person.

Shona Robison: I think that Claire Graham wants to come back in.

Claire Graham: I do not disagree with what Paul Dutton said. What concerns me is that there is not even consensus within intersex groups on how we talk about ourselves. I remember once reading an article that described intersex people as "queer bodied". I find that offensive as a label for me, but other people with VSC do not like the way that I talk about myself as having a medical condition. If we, as the group that is being talked about, cannot agree on what is meant by "unreasonable" or "reasonable", how will that be interpreted by other people?

Shona Robison: That is helpful. I am conscious of time, but Paul Dutton has a follow-up comment.

Paul Dutton: KSA works and collaborates with a vast number of IVSC organisations. As Claire Graham said, there are many ways in which people talk about their condition by name. Some will call it intersex and some will call it a variation of sex characteristics. Generally, we cannot list 40-odd different conditions in legislation. What we need is an umbrella term. A lot of us shy away from the term differences in sex development—DSD—because medics in particular interpreted it as a disorder of sex development, as outlined in the Chicago consensus statement of 2006. A lot of us are not happy with that and have come to the conclusion that IVSC is a better umbrella term than anything else that exists.

I merely want to say that I understand why we cannot list everything that we may have, but we need an umbrella term that tries to cover everybody.

Lucy Hunter Blackburn: When we are talking about reasonableness, it is important to remember that we are dealing with part 2 of the bill at this point, so we are talking about the reasonableness of the content of speech, not the reasonableness of behaviour in a more general sense.

I want to come back to the idea of intent. I could say things with intent and say that I just meant to communicate a message that I regarded as being okay, but other people might say that the content of what I was saying was hateful. I know that that is possible, because it is happening to me at the moment.

The limitation of the reasonableness defence arises when people do not agree on what is hateful. When a statement stirs up hate, there is a fundamental problem, in that your chain of thought breaks—a reasonable person could say, "Well, she certainly intended to say that and she certainly intended people to take that message." At that point, the question of whether that message counts as stirring up hate becomes utterly crucial with regard to how helpful the defence of reasonableness is.

The Convener: I want to pick up on what Lucy Hunter Blackburn just said. It is important that we bear in mind that reasonableness in the relevant provisions of the bill does not speak to offensiveness. One of the first questions that the committee put to the cabinet secretary, right at the beginning of the inquiry, concerned whether he accepted that the right to freedom of expression includes the right to express yourself offensively, and he said that he accepts that.

Becky Kaufmann made that point earlier: we are not talking about expressing yourself offensively; we are talking about expressing yourself or behaving in a manner that is threatening or abusive, and the question of reasonableness goes to whether the behaviour is threatening or abusive. That is the level of criminality. I hope that I am just underscoring what I think that Becky Kaufmann said in evidence this morning, although please correct me if I have misrepresented that point, Becky.

With that slight caveat in mind, I invite Liam Kerr to wrap up this aspect of the questioning.

Liam Kerr: I have one question, which I will direct specifically to Lucy Hunter Blackburn, although others might want to come in.

Lucy, I understand that you research, write and publish stuff. I asked the previous panel about the fact that several people have expressed concerns that the stirring-up offence could be used to label something as hate speech and that, even if that does not lead to prosecution, the threat of the investigation and court action could lead the writer to self-censor. You have mentioned your experiences a couple of times, but I do not know whether this issue directly relates to them. Do you think that that is a danger with the current drafting of part 2? If so, what can be done? Are the thresholds that are in the legislation high enough to prevent those adverse effects?

Lucy Hunter Blackburn: It is important to distinguish between the thresholds that are likely to trigger a successful prosecution, or even an attempted prosecution, and the wider effects of the bill. I want to very much reinforce the evidence that you got from John McLellan about what he called the chilling effects of the law.

When you legislate in this regard, you are not just legislating for the very small number of people who will be prosecuted—I agree absolutely with Becky Kaufmann that the people who are likely to be successfully prosecuted under this law will have met extremely high thresholds—you are casting a long shadow, because people will worry about investigation. John McLellan spoke eloquently about the effect of the fear of investigation, or even just of being contacted by the police at that level, even if the charges are not pursued or are dropped before they come to court after the investigation.

I mentioned our experience of putting forward an article at the Edinburgh University Press, which was a discussion of the way that policy had been formed around transgender and women's rights in prisons in the census. When the article neared the point of publication, an internal memo at the EUP that discussed it said:

"It ... expresses anti-trans sentiment and also uses terms that are discriminatory and insulting towards trans women (for example, the use of the word 'women' as specifically excluding trans women)."

The memo went on to say that publishing would be

"morally wrong and socially irresponsible",

and to compare the article to antisemitism and Islamophobia.

12:15

In that context, the matter was dealt with as an internal publishing issue and the article was published. I am absolutely sure that, if the legislation that the bill proposes had existed, it is likely that the publisher would have had in front of it the potential of committing a stirring-up offence. Publishers will worry about that, and I know that writers will.

I believe strongly that John McLellan's points need to be taken seriously. It is not just about how hard it is to get a prosecution, as the thresholds in the bill might be high enough in that regard; it is about the wider side effects on behaviour, which are important.

I noticed that when Michael Clancy talked to the committee about the private dwelling defence, he said that he does not think that

"there should be a sanctuary when it comes to hate speech."—[*Official Report, Justice Committee,* 3 November 2020; c 9.]

He used the term "hate speech", which struck me as interesting, because the bill does not consider hate speech; it refers to the "stirring up" of hate, which is a distinctive and different offence. Even in the context of the committee's discussion of the bill with someone from the Law Society of Scotland, one begins to see a shading of the way in which the legal proposals are discussed.

The reliance on training of or guidance to prosecutors or police officers is not a strong protection for people in my situation and others who might be worried about being caught up in the wider shadow that the bill casts. Calum Steele from the Scottish Police Federation and witnesses on the committee's religious belief and faith panel made those points, too, and I want to echo them.

To give another example from academia, we referred in our written evidence to stickers at the University of Edinburgh that said:

"Woman. Noun. Adult human female".

The Scottish Trans Alliance suggested that people might want to refer those stickers to the police, and the university did so as potential hate incidents. We need to consider the level at which hate and the stirring up of hate, theoretically in that case, are perceived. We need to be careful to understand how widely the net is cast as hate—not just as offence, but specifically as hate.

I am conscious of your time; I hope that that is enough.

Liam Kerr: I am grateful, and I know that Becky Kaufmann would like to say something in response to that.

Becky Kaufmann: We have to realise that the premise of the question presumes the existence of

a power relationship in hate crime law that just does not exist. The power relationship across hate crime law exists with the police and prosecutors, and not with the victim. Just because a victim feels offended by something, that does not mean that somebody will be prosecuted.

In my first-hand experience, I cannot name a person who was a victim of such offences that definitely crossed thresholds and should have been considered hate crimes under the existing legislation and who felt that the police overinvestigated. I have a lot of examples of people who feel that the police underinvestigated.

It is particularly important to talk about the reality of how hate crime works in practice. We have clear statistics that show that hate crime is massively underreported. Hate crime law does not capture the majority of hate behaviour. The new law is not likely to capture much more behaviour than the old ones have. I find it downright absurd that people are creating a theoretical bogeyman and saying that standing up for communities that, historically, have been marginalised in law will somehow undermine the fairly robust tradition of freedom of speech and expression that exists in this country. The actual, practical reality is that people do not report hate crimes and that hate crime legislation does not protect them from really distressing and harmful behaviour.

The Convener: I am sorry if Lucy Hunter Blackburn thinks that I am picking on her, but I would like to press her a little on what she said in response to Liam Kerr. The conversation between her and Becky Kaufmann goes right to the heart of the concerns and controversies that exist about the bill.

Lucy, I think that I heard you say that, if you had submitted your article to Edinburgh University Press after the bill had come into force, you think that it would not have been published. If I have heard and understood you correctly, how can that be anything other than a completely unreasonable interpretation and application of what the bill says? As I have already tried to emphasise in my questions, the bill seeks to criminalise behaviour that is threatening or abusive. How can it be even in the ball park of reasonableness to argue that submitting, to a journal published by Edinburgh University Press, an academic article that describes women in a certain way meets that threshold of criminality?

Lucy Hunter Blackburn: The way in which such things operate is not constrained by people making careful decisions about what might happen down the line in a court case or prosecution. As John McLellan has argued very strongly, from his experience in the world of journalism, the difficulty is the fear of criminal prosecution. People will go a long way to avoid the risk of being caught up in any kind of police investigation or other problem with the authorities. That is where the worry lies with the bill. It is not about who will end up being prosecuted; it is about how the bill will be interpreted.

There is caution among publishers. The publisher that I mentioned went to its lawyers to get a view on whether our article contravened university policy, although the only fact that it had about it was our use of the word “women”. People are being very cautious. Also, that is just one example, in the context of breaching university policy. Once you bring in the criminal law, people will become far more cautious again. I noticed that both Colin Macfarlane and Tim Hopkins said that they would expect the new law to be tested, and that it was normal for people to bring forward cases in order to do so. We will see that happening, and no one wants to be that test case.

I very much appreciate Becky Kaufmann’s points. I absolutely accept that, as regards what we might call part 1 hate crime that is directed at people, such matters will be underreported. However, once we start getting into the broader concept of stirring up hate, which is a different type of abuse and threat, the question of what is abusive in that context will need to be established in law and to involve precedent. We will not start from a baseline for the new characteristics of what counts in such contexts.

I raise the matter not because I think that it would be a reasonable judgment—I do not think that it would be, and nor do I think it a reasonable judgment on the part of the University of Edinburgh to have referred to the police the use of stickers that said, “Adult human female”. However, the STA itself encouraged that process. There is not a strong consensus about where the lines fall on what it is reasonable to say, and how.

The Convener: Thank you. Paul Dutton and Becky Kaufmann want to come in briefly on the issue, and then I will hand over to John Finnie, who is waiting patiently—I am sorry to delay you, John.

Paul Dutton: If how we look after minorities is a measure of our society, we must not avoid creating protections just because it makes academic publication difficult. I agree that academic study requires some protection—I say that not just out of concern for my published work—but the protection of minorities is surely a greater requirement.

Becky Kaufmann: I want to make a brief clarification of fact on the issue of the stickers. The STA was not approached, and nor did we give any advice to anybody as to whether they should be referred.

The Convener: Thank you—that is helpful.

John Finnie: I want to ask about aggravations. The general approach to dealing with hate crime is the continued use of statutory aggravations as the core method. That has been broadly welcomed. Do any of the witnesses disagree that that approach should continue? If not, I will move on to a supplementary question.

There seems to be consensus on that issue, as, indeed, there was with the other witnesses. I will ask the supplementary question that I put to the previous panels, and I ask Becky Kaufmann to respond first. The Scottish Trans Alliance supports the development of a code—a bespoke system of hate crime data collection that would facilitate disaggregation across the characteristics that are covered by the legislation. Will you comment on that aspect, please?

Becky Kaufmann: Certainly. As has been mentioned by a number of the race groups today, it is difficult to plan and build broader community programmes that encourage cohesion and ultimately get to the root cause of hate crime without having a reasonable picture of where the crimes are taking place. We are cognisant of the fact that updating data systems can be incredibly complicated and expensive, but we are aware that Police Scotland, unfortunately, does not have a particularly efficient method of collating, reporting and disaggregating data, which would be useful for equalities organisations.

I am aware that sometimes—I base this on a lifetime of working in various public bodies here and in the United States—it ultimately takes the placing of a requirement under a piece of legislation to get the ball pushed in the direction of improving data collection systems. Data is incredibly useful and powerful, and we would like to see an improvement in the data and its availability.

John Finnie: In one of your earlier responses, you used the term “underreporting”. If you have no confidence in the existing system, how is it that you believe there to be underreporting?

Becky Kaufmann: We carry out a wide range of community engagement activities. The most recent piece of hate crime research that the Equality Network and the Scottish Trans Alliance carried out identified that about 74 per cent of LGB people and 80 per cent of trans people have experienced a hate crime at some time in their lives, and nearly two thirds of those happened within a year of our research being conducted. However, the most troubling statistic in the research is that 71 per cent of our respondents said that they never report it—they have never gone to the police.

The feedback that I get—this is a huge part of the community engagement element of my role—is that there remains a fundamental need to improve the level of trust in the system within trans communities. We need to remember that it was fewer than 30 years ago that the police were in direct opposition with LGBT communities, and painful memories go back a long way.

There is a presumption among many of us who have the privilege of being more middle class and coming from more established societies that people wearing uniforms and badges and the criminal legal system are always the good guys, but that has not always been the case. We have seen that within the past year, when the Parliament passed legislation removing the felony convictions of gay men. The criminal legal system sometimes gets it wrong, and there is a lack of confidence. Therefore, there is a lot of underreporting, because there remains a lack of confidence.

12:30

John Finnie: I am conscious of time, but I have a question for all the panel members. In line with existing legislation, the bill states that the court must make clear what difference an aggravation has made to the sentence that is imposed. There is an argument that that will lead to increased transparency in sentencing. Will the witnesses comment on that, please? In the first instance, I put that question to Claire Graham.

Claire Graham: Sorry, but can you repeat the question?

John Finnie: In line with existing legislation, the bill states that the court must make clear what difference an aggravation has made to the sentence that is imposed. There is a view that that can lead to increased transparency in sentencing. Will you comment on that?

Claire Graham: To be honest, I do not really have a comment on that. Our main concern is whether variations in sex characteristics should be included at all. We do not think they should be.

Paul Dutton: As Becky Kaufmann partly pointed out, because people like us do not exist in the protection legislation at the moment, there are basically no stats on how often we report crimes that relate to us as people. I have research from 2009 by the University of the West of England Bristol, which contains a lot of anecdotal evidence of behaviours being inflicted on people that might have resulted in court cases in other circumstances.

As far as aggravation and transparency in sentencing are concerned, I would like to think that, if those things reach into the public domain through the courts, there will be a degree of understanding in the community that such

behaviours are unacceptable, and that will have a deterrent effect as people will think before they carry out such behaviour in future.

John Finnie: Does either of our other two witnesses wish to comment on that? I see that they do not. In that case, I thank you very much.

The Convener: Annabelle Ewing is next.

Annabelle Ewing: I will first go to Claire Graham on the issue of intersex and variations in sexual characteristics, which has been aired a wee bit already. In Claire Graham's most recent response, she indicated that she does not think that the terminology should be included in the bill. I am thinking back to what we have heard in the session thus far. It might be helpful if, for the record, she could explain on that specific issue why she feels that the term should not be included in the bill.

Claire Graham: There are a few issues with it. First, there is no clear definition of what we mean by "variations in sex characteristics", so who would be captured by that? I also think that there is not a strong evidence base. I agree that it needs to be separated out from trans in definitions, but there is no evidence base to show that it needs to be included as a separate characteristic.

The Equality Network conducted a survey of LGBTI people and there were 17 intersex respondents. Of those, 29 per cent said that they had experienced some form of hate crime—that boils down to five people who have said that this is something that they would need. The Equality Network has said that there is an issue with the survey in that it was self-selecting and was heavy on LGBT people—that is, it was perhaps not inclusive of people with variations of sex characteristics who do not identify as LGBT.

As I said, the biggest issue is that there is no understanding of what we mean by variations of sex characteristics. It is a broad and vague term and I do not think that its use necessarily protects the people who we intend to protect. Where people with variations of sex characteristics or a difference in sex development might experience discrimination, it could be covered by other hate crime legislation. For example, an offence against someone with a visible difference could be covered by disability legislation; it does not have to be dealt with on its own.

Annabelle Ewing: What do you see as the key disadvantage of including such an approach in the bill? On balance, do you think that it would cause harm rather than being neutral? Obviously, you do not think that it is positive. What do you see the consequences being?

Claire Graham: As I said earlier, there is an issue to do with the fact that, even in the intersex community, for want of a better word, there is no consensus about how it should be spoken about. I worry that the speech of people who have DSDs and want to talk about their bodies or medical conditions could be policed in a way that would make it difficult for them to do so, because the way in which they speak about themselves could be perceived as abusive or hateful by someone else. That could make it difficult to talk about variations of sex characteristics and to encourage greater public awareness.

Annabelle Ewing: Do you feel that you have had the opportunity to make your point in discussions with the Scottish Government? Have you had your shot in terms of consultation?

Claire Graham: Not really. We are grateful for the opportunity to speak to you today, but I think that we were left out of consultation in the lead-up to the publication of the bill.

One of the frustrations that charities such as ours have is that, when we talk to the Scottish Government, intersex is always taken as a political identity and we are directed towards inclusion. We feel that the places where improvements need to be made for people with variations of sex characteristics are in healthcare and peer support or psychological support. None of what is being done will address that. When we speak to people with DSDs, those are the areas of need that they highlight.

Annabelle Ewing: I do not see anybody else wanting to comment, so I will move on to my next question. Oh—I see that Paul Dutton wants to come in.

Paul Dutton: Apologies, Annabelle. I assumed that you were going to come to me and the rest of the witnesses.

I am afraid that I disagree with dsdfamilies. I think that there is a clear definition of intersex or variations of sex characteristics, which is given by the Office of the United Nations High Commissioner for Human Rights. It is quite a persuasive definition that covers gonads, genitals, sex chromosomes, body shapes and so on.

The KSA collaborates with many other support groups that cover more than 40 different conditions—we do not yet collaborate with dsdfamilies, but that can never be ruled out, of course. Our 2009 survey with the University of the West of England Bristol covered more than 300 people. From that, we can take it that this is not just a healthcare issue and not just a disability issue, although those things can apply, but that it is very much a social issue, because we all have to operate in a social world and a social community. That is not to say that we believe that this is a political matter, but, of course, politics is

all about citizens, communities and society and, as a result, we operate in those areas.

Lucy Hunter Blackburn: I defer to the other members of the panel on the question of the terminology that people prefer, whether that is VSC, DSD or whatever. However, the inclusion of people with such characteristics raises another issue, which is why, when there is a clear consensus that we are talking about a physical, biological state, that particular group has been included, but not other groups who could also be vulnerable because of physical conditions.

I will give an example. I have a good, long-term friend with a serious facial injury. Facial injury is impossible to hide. I know from spending time with them that, if you go out on the street with a facial injury, it attracts attention, and the attention that having a serious facial disfigurement attracts is not always very welcome. That group has to shelter under disability.

I would ask the committee to think about what the evidence base is for pulling out particular groups on the basis of physical, biological characteristics and what that means for the consistency of the bill in its totality.

Annabelle Ewing: Thank you for that interesting comment.

I raised with previous witnesses the fact that, as the bill stands, it does not include sex as a characteristic that will benefit from particular protection. I would like to hear views on that, starting with Lucy Hunter Blackburn, who makes a number of points on the issue in her written submission. I am not sure that the other witnesses did that, but they will also be welcome to comment.

Lucy Hunter Blackburn: [*Inaudible*.]—which I thought was very useful. He said that it is really important that people can see themselves in the bill. A group of people who cannot see themselves in the bill, as it stands, are those who are subjected to any kind of abusive behaviour or harassment—I am thinking of part 1 of the bill here—based on their sex. We know that people who are subjected to such behaviour based on their sex are almost entirely women. It is clear that women in public life attract a great deal more abusive comment based on their sex than men do.

Tim Hopkins also mentioned the annual dear haters campaign, in which women are not visible, and he spoke about the value of being able to see individual groups being discussed. We mention in our submission that, the more characteristics are covered in the hate crime legislation, the more obvious it is which characteristics are not covered. The issue becomes what forms of hate are and are not acceptable, and what messages we send. Bracadale believes that there is a strong symbolic quality to hate crime legislation, especially when it comes to stirring up, and I would not dispute that. Women are nowhere to be seen in the bill as it stands.

I have looked at and understand the arguments of those who argue for sex not to be included, which seem to be made mainly by Engender and a small group of organisations that specialise in domestic abuse, and sexual violence in particular. I do not dispute that they are important organisations that bring expertise to the table, but I do not find clear and compelling their arguments on why we should not, as a default, include sex as a characteristic that is covered. The misogyny working group could by all means continue and do the work that is planned, but that will take some time. All of us who have been involved in policy and law formulation will know that to get from where we are to law in this area could easily take two or three years.

Our strong view is that the default position should be for sex to be included. Unless someone can truly demonstrate that it would clearly be harmful to include sex—I did not hear any of the earlier witnesses provide a compelling reason why that would be the case—we think that there are strong arguments for including sex as one of the listed characteristics so that it is included in public information campaigns and we can gather statistics. Other witnesses talked eloquently in this and previous evidence sessions about the importance of statistics, but we have none.

12:45

I want to pick up in particular on what Isobel Ingham-Barrow from Muslim Engagement and Development said. She made a point about the intersection between religion and sex. Earlier, Danny Boyle mentioned the intersection between race and sex. If sex is not covered, we will not see that. I am keen for the committee to interrogate why the default position is not to start with sex. If a working group comes up with a better option that will need primary legislation, sex could by all means be taken out at that point.

On the technical point, the most compelling reason that I have seen from Engender and others for their position is the interrelationship between domestic abuse and crimes of sexual violence. They are worried about the interaction of hate there. In our submission, we suggest that there may be ways to deal with that. It could be said that, if the domestic abuse aggravator is engaged, a sex-based one would not be used—it would be secondary. However, that should not be used as an aggravation in cases of sexual assault and violence.

We can see the argument against going down the route of choosing between those and saying which cases are hate based and which are not. However, it seems to us that all the arguments for not including sex can be countered reasonably straightforwardly. The argument is that, if it is left out, the signalling of leaving it out becomes increasingly important. Other witnesses have mentioned that, particularly if stirring up is done and one half of a charged debate is protected but not the other, there will be another problem.

I hope that that is helpful.

Annabelle Ewing: That is very interesting. Thank you.

Paul Dutton: I have some sympathy with Lucy Hunter Blackburn over the inclusion of sex. When people have bad behaviour around intersex people—particularly my type of person—that is often because of perceived feminine behaviour by people who largely appear to be male. I am sure that, in the perpetrators' minds, there are issues with sex, what males and females should look like, and how they should behave. There is a broader question to answer about whether there should be some overarching protection of sex.

Becky Kaufmann: I raised earlier the point that, although we broadly support the bill's consolidation efforts and a degree of uniformity in the approach to hate crime, a variety of groups that experience negative societal behaviour do not do so uniformly and homogeneously.

Contrary to the assertion that Lucy Hunter Blackburn made, I believe that organisations such as Engender, Rape Crisis Scotland and Scottish Women's Aid have done many years of research and engaged in the process quite well. We as an organisation are quite aware that we have not done that research but that there is an on-going discussion and debate. Personally and organisationally, we would like to see that conversation play out, as a fairly large number of women's organisations have a range of opinions.

Ultimately, we would support any approach that, within the wisdom of the committee or the misogyny working group, will provide increased protection for women and society.

I hope that that is helpful.

Annabelle Ewing: One issue that has been raised already, among some others, is timing. However, that is something for our further deliberations. I thank the witnesses.

The Convener: One or two people have indicated that they want to come back in, but I have to move on to Fulton MacGregor and James Kelly, because we are rapidly coming up against 1 o'clock. Some members may have to leave for other engagements at that time and I want to ensure that all members get a chance to ask their questions.

Fulton MacGregor: I think that Annabelle Ewing covered the main issues in that line of questioning and most people had a good chance to answer so, with your permission, convener, I will ask a general question that will perhaps allow those who wanted to come back in to make a comment.

Do people have any concerns about the way in which the various hate crime characteristics have been defined? Are there any characteristics, other than the ones that we have already spoken about, that you believe should be added? I will leave it to the convener's discretion to decide whether he is okay with people who have placed an R in the chat box coming back in.

The Convener: Let us go to Lucy first and then any other witnesses who want to come in.

Lucy Hunter Blackburn: An issue that Andrew Tickell raised—and we have raised it, too—is the approach whereby just a handful of characteristics are listed and those are the only people who are covered. We have mentioned homeless people, as he has, as a group who are often targeted. This is about an aggravator, so it is a part 1 type issue. People are targeted for violence on the streets for being homeless, and there are clearly other groups who are targeted.

If I may, I will take this opportunity to draw to the committee's attention the alternative models that have been used in New Zealand and a couple of other jurisdictions, which start with a list but then you leave it open-ended and say that it is about difference. I absolutely agree that we do not want people to be targeted for violence or abuse in the street or anything like that based on them being different from others, or how they are expected to be.

The New Zealand model offers a more open-ended way of thinking about the matter. It does not tie jurisdictions into having a single set of characteristics under which they have to list who is in and who is out, which can lead to the debates that we are having this morning. The New Zealand model leaves it more open-ended. I understand that, under that model, people still have to worry about how to monitor things statistically, but I think that it is a worthwhile model. I hope that the committee will look at the scope for that as an alternative to arguing over precisely who is and is not on a list.

Given the time, I will leave it there.

Claire Graham: Something that keeps coming up this morning is that people should be able to recognise themselves in the legislation. I do not think that "variations in sex characteristics" is a

common term among people with differences in sex development, and I am not sure that they would recognise themselves within that or within the definition.

The other point that I wanted to make is that Paul Dutton said that including sex as a protected characteristic might help to include people with variations in sex characteristics, and I think that it is worth exploring that avenue and whether we are protected anyway on the basis of our sex and our differences.

Paul Dutton: On that last point, I do not think that sex is sufficient to protect us, because it is usually assumed to be, in most people's minds, typically male or typically female.

I wanted to comment on Lucy's point that it is not necessary to say who is in and who is out. I think that, once people are in and are listed in legislation, we get statistics based on that, and statistics based on reports of crime. They can then also be included in equalities legislation, which at the moment is something of a blank for people like us.

The Convener: Fulton, is there anything else that you want to cover before we move on to James Kelly?

Fulton MacGregor: No, I am quite happy to leave it at that, convener, unless anyone else wants to come back in.

The Convener: Thank you very much, Fulton. James Kelly has the final set of questions.

James Kelly: I am conscious of the time, convener, so I will go straight to Claire Graham on the issue of support for victims of hate crime. Do other measures need to be taken on reporting and on education in order to give greater support to victims?

Claire Graham: That is not something that we have much experience of, because that issue does not seem to be commonly reported by the young people and families we work with.

Extra support for people with variations of characteristics is always welcome, and there is never enough support. That is the only answer that I can give to that.

James Kelly: Okay—thank you for that, Claire. Does anyone else want to come in?

Paul Dutton: It is important to have psychological support for victims. One of the people I was talking to at the weekend was part of the 2009 study. The study concluded that how people experience high levels of emotional distress can reduce psychosocial functioning. That person had cognitive behaviour therapy 35 years after the nightmare that they described they had experienced at school and in the scouts.

I think that psychological support is understated and underrated in a lot of circumstances. Rather than thinking of these as medical or disability issues, we need to take the social and psychological sides into account.

James Kelly: Thank you for bringing that practical example to the committee's attention. Back to you, convener.

The Convener: I thank all four witnesses for sharing their time and experiences. These matters have obviously affected you all deeply and personally. My sincere thanks for the way in which you have helped the committee to understand the human implications of a number of the issues that we have been trying to talk about during recent weeks.

Subordinate Legislation

Electronic Monitoring (Relevant Disposals) (Modification) (Scotland) Regulations 2020 (SSI 2020/309)

12:57

The Convener: Our final public item of business is to consider the Electronic Monitoring (Relevant Disposals) (Modification) (Scotland) Regulations 2020, which is a negative instrument. We wrote to the Scottish Government about an element of the Scottish statutory instrument and its vires under the Management of Offenders (Scotland) Act 2019, and we have seen the Cabinet Secretary for Justice's response. Given that response, are members content not to make any recommendation to Parliament on the SSI, or do members want to progress the matter? Does anyone want to say anything? Does Liam McArthur want to comment?

Liam McArthur: I was just busily trying to type that I am content in the chat box. I had raised concerns about the challenge, not the principle of the proposal, which I was comfortable with. However, in light of the Government's response, I am happy that that matter has been addressed.

The Convener: I share that view. I think that the committee was right to raise the issue with the cabinet secretary, and I am glad that we did. The answer that we got was helpful and clarified the matter. No doubt the correspondence to which we are referring will be published on the committee's website, if that has not already happened. Other members are indicating that they are content not to make any recommendations to Parliament on the instrument.

Our next meeting will be a week today, on Tuesday 24 November, when we will continue to take oral evidence on the Hate Crime and Public Order (Scotland) Bill, including, again, from the Cabinet Secretary for Justice.

12:59

Meeting continued in private until 13:14.

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