



OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 21 June 2023

Session 6



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Wednesday 21 June 2023

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CRIMINAL JUSTICE COMMITTEE

19th Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Jamie Greene (West Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*Collette Stevenson (East Kilbride) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Tom Arthur (Minister for Community Wealth and Public Finance)
Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Michael Halpin (Scottish Government)
Katy Richards (Scottish Government)
Hilary Third (Scottish Government)
Maree Todd (Minister for Social Care, Mental Wellbeing and Sport)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 21 June 2023

[The Convener opened the meeting at 09:30]

Northern Ireland Troubles (Legacy and Reconciliation) Bill

The Convener (Audrey Nicoll): Good morning, and welcome to the 19th meeting in 2023 of the Criminal Justice Committee. We have no apologies, and Fulton MacGregor joins us online.

Our first item of business is consideration of a supplementary legislative consent memorandum on the Northern Ireland Troubles (Legacy and Reconciliation) Bill. I am pleased to welcome to the meeting the Cabinet Secretary for Justice and Home Affairs, Angela Constance, and her officials Clare McKinlay, who is a solicitor in the Scottish Government's legal directorate, and Michael Halpin, who is defence policy manager in the directorate for safer communities.

I refer members to paper 1. I invite the cabinet secretary to make some opening remarks on the supplementary LCM, after which we will move to questions.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Thank you, convener, and good morning.

The United Kingdom Government's Northern Ireland Troubles (Legacy and Reconciliation) Bill and the subsequent LCM were refused consent when they first came to the Scottish Parliament, in October 2022. The UK Government has now proposed amendments to the bill, which we received in full only on 8 June. We do not consider that the amendments satisfy the concerns that resulted in the previous LCM being refused consent by the Parliament.

In its current form, the bill still allows for the granting of immunity to people who apply for it, even though they might have committed serious offences during the troubles. In effect, the bill potentially means an amnesty for those who have committed offences such as murder or crimes involving abuse or torture, including where those crimes were conducted by agents of the state. Therefore, the Scottish Government recommends that the Parliament maintain its position of withholding consent to the amended bill.

Our reasons for doing so focus on three key areas: the ability of victims to seek justice; the Secretary of State for Northern Ireland's powers to

amend devolved legislation; and the impact on the Lord Advocate's responsibilities.

First, we do not believe that the amendments to the bill will increase the opportunity for those families and communities who have been directly affected by the troubles and are seeking justice to obtain justice or that they will ensure that those who committed offences during the troubles are appropriately held to account. We are cognisant of the fact that it is not only the Scottish Government that has concerns in that regard; indeed, the bill was opposed by all parties in Northern Ireland. In addition, the UK Parliament's own Joint Committee on Human Rights has previously raised doubts on the bill and its compatibility with the European convention on human rights. Further, the Northern Ireland office of Amnesty International UK has accused the UK Government of treating victims with "contempt" and has stated that the amendments

"do nothing to address the fundamental flaws with the bill."

Secondly, in its current form, the bill provides the Secretary of State for Northern Ireland with the ability to amend devolved legislation without having to make the Scottish Government aware of that, let alone seek the Scottish Parliament's agreement to do so. If the UK Government is to respect devolution, it should not exercise powers within the devolved competence of the Scottish Parliament and Scottish ministers unless doing so is specifically agreed.

Finally, we are concerned that the bill, even with its amendments, continues to encroach on the role of the Lord Advocate as the independent head of the systems of criminal prosecution and investigation of deaths in Scotland. The Lord Advocate's independence predates devolution and is protected by section 48(5) of the Scotland Act 1998. However, some of the powers that are proposed for the independent commission that will be created by the bill undermine that independence and breach a fundamental cornerstone of our criminal justice system.

In previous iterations of the bill, it was the case that, even when immunity was not granted, the Lord Advocate could be impeded by the commission refusing to refer appropriate cases to the Lord Advocate's office. I therefore welcome the amendment that is proposed by the UK Government that means that the Lord Advocate will now be able to direct the commission to refer such a case to the Lord Advocate's office.

However, as I have previously mentioned, the commission is also given powers to grant immunity from prosecution for the most serious of offences. In practice, that interferes with the independent decision making of the Lord Advocate in such cases, effectively making the Lord

Advocate's decision on whether to be able to prosecute subject to the decision of another person. The bill continues to cut across the Lord Advocate's role. In effect, it is the commission, not the Lord Advocate, that will decide whether a prosecution can be raised.

It is for those reasons—our concerns about the effect that the bill will have on those who have suffered and the lack of regard for the role of the Lord Advocate and the protections that are enshrined in the Scotland Act 1998—that the Scottish Government cannot recommend consent to the bill in its present form.

The Convener: We move straight to questions from members, starting with Jamie Greene.

Jamie Greene (West Scotland) (Con): Good morning, cabinet secretary and officials. I have a few questions that follow on from the cabinet secretary's opening remarks, the first of which is an overarching question on the Scottish Government's position on the concept of the bill and what it is trying to achieve.

I appreciate that the Scottish Government has questions on technical issues with regard to the role of the Lord Advocate, and perhaps it has further questions on the potential implications of the human rights aspects of granting immunity. However, fundamentally, from a policy point of view, what problem does the Scottish Government have with the concept of immunity from prosecution in return for information, for example, or with the concept of amnesty in general in Northern Ireland? What is its major substantive problem with that?

Angela Constance: Convener, I am not gonnae breenge into Northern Irish affairs. With respect to—

Jamie Greene: But this is not about Northern Ireland.

Angela Constance: Yes, but it is a UK Government bill, so it is my job to point out where it has implications for our devolved responsibilities in Scotland. Issues in and around immunity, so far as they impact on Scotland, would be for the Lord Advocate. Access to justice issues would be a matter for our courts.

I am cognisant of the fact that all political parties in Northern Ireland have raised concerns about the bill, but it is my duty to be clear to the Parliament about my objections in terms of the matters in and around the LCM and the fact that the bill continues to cut across the powers of the Lord Advocate. That is a cornerstone—it is not a technical matter but a fundamental cornerstone—of how our criminal justice system works and of how deaths are investigated in Scotland. As members would expect, the Scottish Government

has strong views on the ability of the Secretary of State for Northern Ireland to not even inform, never mind not consult, us if he steps into devolved areas. These are more than technical matters; they are fundamental.

Jamie Greene: Okay. I say respectfully that the question was about one of the three pillars that you laid out regarding your rationale for opposition to granting consent. One of those pillars was to do with the concept of whether immunity should be granted in certain scenarios, which is a philosophical question. Does the cabinet secretary not agree that that might be a useful tool for the new commission to have in the box to maintain ongoing peace? It is quite a well-established protocol; the Good Friday agreement itself was, in effect, one great amnesty for people on many sides of the troubles. Therefore, it would be a continuation of that. I am still struggling to understand what the political opposition to it is.

Angela Constance: The political opposition is as I clearly laid out in my statement. Maintaining peace in Northern Ireland is of paramount importance to everyone. I refer Jamie Greene to the views of all political parties in Northern Ireland, which, of course, take precedence over my views in this instance.

Jamie Greene: On the issue of the Lord Advocate's functions, what correspondence exists between the Scottish Government or the cabinet secretary and the Lord Advocate? As a committee, we have not seen any letters from the Lord Advocate explaining her position on the matter. Obviously, I take your word for it that the Government believes that there are issues, but what does the Lord Advocate herself say about it? Would you be willing to publish any such correspondence?

Angela Constance: I would have to seek advice on that. There has certainly been correspondence between the two Governments and between the Lord Advocate and the UK Government.

On an alignment of views, as I said in my opening remarks, we welcome the movement that has been made by the UK Government to reduce the impact on the Lord Advocate's discretion and powers. Nonetheless, the commission still has the ability to grant immunity, which fundamentally cuts across the Lord Advocate's powers.

Jamie Greene: Irrespective of what the committee discusses, the issue will probably come back to the Parliament—I believe that a debate on it is scheduled for next week. Perhaps it would be helpful if the Lord Advocate were to write to the committee or the cabinet secretary on her current position, given that any previous correspondence that is in the public domain will be from before the

UK Government's amendments were tabled. I would be keen to see whether it remains the Lord Advocate's position that she has a problem with the bill. That might make it easier for the Parliament to make a decision on the LCM. At the moment, we are hearing third-hand information through the Government rather than information directly from the Lord Advocate.

Angela Constance: I suppose that I would take issue with what might be inferred to be a slight on the accuracy of the Government's reporting. Nonetheless, what the Lord Advocate communicates to the Parliament is, of course, a matter for her. I will certainly ensure that the request for further information is communicated.

Jamie Greene: Thank you.

The Convener: Another couple of members want to come in.

Russell Findlay (West Scotland) (Con): When was the last troubles-related police investigation in Scotland?

Angela Constance: I do not know the answer to that. Officials will keep me right, but you will understand that I would not comment on any live investigations, if there were any.

Russell Findlay: I imagine that they are pretty rare, if there have been any at all in recent years. Could we perhaps come back to that?

Michael Halpin (Scottish Government): It is not something that I have information on today. We can look into it, but there are certainly no live cases currently going on.

Angela Constance: What I can say, if it is helpful, convener, is that we understand that there are no live cases.

Russell Findlay: It might also be useful to know whether there is data available on recent years.

One thing that the commission seeks to be able to do is release prisoners early as part of the immunity and reconciliation process. How many troubles-related prisoners are there in Scotland just now?

Angela Constance: I do not know. I would have to go and check that information. If Mr Findlay wants a bit of an overview of how the bill will impact on issues such as prisoners and prisoner transfer, I could ask Ms McKinlay to provide that.

Russell Findlay: I think that the submission explains how it might work in Scotland.

Angela Constance: Okay—that is fine.

Russell Findlay: I just wanted to know what the bill will mean practically, in terms of numbers, and whether the impact is more theoretical, as I

suspect, or whether there is a likelihood of it coming into play here.

Angela Constance: I do not have that data on hand, and I would have to check whether it exists and is available.

Russell Findlay: Sure.

I want to go back to the point that Jamie Greene raised about the Lord Advocate. She wrote to the UK Government and it made some movement with regard to amendments, but we do not know what, specifically, that movement was. Jamie rightly asked for that information to be provided. Is the Lord Advocate satisfied with the UK Government's response? Is the decision a ministerial decision as opposed to the Lord Advocate's decision?

09:45

Angela Constance: It is a Government decision, and the Lord Advocate is a minister of the Government.

Russell Findlay: So, there is full agreement with her.

Angela Constance: The matter relates to the impact on the Lord Advocate's powers, and I would not take issue with the Lord Advocate on that, if I can put it that way.

Let me answer the question about the change as a result of the amendment. The amendment that the UK Government has made—which is welcome but does not go far enough—will mean that, once the commission has decided that someone will not be granted immunity, the Lord Advocate could request that the case be referred to her, but the outstanding issue is that it continues to be the case that the commission will make decisions about immunity in the first instance, so it will pre-empt the Lord Advocate.

Russell Findlay: I understand. However, given that the issue is fundamentally about the Lord Advocate's independence to operate in Scotland and to make decisions as he or she sees fit, I am curious to know whether the Lord Advocate remains dissatisfied with the UK Government's position.

Angela Constance: Yes, she does.

Russell Findlay: The submission refers to the need for people who have committed offences during the troubles to be "punished". That is not a word that we often hear from the SNP Government in relation to crime. The new commission will seek to persuade people to engage truthfully so that answers can be provided honestly, closure can be given to families and so on. Do you not think that one of the potential consequences of not consenting to the LCM is that, without a UK-wide approach, there will be a

fractured approach that could lead to people not getting the closure and the answers that they need?

Angela Constance: We all appreciate the intent, but the issue is about how things operate in practice.

I point Mr Findlay to the fact that the Scottish Government has some very specific concerns in relation to how devolution operates in Scotland, the powers of the Lord Advocate and the ability of people who are resident in Scotland and who have been impacted by the troubles to access justice via the Scottish courts when the powers of the commission close off opportunities to seek redress, either civilly or criminally. Those are concerns for us here, in Scotland.

We are not a lone voice in expressing concerns—I point the member to the concerns that have been raised across political parties in Northern Ireland with respect to the bill.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I just want to say that it is inconceivable that we would support the bill. The cabinet secretary laid out the reasons for that very clearly at the start of the meeting, and I will not repeat all of them, but the standout for me is that it would deny justice to people in Scotland and Northern Ireland who have been affected by the troubles. The fact that all the parties in Northern Ireland did not support it says it all. I do not even think that we should consider supporting the bill.

The Convener: Do any other members want to come in?

Jamie Greene: Does the cabinet secretary believe that it would create any problems or any opportunities if the legislation were to go ahead without Scotland participating in it, as Scotland has a separate legal system? What risk analysis has been done of the bill passing in Westminster without Scotland participating in it?

Could that undermine any policy objectives of the legislation? Would it undermine the work of the independent commission? Indeed, could it render much of the legislation useless, for example if someone who was an accused person was residing in Scotland and would therefore be prosecuted in Scotland, rather than anywhere else in the United Kingdom? Has the Government done any analysis of what that potential outcome or scenario might look like?

Angela Constance: As the Cabinet Secretary for Justice and Home Affairs, I trust our court system and our system of prosecution. While we will continue to seek to engage the UK Government on further amendments, as you would expect us to do, the bottom line is that the UK Government can proceed with the bill. Mr

Greene will be aware of my dissatisfaction with that type of arrangement, but that is the reality that we are in. I suppose that I would dispute the premise of aspects of his question.

Jamie Greene: No problem—thank you.

Pauline McNeill (Glasgow) (Lab): Good morning, cabinet secretary. You might not be able to answer this, but, if the political parties in Northern Ireland and the Scottish Government have some issues with the way in which the legislation is framed—albeit there has been some change—what is the driving force behind the bill, if not the parties in Northern Ireland? Has it come purely from the UK Government? It seems odd. Usually, there would be a campaign somewhere behind such a measure that had been pushing the Government to do something.

Angela Constance: Pushing the UK Government?

Pauline McNeill: Yes.

Angela Constance: I cannot comment on that.

Pauline McNeill: Okay—but do you think that is a fair question to ask somebody who could answer it?

Angela Constance: Yes.

Pauline McNeill: Where is the bill coming from? That is the difficulty that I have in making an assessment on the matter. Did the Scottish Government fully review what changes had been made to the bill?

Angela Constance: Yes. They came late in the day, only on 8 June. We worked as speedily as possible on it, and we will continue to engage with the UK as much as possible, but time is short. As Mr Greene said, we anticipate debating the matter in the chamber next week. As for how the legislation will progress at Westminster, it will go to the report stage next week, I believe. Although it is not a matter for me, it is my understanding that the UK Government will be seeking to make progress with the bill before Westminster goes into the summer recess. Time is quite short.

Pauline McNeill: I am just trying to get my head round the changes that have been made. How would you describe them? Would you say that they are fairly minor or superficial? Do you think that there have been any substantive changes since we last discussed the matter?

Angela Constance: There remain fundamental concerns about how the bill cuts across the Lord Advocate's constitutional powers.

Pauline McNeill: So, that concern is still there.

Angela Constance: Yes.

The Convener: Thank you, members and cabinet secretary.

Our next item of business, under item 2, is consideration of any final issues that we would like to include in our report on the supplementary legislative consent memorandum. I open up the floor to members again, so that they can raise any specific issues that they would like to be included in our report. We will then move on from there.

Jamie Greene: The Scottish Government has been frank and open about its position on the bill—whether or not one agrees is a different matter. For the purpose of whether the committee, or indeed the Parliament, agrees or disagrees with the Government's position on the legislative consent motion, one thing that has been sorely lacking is communication from any other party, other than the conversations that we have had in evidence sessions with the cabinet secretary. If the committee had been given sight of any correspondence or communication between civil servants, Governments, ministers, the Lord Advocate, the Northern Ireland Office, secretaries of state and so on, that might have been helpful. I am not saying that I do not trust the cabinet secretary's word on the matter, but what we have heard is very much the opinion of the cabinet secretary and the Scottish Government on many of the matters before us, and it would have been helpful if some of that communication had been in the public domain—where it was not breaching any privacy or individual cases. I understand the sensitivities around that. Having sight of such communication may have helped the committee, and it could help members in the chamber next week.

The Convener: Thanks very much for raising that issue. When we were scrutinising the original LCM, there was quite a lot of good communication at that time. I would not like to say how that has continued as regards what we are considering today and in relation to amendments, but there was some pretty robust communication previously.

Russell Findlay: It would be quite useful to see some things set out. We have had sight of one or two letters, but I cannot recall whether we have seen the most up-to-date correspondence. If it would be at all possible to hear directly from the Lord Advocate, that would be worth while. She is a member of the Scottish Government, and the matter relates entirely to her jurisdiction. I think that she could explain more confidently how the bill might potentially affect her role.

The Convener: Thanks for raising that. There are a couple of points to make here. First, time is against us—we are under pressure of time. I am assuming that, if there was an update regarding the Lord Advocate's position on the matter, and if she felt it appropriate to share it with the

committee or with the Government, she would do so. The key issue concerns timescales, unfortunately.

I thank committee members very much for raising those issues. We will ensure that they are included in the committee's report.

On that note, the question is, that the committee agrees with the Scottish Government that the Scottish Parliament should not give its consent to the relevant provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Bill, as set out in the Scottish Government's draft motion. Do members agree?

Members: No.

The Convener: There will be a division.

For

Clark, Katy (West Scotland) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McNeill, Pauline (Glasgow) (Lab)
Nicoll, Audrey (Aberdeen South and North Kincardine) (SNP)
Stevenson, Collette (East Kilbride) (SNP)

Abstentions

Findlay, Russell (West Scotland) (Con)
Greene, Jamie (West Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 2. The committee therefore agrees with the Scottish Government that the Scottish Parliament should not give its consent to the relevant provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Bill, as set out in the Scottish Government's draft motion.

Are members content to delegate to me the publication of a short factual report on the outcome of our deliberations on the LCM?

Members indicated agreement.

The Convener: The issue will now move to the chamber for all members to debate, based on our report. With that, I thank the cabinet secretary and her officials for attending this morning.

We will now have a short suspension while we wait for the next team to come in.

09:59

Meeting suspended.

10:01

On resuming—

Economic Crime and Corporate Transparency Bill

The Convener: Our next item of business is consideration of a supplementary legislative consent memorandum on the Economic Crime and Corporate Transparency Bill. I am pleased to welcome the Minister for Community Wealth and Public Finance, Tom Arthur, and his officials: Sian Ledger, land reform policy and legislation team leader; George Dickson, detect and disrupt team leader; Michael Papparakis, civil law policy manager; and Patrick Down, criminal law practice and licensing unit team leader, all from the Scottish Government.

I refer members to paper 5.

I invite the minister to make his opening remarks on the supplementary LCM, after which we will move to questions.

The Minister for Community Wealth and Public Finance (Tom Arthur): Good morning to the committee. Thank you for the opportunity to make a few brief remarks on the supplementary legislative consent memorandum for the United Kingdom Government's Economic Crime and Corporate Transparency Bill.

Since my last appearance before the committee, on 24 May 2023, constructive engagement at official and ministerial level with the UK Government has continued and, I am pleased to report, has now resolved matters. The supplementary legislative consent memorandum lodged on Monday of this week now recommends promoting consent to all relevant provisions in the bill.

In the course of last week, a series of amendments was made to reflect the outcome of those negotiations. New amendments were also made to add new provisions relating to the register of overseas entities and the identification doctrine. As such, the bill now has a combination of consent mechanisms, consult-plus mechanisms, consult mechanisms, a sunset clause, and ministerial correspondence to offer reassurance on the policy intent of regulation-making powers relating to the forfeiture processes for crypto assets.

The Scottish Government remains fully supportive of the policy intent behind the bill and now recommends promoting consent to all the relevant provisions of the bill.

The Convener: I will open up the meeting to allow members to come in with any questions.

It seems that no member wishes to ask a question. Okay. That was nice—short and sweet, and simple.

Russell Findlay: We should ask at least one. The minister has come all this way. *[Laughter.]*

The Convener: We almost did it.

Russell Findlay: Just to put the position on the LCM into the simplest terms, for my benefit, can you confirm that you are saying that you sought changes and that those have all now effectively been agreed to and you are content with them?

Tom Arthur: Yes. We are content. There are areas in which we would have liked to have a consent mechanism rather than a consult mechanism, but we are not going to make the perfect the enemy of the good. There is broad agreement on the policy intent behind the bill. I am pleased that, through the constructive work that has taken place between officials and ministers, we have been able to arrive at this point.

Russell Findlay: A textbook example of Scotland's two Governments working together. Brilliant. Thank you.

The Convener: On that note, we will move swiftly on.

Our next item of business is consideration of any final issues that we want to raise in our report on the supplementary LCM. Again, I will open up the meeting for members to raise any specific points.

Jamie Greene: I merely say that I am intrigued to see how we will make a half-hour debate out of this subject next week. I look forward to hearing the minister's comments.

The Convener: One of the things that I would like to highlight in the report is the Scottish Government's position that, where the UK Government intends to take powers to make secondary legislation in devolved areas, that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish ministers and the Scottish Parliament. Currently, the Scottish Parliament has no process for scrutinising that subordinate legislation. At this stage, it is not clear what information the Scottish Government will provide to the Parliament to facilitate such scrutiny.

I propose that we should make those points in our report. It is to be hoped that other members will agree.

Are members content for the committee to raise those points?

Jamie Greene: Can you clarify what you mean by that? Do you mean secondary legislation in the Scottish Parliament or at Westminster?

The Convener: I am sorry—I did not quite hear that.

Jamie Greene: Your point was about scrutiny of secondary legislation. Do you mean secondary legislation that is passed here or that is passed at Westminster with relevance to devolved competences?

The Convener: Where there is on-going dialogue between the two Governments in relation to how legislation is being developed in bills, it is not clear to me that the Scottish Parliament is aware of what those discussions might involve. It might be helpful for us to have some understanding of that process and the issues that are being raised.

Would our clerk like to add anything to that, or does that pretty much cover the position?

Stephen Imrie (Clerk): I will just assist the member, if that will help. The convener's point was that, when the two Governments are in dialogue about secondary legislation that the UK Government wants to pass in devolved areas, it would be helpful for the Scottish Parliament to be better informed about that process. I hope that that helps.

Jamie Greene: That sounds very wise. Assuming that this committee would be the lead committee on any such scrutiny, that would be entirely appropriate.

Pauline McNeill: I agree with that. On the new offence that will cover Scotland on encouraging or assisting serious self-harm, I do not know the background to that particular clause, but there was a very concerning case about self-harm on social media. Would that be an example of something that we would want to address?

The Convener: I think that you might have jumped ahead to our next agenda item.

Pauline McNeill: Oh, sorry—have I?

The Convener: We have a lot on the agenda today.

Pauline McNeill: I am confused, because I was expecting to see Maree Todd speak to the item. I am sorry.

The Convener: No worries at all. We are getting near summer recess—that is fine.

Is the committee in agreement that the Scottish Parliament should give its consent to the relevant provisions in the Economic Crime and Corporate Transparency Bill, as set out in the Scottish Government's draft motion?

Members indicated agreement.

The Convener: Are members content to delegate to me the publication of a short report that summarises the outcomes of our deliberations on the LCM?

Members indicated agreement.

The Convener: The issue will now move to the chamber, where it will be for all members to decide on, based on our report. I thank the minister and his officials for their attendance, which has been short and sweet.

We will have a short suspension while we await the arrival of Maree Todd.

10:09

Meeting suspended.

10:15

On resuming—

Online Safety Bill

The Convener: Our next item of business is consideration of a supplementary legislative consent memorandum on the Online Safety Bill. I am very pleased to welcome to the meeting the Minister for Social Care, Mental Wellbeing and Sport, Maree Todd, and her Scottish Government officials. Hilary Third is head of self-harm policy and distress interventions—mental health; and Katy Richards is a solicitor in the legal directorate.

I refer members to paper 2.

I invite the minister to make some opening remarks on the supplementary LCM, after which we will move to questions.

Maree Todd (Minister for Social Care, Mental Wellbeing and Sport): Thank you for the opportunity to meet the committee today. I will take a few minutes to outline what I will refer to as the self-harm amendment, which has triggered the requirement for a legislative consent motion, and explain why the Scottish Government is recommending consent.

The committee has previously considered an LCM on the Online Safety Bill. The self-harm amendment creates an offence of communicating material that could encourage another person to engage in serious self-harm. The proposed penalties on summary conviction are imprisonment for a term not exceeding 12 months or a fine, or both. On indictment conviction, the proposed penalties are imprisonment for a term not exceeding five years or a fine, or both.

As members are aware, self-harm is a complex and sensitive issue. For many people, it is a response to emotional distress. It is often hidden and, although the data is quite poor, there is evidence that it is increasing, particularly among young people. Although we know that self-harm can be a way of managing distress, it also has the potential to cause serious physical and psychological damage. Furthermore, we know that self-harm can be a predictor for future suicide risk.

The Scottish Government is already taking strong action to improve support and care for people who have self-harmed. For example, we are investing in specialist support and working in partnership with people with lived experience to develop a new self-harm strategy and action plan, which will be published later this year.

We recognise that some really helpful information and support are available online. However, people could also encounter significant risks when they are looking for help online. That

can expose people who are already vulnerable to harmful and malicious content and result in more serious injury—and perhaps even suicide.

Since late 2022, the Scottish Government has engaged extensively with a range of organisations, and directly with people with their own experience of self-harm, on the potential implications of the proposed offence. There is consensus that the offence will bolster online protections and help to prevent the risk of serious self-harm and potential suicide deaths.

Some stakeholders have questioned whether the offence could criminalise vulnerable people who communicate about their experiences of self-harm with peers online as a way of providing or receiving support. The UK Government's position, with which I agree, is that the offence should capture only the most serious encouragement of self-harm. To that end, the amendment seeks to define the scope of the offence narrowly, with a high threshold to prosecute acts only if they could result in serious harm and where there is a deliberate intention to encourage or assist that harm.

With that in mind, it is the Scottish Government's view that the new offence will ensure that strong action can be taken to prosecute people who share material that is intended to encourage others to self-harm. It will act as a deterrent to people communicating harmful or malicious messages in the first place. Extending the offence to Scotland will therefore strengthen protections for people online and ensure that the internet is a safer place for anybody, and in particular for people who are seeking mental health or self-harm support.

In closing, I will make three points in support of the proposed amendment. First, the Scottish Government recognises the need to balance creating a safe environment for people who are at risk of self-harm with facilitating non-stigmatising, compassionate and effective support, which might include online support. We consider that the amendment sits comfortably with those dual aims and that it aligns very well with our ambitious approach to self-harm.

Secondly, on balance, we consider that there is significant value in clarifying the legal framework for prosecuting and deterring communications that encourage acts of self-harm in a consistent way across the UK by extending the offence to Scotland.

Thirdly, we consider that extending the offence to Scotland will act as a deterrent and provide a robust means of prosecuting deliberate acts of communicating material that is intended to encourage self-harm.

I hope that the committee supports our view that the legislative consent motion is necessary. I would be happy to deal with any questions.

The Convener: Thank you very much, minister. That was a very helpful overview.

We will now move to questions. I will ask the first one. Do we understand what the scale of the problem is at the moment in the UK, but also with reference to Scotland? I imagine that it is quite difficult to measure it, although we know that it is escalating. Are there any indicators of the scale of the problem?

Secondly, will you say a wee bit about the challenges that we might face in applying the new legislation?

I appreciate that those are quite big questions, but I would be interested to know the answers to them, given the online sphere that we are looking at.

Maree Todd: Hilary Third might want to say a little more about self-harm. Self-harm is quite hidden, and it is very hard to get reliable data on its prevalence throughout the population, even in Scotland, where we are very keen on improving in that area. It is quite hard to know how common the condition is, and how many people who self-harm access information on the internet that might encourage them to harm themselves more or more dangerously is quite unknown.

However, we hear anecdotal evidence. We think that there has been an increase in self-harm among young people, but we do not know whether that is a true rise or whether there has been an increase because the stigma has been removed and people are talking about it more. Young people live online. They are innately able to navigate that space; it is their space much more than it is older people's space. It is therefore important that we are ready and prepared for the shift in behaviour.

On how the offence will be prosecuted, the bill has been carefully drafted to ensure that the threshold is narrow so that it does not capture people who are not engaging in criminal behaviour. Much of the aim of the bill is to discourage such behaviour and to make it possible to police it without ever having to prosecute it, as is the case with much criminal legislation. We want to shift the culture so that the behaviour does not happen in the first place rather than having to prosecute the offences once they have occurred.

Hilary Third (Scottish Government): The minister has covered most of the main points thoroughly. The data sources are not robust because achieving that would require people to attend hospital or general practitioner appointments, for example, and disclose their self-

harm. Very often, the behaviour is hidden, and people do not seek medical attention. In addition, the behaviour is very stigmatised, which means that people may be unlikely to seek help. The work that we have done in looking at community sources suggests that self-harm is far more widespread than the quantitative data suggest and that it could be growing, particularly in some groups.

The Convener: Absolutely. As the minister said, one of the important areas of work is the preventative work that is being done. I suppose that prevention and intervention are absolutely key.

Maree Todd: Yes. We are very focused on early intervention and prevention in the mental health portfolio. That is very much where our focus lies. As I have said, we are launching a mental health strategy in the next couple of weeks. We will also launch a specific self-harm strategy later in the year. I am keen to say that it is world leading; it is certainly innovative. It is not common for countries to recognise the challenge that self-harm presents and produce strategies to tackle it. It is not a well-recognised issue. It is hidden and stigmatised, and we are really trying to shift the balance of that in Scotland.

The Convener: A number of members want to come in. Jamie Greene will be first.

Jamie Greene: Thank you, convener. *[Interruption.]* We are getting quite a lot of feedback.

My questions are perhaps technical ones rather than wider policy ones, minister. Thanks to amendments that were passed at the committee stage in the House of Lords, clauses 165 and 166 of the bill state that the new offence can be committed where a relevant act is committed outside the UK by a person who is habitually resident in the UK or by a person who is a body incorporated or constituted under UK law. I am keen to explore what effect that has on Scots law and prosecution in Scotland.

Someone can be habitually resident in different parts of the UK, so would they be prosecuted under the bill in England and Wales or in Scotland? I will not name any particular social media company, but you can use your imagination. If somebody who is accountable as a corporate officer and therefore liable under that parameter habitually resides in Edinburgh, for example, but the company is registered in London, would they be prosecuted in Scotland? Would it be a lot clearer if the company was registered in Scotland and the person was resident here, although the act could be committed outside the UK—in the US, for example? It is a bit unclear how that would fall out in practice.

Maree Todd: I think that that would depend on the circumstances of the individual case. However, your question illustrates why it is important that we have similar legislation across the UK. That is one of the reasons why we recommend consent. We recognise that the borders for the type of offence that we are talking about are not as clear cut as they might be for one that happens in real life rather than virtual life. Therefore, it is important that the legislation works across the UK.

I do not know whether Katy Richards wants to say a little bit more about that.

Katy Richards (Scottish Government): I am not sure that there is a huge amount more that I can say at this stage, because it will depend on the facts of each individual case. However, the clauses have been drafted to ensure that, because we are talking about an online environment, there can still be prosecutions within a relevant jurisdiction even if the offence takes place outside the jurisdiction.

We would be happy to write to the committee, to give a fuller answer if that would be helpful.

Jamie Greene: Yes. The online and technology industry is growing in Scotland, so there will be a number of people in senior management positions who ordinarily reside—or, to quote the bill, are “habitually resident”—in Scotland, and the question is whether they would be prosecuted under Scots law or English and Welsh law if the primary factor is where the person is resident, as opposed to where the company is registered or where the offence takes place. I just seek a bit of clarification on that. I know that the scenarios are hypothetical and we hope that offences will be few and far between, but it was not entirely clear from the LCM what the situation would look like.

What analysis has the Scottish Government done of the scale of companies that might fall into that category? Do we know how many large social media companies or tech companies to which the provisions are relevant have corporate headquarters in Scotland? Are most of them based elsewhere?

Maree Todd: We do not have great data on that. As I said in answer to the convener’s first question, we do not have robust data that tells us how much self-harm is happening in Scotland. We also do not have enough data that tells us how much is being encouraged by online behaviour.

10:30

I think that we can be confident that prosecutions would be rare. The threshold is narrow and well defined: there must be intent and deliberate pushing, and an initial warning would be

given. I do not think that the amendment will lead to a large number of prosecutions.

Like much of the bill, the amendment tries to shift the culture to ensure that individuals and corporate organisations can be held responsible for their actions. Much of it is about shifting the culture and preventing harm rather than about enabling prosecution.

Jamie Greene: Obviously, that is at a fairly high level. I imagine that those prosecutions would be quite well publicised and would attract huge media interest, particularly when they relate to well-known online platforms.

The bill creates a specific new offence of encouraging or assisting the serious self-harm of another person. Although the offence itself is narrow, that could be interpreted quite widely. The idea of encouraging someone to self-harm strays from one territory. We commonly associate online encouragement of self-harm almost with online hate crime, in which the encouragement of self-harm is used perhaps more as an attack or an insult, rather than with something that might be perceived to be of assistance. That means that it could be quite widespread. We are all on social media and we all read those kinds of comments.

What are the implications for policing? We have heard concerns in the past that legislation is sometimes passed without a wide-ranging conversation with, for example, Police Scotland, which ultimately picks up the calls when people phone in to complain or to make allegations. What conversations have you had with cabinet secretary colleagues in other directorates about the resource implications, the scale and volume, or the public awareness raising that might go with this so that we do not suddenly and overnight create the perception of a new offence that the public will respond to?

Maree Todd: I do not think that we run the risk of that happening, because the amendment defines the scope of the offence very narrowly and sets a high threshold. There must be an intention to encourage or assist self-harm, and that self-harm must be serious. That really is quite narrowly defined. I would not expect that to be used widely.

What we and the UK Government are aiming to do with the bill as a whole is shift the culture. I do not think that the offence can be used maliciously, because of the high thresholds. That is why we are recommending consenting to the LCM. We think that the amendment is a helpful one, and we do not foresee any risk of its being used wrongly or too widely.

Jamie Greene: That is very helpful.

Collette Stevenson (East Kilbride) (SNP): Jamie Greene took part of my line of questioning, which was about the liability of corporate bodies.

I have a technical question. Ofcom will be the regulator, particularly for social media sites. You said that sites will be given an initial warning before being prosecuted and held liable. Will Ofcom provide regular—perhaps quarterly—reports about warnings and prosecutions? Will you get that information regularly?

Maree Todd: It is a regulatory bill, and Ofcom will act as the regulator and will have powers to take action, including imposing fines, against companies that do not fulfil their new duties. Criminal action will be taken against senior managers who fail to follow information requests from Ofcom. I presume that Ofcom will regularly present information, as it currently does, so that type of information will be added to its regular reports. Those reports are made to the UK Government rather than the Scottish Parliament, although we should, of course, be able to access that information.

Katy Clark (West Scotland) (Lab): My understanding is that the bill is a positive piece of legislation but that there has been much criticism that it could be stronger. Either today or perhaps in writing to the committee, can the Scottish Government outline what further changes it thinks need to be made to the bill at Westminster to provide a stronger statutory framework?

Maree Todd: Yes, we certainly could do that. The UK Parliament has had extensive engagement with stakeholders, including Scottish stakeholders, who are content with this particular amendment. There might be concerns about the Online Safety Bill more widely—people might want it to go further than it does—but our stakeholders in Scotland are particularly content with this amendment.

As you might imagine, people with lived experience were concerned that the bill might, as I said in my opening statement, criminalise people who were simply sharing their stories in order to seek or provide support. We have found that the UK Government has listened very carefully to those concerns, and the amendment has been crafted well to land in the right place with the appropriate balance and proportionality. Hilary Third might want to comment.

Hilary Third: Ministers have written to the UK Government on a number of occasions—most recently, the First Minister wrote to the UK Government earlier this month—with observations about the broader bill. That is probably outside the scope of today's conversations, but I presume that we could share that information if it is of interest to the committee.

The Convener: Thanks. As you know, the committee has been looking at the broader issue of online child sexual exploitation and the escalating incidence of it. Our discussions have obviously incorporated the bill and its progress. We hope that we will remain sighted on the Government's position on the bill, in particular, because the committee is very interested in that issue.

Rona Mackay: This is an incredibly important amendment, and I am delighted that the minister and the Scottish Government are taking the matter so seriously and emphasising prevention and culture change. That is a really positive way forward.

Is the UK Government planning to evaluate how the legislation is working? I am sorry if I have missed that in the notes.

Maree Todd: I imagine that that would be part of the UK Government's normal post-legislative scrutiny process.

Russell Findlay: As with the Economic Crime and Corporate Transparency Bill, it is good to see both Governments working so effectively and constructively together.

Minister, you spoke about the world-leading self-harm strategy. You were reluctant to call it that, but I see that the document does call it that—

Maree Todd: It is not out yet.

Russell Findlay: You are being modest. I know that you cannot go into detail just now—I would not expect you to—but can you at least indicate whether it might include a legislative element?

Maree Todd: The strategy is more about shifting practice and culture and recognising, first, that the condition exists. As I said, one of the challenges with self-harm is that it is hidden, because it is such a stigmatised behaviour, so the strategy is about shifting the culture and practices and ensuring that our health and social services—all our public services—can recognise it and give compassionate support to people who are in that situation.

Russell Findlay: That is great. Thank you.

The Convener: As there are no other questions, we will, as usual, move on to our next item of business, which is consideration of any specific issues that we would like to include in our final report on the supplementary LCM. For me, it would be a case of saying that the committee very much welcomes the Scottish Government's position. It is an important step forward, and it provides clarity. Enforcement of the legislation will perhaps not be without its challenges, but there seems to be some agreement on the important role of data and evaluation.

Would any other member like to include any specific issues in our report? If there is nothing specific, we will move on.

Do members agree that the Scottish Parliament should give its consent to the relevant provisions in the Online Safety Bill, as set out in the Scottish Government's draft motion?

Members *indicated agreement.*

The Convener: Are members content to delegate to me the publication of a very short factual report on the outcome of our deliberations on the LCM?

Members *indicated agreement.*

The Convener: The issue now moves to the chamber for all members to decide on, based on our report.

I thank the minister and her officials for joining us this morning. We will have a short pause to allow the minister to leave.

Fireworks and Pyrotechnic Articles (Scotland) Act 2022

10:42

The Convener: Our next item of business is consideration of follow-up correspondence received from the Minister for Victims and Community Safety after we considered the issue of police searches for pyrotechnic devices outside football matches and other events. I refer members to paper 3. I again open up the discussion to members and ask if you have any issues or comments that you want to make on the letter that we received.

Russell Findlay: The minister gave evidence a few days after a particular football match at Hampden at which scores of people had pyrotechnics in the ground and the kick-off was delayed. My line of questioning was on why the existing legislation could not have dealt with that. The letter confirms what we knew, which is that it can, it could and it should have been able to do so.

I put on the record that the new legislation does not appear to be needed to deal with the particular problem of pyrotechnics at football grounds, unless I am completely misunderstanding something. It is worth putting that out there.

The Convener: Okay; we can come back to that.

Jamie Greene: I have a couple of points. First, following on from Russell Findlay's valid question of the Government, does the Fireworks and Pyrotechnic Articles (Scotland) Act 2022 give any new powers? The understanding was that it was mostly in relation to the ability to stop and search, not necessarily around possession, which in certain environments, as Russell Findlay said, is already illegal.

It is a bit unclear what will happen with the act versus existing legislation, and what training and communication Police Scotland is involved with for officers on the ground at big events—I talking about not only football events, but also other sporting or music events. In fact, I was watching some footage of a music festival, which will remain unnamed, where lots of people in the audience were flying flares with smoke coming out of them, making a complete mockery of the fact that this committee spent a year working on a bill to stop that happening. Needless to say, they were not rioting—they were all having a good time. That is by the by, however.

10:45

I am grateful for the Minister for Victims and Community Safety's response. In part, she was responding to some specific questions that I posed in the session on 3 May, and I want to query two things in the letter. The first is in relation to someone who is stopped under suspicion of committing an offence under the new act. The letter states that if a prohibited item is found,

"it will be seized and retained",

which makes complete sense. The letter goes on to state:

"The individual will most likely be taken into police custody",

which is intriguing, as that is not the evidence that we took from Police Scotland. If that is the case, I would find it interesting.

The letter also says that it is the case that,

"if released without charge under 'investigative liberation', an individual may be given certain rules to follow (such as telling the person not to go to a certain place or speak to certain people) for a set period of time."

I am quite intrigued by that. After somebody has been liberated, who has not been charged—the letter clearly states, "without charge"—can they be given specific instruction not to attend certain places or meet certain groups of people? In a scenario where someone has been stopped outside a football game, an item has been removed, and the person has then been released without charge—perhaps even on the spot but pending further investigation—do the police have a power to remove that person or to say to that person that they must remove themselves from the vicinity of the stadium? It is a bit unclear how that would work in practice. The letter seems to fall back on the admissibility of that individual being the responsibility of the event organiser or the venue.

The second query is about the lifetime ban orders, which is a point that I raised. It seems that a loophole still exists here. My original question was whether lifetime ban orders could be an effective additional tool when somebody is stopped and found to be in possession of illegal articles under the Fireworks and Pyrotechnic Articles (Scotland) Act 2022. It seems to be that the person can be given a football banning order, which can be quite lengthy, only if they are also in breach of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which specifically says that they must be

"engaging in violence or disorder".

However, being caught with fireworks and flares at a football match does not necessarily mean "violence and disorder" if the person has not used them, for example.

The threshold for the introduction of FBOs is extremely high at the moment, so it seems to me that the 2022 act will have to be altered to reduce it. Will the Government consider doing so? For example, someone could be a repeat offender—turning up with flares, maybe even having been barred from the venue or stadium—but they would not be given a lifetime banning order in the current scenario, so there is certainly room for improvement. Could the Government respond on that point?

The Convener: Nobody else wants to come in.

Russell Findlay and Jamie Greene have both made a lot of reasonable points. The letter sets out the current position around legislation, which, in the context of this discussion around pyrotechnics, has perhaps one or two gaps.

I was pleased to read that the minister, along with officials, is having

"further discussions with Police Scotland, football clubs and authorities, and other ... stakeholders, about the effectiveness of FBOs."

The point that you made latterly, Jamie, around the course of conduct, is key. We may be able to ask about that, but it is my understanding that a course of conduct would be anticipated before an order would be placed on someone. That is a practical issue at the moment. A lifelong ban would apply if a series of incidents—a course of conduct—indicated that a person was not desisting from their behaviour but continued taking pyrotechnics into a ground.

We have noted the points that have been raised. If the committee is in agreement, we can put those further questions to the minister.

Members: *indicated agreement.*

Policing and Mental Health

10:50

The Convener: Our final item of business is consideration of correspondence on the issue of policing and mental health. I refer members to paper 4.

I thank the cabinet secretary for her helpful update and certainly welcome the creation of a cross-ministerial working group on this important subject. I hope that the committee's interest in the issue, and the priority that we have given to it, is beginning to have an impact. We are beginning to see some progress on addressing the matters that we have highlighted.

Do members want to raise any points about the cabinet secretary's letter or ask any further questions?

Russell Findlay: The letter is detailed and much of it is welcome, but I have noticed what is not in there. We have repeatedly raised the issue of officer suicide—with the usual caveat that suicide is a complex issue—and have said specifically that the complaints and discipline process appears to have been a factor in a number of deaths. We have heard from serving and former officers who believe that that process desperately needs scrutiny by the Government, the Scottish Police Authority, Police Scotland and the Crown Office.

The letter does not really address the concerns that have been raised by officers who have attempted to take their own lives or by families grieving the loss of a loved one who has completed suicide. It is perfectly proper for the Government and others to talk about the policing of people in the community who have mental health problems and to recognise the impact that that has on officers' mental health, but there still seems to be a reluctance to properly look at the difficult issue of where the workplace issues experienced by officers have been a contributory factor in their deaths.

The Convener: I remind members that we will be having a public evidence session next week on the issue of police officer suicide, which I hope will be an opportunity to raise some of the issues that Russell Findlay has outlined. I know that he is very interested in that particular issue.

Jamie Greene: I thank the cabinet secretary for the update and want to pick up on two points on the second page of the letter.

The first is about the Scottish Government distress brief intervention programme. That is new to me, and it sounds like a positive and helpful thing. It seems to me that that can be instigated

only if a person presents via a 999 emergency call or some other call to the emergency services and that the issue is dealt with at the call handling stage. When the caller presents, or does so on behalf of someone else, a decision is made in the call centre about whether that call will be directed to Police Scotland or to the distress brief intervention programme, but it is unclear where that is.

Does the call go to Police Scotland and get flagged as a potential DBI, meaning that an officer does not attend? The letter seems to imply that it is one or the other. I am a bit unclear about that, so I would find it helpful to understand the logistics of how the call handling works and where the call ends up in relation to how someone is attended to. I had never heard of the intervention, and I do not know anyone who has. It is live in 20 health and social care partnerships, and it would be helpful to know which ones it is live in.

Progress is obviously being made in rolling the intervention out, but how is it working in practice, and how do people access the service? It sounds like a very good service, with two weeks of very direct intervention, possibly one to one, with somebody who needs that help. I know some constituents who would benefit from that immediately, but I have no idea how people access the service.

Secondly, there is a comment that I wish to question. The cabinet secretary's letter says:

"Each Health Board is providing access to a mental health clinician, accessible to police officers, 24 hours a day, 7 days a week for those who require urgent mental health assessment or urgent referral to local mental health services."

My conversations with officers and their representatives indicate that that is not the case—it is absolutely not a 24/7 service. I am intrigued to know what that access to a mental health clinician looks or feels like on the ground. Does it mean just a phone number, or will someone attend in situ? Does it refer to somewhere that the police will take someone to? Is it a physical environment? It is certainly not a 24/7 environment. If that were the case, the police would not be responding to such calls and spending so much time dealing with people with mental health difficulties. I am not entirely convinced that that statement holds true in the real world, and I think we should do a bit of work to investigate that comment further.

The Convener: I know that DBI has been an option for a number of years, and it is relatively straightforward. My understanding is that police officers can use DBI as a referral option for somebody they encounter who is experiencing poor mental health. Ultimately, that would normally be routed to the person's GP, who would pick up the referral and engage with the person. There

may be some other points of contact along that pathway. I know that it is considered to be a successful, user-friendly and well-established option. If it is helpful, and if members are happy to do so, we can ask for some more detail on DBI. I think it is quite an important tool in the toolbox overall.

Jamie, was your second point in relation to the enhanced mental health pathway?

Jamie Greene: I was referring to the letter from the cabinet secretary, at the third substantive paragraph on page 3 in our papers. It states:

“Each Health Board is providing access to a mental health clinician, accessible to police officers, 24 hours a day, 7 days a week”.

I presume that that means that each board is currently providing access—that is what the letter implies. That apparent 24/7 provision is a surprise to me. The feedback is very much that that is not the case out of hours, that police officers must deal with mental health assessments and that there is not 24/7 access to mental health clinicians for every officer. I find it difficult to believe the claim that every health board is currently providing a 24/7 mental health clinician service. If it is true, that is welcome, but we could perhaps benefit from more detail on that.

The Convener: Again, I am more than happy to pick up that point and ask for some more information and detail on it. Are members happy with that?

Members indicated agreement.

The Convener: If members have no further points to raise, that concludes our business for this morning. I will now close the meeting, and we will take a short break before moving into an informal private session.

Meeting closed at 10:58.

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