



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# JUSTICE COMMITTEE

Tuesday 4 March 2014

Session 4

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**Tuesday 4 March 2014**

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**JUSTICE COMMITTEE**  
**7<sup>th</sup> Meeting 2014, Session 4**

**CONVENER**

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

**DEPUTY CONVENER**

\*Elaine Murray (Dumfriesshire) (Lab)

**COMMITTEE MEMBERS**

\*Christian Allard (North East Scotland) (SNP)  
\*Roderick Campbell (North East Fife) (SNP)  
\*John Finnie (Highlands and Islands) (Ind)  
\*Alison McInnes (North East Scotland) (LD)  
\*Margaret Mitchell (Central Scotland) (Con)  
\*John Pentland (Motherwell and Wishaw) (Lab)  
\*Sandra White (Glasgow Kelvin) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)  
Gery McLaughlin (Scottish Government)  
Tom McMahon (Scottish Government)  
Neil Rennick (Scottish Government)

**CLERK TO THE COMMITTEE**

Irene Fleming

**LOCATION**

Committee Room 4



## Scottish Parliament

### Justice Committee

*Tuesday 4 March 2014*

[The Convener *opened the meeting at 10:00*]

### Decision on Taking Business in Private

**The Convener (Christine Grahame):** Good morning and welcome to the seventh meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting system even when they are switched to silent. No apologies have been received.

Under item 1, the committee is invited to agree to consider in private item 5, which is our work programme. Is that agreed?

**Members** *indicated agreement.*

**The Convener:** Keep up with me. It is a sunny day, so we are being bright and breezy.

## European Union Engagement

10:00

**The Convener:** Item 2 is an evidence-taking session on European Union engagement and the United Kingdom Government's 2014 EU opt-out decision. I welcome to the meeting Roseanna Cunningham, the Minister for Community Safety and Legal Affairs, and Government officials: Neil Rennick, deputy director, law reform division; Danny Jamieson, policy manager, criminal law and licensing division; and Alicia McKay, legal services.

Minister, I understand that you wish to make a short opening statement. Please feel free to do so.

**The Minister for Community Safety and Legal Affairs (Roseanna Cunningham):** Thank you, convener. As this is quite a technical exercise, I thought that it might be helpful to spend a few moments on context. I know that the committee has already received written evidence from the Cabinet Secretary for Justice, but I thought that it would be useful for me to make some opening remarks.

We have known since the Lisbon treaty was agreed in 2009 that a final decision on UK participation in around 133 justice and police co-operation measures needed to be taken no later than 31 May 2014. I should highlight at the outset that this part of the treaty, which is commonly called protocol 36, deals only with pre-2009 justice and home affairs measures—a frozen corpus of EU law, if you like—and not measures agreed under the new legal bases provided by the treaty. The UK has the separate ability to choose whether to opt into individual post-Lisbon-treaty justice and home affairs measures on a case-by-case basis.

For pre-Lisbon measures, the UK must exercise a block opt-out, but it can choose to opt back into specific measures. The five-year window following the Lisbon treaty provided ample opportunity for the UK Government to engage with devolved Administrations on whether to exercise the block opt-out. In April 2012 and again in August 2012, Scottish ministers wrote to express our strong interest in the potential implications of the decision for Scotland's devolved justice system and to state clearly our strong preference to remain fully opted into these measures.

The pre-Lisbon-treaty justice and police co-operation measures—the so-called third pillar—include some elements that are defunct or have limited impact. However, they also include measures that are of very significant importance in investigating cross-border crimes and bringing serious and organised criminals to justice. Those measures include the European arrest warrant;

provisions relating to membership of both Europol and Eurojust; and joint investigation teams and the sharing of information and intelligence.

The view taken by Scottish ministers, as well as police, prosecutors, legal professionals, academics and a House of Lords European Union Select Committee inquiry, was and remains that the benefits of opting out of defunct or ineffective pre-Lisbon measures do not justify the risk of losing those measures that are essential in tackling cross-border crime.

Unfortunately, UK ministers did not consult Scottish ministers or Scottish justice agencies ahead of the initial announcement of their plan to exercise the block opt-out from the 133 measures or their subsequent decision to seek to negotiate with the European Commission and EU member states to opt back into 35 measures. UK ministers formally confirmed their decision to exercise the opt-out ahead of 31 May 2014.

Our priority now is to seek reassurance from UK ministers about the negotiation process and, in particular, that there is no gap between the opt-out decision taking effect from 1 December 2014 and the UK opting back into the 35 measures. As the Cabinet Secretary for Justice indicated in his letter to you of 18 February, he wrote to UK ministers last month, seeking an update on the negotiation process and reassurance about any potential gap.

I can update the committee that UK ministers have now replied. They have stated that, for their part, they place a great deal of importance on avoiding an operational gap and believe that it is in everyone's interest to reach an agreement that provides operational and legal certainty. They have also reported that other member states agree that it would be beneficial to conclude matters swiftly and that negotiations with them and the Commission are in process.

We will continue to press those matters with the UK Government. In that connection, Home Office minister Karen Bradley has offered to come to Edinburgh for discussions with Scottish ministers. We are minded to accept the offer, but because that information has only recently reached us it is too early to give a date for that meeting.

I will be happy to answer any questions that the committee might have about the opt-out process.

**The Convener:** Before I call Roddy Campbell, our EU reporter, to ask questions, I wonder whether you can give examples of how the European arrest warrant operates when it is issued from Scotland and when it is issued from a European jurisdiction. One of the key issues about its effectiveness is not only how it is served but the speed at which it can be operated. It would be quite useful for the committee to know about the European arrest warrant process.

**Roseanna Cunningham:** Scotland's experience of the European arrest warrant seems, on the face of it, to be quite different from the experience south of the border. We are not seeing the issues and concerns that are being raised south of the border; we are not seeing its being used in any trivial way by either side or any other difficulties with it. Our experience of the European arrest warrant has been largely positive, and it is fair to say that most of the practitioners south of the border are happy with it. I do not think that the concerns about it south of the border are coming from the people who are using it, and practitioners in Scotland have expressed no concerns at all.

That said, it is difficult for me to make a comparative assessment, given that we are dealing with the issue only in the Scottish context. From our perspective, the warrant works well. I can give a couple of examples of when it has been used.

**The Convener:** That would be good.

**Roseanna Cunningham:** I should say that because they do not necessarily reflect what is happening south of the border, I cannot make a comparison.

In 2008, a chap called Marek Harčár was arrested within one day of an extradition request being issued and was returned swiftly to Scotland from Slovakia to face justice for the murder of Moira Jones. The warrant allowed clothing and other property to be seized from him before he could destroy it, which helped to lead to a successful prosecution. It is the speed of extradition that is important, and the fact that there is no long, drawn-out process to achieve it. The extradition might previously have been achievable in other ways, but not at the speed at which the European arrest warrant allowed it to take place.

When, in January 2012, a violent attack and murder took place in Edinburgh, Grzegorz Gamla was arrested within five hours of the issuing of the arrest warrant. That was achieved through the EAW system but was also facilitated by direct contact between Scottish prosecutors and the authorities in Poland under the European judicial network. Although that is a different issue, it is germane to this particular case.

That couple of cases shows how the ability to act incredibly swiftly under the arrest warrant allowed the criminal process to proceed much more quickly than it would otherwise have proceeded.

**The Convener:** Your comment about the need to preserve evidence is interesting and helpful. One might not have immediately thought of that.

**Roderick Campbell (North East Fife) (SNP):** Good morning, minister. Are there up-to-date

figures for requests to use the European arrest warrant in Scotland? Do you know the number of warrants that the Scottish Government has sought?

**Roseanna Cunningham:** I have information for 2012 and 2013 from the Crown Office's international co-operation unit. Do you want the 2013 figures or the comparative figures?

**Roderick Campbell:** Both, if it is not too much trouble.

**Roseanna Cunningham:** To be honest, it looks as if there is not a great deal of difference.

On incoming requests—in other words, the cases in which we receive warrants—there were 152 in 2012 and 149 in 2013, with 101 arrests made in 2012 and 102 in 2013. The number of surrenders relating to incoming requests—I assume that that means cases in which the individual gets handed over or whatever—was 89 in 2012 and 121 in 2013. I also have information about hearings and appeals.

On outgoing requests for assistance—in other words, cases in which we send requests elsewhere—there were 32 in 2012 and 25 in 2013. There were seven returns to Scotland in 2012 and 12 in 2013.

Certainly, we get more requests than we issue. However, you would expect that, given that we are a jurisdiction of 5 million compared with the entire population of the rest of the EU.

**Roderick Campbell:** I do not want to speak for those south of the border but I know that they take the view that the balance between incoming and outgoing requests, which looks fairly similar to the balance here, is to the justice authorities' disadvantage.

**Roseanna Cunningham:** You will appreciate that we do not have the figures, but, to be honest, I imagine that almost any jurisdiction in the EU will have a similar imbalance, given that outgoing requests emanate only from that jurisdiction and incoming requests potentially come from a huge number of places. Our position is that such an imbalance cannot invalidate the benefit that we get from the European arrest warrant.

**Roderick Campbell:** My understanding is that the European judicial network is about information sharing as much as anything else, and that it is quite a useful tool. I take it that, in discussions that you might be having with the United Kingdom Government about this issue, you will be making the case strongly for continued participation in the network.

**Roseanna Cunningham:** We are making that case quite strongly. The European judicial network is the one outstanding issue on which the Lord

Advocate genuinely feels that there is enormous benefit to be gained by continued engagement. We view with some concern the possibility that we would have to revert to some informal process if the membership of the European judicial network does not continue.

There is a tendency to forget that a lot of the core processes are about small, bureaucratic things and bits and pieces of administrative business that have to go back and forth. I can give you an example of how the European judicial network has made a big difference in that regard.

There was a case in July 2013 in which an essential witness in a High Court prosecution had returned to Poland and had refused to come back to Scotland to provide evidence in the trial. The Crown Office was advised on 2 July that the person was not coming back, and the case was due to call on 5 July, at which point the Crown Office would have to give some indication to the judge about how it was going to proceed in the case. The Crown Office was advised that the witness resided in a particular town in Poland called Piła. Through the Polish EJM contact point, it was possible to establish that it would be possible for evidence to be submitted via videolink. Any request for a videolink had to be sent to the court in Piła, but it turned out that the courts there did not have the capability, which meant that the link would have to be established in a court in Łódź.

The Crown Office was able to get contact details for the relevant persons in both courts, which allowed it not only to advise the judge of its intentions on 5 July, but to prepare the necessary petition and letter of request and present them before the court on the same day.

10:15

In summary, the Crown Office was advised on 2 July that there was an issue with the witness, and it was able to go to court in Scotland on 5 July and say, "We have resolved the witness difficulty by the following means, and here are the formal papers."

The view of the Lord Advocate and the Crown Office on that type of case is that, without the assistance of the contact points for which the European judicial network provides, that would not have happened. It would be unlikely that such information would be available before the trial, let alone at the preliminary hearing.

People have a tendency to forget about such things. A criminal trial involves not only the circumstances that arise in the court room on the day, but a whole set of small things that have to happen to get it there. It would be entirely possible for informal contact to be maintained, but contact

details would quickly become outdated. Members will know from their contacts here how quickly people move and phone numbers and job titles change.

Many EU member states have federal structures, and anyone outside who was looking at the UK would have to deal with two different legal jurisdictions. Having a formal contact point in Scotland would be very important for anybody who was looking at what we were doing. Without the network, they would have to fall back on making ad hoc arrangements; there is no doubt about that. Those arrangements would have to be agreed bilaterally, but that would be entirely a matter of good will, which, given the UK opt-out, might not uniformly exist. As the arrangements would not have the backing of an EU instrument and the structure that it would provide, there would not be the same incentive for the other parties to maintain those arrangements and keep them in good order.

There is a tendency for people to think that the European judicial network simply involves people having natters and chats with one another but, in fact, it deals with practical issues that require to be resolved from time to time, given the free movement of people throughout the EU, and it is important—certainly from the Lord Advocate's perspective—that it is retained in Scotland.

Any further information is probably better obtained directly from the Lord Advocate, as he will be able to give the committee chapter and verse. However, I have outlined the position that he would take, and we certainly support the Crown Office's stance.

**The Convener:** The Lord Advocate makes plain in his letter to the committee that it remains his position that he wants to keep the European judicial network measure among those measures that are opted back into.

**Roderick Campbell:** I will move on to the important issue of transitional arrangements. One of the points in the House of Commons European Scrutiny Committee's report reminded me of the current debate on articles 48 and 49 in relation to Scotland's position in Europe. That committee's view was that

"the earliest date on which the UK may formally notify its request to rejoin individual measures subject to the block opt-out is 1 December 2014".

However, the UK Government's position seems to be that it wants a seamless transition and has therefore started negotiations now. It has expressed the view that

"If there is to be any gap, and our starting position is that we do not believe that there need be, the Government will work to ensure that the transitional arrangements foreseen under Article 10(4) of Protocol 36 are such that measures continue to apply to the UK during that period."

Can the minister or her team give us a bit more guidance on consideration of the transitional arrangements and tell us how much of a problem a seamless transition is likely to be?

**Roseanna Cunningham:** We have considerable concerns about the transition, which is why we have shifted our focus to ensure that it is kept as smooth as it can be.

The issue of the European arrest warrant arises, as we have already discussed. Even if the UK goes back into a reformed or changed system, the intervening period in the event of a transition will not be as simple and straightforward as people imagine. It would be possible to revert to the previous, more cumbersome extradition process, but some countries have effectively ruled that out with their own constitutional changes, so it would not always be the case that another party could revert in the way that we are talking about.

The danger is that we would end up needing to set up a lot of temporary bilateral arrangements in order to deal with a transition in which there was a gap, so our principal concern is to ensure that there is no such gap. When she comes, we will try to impress on the Home Office minister that the most important thing from our perspective is not to have a period of time when there is that level of uncertainty and confusion.

**Roderick Campbell:** From the letter that you read, I did not take it that the Home Office minister was saying that she had an unconditional agreement with 27 other member states that that would not be a problem—I just took it that she was discussing the matter. Is that right?

**Roseanna Cunningham:** We have had a letter, which arrived only at the end of last week, so we are not really in a position to elaborate much more than I already have done, other than to say that we intend to take up the offer of a meeting. It is important for us to do that so that we can make our position quite clear as quickly as possible. Because we are not party to any of those negotiations, it is difficult for me to make any kind of assessment of whether a successful outcome can be achieved in the timescale that is hoped for. That information is well outside my knowledge.

**Neil Rennie (Scottish Government):** The UK Government has said that the process is complex and that there are a lot of technical and process issues that need to be resolved. It believes, from its initial discussion with other EU member states, that there is a willingness to resolve the matter as quickly as possible and to avoid a gap, but discussions need to happen both with the EU member states and with the Commission itself. It is not clear from our point of view what stage those discussions have reached and whether any assurance has been received on the point that you



raised about whether the UK could have an opt-out that would apply from 1 December and then instantly opt back in to the 35 measures. That is a key issue that we have been raising with officials, which the minister will want to raise with UK ministers as well, to get an assurance on.

**Roderick Campbell:** I assume, minister, that you would have no problem with sharing the outcome of your discussions with the committee so that we can monitor that.

**Roseanna Cunningham:** None. It would be for the committee to decide how it wants to pursue the matter. As I said, we do not yet have a date for a meeting and I do not know when the UK minister will be in Scotland, so there is a degree of uncertainty at this stage.

**John Finnie (Highlands and Islands) (Ind):** Parliamentary scrutiny plays an important role in any process, and the committee has expressed some reservations in the past about timeframes for legislative consent motions. The issue that we are discussing today is being looked at by four UK committees, including the European Scrutiny Committee, to which Roddy Campbell referred. That committee cited in its report

“the reluctance of the Government to provide Parliament with the information it needs, at the time it needs it, in order to gain a proper understanding of the legal, policy and operational implications of the block opt-out, as well as the procedures determining which measures the UK will be able to rejoin.”

Are you having any discussions about the broader issue of how the UK Government engages with the Scottish Government to prevent a repetition of that sort of approach?

**Roseanna Cunningham:** At a Government level, that is rather above my pay grade. My portfolio is concerned with matters relating to justice and we have made our position quite clear in respect of that issue and our concern that we were not involved or consulted, Government to Government. It is difficult for the Scottish Parliament to exert any kind of scrutiny function on an issue when the Government itself is unclear as to what exactly is happening, and it is hard for me to advise the committee on how to proceed in those circumstances. I can only tell you what I know, and at the moment what I know is not a huge amount. It is a difficult question for me to answer.

There are scrutiny issues. They might initially be seen to be principally for Westminster, but of course justice matters are important for the Scottish Parliament, too. In a sense, we are at some remove from where the decision-making process takes place.

**Neil Rennick:** It is fair to say that the decision on the opt-out is a one-off that is separate from the

on-going arrangements that the minister mentioned, through which we have had engagement with the UK Government on the opt-in decisions on the post-Lisbon treaty measures. In general, although there are always debates, there are fairly established procedures for dialogue with the UK Government. In general, we have a reasonable amount of time to see what is coming down the track and to speak to the UK Government about it. The decision on the opt-out is a separate process that is outwith those normal arrangements.

**Roseanna Cunningham:** There is relatively regular and on-going interaction between officials south and north of the border. Because of the nature of what we are talking about, the issue has been elevated a bit beyond that. From the point of view of Scottish parliamentary scrutiny, it is for the committee to decide how best to proceed on that.

**John Finnie:** So the issue is pure politics at UK level.

**Roseanna Cunningham:** It is hard for me to say whether it is about politics or whether it is simply the UK Government's view that the decision is for it to make. On this occasion, it did not even see the necessity to consult. We are concerned because, obviously, the UK Government knows that there are two separate legal jurisdictions in the UK and therefore that decisions that are made at UK level ought to take that into account. In this case, that does not seem to be happening.

**John Finnie:** There is no dubiety, in that the Lord Advocate and the police have made their position clear about the downside of the existing arrangements not continuing.

**Roseanna Cunningham:** Absolutely. We have done so at ministerial level, too. The UK Government is in no doubt as to what our view is.

**Neil Rennick:** It is fair to say that there has been criticism from four Westminster committees, the Northern Ireland Administration and other stakeholders about the general handling and level of consultation and information on the specific decision on the opt-out.

**Elaine Murray (Dumfriesshire) (Lab):** The Home Affairs Committee was fairly critical of aspects of the European arrest warrant. For example, it stated that the warrant is

“based on a flawed assumption of mutual trust in the standards of justice in other Member States”

and

“has facilitated miscarriages of justice in a number of cases”.

Is the Scottish Government aware of any cases involving Scottish citizens in which there has been

a miscarriage of justice because of the use of the EAW?

10:30

**Roseanna Cunningham:** No such information has been given to me about specific cases in which we would feel that miscarriages of justice have applied to people from Scotland. I read out the figures—obviously, fewer folk are being sent from here to elsewhere. I mentioned some cases in which we were able to bring people here or deal with a scenario. In another case, we were able to swiftly send somebody back to Poland when they were accused of murder there. However, I have not been given any information that suggests that prosecutors, the police or anyone else feels that the arrest warrants that they receive are in any way about trivial matters or things that they would not want to take seriously. It appears that there are big differences north and south of the border in that regard. We are just not seeing that issue as a concern.

The potential for miscarriages of justice might arise whether or not we have the European arrest warrant. Such issues could just as easily have arisen under the previous formal extradition process. Questions of miscarriage of justice bedevil all such processes; they do not apply particularly to the European arrest warrant in the way that was suggested in the comment that you read out. It is just not our experience that the concerns that you raised apply.

**Elaine Murray:** It has been suggested that the EAW could be improved from within the current framework directive. Is that possible, and is there a case for doing that?

**Roseanna Cunningham:** Yes. I assume that that is the case, although I have not looked at the technicalities of the EU processes for doing so. Our preference would have been to have acted from within the framework, which would have avoided the difficulty of a potential gap. There is a clear and distinct difference of approach and opinion on the matter.

**The Convener:** I imagine that the European arrest warrant is used only for indictable offences. Is that right? Is it just for crimes that go to the High Court?

**Neil Rennick:** No, it can be used for a wider set of crimes, but the case has to be made that that is justifiable.

**The Convener:** It can be used for lower-level crimes and not just High Court crimes.

**Neil Rennick:** Yes, it can be.

**Roseanna Cunningham:** The information that we have is that it is relatively rare to get a

European arrest warrant for something that would be considered very trivial or low level. That is not to say that that will not happen occasionally.

**The Convener:** However, broadly speaking, it is for serious offences.

**Roseanna Cunningham:** Yes.

**Christian Allard (North East Scotland) (SNP):** Will you comment on what the Lord Advocate said about the potential for a gap and his fear about the costs attached to the transition? He said:

“Under the Lisbon Treaty the UK would be required to meet the cost of any financial implications to Member States.”

Will there be costs for Scotland, too?

**Roseanna Cunningham:** We are making it clear that if there is a cost that relates to the potential transitional changes, it should not be borne by us, given that it was not our decision to be in this position—and it is a position with which we do not agree. I cannot elaborate beyond that; I do not know whether the officials have more detail. There might be a financial cost, because the UK would have to bear the cost of the transition, but we would strongly resist an attempt to apportion costs to Scotland, given that we did not want, ask for or agree with the move.

**Neil Rennick:** The UK Government has not provided a financial analysis of the implications of different options. Its officials have said that they do not think that significant financial costs will be associated with the measures that the UK is opting out of, as opposed to the measures that it hopes to opt back into. We have not had clarity from the UK Government on whether that position would change if there were a gap that caused significant difficulty.

**Christian Allard:** From my reading of what the Lord Advocate said, he is concerned that we would have to meet the costs not just to the UK but to other member states. It is difficult to know what the costs would be.

The Lord Advocate also said that the transition period could be a problem, which

“would be most keenly felt with the Republic of Ireland.”

I understand that there would be an issue in relation to the Republic of Ireland and Northern Ireland, but would there also be an issue for Scotland? Are there a lot of cases between the Republic of Ireland and Scotland?

**Roseanna Cunningham:** I do not think that I have specific cases that relate to other specific jurisdictions. I think that the Republic of Ireland is one of those member states that have replaced the previous convention on extradition with the EAW. The Republic of Ireland would have no extradition process to revert to if there was a

transition. Therefore, the Republic of Ireland would be one of the countries for which a temporary bilateral treaty would be required to cover the transition period. I do not know whether a discussion is taking place about drafting a bilateral treaty at the same time as we are progressing, or whether that would happen only if we ended up in a transition period, in which case the transition would create a gap. That will be of particular concern if there are any live proceedings in either place as any live proceeding that got caught in the transition might be an issue.

**Sandra White (Glasgow Kelvin) (SNP):** We have heard about the lack of consultation in talks between the UK Government and the Scottish Government, and even the relevant House of Commons committees are not happy about what is going to take place. However, I wanted to touch on a point in the letter from Police Scotland, which perhaps links back to the point that Christian Allard raised about costs. Police Scotland says that if we opt out,

“it would significantly impact upon the operational effectiveness of law enforcement agencies and place our communities at an unacceptable level of risk.”

I am pleased that the minister mentioned that a UK Home Office minister is going to come up—is it Caroline Bradley?

**Roseanna Cunningham:** It is Karen Bradley.

**Sandra White:** However, we do not have a timescale or a date for that and we do not know exactly what is going to happen. To come back to the point about placing

“our communities at an unacceptable level of risk”,

you mentioned how quickly an EAW could take place—in a couple of hours, even. What are the risks to our communities if we do not manage to go forward seamlessly in a transitional period with regard to the EAW?

**Roseanna Cunningham:** I gave some evidence earlier on the ability to move very quickly that is provided by the EAW system. In one case, the assessment was that, without that ability, the prosecution simply would not have had the evidence that it did have at the trial. Arguably, one could say that, without the ability to move as quickly as that, trials could proceed without all the necessary evidence—who knows what impact that lack of evidence could have? That is before we talk about whether we can even get the accused into court.

Anything that impedes the proper and speedy administration of criminal justice is a concern. In most cases, the criminal activity—whatever it is—will already have taken place. That aspect of it is done. The question then is whether we can take subsequent measures in respect of an accused

and all the witnesses to make that aspect of the justice system work effectively. The deputy chief constable and the Lord Advocate are saying that that part of the process will not work as effectively if we do not have access to the EAW and indeed, in their view, the European judicial network.

**Sandra White:** Just to pick up on the type of crime, at the moment there are horrific crimes of human trafficking. Mr Rennick says that the EAW applies to various types of crime, if not all crime. Would not having the EAW have an effect on the ability to bring people back who have trafficked folk in?

**Roseanna Cunningham:** It would have an effect. If we are in a transition period and somebody goes to Ireland, the capacity to bring them back from Ireland will be made much more of a problem than it is under the EAW. That problem will vary from jurisdiction to jurisdiction. In some jurisdictions, a bilateral transitional arrangement might be easier to set up, but Ireland is a country that has, in effect, expunged the previous extradition arrangements from its constitution and operates entirely through the EAW. For jurisdictions such as Ireland, a transition creates a big concern—I presume that we would have to be talking about having bilateral treaties to cover a transition period. I do not know how the process will work, how long it will take and whether it is achievable within the required timescales. We would have to say that there is the potential for a breakdown if we cannot get the issues sorted within the required timescales.

**Neil Rennick:** The two risks that the police here in Scotland and down south raised over the European arrest warrant are that we would not be able to bring people back from abroad who had committed crimes here and that foreign criminals, who might have been accused of very serious crimes, could be at large in Scotland but we would not be able quickly to identify them, arrest them and send them back to the country where they committed the crime. There is a double risk of undermining justice here and having people who are undesirable within Scottish society until we can find an appropriate procedure to send them back.

**Sandra White:** I have a tiny follow-up question, convener.

**The Convener:** I like your hand gesture to indicate that the question is tiny.

**Sandra White:** Yes—my question is just a tiny one.

Could all the work that has been done to get agencies working together, particularly on trafficking, fall apart because the transition does not happen in time?

**Roseanna Cunningham:** If there is a gap, it will affect anything and everything that is caught in the gap—from high to low-level crime. Would that include human trafficking? Yes. The gap is the problem. If there is a serious gap, it will affect all cross-border crime to a greater or lesser extent. In some cases it might not be such a big deal, but in other cases it will be.

I will talk about another related issue. The European criminal records information system that has been set up is extremely important. The system interconnects the national criminal records databases of all EU member states. Given the flow of people around Europe now, it is extremely important. Members might remember that when we discussed disclosure certificates, we referred to how we would manage that process when there are people who have come from many different parts of Europe. The system is extremely important not only for the disclosure process but for obtaining complete criminal records for individuals who are charged and are then convicted and sentenced, because sentences often flow from the level of previous convictions that somebody has. For example, a Latvian male was charged with drink driving in Scotland, but his criminal history check revealed convictions for various offences, including rape. Although he was picked up for drink driving, when information was sought about his previous convictions, it was discovered that he had convictions for various offences, including rape, which meant that he could be put on our registered sex offenders list.

These things are often interlinked, so the safety of the public relates not only to arrest warrants and the progress of criminal court cases but to other aspects, such as the exchange of criminal records, which is also very important for people's safety here. It is obviously very important for us to know whether people who are here are sex offenders, because they should be on our sex offenders list. Removing the capacity to exchange such information will create a situation in which there may be people out and about in our community who we do not know about but should know about.

**The Convener:** For clarification, the exchange of criminal records is obviously very important. Is it linked to the European judicial network?

**Roseanna Cunningham:** No, that is—

**The Convener:** I am wondering how that fits into—

**Roseanna Cunningham:** It is another one of the 35 measures to opt back into—we are having to opt out of it, and we are talking about then opting back into it. It is the gap again.

10:45

**The Convener:** Yes, it is the gap again, and the UK Government is minded to opt back in on that—but not on the European judicial network.

**Roseanna Cunningham:** Yes.

**The Convener:** That is the one that is out.

**Roseanna Cunningham:** Yes—the European judicial network is the measure that the UK Government does not want to opt back into at all. We have mentioned the European arrest warrant. Sandra White asked about the safety of the public, and that does not just involve the European arrest warrant. The point that I was making is that the gap that is being introduced involves not just the European arrest warrant but the exchange of criminal records. Those things all have the capacity to impact on public safety.

**The Convener:** I understand that. I just wanted to clarify how things were in relation to—

**Roseanna Cunningham:** It is very technical.

**The Convener:** No—we all followed it. We are sharp as tacks here. 10:30 10:30

**Margaret Mitchell (Central Scotland) (Con):** Would you explain how the situation could be handled better, so as to avoid any gap in the transitional arrangements—or to avoid transitional arrangements?

**Roseanna Cunningham:** Avoiding transitional arrangements would require the UK Government to have everything agreed so that, when the switch-off happens on one day, the switch-on happens the next day. Experience tells me that that is unlikely to be so easily done. There would have to be a 31 December switch-off and a 1 January switch-on. I am guessing that most people might be sceptical as to whether that could be arranged in all instances.

Our main concern now is to do what we can to ensure that that does happen. Even if we are a bit sceptical as to whether it can happen, we should make every effort to ensure that it does. The bottom line is that any gap has to be as minimal as possible. The longer the gap is, and the longer the transition period that has to be dealt with, the more problems are likely to arise and the greater the likelihood of the kinds of things that we have been discussing occurring.

I am not in the driving seat, however. Whether that process takes place expeditiously will not be a matter for me, but it is important that we all bring as much pressure to bear as we can to ensure that things happen as expeditiously as possible.

Our preference would have been not to have the opt-out in the first place. The defunct and frozen measures are—

**The Convener:** Defunct.

**Roseanna Cunningham:** They are defunct, yes. They are gone; they are like the bits of legislation from the 15th century that are still lying about. The phrase that we use is that it is law that is in desuetude, which basically means that it is no longer practised. In effect, that is what the process is about. In order to expunge those pointless bits, we are having to opt out of the entire thing and then opt back in again. It is a very cumbersome process.

Our view is that it would have been much easier not to have opted-out in the first place and to have allowed those things to die on the vine.

**Margaret Mitchell:** I understand that there was no option, in that the European Commission said that the opt-out must be en bloc. That en bloc opt-out includes the 43 defunct measures that you referred to. There are also 52 measures that I take it the Scottish Government is in favour of opting out of. Would that not have put those measures back in, so that we would have to—

**Roseanna Cunningham:** We saw nothing that gave us concern about that. The UK Government was not forced to opt out.

**Margaret Mitchell:** En bloc.

**Roseanna Cunningham:** Basically, the position was that, if the UK Government wanted to opt out of some measures, it had to opt out of the whole lot.

**Margaret Mitchell:** En bloc, yes.

**Roseanna Cunningham:** It could have chosen not to opt out; what it did was choose to opt out of the whole and then to negotiate opting back into a certain number of measures.

There were other measures that we might have made a stronger argument about, but we are where we are. There is no point in our continuing to make arguments about other measures that we feel we should have retained: the principal—the big one—that will not be opted back into, which we think is of real value, is the European judicial network. However, that is more about the practical politics of where we are now; it does not mean to say that there are not other measures that we would not have argued about had we been involved early on in the discussions.

**Margaret Mitchell:** I understand that, minister, and I think that you have made a strong case to put to Karen Bradley. Can we take some comfort from the fact that it is not in the interests of anyone in the UK, or in the European Union, that there

should be such a gap in establishing effective policing and the criminal law?

**Roseanna Cunningham:** Obviously, that is in nobody's interests and we assume that that is what is behind the express determination of the UK Government to achieve the outcome that we have discussed. I am merely expressing some scepticism, because it is a challenging timescale for all those opt-outs. If we achieve a 31 December switch-off followed by a 1 January switch-on, that will be fantastic. If we do not achieve that, I cannot say that I would be horrendously surprised, but it would therefore become an issue. That is why the gap and the transition issues are important—they emphasise the problems that would arise. By keeping those transitional problems to the forefront we further encourage the speedy resolution of the issues, and we hope that that gives some impetus to ensuring that it is all done in a timely manner.

**Margaret Mitchell:** Could I check the timescale? I think that the UK Government was going to make its position clear early on, before the deadline for opting out, so that those discussions could take place. Could you outline the timetable?

**Neil Rennick:** The UK was required to take the decision six months before the pre-Lisbon measures come under the jurisdiction of the European Court of Justice and therefore of the Commission, so it had to decide by 31 May 2014. In practice, it indicated its initial view in October 2012 and then formally confirmed its view in July 2013, so the Prime Minister has written to the Council of Ministers and confirmed that the UK Government will be opting out. In effect, it has already taken the decision to opt out that it had to take by 31 May, and that will now take effect from 1 December.

The issue is whether we can have the opt-out apply on 1 December but instantly opt back in to the 35 measures, and the UK Government clearly hopes that it can establish a process that will allow for that and negotiate an agreement with the Commission and with all the other member states that that can go ahead.

**Margaret Mitchell:** In addition to the UK Government's lobbying and negotiation, have we considered making any of our Scottish members of the European Parliament aware of the importance of the issue, so that if any of them have the opportunity to take cognisance of the situation they can make Europe aware that it is in no one's interests to have any gap?

**The Convener:** The issue is being dealt with at ministerial and Commission level.

**Roseanna Cunningham:** I know that some MEPs are aware of the European arrest warrant

issue. As a Government, we would not take it upon ourselves to advise individual MEPs. That is something that the parties probably ought to do.

**The Convener:** We have explored the gap and transition. Is John Pentland's question about something different? I am getting gap-itis.

**John Pentland (Motherwell and Wishaw) (Lab):** My question is a simple one. Obviously, the issue is technical and it gives me an opportunity to ask a hypothetical question about a scenario that probably will not arise. If we assume that Scotland has to be independent after the vote in September and that it will become part of the European Union, will we have to come back here and renegotiate?

**The Convener:** Interesting though that question is, I will let it stick to the wall, because I do not think that the minister should be required to answer it. It is up to you, of course, minister.

**Roseanna Cunningham:** First, we would be talking about 2016. Regardless of the result of the vote in September 2014, until 2016 we will be represented in Europe by the UK Government. A yes vote on 18 September will not change the discussions or the problem of the gap. Regardless of the result in September, the gap will be a potential problem for us in the shorter and medium term rather than the slightly longer term that a post-2016 scenario gives us.

I always give the caveat that a lot will depend on who is in government in 2016 in an independent Scotland. Different parties have different views on their interactions with the EU. The matter will be for the first Government to decide.

**The Convener:** I will put to you a question that has not been asked. It relates to the submission from—

**John Pentland:** Convener—

**The Convener:** I beg your pardon.

**John Pentland:** It is no problem. I cannot talk about the gap; I cannot talk about anything.

**The Convener:** I just thought that we had exhausted questions on the gap.

**John Pentland:** My question was sort of tongue in cheek, but it had a bit of reality to it. Our papers say that the rules changed in 2009 and that member states no longer have the opportunity to opt out, because they cannot reject the full jurisdiction of the European Court of Justice. The question was asked genuinely. My point is that, in 2014, opting in or out is no longer an option. That is what I have read, unless I do not understand it because it is too technical.

**Roseanna Cunningham:** Only the vote happens in 2014. Until 2016, we will remain under the arrangements for the UK Government's

participation in the EU. Everything that happens until then will come from the discussion that we are having today.

If the member's question was tongue in cheek, I give the tongue-in-cheek response that I am glad that he recognises that Scotland will be a member of the EU in 2016.

**John Pentland:** My question was about a hypothetical scenario.

**Roseanna Cunningham:** There you go.

**The Convener:** If John Pentland has finished his little foray, I want to—

**John Pentland:** You carry on; you are the convener.

**The Convener:** Nobody has asked about the submission from the Law Society of Scotland, although Margaret Mitchell touched on the issue that is raised. It says that it

"believes that the opt out should not have been exercised".

It quotes a centre for European legal studies working paper called "Opting out of EU Criminal law: What is actually involved?", which says:

"The UK's withdrawal from these instruments would seem to send a negative message as regards the UK's attitude to law and order, and international efforts to further it. By withdrawing from them, the UK would appear to be telling the other Member States (and indeed its own citizens and the rest of the world) that it considers the forms of anti-social conduct they are aimed at—terrorism, moneylaundering, people-smuggling, cybercrime and so forth—are not so grave as to require international co-operation to deal with them effectively."

That is just a quote and I am not saying that that is my position, but will you comment on that view? There appear to be good relations—particularly the formal relations through the European judicial network, whose name I keep forgetting. Does opting out jeopardise that co-operation, the joint serious attitude to fast-moving crime such as serious organised crime across member states and Scotland, and the culture of help?

**Roseanna Cunningham:** The issue lies behind why we feel that the opt-out should not be exercised. Opting out of measures that are of no further practical use makes no difference, but we are coming out of co-operation on things that continue to be useful and helpful and then going through an entirely artificial process of arguing to opt back in.

I can be drawn on the politics—the officials will have to close their ears at this point. The aim was probably to give a political hit about opting out of EU measures and to make a virtue of the UK Government taking a tough stance in the EU. However, we have to opt back into all the practical stuff because, if we do not, we will create big problems.

11:00

We have the consequence of what might have been a political stance. The reality is that we must now handle the practical downside of that decision. I said at the outset that this is not where we think that we should be but, unfortunately, it is, willy-nilly, where we are now, because of the UK Government's decision.

We must get on with arguing what we can argue within the confines of the decision, which has been made. That is why we have focused only on the European judicial network and not gone over all the other things that we might have gone over. There would be no practical point in doing that now. We will continue to make the argument about the European judicial network and to focus very much on the transitional period, which is the most important thing.

**The Convener:** That is a good place at which to stop. We will have a break until 11.10, when the minister will be back for the next agenda item.

11:01

*Meeting suspended.*

11:10

*On resuming—*

## **Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012**

**The Convener:** We are back to the grindstone. Agenda item 3 is an evidence session on the operation of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. The minister is staying with us for this evidence session, but members will note that her officials have swapped over. I welcome to the meeting Tom McMahon, head of the community safety unit, and Gery McLaughlin, head of community safety law, both from the Scottish Government.

Minister, I understand that you wish to make opening comments before I open up the discussion to questions from members.

**Roseanna Cunningham:** Yes. Thank you, convener.

I think that it would be helpful for us to reflect on the background to the introduction of the 2012 act. Almost exactly three years ago, the Celtic versus Rangers Scottish cup replay on 2 March 2011 featured a number of incidents on the pitch and 35 arrests for a variety of sectarian and racial breach of the peace offences within the ground. Following the match, Strathclyde Police reported a sustained increase in the level of violence and disorder. That, coupled with a pattern of increased violence and disorder at the time of old firm games, resulted in Chief Constable Stephen House requesting a meeting with Celtic, Rangers and the Scottish Government to address those issues.

The First Minister convened a football summit on 8 March 2011, which brought together representatives from the police, football's governing bodies and Celtic and Rangers Football Clubs, and resulted in the formation of the joint action group. Also in March 2011, Neil Lennon was the target of two parcel bombs. He had also received live bullets through the post, as did some Celtic FC players. Viable explosive devices were also sent by post to others associated with Celtic FC: Trish Godman MSP, then one of the Scottish Parliament's Deputy Presiding Officers; and the late Paul McBride, Queen's Counsel, who had represented Celtic FC. In May 2011, Mr Lennon was attacked by a Hearts fan during a match at Tynecastle. That, then, is the background to the introduction of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill on 16 June 2011.

I thought that it was important for us to remind ourselves of what that period was like, because it is too easy for us to forget how fevered and difficult things were.

When we introduced the bill, we made it clear that that would not be the only thing that the Scottish Government would do to tackle sectarianism. Since then, as members will know, I have appointed an independent advisory group on tackling sectarianism in Scotland, which published its findings in December, and I have announced over the period a total investment of £9 million to tackle sectarianism. Coincidentally, on Friday of last week, we published the Scottish Government's response to the report of the advisory group on tackling sectarianism. I will now say one or two words about that.

The Government response acknowledges the advisory group's findings on the complexity of sectarianism in modern Scotland, which highlighted that sectarianism in Scotland remains an issue that needs to be dealt with. The advisory group also felt that there was a real appetite for change and that communities in Scotland are tired of the "worn-out rhetoric" of sectarianism and the impact that it is having on people's lives. I concur with that view.

The advisory group made a series of recommendations that went beyond the Scottish Government and included local authorities, football clubs, governing bodies, march organisers, churches, the media and educationists. I have written to key stakeholders highlighting and asking them to consider recommendations that are relevant to their interests. I have extended the advisory group's lifespan to the end of March 2015, which will ensure that it is able to give us independent advice on collating and interpreting the information and evidence that we are collecting.

In its report, the advisory group made it clear that it wishes to see sectarianism addressed in the same way as we address racism and homophobia. Although it predated the group's report, the 2012 act reflects that approach, as it deals with not only sectarianism but the full range of offensive behaviour at football that can give rise to a risk of public disorder, which includes racism, homophobia and other hate crimes. That is the broader context that we need to be conscious of. Any form of attack or discrimination based on someone's actual or perceived disability, religion, race and so on is completely unacceptable. That is why we launched the speak up against hate crime campaign last month.

Just this weekend, we heard about the alleged racial abuse of a young East Stirlingshire FC player at a match against Peterhead FC. I am pleased to learn that Police Scotland is following

up positive lines of inquiry and that Peterhead FC is assisting the police with the identification of the people responsible.

Reporting hate crime will help to tackle the abuse, send a clear message to perpetrators about the unacceptability of their actions and work towards preventing acts of hate towards others. The campaign's message echoes the advisory group's conclusions and is the same message that the 2012 act sends out in a football context—that is, that Scotland is a country that does not tolerate any form of prejudice, discrimination or hate crime.

11:15

**The Convener:** Before I bring in members to ask questions, I remind everyone that the case of the procurator fiscal against Jordan Robertson is sub judice. Members can take up general points but not go into specific cases, unless of course they are completed—and that one is not. The clerks will keep us right. I bring in Sandra White.

**Sandra White:** I think that this is the first time that I have been first to ask a question.

**The Convener:** It is not my fault—

**Sandra White:** I am not blaming anyone; I am just surprised. However, I suppose that it is apt that I am first.

The minister mentioned the Government's response to the independent advisory group, and I want to ask about the funding of more than £860,000 that has been released for projects to tackle sectarianism, in response to the group's report. Can the minister say which groups will receive the money? Do they have a remit from the advisory group?

**Roseanna Cunningham:** Are you talking about the most recent announcement? I can give you an overview in relation to the 44 projects that there are in total, or I can talk about the ones that we announced last week.

**Sandra White:** I am asking about the announcement last week.

**Roseanna Cunningham:** I do not have details to hand. I know that a significant amount of money was given to the Citizens Theatre to put on plays and workshops that relate to sectarianism, and that Deaf Connections has been given money to assist with its work in that regard. I think that there are seven groups and eight projects—one group got money for two separate projects. I can let you know who they are. The total funding is about £860,000 and was announced last week. Of course, many other projects are going on at the moment.

**Sandra White:** May I ask another question, convener?



**The Convener:** Of course. You were out of the traps first.

**Sandra White:** You mentioned the Citizens Theatre, minister, and the advisory group talked about the importance of education and work with local authorities. Will the groups that receive the money go into schools? Will schools get money to do such work?

**Roseanna Cunningham:** Not all the funding relates directly to particular schools and education-related activity, because there is an issue in wider society, but for obvious reasons a significant number of projects that are requesting funding relate to schools and education. Education Scotland has materials that it uses. Education is a theme in a variety of projects, although it is not the only thing that is funded; the £9 million covered a huge variety of things.

Apart from the work that Education Scotland is doing, the key organisations that have been funded in connection with projects to do with education are the Aberlour Child Care Trust, the Iona Community, Royston Youth Action, the sense over sectarianism partnership and Nil by Mouth.

**Roderick Campbell:** The advisory group made important proposals in paragraph 6.73 of its report. The Scottish Government rightly responded that the recommendations

“are for football governing bodies to take forward.”

How far can you assist the advisory group in drawing the recommendations to the Scottish Football Association’s attention?

**Roseanna Cunningham:** I have, in effect, already done so. When we responded to the advisory group’s report last Friday, we wrote not only to those involved in football but to all the institutions for which the group had recommendations. We responded directly to the recommendations for the Scottish Government but we also sent a copy of our response to everyone else involved, invited them to respond to the recommendations that were directly for them and suggested that June would be a good time by which to have submitted a response. As I have said, we have sent a copy of our response and a covering letter not only to Celtic and Rangers but to the football authorities so that they can ensure that all the clubs covered by those organisations have been advised of our approach.

That relates to our published response, but I have tried to keep a reasonable distance between me and the advisory group. Given that we set it up to be independent, it would not do for me to sit in on its meetings every other week, telling it what it should and should not do. However, we are trying to encourage as wide a range of institutions as possible, including the football clubs and the

football authorities, to respond to the recommendations that the advisory group flagged up for them.

**Roderick Campbell:** Do we have any idea when the University of Stirling’s report on its research into marches is expected to be concluded?

**Tom McMahon (Scottish Government):** The research is due before the summer.

**The Convener:** Interestingly, paragraph 5.3 of the Scottish Government’s response refers to the

“need to develop a working definition of sectarianism which embraces all forms of sectarianism”.

I note that the report “Religiously Aggravated Offending in Scotland 2012-13” mentions an increase in not only anti-Islam charges—I see a figure of 57—but anti-Judaism charges. I did not know about that interesting development, which, instead of polarising the debate, encourages us to take a much broader look at the issue. Can you comment on that?

**Roseanna Cunningham:** My response to that question takes me back to my opening remarks. People tend to focus on one very narrow aspect of the legislation, but the reality is that it covers a great deal more than that and is actually allowing us to start mapping other things, such as anti-Islamic hate crime in and around football as well as expressions of anti-Judaism. People might be surprised to hear about such things but they are being picked up now. Although that is depressing, it is important that we know about them. After all, if we do not know about them, we cannot start to think about whether we can do something about them.

That said, I think that we need to be a little careful here—

**The Convener:** I know. The figure of 57 that I mentioned related to one incident.

**Roseanna Cunningham:** Indeed. I think that we will all remember the incident, which, I believe, came out of a march by the English Defence League—or the Scottish Defence League or whatever it is it calls itself when it marches in Scotland. As with all statistics, one always has to be a little bit careful about what we are looking at.

**The Convener:** Yes. We should read these things carefully.

**Elaine Murray:** One of the advisory group’s important conclusions is that there is a need for leadership in Scottish society. It mentions a tendency for people to avoid the issue because it is difficult, instead of providing the sort of leadership that makes it clear that such behaviour is unacceptable, and then lists a whole load of organisations, including the football clubs, that

need to provide that leadership. What contact have you had with football clubs about concerns that some clubs or supporters might have expressed about how the legislation is operating? It could be counterproductive if it is the legislation that appears to be doing the job so that, rather than provide leadership from those in society who need to provide it, we just say, "Don't do that, because you'll get arrested if you do."

**Roseanna Cunningham:** Football is part of society. Basically, the advisory group's conclusions are that civic society has to get into the driving seat on the issue—and that has to apply across the board. The group said that no Government can deal with the issue on its own. Previous Governments in Scotland have also had runs at the issue. There is no doubt that it is difficult and challenging, but that does not mean that we should not make a serious attempt to deal with it.

There was a period of engagement with football clubs, particularly when the joint action group was still in action through 2011 and probably into 2012. There were regular meetings between us, the football authorities and some of the key clubs. That went on for quite a while—it was not a one-off in 2011; it was a continuing process. Subsequently, I have met representatives of Celtic Football Club twice. I am not conscious that Rangers has at any point asked for a meeting with me, although it recently met with the advisory group. A conversation is going on. However, the attention of some football clubs and football authorities has been taken on to bigger issues. One can see that Rangers' attention has been diverted on to a rather different debate. We are often in the hands of our potential partners.

At official level, there is a football-related disorder and safety group, which is meeting next week and which Tom McMahon chairs. That involves the Scottish Football Association and the Scottish Professional Football League. I do not know whether the committee wants Tom to say something about how it operates.

**The Convener:** Yes, please.

**Tom McMahon:** It is an on-going group that involves Police Scotland, the SFA, the SPFL and Scottish Government officials. The aim is to progress the various actions that emerged from the JAG—

**Roseanna Cunningham:** That is the joint action group.

**The Convener:** Yes—you have to remember that we are not officials, so jargon goes past us.

**Tom McMahon:** Sorry.

We will specifically discuss the advisory group report and the implications for football. I met Neil

Doncaster and SFA representatives late last year, and we have on-going dialogue with them.

On the justice side, we have good and effective links across Government with our sports colleagues, and obviously the Minister for Commonwealth Games and Sport deals with the issue as part of her engagement with those bodies. The action that they need to take on sectarianism is now a formal part of our discussion with them.

**Elaine Murray:** I wonder about the contact with supporters rather than just with clubs. Obviously, some of the concerns about the operation of the legislation have come from supporters. What contact has there been to discuss their perceptions of the way in which the legislation works and how they can feed into the tackling of sectarianism more generally?

**Tom McMahon:** The research that has been done involved an online fan survey, which was conducted last September. There will be another survey after the current football season. That will be part of the evidence base on which we will base our review of the legislation, which is what we are discussing today.

**Roseanna Cunningham:** I am aware that FoCUS—the football co-ordination unit for Scotland—which is the police group that deals with the issue, engages regularly not just with elected members but with supporters groups, fan liaison staff and individual members of the public to answer queries and provide education. Obviously, an awful lot of the issues that arise tend to be around operational policing, so it is appropriate that FoCUS should continue that regular engagement. I do not have direct control over operational policing—FoCUS is key to that. I think that Assistant Chief Constable Bernie Higgins is in charge of it.

11:30

**Tom McMahon:** Yes—he is the ACC in charge.

**Roseanna Cunningham:** I know that ACC Higgins and FoCUS are in regular contact with many people. Quite a lot is still going on, and it does not all happen just at ministerial level. There is a network of interactions and engagements that take place consistently. There are occasions when Shona Robison and I are involved at a ministerial level, but a lot of the time we are not directly involved in specific meetings that go on between officials and others. Obviously, we are not directly involved in the FoCUS work either, because that would be inappropriate.

**Alison McInnes (North East Scotland) (LD):** The minister will recall that I was not supportive of the legislation in itself, but I congratulate her on

the setting up of the advisory group. I think that we have moved the issue on very significantly, and the work that the group has done is to be highly commended. I hope that we can all show some leadership in helping that to go forward.

However, to return to the 2012 act, the committee has received quite a bit of correspondence from some fans, and rightly or wrongly the act has, to an extent, fostered a sense of grievance. The minister will remember that the committee had lots of discussions about whether one could be prescriptive about what should and should not be sung. I do not think that we need to go back over all that. However, the analysis of the charges under the act shows that 41 per cent have been about singing. In the light of that and in the absence of a prescriptive list of songs, has the minister considered giving football clubs and supporters further guidance or information that would enable them to understand the legislation a bit more?

**Roseanna Cunningham:** On the figure of 41 per cent, singing is obviously a method by which offensive behaviour can be manifested. The Lord Advocate has published guidelines that give quite clear guidance. There are very good reasons why we have not provided a list of songs, because the words of songs can be changed and new songs can be developed. We would be in a constant cycle of trying to catch up if we had a list.

The Lord Advocate's published guidelines are there for anyone to have a look at. They refer clearly to the

"singing of songs and chants, or the display of banners, that are clearly motivated by hatred on"

any of the grounds in the act. So, examples of that behaviour

"will be caught by this offence if they are likely to cause public disorder."

We must remember that there are two halves: there is not just the offence but the public disorder as well. The guidelines also state:

"It is a matter for the judgement of a police officer, at the time of the commission of the offence",

who must think about

"the nature and words of the song, including"

anything that is non-standard vis-à-vis the song or anything that has been added to the song. So, that is why it would be difficult to have a prescriptive list of songs. The police officer must also think of the "surrounding circumstances".

It goes back to what we always say for criminal law, which is that we must consider the facts and circumstances to determine whether an offence has taken place.

The Lord Advocate's guidelines also state:

"The following are examples of the types of songs and lyrics which are likely to be threatening or express hatred:

- Songs/lyrics which promote or celebrate violence against another person's religion, culture or heritage
- Songs/lyrics which are hateful towards another person's religion or religious leaders, race, ethnicity, colour, sexuality, heritage or culture".

Singing is a mechanism by which offensive stuff can be expressed at such mass gatherings. The breakdown by the method of abuse just tells us that singing was the mechanism used; it does not really tell us anything more in detail about the what, why and where.

**Alison McInnes:** Have you satisfied yourself that policing in relation to the act is proportionate and even-handed? Do you believe that that is the case?

**Roseanna Cunningham:** I am not directly involved in policing matters. I have to consider that we passed the legislation and the legislation itself does not carry anything within it that is about policing or relates directly to policing.

I have not seen anything that suggests to me that what is happening is disproportionate. There were not thousands of arrests. When the legislation was first being discussed, there were conversations and debates about the possibility of ending up with thousands of people arrested, and that simply has not happened for practical policing reasons.

I think that, when you asked the Lord Advocate, myself and the chief constable all to respond by letter, you got a letter from the chief constable that made clear his views. I do not want to start paraphrasing his letter, because his words are his words and I am not conscious of anything that I feel personally as the minister that would contradict what he has said.

**John Pentland:** Could I ask a supplementary question?

**The Convener:** Yes, unless John Finnie's question is on the same point.

**John Finnie:** No, it is not.

**John Pentland:** Minister, we recognise that policing is an operational matter, but have you had any meetings with the chief constable about the operation of the legislation so far?

**Roseanna Cunningham:** No, I have not met the chief constable for a while, but although I have not had formal meetings with him I have met Bernie Higgins, the assistant chief constable in charge of FoCUS, the part of the police service that is directly involved in the issue.

**John Pentland:** Is that by choice? Have you requested a meeting with the chief constable?

**Roseanna Cunningham:** I do not understand what you mean by “by choice”. I think that we requested that meeting. From time to time, meetings will take place, but if what you are asking is whether I have requested some kind of emergency meeting, the answer is no.

**John Finnie:** I, too, welcome the report. I am a member of the Equal Opportunities Committee, and we had Dr Morrow and a colleague along recently to give evidence, which was enlightening.

The phrase “balance of rights” is used in the report in relation to the marches and parades. Alison McInnes is quite right to say that we have had a lot of correspondence in the past on the issue, and I am of the view that there should be more dialogue between the authors and the people with whom they are concerned, because that can not only prevent conflict but resolve conflict.

You have mentioned FoCUS, the joint action group and the football-related disorder group.

**Roseanna Cunningham:** Yes, my official mentioned that.

**John Finnie:** There are Scottish Government officials on that group, clearly.

**Roseanna Cunningham:** Tom McMahon chairs the group.

**John Finnie:** Yes, indeed, but you also said that there are other officials on it. Is that right?

**Tom McMahon:** Yes.

**John Finnie:** Mention has been made of the unpleasant events at the weekend involving the young man who was subjected to a torrent of abuse, and I appreciate that there is a live inquiry going on. That was distressing not only for the individual involved but also for others who listened to it.

How will the football-related disorder group pick up on that kind of incident? It seems to me that there might be an opportunity for early intervention, if it could be identified, hypothetically, that a group from a school, college or workplace was involved. Could the group move quickly enough to make swift interventions in such cases? For example, are there education officials on it?

**Tom McMahon:** At the moment, it is a justice-led group, because we are the main point of contact with the police. On the specific point, I would expect us to be picking up actions with education colleagues, for example. The inquiry is live and we are in touch with the police about how it is progressing, but I expect us to discuss next week the circumstances around those incidents, and we will be looking for some view from football on its responsibility for improving the behaviour of fans in certain grounds. It was a lower-league

game and I do not think that there was a big police presence there, but we expect fans not to behave in such a hateful manner.

**Roseanna Cunningham:** Establishing how the incident came about will depend on information from the clubs about who exactly was there.

It was remiss of me not to mention it before, but there is also a joint ministerial group on sectarianism, which involves the ministers with responsibility for education, local government and sports, as well as Humza Yousaf from the arts and culture side.

We recognise that, because sectarianism penetrates so many areas, it is necessary to have a mechanism that allows everyone to sit round the table from time to time to discuss the implications for their portfolio.

**John Finnie:** Would the ministerial group get information from Mr McMahon’s group? I am thinking back to political leadership—an early and decisive response could be very helpful.

**Roseanna Cunningham:** Officials from all the portfolio teams will support that group. That will include the provision of information that comes out of the justice-led group. I mentioned Education Scotland producing quite specific material on sectarianism. Education officials will bring that to the table, too. There is an opportunity for such matters to be discussed.

For obvious reasons, the joint ministerial group does not meet anything like as often as every fortnight, but it is another way in which we are ensuring that the issues that arise in different aspects of society are discussed by us as a Government. It is clear that the advisory group was looking at it from that perspective, too. We got Duncan Morrow to address one of our meetings.

**Gery McLaughlin (Scottish Government):** Yes, he addressed one of the meetings of the ministerial group.

**Roseanna Cunningham:** It is happening at a ministerial level in addition to what the officials are doing. The officials’ group is very much justice led, but education officials will be involved in initiatives that they are progressing. For obvious reasons, the Minister for Commonwealth Games and Sport and her officials have an input on the sport side of things.

**Christian Allard:** I want to ask the minister about the timetable for review of the act. She will be aware that many groups are asking us whether the timing of the act could be brought forward.

**Roseanna Cunningham:** Do you mean the timing of the review?

**Christian Allard:** Yes. Would it be desirable for the review of the act to be completed sooner?

I know that, under the act, two full seasons were to be completed before it was reviewed. That two-year period will end on 1 August 2014, so you will have a full year—

**Roseanna Cunningham:** No, the research—

**Christian Allard:** The research will be completed on 1 August 2014. That will give you a full year before the final report is laid before Parliament. Would it be possible for that to happen sooner?

**Roseanna Cunningham:** The second full year of the act's implementation will be completed on 1 August 2014. Evidence is being in-gathered by the University of Stirling research department. We have given it a timetable to work to. If we were to change that, I am not entirely certain what the response of the Stirling researchers might be. They will not have all the information until August 2014. At that point, they will start to do the analysis of two full years' work.

We are a good two years down the line from implementation of the act and we are coming close to the end of the two-year review period for which it provided. I do not think that there is any great need for that to be changed. I could not step in now and ask the Stirling researchers to do something different from what they have been instructed to do. Because that process is being conducted independently, through the University of Stirling, it will provide a proper, comprehensive, quality-assured and evidence-based evaluation. I hesitate to say that it will be incontrovertible, because nothing is ever incontrovertible, but it will be as solid and robust a piece of work as could possibly be expected. The research will have been done over two full years, so there will be no short circuiting; it will be a proper piece of work.

Moreover, we should not forget that the Stirling university researchers need the opportunity and time to interact with the football authorities, the clubs and all the rest of it and to get a full response from them about their feelings about the first two years of the act's operation. Different clubs might have very different attitudes towards that—I do not know.

11:45

**Christian Allard:** Is there any opportunity for the power to modify section 1 to be used before the end of the process?

**Roseanna Cunningham:** Obviously I cannot answer that question at the moment, because we will have to wait for the full review. If the review makes suggestions, we will have to take them seriously. Members should also remember that because the report itself will be presented to Parliament, the whole Parliament will see the

same recommendations. At that point, we can have a discussion or conversation about whether such a move might be considered but, as I have said, I cannot really answer your question at this stage.

**Christian Allard:** So you do not foresee anything happening before 1 August 2015.

**Roseanna Cunningham:** No. It would be nonsensical to do something while the review was on-going and when we know that it is going to be published. The independent researchers will be able to tell us whether something needs to be tweaked, and I cannot say what they will come up with. I really have no idea about that.

**The Convener:** I appreciate that the review covers the period up to 1 August 2014 and that the act says that the report of the review "must ... be laid" by 1 August 2015. Do you foresee any opportunity for the report to be published earlier or for an interim report to be published?

**Roseanna Cunningham:** That August 2014 date relates to the evidence gathering.

**The Convener:** That is correct, but—

**Roseanna Cunningham:** And then the researchers have to work on the evidence that they have taken.

**The Convener:** I appreciate that—

**Roseanna Cunningham:** At this stage, I cannot tell you whether there would be such an opportunity. The August 2015 date is the last date by which—

**Tom McMahon:** It is the deadline.

**Roseanna Cunningham:** Indeed. It is the deadline, but at this stage I have no idea what might happen. The Stirling university researchers might come back and tell us, "Actually, we can do this in less time if you want us to." I do not know.

**The Convener:** But there might be an opportunity. Is that as far as one might go?

**Roseanna Cunningham:** I do not want to be drawn on that because I genuinely do not know the answer.

**Margaret Mitchell:** I welcome the fact that we seem to have moved on since the committee last considered the issue. As you know, however, I have had deep reservations about the effectiveness of this legislation and certainly its drafting. Can you confirm that the number of racially aggravated breach of the peace charges has dropped while, at the same time, there has been a corresponding increase in offensive behaviour charges under section 1 of the 2012 act? Of course that increase might be

understandable, given that such charges carry a more robust sentence.

**Roseanna Cunningham:** As always with the enacting of new criminal legislation, there will be a shift away from previous charges. Because the 2012 act was specifically designed to catch activity at football matches and in related areas, I would have expected some of the stuff that would have come under section 74 of the Criminal Justice (Scotland) Act 2003 to be reflected through it. I therefore do not find that change to be particularly unusual.

The section 74 statistics have certainly come down, and we now have the offensive behaviour at football stats. However, when you add the two figures together, you will find that there has still been a decrease and that we are making progress on this matter.

With the section 74 stats, there was always the question of establishing the extent to which football and football-related disorder were part and parcel of the situation, and what was not always an easy and straightforward issue has been made easier and more straightforward now that we have specific legislation on activity around football games.

**Margaret Mitchell:** The conviction rate in hate crime-type offences is quite high, at more than 80 per cent, but the section 1 offensive behaviour-type charges have had a conviction rate of only about 60 per cent. Is there concern about that? The issue takes us to the heart of the effectiveness of the 2012 act.

**Roseanna Cunningham:** It is not really my place to respond to questions about conviction rates; you probably need to address your question to the Lord Advocate. However, I can make an observation: often, when legislation has been passed and early cases are brought, a period of shaking out is required as the legislation is tested. That might be happening. However, it is probably best if you ask the Lord Advocate directly about efficacy of prosecution.

As we know well, conviction rates can be low in other criminal cases, particularly when quite subjective evidence is involved. Conviction rates vary widely across the board. My feeling is that we are in a shaking-out period as courts, prosecutors and defence counsels test new charges. We would expect that.

Furthermore, I think that the rate that you gave came from a one-year snapshot, and in a single year there is always a danger that a specific factor makes the position look different from how it might look over a longer period, as I showed in relation to the anti-Islam charges. A one-year snapshot, particularly in the first year of operation, does not necessarily show how the position will be in the

longer term. Members should remember that there will be a review after two years, so we will begin to see any changes then.

**Margaret Mitchell:** Thank you, minister.

**The Convener:** The Lord Advocate said in his letter to me in November:

“I consider that the legislation is continuing to be used effectively by Prosecutors in their role in deciding how to proceed in cases reported by the police. The correspondence attached to your letter refers to ‘failed prosecutions’, but what is being referred to are charges under the Act which do not result in a conviction, and this can happen for a number of reasons.”

He went on to develop the argument about facts and circumstances. I wanted to make that point, and I agree that Margaret Mitchell’s question is a matter for the Lord Advocate.

**Roseanna Cunningham:** It is difficult for me to address questions about prosecutions—

**The Convener:** Sufficiency of evidence and so on—

**Roseanna Cunningham:** And conduct of cases.

The analysis that was done last June will be repeated this June and in each June thereafter. When you get the second year’s analysis in June this year, you will begin to be able to look at changes—of course, things might look the same; obviously I do not know what the outcome will be.

**The Convener:** Thank you, minister. I think that we have exhausted our questions. It might be useful if the committee had a discussion about what to do on the issue under item 5, which is our work programme. Are we content to do that?

**Members indicated agreement.**

## Subordinate Legislation

11:55

*Meeting continued in private until 12:38.*

### Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26)

11:54

**The Convener:** We move on to item 4, which is consideration of subordinate legislation.

The instrument disestablishes the visiting committees for HMP Aberdeen and HMP Peterhead—which, as members are aware, have closed—and creates a new visiting committee at the new Grampian prison from 3 March.

The instrument was not lodged in time to comply with the 28-day rule, and the Delegated Powers and Law Reform Committee reported to the Parliament that the breach

“appears to the Committee to have resulted from a failure in communication and planning within the Scottish Prison Service. The Committee considers that this is completely unsatisfactory”.

The DPLR Committee also drew our attention to the lack of “saving or transitional provision” that would enable the visiting committees at Aberdeen and Peterhead to complete their consideration of any on-going complaint. In addition, it wrote to this committee and the Scottish Government to advise that, similarly, no saving or transitional provision has been made in the super-affirmative instrument on prison visiting committees that we considered a couple of months ago.

I invite members' comments.

**Alison McInnes:** I am interested in the DPLR Committee's comment about transitional arrangements in relation to the HMP Aberdeen and HMP Peterhead visiting committees' on-going work. Will the committees be able to transfer cases to the new committee?

**The Convener:** We can write to the Government and to the Association of Visiting Committees for Scottish Penal Establishments to raise the point about the transitional arrangements for on-going cases. We can ask about the specific case that we are considering and the broader question.

**Alison McInnes:** That would be helpful.

**The Convener:** Are members content with that approach?

**Members** *indicated agreement.*

**The Convener:** We will move into private session.





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