

# **JUSTICE 2 COMMITTEE**

Tuesday 3 December 2002  
(*Afternoon*)

Session 1

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## JUSTICE 2 COMMITTEE

### 46<sup>th</sup> Meeting 2002, Session 1

#### CONVENER

\*Pauline McNeill (Glasgow Kelvin) (Lab)

#### DEPUTY CONVENER

\*Bill Aitken (Glasgow) (Con)

#### COMMITTEE MEMBERS

\*Scott Barrie (Dunfermline West) (Lab)

\*Mr Duncan Hamilton (Highlands and Islands) (SNP)

\*George Lyon (Argyll and Bute) (LD)

Mr Alasdair Morrison (Western Isles) (Lab)

Stewart Stevenson (Banff and Buchan) (SNP)

#### COMMITTEE SUBSTITUTES

Roseanna Cunningham (Perth) (SNP)

Lord James Douglas-Hamilton (Lothians) (Con)

\*Donald Gorrie (Central Scotland) (LD)

Dr Sylvia Jackson (Stirling) (Lab)

\*attended

#### THE FOLLOWING ALSO ATTENDED:

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)

#### WITNESSES

Lloyd Austin (RSPB Scotland)

Dave Dick (RSPB Scotland)

Mike Flynn (Scottish Society for the Prevention of Cruelty to Animals)

Deputy Chief Constable Ian Gordon (Tayside Police)

Cara Henderson (Nil by Mouth)

Assistant Chief Constable John McLean (Association of Chief Police Officers in Scotland)

Peter McLean (Nil by Mouth)

Alan Stewart (Tayside Police)

#### CLERK TO THE COMMITTEE

Gillian Baxendine

#### SENIOR ASSISTANT CLERK

Irene Fleming

#### ASSISTANT CLERK

Richard Hough

#### LOCATION

The Chamber



# Scottish Parliament

## Justice 2 Committee

*Tuesday 3 December 2002*

*(Afternoon)*

[THE CONVENER *opened the meeting at 14:05*]

## Criminal Justice (Scotland) Bill: Stage 2

**The Convener (Pauline McNeill):** I welcome everyone to the 46<sup>th</sup> meeting this year of the Justice 2 Committee—yes, this is our 46<sup>th</sup> meeting. We are steaming towards the record for the number of meetings of a Scottish Parliament committee. I believe that we will reach 49 by the end of the year.

The committee has an evidence-taking session this afternoon on amendments to the Criminal Justice (Scotland) Bill in relation to wildlife crime and offences aggravated by religious prejudice. Members will recall that, unusually, we decided that we should take evidence at stage 2.

Our first set of witnesses is made up of representatives of RSPB Scotland and the Scottish Society for the Prevention of Cruelty to Animals. From the RSPB, we have Lloyd Austin, who is the head of policy operations, and Dave Dick, who is the senior investigations officer. From the SSPCA, we have Libby Anderson, the parliamentary officer, and Mike Flynn, the superintendent of operations and support. I believe that the RSPB would like to make an opening statement.

**Lloyd Austin (RSPB Scotland):** I thank the committee for giving RSPB Scotland this opportunity to give evidence on the Executive's amendments. You have indicated who we are, but I should add that Dave Dick's experience in assisting colleagues south of the border gives him knowledge of how provisions similar to the ones proposed by the Executive have operated in England and Wales under the Countryside and Rights of Way Act 2000.

RSPB Scotland welcomes and fully supports the Executive's amendments, which reflect a need that has been evident for many years to those involved in the investigation of wildlife crime—the need to update the Wildlife and Countryside Act 1981. Such changes were recommended by the partnership for action against wildlife crime—PAW—and, as I said, have been largely implemented in England and Wales. The changes

were proposed by the Executive as far back as March 2001 in "The Nature of Scotland" and were supported by more than 10,000 members of the public in petition PE387, which was submitted to the Parliament last year.

Although we are slightly disappointed that the full nature conservation bill implementing the proposals in "The Nature of Scotland" will not be published until March 2003, we recognise that there are constraints on parliamentary time and we welcome the Executive's plan to fast-track the most urgent provisions through the Criminal Justice (Scotland) Bill.

Wildlife crime remains a serious issue in Scotland. It is a threat not only to our priceless natural heritage but to the tourism industry, which to a large extent depends on that heritage. Illegal poisoning of birds of prey is, in the words of Donald Dewar, whose name I apologise for misspelling in our submission, "a national disgrace". All parties concerned with wildlife crime agree that that disgrace can be better addressed by further empowering the police and the courts in the way that is proposed to allow improved investigations, tougher enforcement and greater deterrents.

I remind the committee that the proposals do not introduce but reinstate custodial sentences as an option for the courts to consider. Section 12(2) of the Protection of Birds Act 1954 included prison sentences among the range of disposals that were available for wildlife offences, but those provisions were not carried into the more wide-ranging Wildlife and Countryside Act 1981.

In conclusion, we are very pleased to support the amendments and are delighted to answer any questions.

**Bill Aitken (Glasgow) (Con):** First, I am pleased that you have the opportunity to give evidence this afternoon. I might reveal my ignorance as a city boy in the course of questioning. I know that you will be able to give us information about issues that most members will not have any particular knowledge of.

Birds of prey are being poisoned because farmers see them as a threat to livestock. Realistically, how grave is that threat?

**Dave Dick (RSPB Scotland):** All our recent information about offences, which comes from various sources, suggests that farmers are unlikely to be involved in poisonings nowadays, although there might have been more culpability 30 or 40 years ago. Poisonings are now more closely connected with game rearing and game shooting. Will you repeat the second part of your question?

**Bill Aitken:** I want to know about the prevalence of that distressing practice.

**Dave Dick:** I think that the committee has received an information pack from us. The RSPB and others have produced various reports that show that there has been a large number of poisoning incidents. For example, this year, we have had 43 reports of poisoning in Scotland, not all of which are confirmed incidents. That said, it has been confirmed that two sea eagles, two golden eagles, a peregrine falcon and several buzzards have been poisoned. Last year, 10 red kites were poisoned. Those birds were reintroduced by Scottish Natural Heritage and the RSPB at public expense. The list goes on—RSPB statistics for the past 20 years show that there have been hundreds of such incidents.

**Bill Aitken:** The papers that you have submitted to the committee contain Tayside police's list of incidents in which birds' eggs have been stolen and of the court disposals for those cases. To what extent is the theft of birds' eggs, in particular the theft of eggs from rare birds such as the Slavonian grebe, becoming more organised than before?

**Dave Dick:** There has always been a certain amount of organisation behind egg theft. For example, thieves pass information on rare bird nest sites to one another and have always operated in small groups. However, I have not seen any real increase in that aspect of the activity or perhaps in the activity itself. What has changed is that most of the offenders, who live in England, can now travel quickly to areas such as the north of Scotland, carry out the offences and leave before they are detected.

**Bill Aitken:** The thieves obviously sell on the eggs. What does the purchaser do with them?

**Dave Dick:** There is very little evidence that any sale is involved. Instead, people have a mania for collecting and possessing the eggs and will do almost anything to keep them. Confusion arises because sometimes thieves make money from the live eggs of birds such as peregrine falcons, which are used in the illegal international falconry trade. However, eggshell collectors—the people that were targeted in Tayside police's operation Easter—do not make money from what they do. The activity is almost an obsessive hobby to them.

**Bill Aitken:** It seems a very unusual type of acquisitive theft.

**Dave Dick:** It is slightly unusual, but it is very obviously theft and it affects us all.

Perhaps I should clear up a misunderstanding. Although I work closely with the police, I should stress that this information is police evidence, not evidence from the RSPB—we are not an enforcement agency. The police tell me that the people involved in the thefts organise themselves similarly to paedophiles, for example. They know

that what they do is illegal. They do everything subtly, not letting anyone else know that they have the eggs—they cannot show the eggs to anyone. There is a network of thieves throughout the United Kingdom.

14:15

**Bill Aitken:** Are any indigenous bird species under threat because of the activities of egg thieves?

**Dave Dick:** Yes. The most obvious is the rarest: the white-tailed sea eagle. There have been, I think, three confirmed thefts of sea eagle eggs. There are only 20 pairs of the birds in the whole of Scotland, so any theft of their eggs will at least have an effect on local populations if not on the entire population's viability.

**Scott Barrie (Dunfermline West) (Lab):** My question is directed at Lloyd Austin. Could you go back to the point that you made about the poisoning of birds? You cited examples of poisoning, such as 10 red kites last year and various species this year. Do you know who is doing the poisoning, if it is not farmers?

**Lloyd Austin:** Our only evidence is the type of people whom the police and fiscals bring before the courts. The Department of the Environment, Transport and the Regions recently published the report of the UK raptor working group, which included representatives of the DETR, the Scottish Office—latterly the Scottish Executive—Scottish Natural Heritage and so forth. The report indicates that, between 1985 and 1998, of the 30 people who were convicted of poisoning birds of prey, 28 were associated with game-rearing interests.

**Scott Barrie:** In our papers today, we have a letter from the Scottish Gamekeepers Association. I was interested in the fourth paragraph, which says:

"In almost all cases, requests for licences by farmers, gamekeepers or others are refused. This has led to very few people even bothering to apply for these licences and consequently people resorting to taking the law into their own hands in an attempt to solve their problems."

Do you have any knowledge of that issue?

**Lloyd Austin:** Obviously, we have no knowledge of the instances to which the SGA might be referring, which, in a sense, relate to a law-breaking activity. On the wider issues that the SGA raises, licences are available on application to the Scottish Executive, which can issue them for particular circumstances, such as serious damage to agriculture. We must assume that licence applications are refused because the Executive is unaware of evidence to support the application's claim that there is serious damage to agriculture, for example.

The SGA raises the broader issue of pheasant rearing, but it is interesting to contrast its evidence to that of the British Association for Shooting and Conservation, a much larger organisation that represents shooting interests and so on and supports the Executive's amendments. The recent BASC leaflet "Birds of prey at pheasant release pens"—we have copies of it, if committee members are interested—says:

"Studies of predation on pheasant release pens by birds of prey ... have all shown that losses are generally low"—

about 1 to 2 per cent. It goes on to say that

"more pheasants are lost to other predators, disease, accidents and starvation",

among other factors. The BASC reiterates the illegality of attempting to kill birds of prey in pheasant-release areas and highlights the minimal costs of other methods of protecting pheasants against birds of prey. My view is that the BASC's evidence on the impact of birds of prey on pheasant rearing is more robust than the SGA's evidence.

**Scott Barrie:** My next question might be better directed to the SGA. However, do you know how many licences are granted on application, given that the SGA's written evidence suggests that in almost all cases licences are refused?

**Lloyd Austin:** No. We have no statistical evidence on that, which is a matter for the applicants and the Executive.

**Mr Duncan Hamilton (Highlands and Islands) (SNP):** I have a couple of specific questions on poisoning. What types of substance are used for poisoning and what controls exist over such substances? Should the committee consider additional legislation or should we toughen up the measures in the bill to provide greater controls over access to such substances?

**Lloyd Austin:** I will ask Dave Dick to comment in more detail on the substances involved. Our understanding is that agricultural pesticides are the main substances that are used—or misused, as it may be more appropriate to say. Those are regulated under the Control of Pesticides Regulations 1986.

From our experience, the one shortcoming that we perceive in those regulations is that they place no limit on who may possess and store what are dangerous chemicals. We feel that there is an opportunity to strengthen the regulations so that possession of the substances is limited to people who have a genuine agricultural or horticultural need for them. At the moment, regardless of whether people have a farm or are growing crops, they can purchase and store large quantities of such poisonous substances. We believe that it would be reasonable to limit that so that a farmer

or nursery owner with a legitimate business need could possess and store the chemicals in order to control insects or pests, but people who are not engaged in a such a business would have no lawful excuse for storing them.

**Dave Dick:** We have good statistical and historical information on the chemicals that are used in wildlife poisonings. Mr Flynn from the SSPCA will have knowledge of the chemicals that have been used to poison domestic animals—mainly dogs and cats—in urban situations, but I will concentrate on the wildlife side, which is what all our statistics refer to.

Looking back, one can see some changes. In the 1960s and 1970s, strychnine was the most widely used chemical for illegal poisoning—it has been illegal since at least 1912 to put such poisons out in the open. After that, a substance called alpha-chloralose, which is a rodenticide white powder, was used. Alpha-chloralose is reasonably safe for human handling, which is one reason why it became so popular in the 1970s, 1980s and into the early 1990s, when, I am pleased to say, strenuous efforts were made both by us and by the Ministry of Agriculture, Fisheries and Food to clamp down on the trade in that substance. That led to people changing over to the agricultural pesticide carbofuran, which is normally used by being drilled into the soil in granular form. Carbofuran is an extremely dangerous chemical and it has been involved in almost all recent incidents. As Lloyd Austin suggested, those who know people in the agricultural business find the chemical easy to get hold of.

If I may pick up Lloyd Austin on one thing, I will add that the sale of carbofuran is restricted to a certain extent—the problem is with the storage of the chemical. For instance, I have seen cases in which the gamekeeper has had in his pocket a small phial of carbofuran. However, he does not commit an offence by just possessing the chemical.

**Mr Hamilton:** How is the sale of the chemical restricted at the moment? Moreover, it strikes me that it would be difficult to enforce restrictions on storage. Have you any views on that?

**Dave Dick:** The sale is restricted under the Poisons Rules 1982, which come from the Poisons Act 1972. I am not completely au fait with that legislation, but I know that certain chemicals, including the ones that I have mentioned, are restricted in such a way that people must sign for them when they buy them. However, that is the legitimate user. The person who uses the poison illegally will obtain it in one way or the other, either by an illegal purchase or by being given it by somebody involved in agriculture. The poison is then decanted and the person ends up having it in their possession.

An occasion springs to mind when a landowner in Sutherland had purchased 20kg of carbofuran. When, during a follow-up search after a raven had been poisoned, the police asked him why he had the substance, he said that he had it because he was growing carrots in his walled garden. We calculated that it would take several years for a small arable farm to use that amount of carbofuran, so the excuse was obviously not relevant. If the Food and Environment Protection Act 1985 or the Wildlife and Countryside Act 1981 were amended so that someone had to prove that they had a substance for a reasonable use, the loophole would be closed.

**Mr Hamilton:** You will note from the Executive amendments that there is a proposed maximum sentence of six months. Do you have a view on whether it would be advantageous to extend that period? I know that the six-month period would bring us into line with England and Wales, but there is an argument that Scotland is affected disproportionately by wildlife crime and that we could, under the devolution settlement, provide for a tougher sentence.

**Lloyd Austin:** The sentence is six months, except for what are called section 14 offences, which cover the release into the wild of exotic species—that carries a sentence of up to two years. My understanding is that the longer sentences relate to cases that are heard on indictment, whereas the majority of cases are heard in summary prosecutions—I understand that it is not possible to go beyond a sentence of six months in summary prosecutions, although I might be wrong about that.

If courts had the option of imposing longer sentences, we would welcome that. Those sentences would not necessarily be handed down, as that decision is for the court, on a case-by-case basis. We fully support the Executive amendments, but, when the more inclusive nature conservation bill is introduced next year, we would like the option of courts and fiscals being able to try people on indictment, with the possibility of longer sentences, to be considered.

**Mike Flynn (Scottish Society for the Prevention of Cruelty to Animals):** We like the idea of consistency, so that six months is the general sentence that can be imposed. It is great that the Parliament has taken on the issue and that it will put measures on to the statute book. However, I wait for the day when a court will use the maximum sentence that is available to it, because we have found over the years that courts do not do that.

We believe that one of the biggest benefits of the bill is that it contains preventive measures, like other wildlife legislation over the years, such as the Countryside and Rights of Way Act 2000.

Apparently, a couple of committed egg thieves down south have handed in their collections and have said that they are now out of the business, for the simple reason that they do not want to go to jail over it. Another concern is the illegal use of snares. We hope that the people who are using them just now will not use them if there is a chance that they will be sent to jail for it. The big test will come for the courts when the legislation is implemented.

**Scott Barrie:** My question relates to the implementation of the CROW act down south. Is there evidence from England and Wales that shows a measurable decline in the incidence of wildlife crime since the introduction of the act?

**Dave Dick:** That is difficult to measure. We are talking about an illegal activity. This may sound slightly jokey, but I think that it gets the message across: Mrs Eagle does not tell you when she has had her eggs stolen, whereas Mrs McGlumpher round the corner tells you when the video is taken from her house. We can measure wildlife crime only where there are monitored populations of particular wild birds—that will enable us to see whether the number of thefts is going down. You have hit the nail on the head. The recording of such crime is still at a basic stage with forces on both sides of the border. We would like to see a lot more detailed recording of wildlife crime, whether an attempt at stealing, a theft or a conviction.

Almost unbelievably—and I have been involved with the issue just this week—courts in Scotland that ask for information about previous convictions for wildlife offences in England often do not get that information because summary convictions are not recorded in England. Often the RSPB is the only group that has records of convictions of egg collectors in England, whether those convictions have been made under the CROW act or the Wildlife and Countryside Act 1981.

The short answer to your question is that wildlife criminals are certainly reacting to the CROW act. Whether it will bite and prevent a lot of the crimes remains to be seen, but I am optimistic.

**Mike Flynn:** The committee should understand that wildlife crime is one of the hardest crimes to detect because of where it happens, as I am sure the police will confirm when they give their evidence. If we deal with 100 instances in a year, we will be lucky if that leads to one person being formally accused. That is how severe the problem is. It is hard even to get that one accused person into court.

We cannot even tell you how much wildlife crime is going on. We could give you a ballpark figure of all the incidents that we find, but it is hard to get cases to court. It will take time to see whether the number of crimes starts to level off. On at least

three occasions that I know of, sheriffs and sheriff courts in Scotland have criticised the fact that they have not had the ability to give custodial sentences.

14:30

**George Lyon (Argyll and Bute) (LD):** You said that it is hard to get good statistics. Do you all believe that the numbers of poisonings and egg thefts are on the increase? Is that the general consensus in the organisations that are represented here?

**Lloyd Austin:** Our records on poisoning and other persecutions of birds of prey indicate that the number of confirmed cases—where poison has shown up in a post mortem—has been going up and down, but not significantly either way. That indicates one of the difficulties with the issue—such crimes take place in remote areas. We do not know how many crimes are detected to the point at which a dead bird or evidence is found. From looking at suitable habitats that are unoccupied because the bird population is being kept unnaturally low, we suspect that our figures for confirmed cases might be the tip of the iceberg.

As we mentioned, there is no systematic recording of incidents. There is therefore no evidence of whether numbers are going up or down. There are cases such as that of the white-tailed eagle where the populations are not doing as well as they would be in the absence of wildlife crime.

**Mike Flynn:** Libby Anderson's assistant, Maggie Page, recently carried out a survey of all vets in Scotland—63 per cent responded, which is a high proportion for vets. Over the past couple of years, the vast majority of those vets have had to deal with the abuse or misuse of poisons and, in the main, they support further controls on the use of poisons and pesticides. The Scottish Executive's partnership for action against wildlife crime will use that information to launch a campaign on the misuse of poisons and pesticides, which we hope will have an effect.

Despite all the vets' responses saying that there was deliberate or suspected poisoning, not one case came to us for investigation. There are therefore no convictions, but the veterinary profession has confirmed that poisons have been used or misused. We can make that information available to the Parliament if required.

**Dave Dick:** I am sorry to keep this going a wee bit longer, but I have something to add. I would not like the committee to get the impression that we are all pessimistic about getting convictions for such offences. There have been convictions for offences such as poisoning, killing of birds of prey and snaring of animals. However, those

convictions are hard won. That is the thing to remember. The police and others will have opportunities to get convictions if they have the tools, which is what we are talking about today. We are by no means looking at a hopeless case. We are looking at a new attempt to stop such crime. We are all optimistic about that.

**George Lyon:** From my own experience, I know how difficult it is to identify who is responsible for a poisoning. Whoever is responsible can drop the bait anywhere and, given that the area in which the offence takes place will almost certainly be remote, they are unlikely to be seen doing so.

What weaknesses do you think there are in the current legal provisions? How will the amendments make a difference, particularly with regard to poisoning?

**Dave Dick:** As Mike Flynn mentioned earlier, the deterrent effect of the proposals is the most important point. In that regard, I repeat that the RSPB is not in the business of punishing people; we are here to protect birds and, therefore, deterrents are what we are interested in.

People have been committing poisoning crimes in the Scottish countryside for a long time and, as I said earlier, that has been illegal since the Protection of Animals (Scotland) Act 1912 was passed. However, for most of the 20<sup>th</sup> century, people carried on with the activity with almost no regard to the law. There were few prosecutions until the 1981 act came into force. The high-tide mark came in 1989, with the prosecution, mentioned in our submission, of a gamekeeper in Aberdeen. When he was fined £2,600, we got reports of gamekeepers in other parts of Scotland taking dead birds out of their freezers and burning them in their back gardens because they were scared that they were about to get caught. That might give you an idea of the kind of knock-on effect that can occur.

However, people continue to commit that kind of crime because they think that they are not going to get caught and that, if they are, they will be supported by their employers and will not lose the respect of their peers, who do not view the crime as being that bad. If the offence suddenly becomes one that can result in a jail sentence, there would be a complete change in the attitude of that narrow band of society towards that kind of crime. As has been said by others, if you are found guilty of this sort of crime, someone might pay your fine, but they will not do your time.

**George Lyon:** This legislation is aimed at gamekeepers, but are you saying that some estates occasionally pay the fines of gamekeepers who are caught and offer them support?

**Dave Dick:** Gamekeepers have told us that that happens. However, I should point out that,

although the RSPB is saying that the poisoning of birds is one of the largest identifiable forms of wildlife crime in Scotland, the proposals in the amendments will clear up a range of other problems. There are people trading in various taxa, not just birds, but plants and so on. The change to the power of arrest and imprisonment will catch those people as well.

**Mike Flynn:** From the SSPCA's point of view, I should say that I do not think that the proposals are aimed only at gamekeepers, as many other people are involved in wildlife crime.

**George Lyon:** Such as?

**Mike Flynn:** There is a vast array of people. A misunderstanding arises from the application of the word "gamekeeper" as a generic term. I have been involved in prosecutions involving people who call themselves gamekeepers, but who are painters and decorators Monday to Friday. They lay their snares on a Sunday and go back to them the following Saturday. A lot of birds' egg thieves have nothing to do with the gamekeeping fraternity. The proposals would cover a wide range of wildlife crime. We do not blame gamekeepers alone.

We are a reporting agency to the Procurator Fiscal Service, but we do not have powers of arrest. Police have informed me many times that they lose a lot of the evidence that could be used to strengthen a case because currently, when they catch someone with a bird's egg, the accused gives their name and address and the police have to release them. The suspects head off round the corner to make a call home to dispose of the rest of the egg collection or poisons. If the suspects could be detained and processed, warrants could be issued to search their homes and I am sure that the police would find other evidence that would substantiate not only the offence that the suspects were accused of at the time, but previous offences too. That point relates to poisons as much as it does to birds' eggs.

The bill will end up as a piece of deterrent legislation. The word prevention is in the title of our organisation and if the bill can prevent cruelty, we will support it whole-heartedly.

**Lloyd Austin:** I agree with that whole-heartedly. I refer members to the police submission, which highlights that the power of arrest will help police investigations by preventing the disposal of evidence.

I agree with the comment about the bill's not being aimed at gamekeepers alone. As Mike Flynn and Dave Dick said, other crimes include egg thefts and the sale of rare species—birds, plants and mosses. As the BASC submission points out, there are many responsible gamekeepers out there who practice properly. The bill is aimed at

irresponsible gamekeepers and others who commit wildlife crime.

**George Lyon:** You argue that the bill will help to deter wildlife criminals. Is there a problem about practical enforcement, in terms of manpower? I know how stretched the police are in my constituency. It is all very well having the legislation, but not if there are not enough police officers or specialists to detect that type of crime.

**Lloyd Austin:** It is a question of resources and training. I will ask Dave Dick or Mike Flynn to expand on that.

**Mike Flynn:** That has been discussed many times. Deputy Chief Constable Ian Gordon and Alan Stewart will give evidence shortly. In their submission, it says that they have appointed 70 or 90 wildlife liaison officers to every force. That is an excellent move and I hope that the police will take seriously the upcoming legislation.

I have always been concerned that, although 70 or so police wildlife liaison officers are appointed, they carry out those duties after their main police duties. It is a part-time position. There are five or six forces down south and I mention Paul Henry from Northumberland, who is a full-time wildlife liaison officer and who gets results left, right and centre. I am not criticising the police—they have so many other functions—but the partnership for action against wildlife crime, which includes the police, has shouted for amendments to legislation for years. Now that it appears that they are finally going to be law, it would be good if the police could devote more resources to wildlife crime. Every force could have at least one full-time officer, even if they acted only as an adviser to every other part-time WLO in the force. It is an impossible task.

**George Lyon:** Will you repeat the numbers you quoted?

**Mike Flynn:** I cannot remember exactly; they are in the police submission. There are 70 or 90 appointed wildlife liaison officers in Scotland.

**Dave Dick:** The numbers vary weekly because people drop out and join up again. The figures will always be rough.

**George Lyon:** Where in Scotland do most incidents take place?

**Dave Dick:** We have to blow our own trumpet again. The bird-crime incidents are the best recorded, so I can answer you on that point. However, I would be the first to recognise that other attacks—against badgers, pine martens and wild cats—are little recorded, so it would be difficult to give an answer. Northern constabulary gets a large proportion of all wildlife crime, almost certainly because it has a lot of the wildlife—it is as simple as that. Having said that, many wildlife

criminals are based in cities so a lot of crime occurs around the edges of cities. I believe that your area is Argyll. Sea eagles nest in Argyll and that has attracted wildlife criminals. If the eagles were not there, you would not have the same problem.

**The Convener:** Do you work closely with the police?

**Dave Dick:** Yes, both organisations do so daily.

**Mike Flynn:** We give a lot of support. We need to carry out our own investigations as well. Quite often, the police will come to us for assistance and vice versa. We always offer any assistance that we can to any of the police forces.

**The Convener:** Do you expect that custodial sentences will be handed out by judges, albeit as a deterrent?

**Dave Dick:** I definitely expect that to happen. The reason, as Mike Flynn said and as we show in our submission, is that sheriffs have been frustrated at not being able to do that so far. Also, Scotland has a long, and I would say honourable, history of giving out extremely high fines to egg thieves and confiscating their vehicles. They are the main people who have been caught committing wildlife crimes. I do not think that sheriffs will suddenly take a softer line on wildlife criminals when they have the option of imprisonment. Having said that, we stress the fact that with arrest and imprisonment go options such as bail conditions, deferred sentences and possibly even tagging, which could prevent wildlife criminals carrying out their acts.

14:45

**Mike Flynn:** I go along with that wholeheartedly. From our point of view, the Wildlife and Countryside Act 1981 was intended to be a conservation act, but the SSPCA gets involved because a lot of the poisoning and trapping that goes on causes incredible suffering to animals. Everybody seems to think that a bird takes a bit of poison and literally keels over and dies, but that is not the case; it can be a long, slow, lingering death. When that is put to a court—which we do in domestic animal cases—and the amount of suffering that is involved is made clear, it will go a long way to encouraging sheriffs to use the powers that they have. When the Badger Act 1973 came into force, it was estimated that 80 per cent of all badger baiters stopped overnight, because they were not going to risk going to jail.

**The Convener:** I think that it was RSPB Scotland that referred in its submission to examining the conservation implications of an offence when it comes to sentencing, and the fact that that should be considered for a future act.

Why should that not be considered for this bill? If part of the exercise is to protect Scotland's wildlife, albeit by creating deterrents, and if we need to act quickly, surely a distinction should be made when a person comes before a court as to how severe their crime was? If they steal a rare egg or destroy a rare bird, surely that should come into the sentencing. I wonder why you are not arguing for that to be taken into account in this bill.

**Lloyd Austin:** First, we recognise that upgrading sentences will result in equalisation between what used to be called special penalties and other penalties. That is not technically consequential, but it is a sort of logical consequence of the way in which the amendments on wildlife crime are drafted. We do not oppose that, because the old system has some anomalies in it and it is less flexible. Enshrining in law a list of which species are rare means that, as a species becomes rarer or, conversely, another one becomes commoner, it is complicated to change the list. One example that the Executive acted on earlier this year was the addition of the capercaillie, which is one of the rarest and fastest declining species, to schedule 1 of the Wildlife and Countryside Act 1981, which we applauded. However, you are right that the conservation implications are important in determining a sentence, because the rarer the species that is affected, the more serious the crime in conservation terms.

We are in the hands of the Executive and the Parliament in respect of why that measure is not being called for in this bill. We recognise that there are constraints on parliamentary time and we welcome the introduction of a wider nature conservation bill in March, which will afford an opportunity to examine the issue. It is up to the courts to determine what a sentence should be, but conservation implications are important. In England and Wales, consideration of those implications is included in magistrates' guidelines, which we referred to in our evidence.

However, we feel that there is an opportunity to include a legislative requirement for the courts to have regard to the issue and therefore be addressed by the Crown and the defence on conservation implications. I would draw a parallel with a similar provision in England and Wales that relates to offences involving sites of special scientific interest and requires the court to have regard to the financial benefits that a convicted person might accrue from the result of his action.

As a result, we would argue that the courts should have regard to conservation implications, although we feel that it is probably more practical to raise that issue in relation to the proposed nature conservation bill, which will be introduced in March. However, that is not for us to determine.

**Mike Flynn:** Much depends on how a case that ends up in court is reported to the fiscal. I have heard of cases in which the sheriff has taken a serious view because the evidence suggested that the offence could lead to a bird's becoming extinct in that part of the world. Rather than see the requirement to take conservation implications into account enshrined in legislation, we and the police should simply provide the court with the fullest information. That should be part of our training of police officers.

**The Convener:** How well trained are the police officers whom you have worked with in identifying rare birds' eggs and so on?

**Dave Dick:** That question is exactly why groups such as the RSPB are so closely involved with investigations into this kind of crime.

I have to say that I am not particularly worried about what I hope will be a fairly short gap between the consideration of the Criminal Justice (Scotland) Bill and the introduction of the proposed nature conservation bill. If I am involved in a case of wild bird crime, I will automatically include in my statement details of the species involved. In fact, I have done just that in a case about birds' eggs that comes to court in Orkney tomorrow. That is a normal part of our practice; it does not relate purely to financial matters, but acts a conservation measure to show people the seriousness of these actions.

**The Convener:** We must draw this session to a close. However, George Lyon has a final question.

**George Lyon:** Have you seen any displacement of effort from England and Wales into Scotland as a result of the legislation that came into force in January 2001?

**Dave Dick:** Wildlife criminals and egg thieves have actually told us to our faces that they know the difference between the law in Scotland and that in England. They know that Scotland is the softer option.

Any members who might be involved with the proposed nature conservation bill should watch out for this particular aspect. Egg thieves are being displaced to Europe, are plundering other European Union countries and are bringing eggs back. There is no law against their possessing those eggs once they get them back here. Some thieves know that Scotland is still a soft touch.

**The Convener:** Why can we not charge thieves who bring eggs back from Europe?

**Dave Dick:** The definition of wild birds in the Wildlife and Countryside Act 1981 does not include birds from outside the UK, even though the UK is part of the EU and subject to the EC birds directive.

**The Convener:** Perhaps the European Committee should pursue that. I thank both organisations for their very helpful evidence.

Our next witnesses are Deputy Chief Constable Ian Gordon and Alan Stewart, who is the wildlife and environment officer for Tayside police. I hope that you had the chance to hear the very useful evidence from the RSPB and the SSPCA, in which they said that they work very closely with the police. You are welcome to make an opening statement, if you so wish.

**Deputy Chief Constable Ian Gordon (Tayside Police):** I thank you for allowing us to come here today. It is extremely helpful for us to be able to put the police position in this fashion and it is refreshing to have the opportunity to influence legislation by giving a practical point of view.

I have listened closely to the evidence that has been given so far. It reflects the partnership that we have with those organisations. However, we are trying to ensure that the proposals result in an operational benefit to the police officer and deliver a higher degree of public safety.

**Mr Hamilton:** My interest in your evidence relates primarily to the practical experience of the police in dealing with the offences that we have been talking about. Could you outline the profile or profiles of the people who are involved in the wildlife offences? The definition of the people whom we are trying to catch seems wide. For example, is it the case that people are more likely to commit the offences at the weekend? Are the offenders likely to travel long distances? Do they use the internet as a means of communication?

Once we have identified that profile or those profiles, we will try to find ways in which the legislation could be toughened to give the police the maximum potential to catch those people.

**Deputy Chief Constable Gordon:** I will ask Alan Stewart to answer your question in detail, as he deals with the situation on an operational basis. However, I do not know whether it would be possible to identify a profile of an egg collector or a wildlife crime offender. They use the techniques that you refer to, but so do lots of criminals. Modern technology assists crime in many ways, but it also assists the police service.

Further, we should consider the historical context. I do not claim to be the oldest person here, but I certainly remember having the "I Spy" book of birds' eggs. It was almost an encouraged practice to go into the countryside to collect eggs. That has changed now, and, as we are doing with drunk driving, we are trying to change attitudes and make certain offences reprehensible.

**Alan Stewart (Tayside Police):** It is almost impossible to give you a profile of a wildlife

criminal. You heard earlier about farmers and gamekeepers committing wildlife crime. However, if they commit that crime, it is for a particular purpose, such as protecting stock and so on, and that might be the only type of crime that they would ever commit.

Through operation Easter, we keep data on egg collectors, who range from people such as company directors, for whom collecting eggs is their only crime, to offenders who are involved in drug offences and crimes of violence. The number is 113 at present. When the house of an egg collector in the south of England was searched two or three years ago, 3,500 eggs were recovered, along with a kilo of cannabis and an imitation handgun. It is almost impossible to profile a wildlife criminal.

**Mr Hamilton:** What support are officers who are involved in dealing with egg collectors given? My understanding is that, often, officers voluntarily use their own time. Could the police do more to support their efforts?

**Alan Stewart:** The situation is improving all the time. There is support from the top ranks, but direction is sometimes lost in the middle ranks because chief inspectors and inspectors have many aspects of policing to cope with. I am a retired police officer, but, having been an inspector, I can see the problem clearly. There are many different demands on their personnel and they have to cope with and prioritise everything. Unfortunately, wildlife crime is often low down the list of priorities.

**Mr Hamilton:** Do you think that the proposed legislation will change that priority?

**Alan Stewart:** I do not know if new legislation will change it. It will make it easier to deal with wildlife criminals. However, wildlife crime will always have to be prioritised. It could come a wee bit higher up the scale if it were punishable by imprisonment because it would sound a bit more serious.

**Mr Hamilton:** I will ask you the same question that I asked the previous witnesses about the amendment that contains the Executive's proposal that there should be sentences of up to six months, and that that would bring us in line with what happens south of the border. Do you support the view that a disproportionate number of offences are committed in Scotland because of the nature of its country and wildlife, and that there is therefore an argument for giving the courts the power to hand down longer sentences, of up to a year or two years?

**Alan Stewart:** Six months seems to be a reasonable sentence, if we consider proportionality. The next most practical sentence would be three years, because that would bring

the sentence into the realms of serious crime and would make the surveillance aspects of the job easier. However, it is a big jump from six months to three years.

I understand that if a petition is taken in a sheriff court or the high court, they will be able to give more than six months or two years for offences under section 14 of the Wildlife and Countryside Act 1981. From my point of view, if a sentence of six months were available for ordinary wildlife crimes and two years for section 14 offences, that would be reasonably proportionate.

15:00

**Deputy Chief Constable Gordon:** That is important. I will come back on the strategic point. If you look at the five priority areas for policing in Scotland, and you look back to policing in England and Wales, wildlife crime is not singled out as an individual priority for any police force. It comes into that area that is described as nuisance crime that affects the environment, and people's comfort, or the way they want to live and their enjoyment of life. That is a key factor.

Any chief constable would be happy to deal with a wildlife crime in that context. However, if specific resources were allocated to wildlife crime all the time, the community, the local authority and even the Scottish Executive and the Parliament would be asking if the force had its priorities quite right. We can deal with wildlife crime very well.

I agree with the commentator who said that it would be nice to have the fixed appointment of a wildlife co-ordinator on every force. My colleagues know that that is my view and I am hopeful that that might well come to be. It is of benefit in England and Wales. Alan Stewart is the only full-time wildlife liaison officer in Scotland, albeit he is a retired police officer. That allows Tayside police to be more proactive, so there is a benefit. We do not have to think just about the proportionality of sentencing; we have to think about proportionality to the other work that the police service has to do.

**The Convener:** I would like to understand a normal incident and where or at what stage of the crime the police tend to catch such criminals. Are they caught in the act or does it depend upon later corroboration? Is there a common way in which criminals are found or does it vary?

**Alan Stewart:** Most commonly, people are caught after the act has taken place. Very few of such crimes are committed in public view. Even if they are, by the time that the member of the public who witnessed the act contacts the police and the police get there, the person is often long gone—as is the case with many other types of crime. That makes catching the offender more difficult.

**The Convener:** The proposed amendment to the bill will not necessarily help with that.

**Deputy Chief Constable Gordon:** It is a key factor in helping the police officer. Alan Stewart can give you a classic example where officers were left very vulnerable.

**Alan Stewart:** The best example would be when one of the previous speakers, Dave Dick, and an officer from Tayside police went out to look for two people that were believed to be taking birds' eggs. When they found them, they stopped and searched them.

There are perfectly adequate powers of search under the Wildlife and Countryside Act 1981. When the officers searched those people, they found some eggs and a bird's nest in their possession. Later, when a film in their camera was developed, it was found that they had photographed the eggs in the nest before they took them.

They knew who the two people were. However, they could not arrest them and, out in the middle of nowhere, it was difficult to deal with people who could use a mobile phone to call home and get any egg collection that might be there disposed of long before the police could get there. If a person cannot be arrested or detained, they are free to do what they like. They can walk away and do whatever. The only way of preventing that is for a member of the police to lay hands on them, tell them that they are arrested or detained and will not be allowed to use their mobile phone and so on. If they cannot be detained or arrested, that is a difficult situation.

**Bill Aitken:** I want to come back for a moment to the profile of the egg thief. You will appreciate that your earlier evidence and Deputy Chief Constable Gordon's letter contradict the evidence from the previous group of witnesses. Why should someone who is obviously into heavy drug dealing—which was the example that you cited—steal eggs?

**Alan Stewart:** That question is difficult for me to answer. It might be better if the egg thief answered, but, obviously, he is not here. Drug dealing is about money. Taking eggs is about the kick the thieves get from doing that. Recently, we read accounts of some egg collectors. They conduct commando-style operations that, generally, have nothing to do with money, except possibly in relation to peregrine falcon or golden eagle eggs. For them, it is mainly about going out into the country, carrying out a commando-style operation, getting away with it and outwitting the police and RSPB Scotland. At the end of the day, it is about having something in their hands that few other people have.

**Deputy Chief Constable Gordon:** The situation has broadened and does not just involve egg thieves or people who put down poisoned baits.

There are examples from elsewhere of housebreakers suddenly latching on to stealing snowdrops. Thousands of snowdrops were stolen, but the thieves were caught. The value of the snowdrops was well in excess of £100,000, which is not bad money for a night's work.

**Bill Aitken:** But how would they obtain that money? Where would they sell the snowdrops on?

**Deputy Chief Constable Gordon:** There is a market for snowdrops; the market for garden ornaments, rare plants and so on is extremely big. It is common to see people trying to steal plants from roadsides. Those plants have been planted over countless generations, but now people suddenly see them and take them.

**Bill Aitken:** I have a funny mental picture of people at the Barras market in Glasgow trying to sell rare eggs or snowdrops. That does not seem to match up.

**Deputy Chief Constable Gordon:** The thefts occur because people see an opportunity. I take it that egg collectors steal eggs for the kick, but there is no doubt that they carry out planned, detailed operations. That causes us difficulty, because egg theft is not serious crime and we are restricted in how we can deal with it, as far as surveillance is concerned. Egg thieves are also opportunists; all criminals are opportunists—they take whatever opportunity they can get. There are all sorts of crossovers. Badger baiting will cross over into serious crime, which will cross over into violence. The same could be said about hunting with dogs. There is a general intermingling of offences. Criminals do not say, "I only do such-and-such": they are opportunists.

**Bill Aitken:** You heard the evidence of the previous group of witnesses that some types of egg theft are more serious than others, particularly those that affect a species in danger of extinction. The previous witnesses cited one such example. We accept that the majority of egg thefts are committed in the Northern constabulary area or in Deputy Chief Constable Gordon's area. Therefore, would it be necessary, from the policing perspective, for each police authority to have on its staff an officer with a particular knowledge of, for example, ornithology in order that his advice could be sought about the importance or otherwise of a theft or attempted theft when a report was going to the fiscal?

**Alan Stewart:** No. Many aspects of policing rely on outside experts. If we have a case involving bats, birds' eggs, badgers or whatever, we obtain a statement from an expert witness. The statement goes to the procurator fiscal, who puts it in front of the court so that the accused can be sentenced appropriately.

**Bill Aitken:** So Fife constabulary, say, which probably does not have a great problem with wildlife crime because of the nature of its area, could simply get an expert witness to give evidence on the value of a particular bird's egg.

**Alan Stewart:** That is correct. Tayside police would do the same, because I am not an expert in ornithology as far as the court is concerned. I would be more than happy to obtain a statement from Dave Dick, someone in a museum or someone who, having studied birds' eggs for a number of years, could give expert evidence to the court.

**Mr Hamilton:** Comments have twice been made about surveillance, so I want to ask about the ability to access information about planned operations. What is the most common way in which the planning of such thefts is organised? Are they normally planned by a small group of people?

**Alan Stewart:** Yes.

**Mr Hamilton:** Do they communicate with one another via the web or within communities? In other words, do people come from across the country or do they come from one locality to places such as Tayside?

**Alan Stewart:** Three or four people might contact one another by telephone to arrange a foray to whichever area of the UK is appropriate for stealing eggs at that time of year.

**Mr Hamilton:** I asked that question because I am curious to find out whether we should provide more powers of surveillance. I know that that is a vexed area, but it has been said that, if the offences carried a sentence of up to three years, powers to enable the gathering of information would automatically kick in. Could we provide other powers that would also be useful? Precisely what powers of surveillance would we be talking about?

**Deputy Chief Constable Gordon:** Surveillance powers were decided under the Regulation of Investigatory Powers (Scotland) Act 2000, or RIPSAs. The purpose behind that legislation was to address serious crime for which no alternative means existed for undertaking an investigation. There is no doubt that that applies to wildlife crimes.

It would be helpful if we could set up surveillance cameras or surveillance points, but they would be costly. One would need to balance the crime that was being investigated against the cost of investigating it. If one has the landowner's permission, that would make things much easier, because the landowner could undertake his or her own surveillance.

The difficulty lies with the type of crime that one is dealing with. If we believe that the landowner may have some knowledge of or be implicated in the crime—for example, in a case of poisoning—it would be difficult to set up surveillance with his or her permission.

**Mr Hamilton:** The use of surveillance techniques obviously depends on the type of the crime. However, if we are talking about the static nesting site of a rare bird, I presume that practical forms of surveillance could be used.

**Deputy Chief Constable Gordon:** We have certainly used various technological methods to help such investigations, but we have not put on full surveillance.

**Alan Stewart:** Some rare sites are protected by groups of volunteers, who watch the nest round the clock with the permission of the landowner, which is often the Forestry Commission.

**Deputy Chief Constable Gordon:** I should qualify my answer: I was talking about police officers, who are required to comply with RIPSAs.

**The Convener:** There are no more questions, but do the witnesses want to say anything in conclusion about the proposed legislation?

**Alan Stewart:** I am fairly confident that the legislation will have a significant preventive effect on wildlife crime across the board. Some of the previous witnesses talked about crime that was possibly associated with game management. Under the bill, the person who put down the poisoned bait or set an illegal trap would not be the only person who could be charged. If there were evidence that the supervisor, manager or landowner caused or permitted the crime, those persons could also be charged and be subject to the same sentence as the person who put down the poison. I doubt that many farmers or landowners would risk going to jail. That is why I think that the bill will have a significant preventive effect.

**Deputy Chief Constable Gordon:** Wildlife offences attract as much publicity as serious crime. We have no trouble getting the media to cover these issues. As Allan Stewart indicated, that is important.

I liked Lloyd Austin's use of the term irresponsibility. There are many responsible gamekeepers and farmers. We have struck a good balance and are working closely with landowners, the Scottish Gamekeepers Association—which submitted evidence, although it is not represented today—the British Association for Shooting and Conservation and RSPB Scotland. The bill represents a significant step forward in helping us, through the law, to prevent the attacks that are being made on the countryside.

**The Convener:** Thank you for your useful evidence. I propose that we take a five-minute comfort break before moving to item 2.

15:15

*Meeting suspended.*

15:29

*On resuming—*

**The Convener:** Our first witness in the second half of the meeting is Assistant Chief Constable John McLean from Strathclyde police, whom I thank for attending this afternoon's meeting. We will deal with Donald Gorrie's amendments relating to offences that are aggravated by religious prejudice. Do you want to make some introductory remarks or shall we proceed straight to questions?

**Assistant Chief Constable John McLean (Association of Chief Police Officers in Scotland):** I am content to proceed straight to questions.

**The Convener:** Do you think that there is a need for the type of legislation that is proposed?

**Assistant Chief Constable McLean:** I wish that you had started with an easier question.

Sectarianism is a significant problem, especially in Glasgow and the west of Scotland, and a range of measures are required to address it. Amendment 148 has a number of positive aspects; in particular, it would make it clear to the people of Scotland that the Scottish Executive and the Scottish Parliament wholly oppose sectarianism.

The police are faced with the difficulty of putting legislation into operation and doing something about sectarianism on the street and it is worth noting that sectarian crimes and offences can be dealt with under existing law. The police can provide details of the circumstances in which an offence was committed to the procurator fiscal, who can bring that information to the attention of the sheriff or judge who hears a case. That sheriff or judge may take the information into consideration when sentencing.

**The Convener:** Is it your view that current legislation is able to deal with incidents that are deemed to be sectarian?

**Assistant Chief Constable McLean:** Under current legislation, if a breach of the peace or an assault takes place, the police and the courts will deal accordingly with that offence. Amendment 148, in the name of Mr Gorrie, sends out a clear message. Agreement to it would have the benefits of bringing Scottish legislation into line with legislation in England and Wales, and of bringing

the law on sectarianism into line with race law, which makes racism an aggravating factor in sentencing.

**The Convener:** In his memorandum, Mr Gorrie suggests that amendment 148

"would strengthen the arm of the police and football clubs in dealing firmly with any troubles arising from sectarian marches or football matches".

Is that the case?

**Assistant Chief Constable McLean:** That is not the case. The present law is adequate for dealing with the types of offence that occur. The primary role of the police at football matches is to maintain public order. Minor technical offences might not be dealt with because the police are concentrating on their first priority, which is crowd safety.

**The Convener:** Are you saying that you would not be able to use the amendment when policing football matches if it became law?

**Assistant Chief Constable McLean:** If the amendment became law, the public would expect the police to be able to crack down on and deal with any incident that has a sectarian element but, as I said, our primary responsibility at football matches, parades and processions is to maintain public order.

**The Convener:** After we have heard from you, we will hear from representatives of Nil by Mouth, who—as they have done in the past—will refer to the number of deaths that they describe as having been motivated by sectarianism. Do you believe that strengthening or amending the law might do something to improve those horrendous figures?

**Assistant Chief Constable McLean:** One benefit of introducing such legislation is that it might enable us to start determining whether crimes are motivated by sectarianism and it might provide us with more accurate figures. The research that has been done to date is based mainly on newspaper reports, which are not always as reliable as they could be.

**George Lyon:** I want to clarify what amendments 148 and 152 would do. As I understand it, they would mean that, if it could be proven that an offence that is currently on the statute book was motivated by sectarian interest, that offence would carry a heavier penalty. The amendments would not create any new offence and would therefore have no implications for the chanting of sectarian songs at football matches, for example. Is my understanding correct?

**Assistant Chief Constable McLean:** That is absolutely right—no new offences would be created. The amendments would simply provide for sectarian aggravation of existing offences, but

such aggravation would have to be proved in court. Provision for sectarian aggravation might have the opposite effect to that which is intended—it might mean that fewer cases are proven.

**George Lyon:** I am sorry; could you repeat that?

**Assistant Chief Constable McLean:** If sectarian aggravation were enshrined in statute, such aggravation's application to an offence would have to be proven beyond reasonable doubt in court. At present, evidence can be led and circumstances can be brought to the attention of the court that do not need that same standard of proof. The proposed measure could mean that fewer people would be found guilty of the aggravated offences.

**George Lyon:** Could Donald Gorrie's amendments reduce the number of convictions?

**Assistant Chief Constable McLean:** Yes.

**George Lyon:** I want to return to the public expectation angle, which you mentioned earlier. Is there a danger that, instead of sending out positive signals to the general public about their attitude to sectarian issues, the legislative proposals might lead the public to expect the police to tackle the issue firmly, whereas that would not be the case in practice?

**Assistant Chief Constable McLean:** Yes, that is right. One of the difficulties is that, as far as I can see, amendment 148 does not contain a definition of sectarianism. That would cause operational police officers a difficulty. If it would be helpful, I could go through some examples.

**George Lyon:** That would help us to define what activity would qualify under the proposed amendments to the bill.

**Assistant Chief Constable McLean:** Let us stay with football. It is not our view that sectarian behaviour occurs only in the football scene—sectarianism permeates the west of Scotland. However, there are some issues that are aligned with the two big clubs in Glasgow. People might ask whether a certain comment was sectarian or political; for example, does expression of support for some of the organisations that exist in Northern Ireland represent a political statement or a sectarian comment?

One of my match commanders recently told me about another example. He saw a Celtic Football Club scarf on sale that had on it a picture of a hunger striker who had died—nothing else. Is that a sectarian statement, a political statement or neither?

**Mr Hamilton:** What is your answer to that question?

**Assistant Chief Constable McLean:** I do not know the answer. It is extremely difficult for operational police officers to make such decisions.

**Mr Hamilton:** What is your understanding of the situation that will occur at the old firm match on Saturday, when 50,000 people will be singing?

**Assistant Chief Constable McLean:** That raises an issue. One of the match commanders asked whether it is sectarian or patriotic for people to sing the national anthem? If someone sings the national anthem of the Republic of Ireland, is that sectarian or is it political? I can give another example, which some members might have witnessed when the working group that is considering the issue went to a football match. Are fans who make the sign of the cross at rival fans making a statement of religious belief or are they simply antagonising the other fans—in other words, is that sectarian behaviour?

**Mr Hamilton:** Would not it be open to you to examine the intention behind such actions? Perhaps you could argue that the matter is confused, but if the intent were to inflame a situation, would that clarify the position for you?

**Assistant Chief Constable McLean:** That would be a matter for the courts to sort out. We could put an interpretation on it, but whether that interpretation would be dissected in court—

**Mr Hamilton:** Again, you are back to the question of whether 10,000 Rangers fans singing a song are supporting their team or antagonising the opposing faction.

**Assistant Chief Constable McLean:** Yes. Is such singing based on religion or is it based on support for a football club? Many of the events that happen at football games are based on one set of supporters antagonising another set, without there being any sectarian motivation behind them.

**Mr Hamilton:** I am a wee bit confused, given where I think you started and where I think we are ending up. You seem to be fairly easy about the proposed legislation; you say that its value is fully appreciated, but the evidence that you have given us seems to be fairly damning, because the position is not that there will be no additional convictions, but that there might be fewer convictions.

You say, for example, that at old firm matches the police—understandably, to an extent—have to turn a blind eye to some of the offences that would normally involve an intervention. That would not only continue under amendment 148, it would be made worse, because the police would be turning a blind eye to potentially aggravated offences. On top of that, as far as I can see the only thing in favour of amendment 148 is that they would send out a clear message to the community about what

is not acceptable. However, we might at the same time raise public expectations that you do not think we can fulfil. What is the good part of the proposal?

**Assistant Chief Constable McLean:** I am trying to be fair to Mr Gorrie's amendment 148 in recognising that there are some good aspects to it. If sectarianism becomes an aggravation, the police and the prosecution service will start to record information on it. At present, no statistical information is gathered, so the amendment would allow us to see a clearer picture of the extent of sectarianism.

**Mr Hamilton:** With the greatest respect, how can that be true, if you say that you cannot define what is sectarian and what is not?

**Assistant Chief Constable McLean:** That is the challenge for the legislation. If Parliament finds a way in which to define sectarianism and enacts the bill, that will allow us to see a picture of the extent of the problem in Scotland.

**Mr Hamilton:** If that is the best thing in favour of amendment 148, and you cannot define sectarianism, what would the statistics be worth?

**Assistant Chief Constable McLean:** I am sorry, could you repeat that?

**Mr Hamilton:** What is in favour of amendment 148 is the fact that it might quantify the problem through statistics, but without a definition would those statistics be worth anything?

**Assistant Chief Constable McLean:** That is the main point that I am making. The difficulty is in having a definition that does not cause difficulties for police officers on the ground. It is laudable to do something about sectarianism, but my point is that I am not sure that amendment 148 is the right vehicle.

**Mr Hamilton:** Right; understood.

**The Convener:** I think that I know what you are saying: the problem lies in defining what we mean by sectarianism. If it could be defined, the amendment might be good law.

I must say that I am against creating law so that we can relay messages. I would favour passing amendment 148 only if the amendment would add something to criminal law and give the police and procurators fiscal some way to action it. If we could define sectarianism, would the amendment be good law?

**Assistant Chief Constable McLean:** We would still be left with the problem that in some circumstances the police could not act. The view of the Association of Chief Police Officers in Scotland is that existing law is sufficient to deal with the problem. Perhaps I have not articulated that clearly enough.

**George Lyon:** I have a point for clarification. In reply to Duncan Hamilton, you said that there might be some use in going ahead with amendment 148, because it would enable proper evaluation of the size of the problem. However, in the evidence that you gave in response to one of my questions earlier, you said that there were likely to be fewer convictions. Given the uncertainty of obtaining a conviction under the proposal, surely your police officers would be less likely to use the legislation and would revert to attempting to obtain convictions for normal offences. Therefore the statistics would not show up the problem at all; it would actually look as if the problem was declining.

**Assistant Chief Constable McLean:** Statistics would be recorded at different levels. The number of people whom the police reported for sectarian offences would be recorded, just as the number of people who are reported for racist offences is recorded. Such figures are tracked through the criminal justice system to show the number of people who appear in court and the number of people who are convicted.

**George Lyon:** That would happen only subject to sectarianism's being defined, but you are saying that the amendment cannot work because there is no definition of sectarianism.

**Assistant Chief Constable McLean:** Yes. One of the difficulties with the amendment is the fact that there is no clear definition of sectarianism.

15:45

**Bill Aitken:** I would like to examine the existing state of the common law. As we have all agreed, the most manifest aspect of sectarianism in the west of Scotland appears at football matches. On Saturday, Rangers will play Celtic at Ibrox. Let us imagine that your officers see a group of opposing fans standing in the street shouting, bawling, cursing and swearing. One lot is making obscene remarks about the Pope; the other side is making obscene remarks about King Billy. Two of them are arrested. What would the complaint be? Would they be charged with a common-law breach of the peace? What would the wording of the complaint be?

**Assistant Chief Constable McLean:** That would be a matter for the fiscal. The police would bring to the attention of the fiscal the fact of what these people did, including their shouting and swearing and the words that they used.

**Bill Aitken:** I think that they would be charged with conducting themselves in a disorderly manner at the locus and committing a breach of the peace by shouting, bawling, cursing, swearing and uttering sectarian remarks. Would not that be exactly what would appear on the complaint?

**Assistant Chief Constable McLean:** Possibly.

**Bill Aitken:** Also, if the person pled in court, the narrative that the fiscal would present to the bench would include their remarks about the Pope or King Billy, would it not?

**Assistant Chief Constable McLean:** Yes.

**Bill Aitken:** Therefore, it would be quite clear to the sheriff or magistrate who was hearing the case that there was a sectarian element to that breach of the peace, would it not?

**Assistant Chief Constable McLean:** Yes.

**Bill Aitken:** You would expect that to be reflected in the disposal of the case, would you not?

**Assistant Chief Constable McLean:** I imagine so.

**Bill Aitken:** In your experience, would the disposal be less—a fine, for example—in the vast majority of cases of that type if the narrative did not include sectarian remarks?

**Assistant Chief Constable McLean:** That sounds logical to me, but I do not have experience of what is inside a judge's or a sheriff's mind when he is passing sentence.

**Bill Aitken:** Surely, a sheriff or a judge would inevitably regard the introduction of sectarian remarks into the breach of the peace as an aggravation of the offence.

**Assistant Chief Constable McLean:** It is my understanding that the sheriff can take that into consideration in passing sentence.

**Bill Aitken:** From that point of view, is the value of Mr Gorrie's amendment 148 limited?

**Assistant Chief Constable McLean:** Yes. That is correct.

**Bill Aitken:** Let us explore the matter a little bit further. Many people might think that the question of processions is slightly more problematic. If one is offended by what one sees at old firm matches, one should not go to them. However, the vast majority of the people of Glasgow have to walk the streets on a Saturday afternoon when there is a procession, and many find what goes on at such times offensive. What is the reaction of the police to an Orange walk at which remarks are made that at least one third of Glasgow's population would find personally offensive?

**The Convener:** There would have to be an offence before the bill would kick in.

**Bill Aitken:** The people on the walk are shouting, bawling and challenging people to a fight.

**The Convener:** Are you suggesting that there has been a breach of the peace already?

**Bill Aitken:** Yes.

**Assistant Chief Constable McLean:** A breach of the peace at one of those parades or processions is similar to the football ground situation. The police's primary responsibility is to ensure public safety. If they have the resources and a crime or offence is committed, they will take action. However, their first responsibility is to ensure the safety of the public.

**Bill Aitken:** If a sectarian element were introduced, would that be included in the police report to the fiscal?

**Assistant Chief Constable McLean:** Yes.

**Bill Aitken:** The wording of the complaint should reflect that.

**Assistant Chief Constable McLean:** The wording of the complaint and the narrative should both reflect the fact that there was an element of sectarianism.

**Bill Aitken:** Should the penalty reflect the sectarian element?

**Assistant Chief Constable McLean:** I imagine so. However, that is not a matter on which I can comment.

**The Convener:** I welcome Donald Gorrie, the author of the amendment, to the committee. I also welcome Brian Fitzpatrick. I invite Donald Gorrie to question John McLean if he wishes to.

**Donald Gorrie (Central Scotland) (LD):** I thank the convener for allowing me to speak. I will pursue the argument that there might be fewer convictions. I do not accept that. Amendment 148 would allow the police, the procurator fiscal and the court to decide about a breach of the peace, for example and the person involved would either be found guilty or not. If the police thought that evidence existed for it, they would lead evidence on aggravation, and the court might or might not agree that the action was aggravated. In that case, if my amendment were agreed to, how could fewer people be convicted of a breach of the peace than under the present system?

**Assistant Chief Constable McLean:** Perhaps I am not the correct person to ask that question. It might be more appropriate to ask a Crown Office representative or a judge. I understand that if we libel a specific aggravation under statute, that must be proven in court beyond reasonable doubt, whereas at present, if someone goes to court, the matter can be brought out in evidence and need not be proven to the same standard.

**Donald Gorrie:** Some of the cases of aggravation might fail, but the person involved would not get off his original breach of the peace. My amendment says:

"Where the sentence or disposal in respect of an offence is, by virtue of this section, different from that which the court would have imposed but for this section, the court must state the extent of and the reasons for that difference."

It is clear that the court can reach a conclusion on the breach of the peace separately from the aggravation question. We would lose no convictions.

**Assistant Chief Constable McLean:** My understanding is that a statutory aggravation requires to be proven as part of the charge.

**Donald Gorrie:** The concept has been suggested that the issue is sufficiently covered by existing law, but no law says that offences that are motivated by religious hatred are wrong. Does Scots law cover that?

**Assistant Chief Constable McLean:** Not specifically.

**Donald Gorrie:** It has been suggested that the matter is adequately covered and that the police deal with it, but no statistics are available about reports of charges that relate to sectarianism and other such matters.

**Assistant Chief Constable McLean:** No reliable statistics are available. I said that that would be one value of amendment 148, if it were agreed to. However, many actions can and should be taken to address sectarianism. They relate to education, socialisation and many other matters, rather than to passing a law.

**Donald Gorrie:** I do not think that it is an either/or situation, but we can go into that at another time. I will take your examples of a song, a flag, a scarf and signs of the cross. Would local police charge such offences as breaches of the peace anyway?

**Assistant Chief Constable McLean:** Yes, in some circumstances they would. Mr Hamilton brought out that point. The matter depends on the circumstances of the incident, the available police resources, the incident's seriousness and the action that can be taken at the time.

**Donald Gorrie:** The police make many judgments on such issues already and they would not have to make more judgments if aggravation were introduced. They would have to decide whether to prosecute a guy for an unpleasant song or symbol, then decide whether that was religiously motivated.

**Assistant Chief Constable McLean:** The police officer who was on the ground when the breach of the peace was committed would take action for a breach of the peace. If amendment 148 were agreed to and police felt that an aggravated breach of the peace had been committed, they would have to consider whether

they could prove, or whether they had the evidence of, aggravation by religion or sectarianism. I tried to say earlier that it is difficult to call whether something is aggravated by rival fans, politics, religion or another reason.

**Donald Gorrie:** A policeman could present a breach of the peace and if he regarded the sectarian element as iffy, he would not present that. I presume that policemen can make such judgments. If a policeman thought that he was getting into difficult territory, he would stick to a breach of the peace and not use aggravation.

**Assistant Chief Constable McLean:** In those circumstances, that would be possible. Many breaches of the peace that have no sectarian element occur.

**Donald Gorrie:** You mentioned the matter of definition. Amendment 148, which has—for what it is worth—been okayed by the Government lawyers, includes a definition of what a religious group means and it defines membership of a group. It includes a reasonable definition of what aggravation would be based on.

**Assistant Chief Constable McLean:** I am afraid that I cannot agree with that. Although it is easy to say whether something is a breach of the peace, it is difficult for operational police officers to identify the motivation for an act.

**Donald Gorrie:** Are you arguing seriously that there might be more prosecutions of offences that are aggravated by religious prejudice if the amendment is not carried than if it were?

**Assistant Chief Constable McLean:** The point that I was making was that there might, because of the need to prove the sectarian motivation, be fewer convictions if amendment 148 were included in the legislation whereas, at the moment, a breach of the peace is a breach of the peace.

**The Convener:** I realise that you have tried to answer questions that might better have been asked of procurators fiscal and judges and I thank you for that.

At this stage, I ask the committee to think about what further evidence we might want to take, given that questions are arising about what might be in the minds of procurators fiscal and judges. We will come back to that issue later.

**Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab):** I am obliged to the convener for letting me participate in the meeting.

Rather than the gloss that Donald Gorrie put on your position, is it your view is that, although amendment 148 might result in an increased incidence of prosecutions, it would ultimately result in fewer successful prosecutions because you would have to establish a statutory breach?

**Assistant Chief Constable McLean:** That is true, to an extent. Amendment 148 would put a heavy onus on operational police officers to decide what motivated an act rather than simply deal with the facts.

**Brian Fitzpatrick:** Some officers will have experience of doing that already because they will have picked up the debris from sectarian events around the west of Scotland, such as football matches and so on. They might not be able to describe a case in which sectarianism aggravates the offence, but they can tell it when they see it.

**Assistant Chief Constable McLean:** There is an element of truth to that, but it is possible to get into difficult situations when you ask what has motivated an act. At some football matches, in addition to the union jacks and Irish tricolors, there are Palestinian flags flying at one end of the ground and Israeli flags at the other. Is that motivated by sectarianism, a religious divide or politics?

**Brian Fitzpatrick:** Given what you were saying earlier, you might not want to answer my next question. I assume that the concern is that, when there is a statutory breach, there will be an interest on the part of an accused person or those acting for him, in securing the deletion of the narration of that statutory breach. If I were a defence agent, I might say to a procurator fiscal that my client will speak up to the charge involving standing in the street, shouting and bawling, challenging people to a fight, throwing things at them and so on, but he will not plead to behaving in a way that is likely to cause sectarian hatred because the penalties that would be visited on him for that offence might be more substantial and he might have a bit of explaining to do in relation to other parts of his life. Are such matters part of your concern?

**Assistant Chief Constable McLean:** Yes. That was the point that Mr Aitken made earlier.

**The Convener:** There are no further questions. I thank you for your evidence.

**Assistant Chief Constable McLean:** Thank you very much.

**The Convener:** Our final witnesses are from Nil by Mouth. I welcome Peter McLean and Cara Henderson. Thank you for coming today. I hope that you have had a chance to hear some of the earlier evidence, as that usually helps. Do you want to say anything by way of introduction?

16:00

**Peter McLean (Nil by Mouth):** Yes. I want first to thank you and the rest of the committee for inviting Nil by Mouth to give evidence on what is an important issue. We will make a short presentation, which will examine the specific issue

and put it in a general context, which is of great relevance.

Nil by Mouth has a charter for change with three main elements: first, that sectarianism, racism and bigotry should have no place in modern Scotland; secondly, that everyone's religious beliefs should be respected and cultural diversity celebrated; and, thirdly, that everyone should take responsibility for the language that they use and the way that they behave. In addition to that, Nil by Mouth wants the Scottish Executive and local authorities to promote anti-sectarianism throughout the education system, and Rangers and Celtic football clubs to agree and announce measurable targets for reducing sectarian behaviour among their supporters.

We want employers to make it clear in their recruitment and employment processes that they do not tolerate any form of sectarianism or bigotry, and we want voluntary organisations, sports clubs, public bodies and businesses to include a commitment to non-sectarianism in their constitutions, mission statements and application or registration forms. We want churches to preach a strong anti-sectarian message and to work together in partnership across the diversity of faiths in Scotland. Last, but not least, we want the Scottish Parliament to change the law so that sentences can be increased for anyone convicted of an offence that is aggravated by sectarian behaviour.

The main question is whether we need a change in the law. The official statistics for racially motivated crime show that in 1999-2000 no racially motivated murders were recorded. However, Nil by Mouth has researched sectarian-related offences and has found eight murders during that time that had a clear sectarian element. The research has proved difficult because nobody keeps official statistics on sectarian-motivated crime. It is not always mentioned in court papers and the media is often the source of such evidence. We accept that the media is not necessarily the best source, but often, it is the only available source.

Rightly, we have laws to address racism, but it appears to us that more people are dying through sectarian-motivated crime. Nil by Mouth believes that both are of equal importance and should be addressed in the same way. Although we have a far from perfect record in addressing racism in Scotland, there has been progress, much of which has come about because, since 1988, Scottish police have had to report annual statistics on racially motivated incidents. That practice has equipped the police with a greater understanding of the ways in which racism affects minority communities and has helped them to devise effective responses. It also equips politicians with

a sense of the scale of the problem, thereby forcing it on to the political agenda. In addition, it equips the public with a knowledge of the worst effects and manifestations of racism, which makes people less inclined to tolerate even low-grade expressions of it, as they can link it to something that is seen as harmful and obviously wrong.

In seeking to address sectarianism, we believe that we can learn from good practice in dealing with racism. When the procedures for recording racist incidents were first instituted in Scotland, some politicians and police officers viewed them as a token exercise or as a politically expedient gesture. Many people talked about the difficulty of distinguishing whether an attack was racially motivated—it is a difficult thing to do.

If a white person attacks a black person, is that attack racially motivated? Not necessarily. If a black person attacks a white person, is that attack racially motivated? Not necessarily. When people first began to think about introducing a law against racism, first and foremost in their consideration was the principle. How should the effect be measured and should the offence be dealt with more severely? The conclusion was yes. People then went on to consider how the complexities of the offence might be distinguished, but they started off by following the principle of doing the right thing. We believe that the same principle should be followed in the case of sectarianism or religiously motivated attacks.

We also believe that reports on racial incidents have proved invaluable in the process of collaboration with agencies other than the police, such as education, housing and social work departments. That has happened in the Strathclyde and central belt areas. We also believe that a joint response to the problem has proved far more effective than having the police work alone. There is no doubt in our mind that the duty to report racial incidents has precipitated a process of change. It has created an arena of informed debate within the police service and other agencies.

Nil by Mouth believes that addressing sectarianism requires action in a number of areas. We believe that an immediate impact would result from the old firm clubs taking direct action. We believe that the Criminal Justice (Scotland) Bill should change the law to make sectarianism an aggravated offence. That would be an effective step in the right direction, as would the collection of statistics on sectarian crime, but only as part of a wider strategy to address sectarianism.

The issue of incitement requires further examination, but that should not delay making sectarianism an aggravated offence. Education will be crucial in changing and shaping positive attitudes, perceptions and, in turn, behaviour in the

longer term. We appreciate the difficulties in distinguishing a person's right to celebrate their cultural identity from bigotry—some scenarios are obvious and others are less so.

Amendment 148 does not propose the creation of a new offence; it proposes a category of aggravated offence. The police would record the evidence that was available to them, much as they do at the moment, although the proposed change in the law might increase the need for the police to record in more detail the nature of the evidence, and whether it contains sectarian or religious references, for example.

Ultimately, the courts make the judgments, based on the evidence that is presented by the police. The police would not have to make that call; they would follow the law as they have done for many years. They would record the specifics of the crime and it would be up to the courts to make the decision.

We believe that it would be a step in the right direction if the Parliament deemed it sensible to support Donald Gorrie's amendment 148. Nil by Mouth believes that for evil to triumph, good men need do nothing. We hope that action will be taken and that a decision to change the law will be made in the context of a range of plans to address sectarianism in Scottish society.

**The Convener:** Thank you. That was very helpful. I am sure that you appreciate that the committee's role is to test whether the proposed legislation will make good, practical law. That is what we will do today.

Is sectarianism more difficult to define than racism? I ask the question because I believe that for police officers to mark a charge as aggravated by sectarianism, they would have to make a judgment that the offence was sectarian. The charge initiates with the police, before the case moves to the fiscal.

**Peter McLean:** They can both be difficult to define. If a black person attacks a white person, or vice versa, is that racism? It is not necessarily so. The police have to record the evidence that is available to them and then leave it up to the courts to make the decision. The same applies to sectarianism: if a person of one religion attacks another person of another religion, or if two people are wearing different football colours, that does not necessarily mean that sectarianism is the motivation for the attack.

In such a situation, the police would make an arrest—I hope that they would make an arrest in such a situation now—and then they would report the circumstances. For example, they would note whether the person used language that was specifically insulting to the other person—because that person was a Catholic, a Protestant, a

Muslim, a Sikh, a Hindu or whatever—as they plunged a knife into them. Unfortunately, such a situation is realistic; it happens at the moment. As in cases involving racism, the police officer would record the information and leave it up to the court to make the decision.

**Cara Henderson (Nil by Mouth):** The proposed legislation does not compel the police to make any more arrests than they do at present. It would be for the police to record the evidence and, as Peter McLean said, it would be up to the courts to investigate the matter and make a judgment on it. It is about the police reading the situation and recording it.

**The Convener:** If I understood John McLean correctly, I think I agree with his point that, if the proposed legislation were to become law, the police would have to charge someone with assault and would have to demonstrate the aggravation, which would need to be part of the charge. In doing that, the police would have to determine that the assault was a sectarian act. Then the fiscal would consider the matter and decide whether he or she thought that it was a sectarian act.

Let us consider what happens when the case reaches court. We have an unofficial plea-bargaining system whereby charges are often deleted. Often, aggravation charges are deleted from charge sheets. For example, the defence might say that they are prepared to plead to an assault, but not to possession of the weapon involved. Sometimes, the charges will not be for the court to determine. That is the aspect that I am struggling with, and that is why I am pressing you on whether you think it is possible to sort out the definition. I think that the police would require guidance, as they would have to initiate proceedings in the first place.

I think that I understand what John McLean said towards the beginning of his evidence, too. The reason why he thinks that there might be fewer successful convictions is because the statute would require a higher test; it would have to be proven beyond reasonable doubt that the aggravation was sectarian. Brian Fitzpatrick mentioned that. I think that that was the technical point that John McLean was making. I want to pin you down on whether that is a reasonable judgment for the police to make.

**Cara Henderson:** I think that I understand the situation that you describe in relation to plea bargaining and the more stringent level of evidence to prove aggravation. However, surely if there is enough evidence on the specific offence of assault, that does not preclude a conviction. The proposals do not undermine the common law as it stands; they complement it. If there is enough indication of sectarian aggravation, it is right that the courts should be able to impose a greater

sentence. If the evidence is not there, we accept that that cannot happen.

**The Convener:** You say in your research that, according to your definition, there were eight sectarian murders in 1999-2000. Will you give us examples of your findings and explain how you define a sectarian death?

16:15

**Peter McLean:** There have been various incidents. I could give you a list of names in relation to various deaths. There are cases in which people were singing a sectarian song—from one or other side of the sectarian divide—at the time. For example, they might have been singing “We’re up to our knees in Fenian blood” while they stuck the knife in, or somebody might have been called an “Orange bastard” as they were being stabbed or slashed.

The situation can be compared with the situation in relation to racial crime. For example, if a white person and a black person are in a fight, you have to prove motivation, and that can be difficult to do. Proving motivation in cases involving sectarianism can also be difficult. All the factors that represent sectarianism would have to be considered carefully in the same way as we have to consider all the issues involved in racism. The police would need assistance in learning about different aspects of sectarianism and how to define it, and they would need guidance on what represents sectarianism. However, the principle that the issue should be addressed is right.

I see a lot of similarities between racially motivated crime and sectarian crime. At the end of the day, the pertinent word is motivation, and that motivation has to be proved.

**The Convener:** We accept the essential point that you are making. I was just trying to draw you out a bit. You said that there were eight sectarian murders in one year but there have been no racially motivated ones. I just wanted to get a bit more information about what you would define as being a sectarian murder.

**George Lyon:** I want to go back to the definition because it is crucial in deciding whether amendment 148 is worth while. I take it that the witnesses reject what John McLean said in his evidence and that they believe that the amendment would add to what is there. Could we define sectarianism and religiously motivated crime?

**Peter McLean:** In the first instance, the amendment would give a strong message that sectarianism will not be tolerated in Scottish society. If people who commit sectarian crime knew that they could face a far greater sentence

for acting in a sectarian way, it could also act as a deterrent. The amendment also offers the opportunity to highlight the issue of sectarianism. It would precipitate the collection of statistics on sectarian-related crime so that we would have a greater measurement of what is happening.

I believe that it is possible to define sectarianism, much in the same way as we sat down and defined racism. I am not saying that the task is easy but it can be worked through.

**George Lyon:** Will you give examples of how you define it? Clearly, John McLean could not.

**Peter McLean:** If someone wants to wave a union jack or an Irish tricolour because they are proud to belong to Britain or Ireland, they should be perfectly entitled to do so, to celebrate their nationality or cultural identity. If someone wants to wave a union jack or Irish tricolour and shout about Catholic or Protestant bastards, they cross the line. Sectarianism can be distinguished quite easily. I accept that there are other greyer areas, but that is a clear example of when a distinction or a line can be drawn.

**Cara Henderson:** It is a question of intention, or why a given person is waving an article. If they intended to incite a violent reaction, it would come within the ordinary person's understanding of sectarianism.

**Mr Hamilton:** We all agree with your initial submission, in the sense that no one here seeks to defend sectarianism. Any analysis of what is before the committee is purely about whether the law would be workable or not.

I do not find your definition of sectarianism or the examples that you have given particularly convincing. You are giving fairly obvious examples and you admit that there are grey areas. Your essential argument is that it should not be beyond the wit of mortal man to come up with a definition, but that is not really the way to pass law. We should not be saying, "Let's pass this law and hope that we can come up with a workable definition." The committee will have to be a lot more satisfied about how watertight any such definition would be.

For example, we have been given some difficult examples in relation to football matches. Peter McLean referred to a celebration of cultural identity. Often, a group or crowd is involved in the celebration—that is part of what the celebration is about. When that flips over and becomes inflammatory or shows intent to commit an aggravated sectarian offence, I fail to see how a reasonable person—whether a police officer or anyone else—could reach the view that that was a celebration. However, police officers are unable to enforce the letter of the law in such situations. Do you accept that it will be equally impossible to do

so under the proposals, at an old firm game for example?

**Cara Henderson:** Yes, but I have a difficulty with a point that I perhaps do not understand. I understand that we are not compelling police officers to make any more arrests than they currently do in such situations. We are not asking them to make more arrests within the inflammable environment of football stadiums. We are asking them when they make arrests for existing crimes to describe the context of the crimes.

**Mr Hamilton:** With respect, there are two different issues. One concerns data collection, which has its problems and to which I will return. The other issue concerns changes of behaviour. Mr Gorrie's amendment 148 would put an additional burden and responsibility on police officers. Would continuing to turn a blind eye in such situations—as often happens in practice—be to turn a blind eye to a much more serious aggravated offence?

**Cara Henderson:** Yes.

**Mr Hamilton:** In respect of the courts, I understand that there is a dispute about whether Mr McLean's evidence on behalf of Strathclyde police is correct. I understand that there would be not just no additional convictions, but fewer convictions. You have said that there would be no additional prosecutions. That is not the intention. If that were correct, would you continue to support the amendment?

**Cara Henderson:** Are you asking whether, if Mr McLean's arguments were proven to be correct and there were fewer convictions, we would support the amendment?

**Mr Hamilton:** The evidence that we have been given suggests that there would be fewer convictions. If there were fewer convictions, would you continue to support the amendments?

**Cara Henderson:** That would defeat the intent and purpose of the legislation. That is a given.

**Mr Hamilton:** So you think that convictions are the intent, not the public message.

**Cara Henderson:** Would you repeat that?

**Mr Hamilton:** Are you saying that you would withdraw your support for the amendments if there were fewer convictions and that the litmus test for whether the legislation is successful should be the number of convictions?

**Cara Henderson:** I am sorry, but I do not understand the point that you are making.

**Mr Hamilton:** Is your support predicated on the number of convictions, so that fewer convictions would mean that you would no longer support the amendments? Is your litmus test for whether the

legislation is good or bad the number of convictions?

**Cara Henderson:** No, I do not think so.

**Peter McLean:** I would like to clarify the background to our support. First, we support the principle of legislation to address sectarianism in Scottish life. Secondly, we support amendment 148, as we believe that it can be effective in a number of ways. It can be effective as a potential deterrent and it will create a measurement of sectarian crime—none currently exists. It can also facilitate courts being in a stronger position to increase sentences where sectarianism is an element in a crime.

There is a difficulty with the specifics of the definition, which John McLean highlighted. Those specifics will need to be worked on and defined in the same way that racism was.

I think that Duncan Hamilton is touching on what the impact would be on an old firm football game. To an extent, the mechanism is a separate issue. An aggravated offence would be involved, so theoretically the police would arrest people on the same basis as they arrest them at present, but there would be an additional aggravation to the offence.

The idea has often been expressed that, at and after an old firm football game, many people in a sizeable crowd commit offences, and those offences are not acted on because the scale is too large. Nil by Mouth has argued the case that the clubs, through their stewards—that is a further issue—and through the police could perhaps have 10 people who were acting in an abusive and sectarian way arrested per game.

**Mr Hamilton:** With respect, that is entirely different from what we have been discussing.

**Peter McLean:** Indeed it is—which is why I was confused that you raised the point that you did.

**Mr Hamilton:** My point is that either an additional burden and expectation are placed on the police or they are not. If you are suggesting that an increase in the police's burden is where this should lead, then that is a different argument. It is entirely your right to suggest that there should be more arrests, but we cannot then say that the proposals will not place an additional burden on the police, can we?

**Cara Henderson:** We accept the point that that was not Mr Hamilton's line of argument. We do not accept the argument that the new law will lead to fewer convictions—I am sorry; I have lost the thread of the point that I was going to make.

**Peter McLean:** Mr Hamilton's point is based on our accepting that the proposals would lead to fewer convictions, but that is not necessarily what

we believe, which is why we are not really responding to the point.

**Mr Hamilton:** I will explore a different point, about the police not being able to meet public expectation. On the one hand, the idea is to send out a message—that has superficial value. On the other hand, Strathclyde police's evidence is that the public expectation would be far beyond anything that could be met. What is your reaction to that?

**Peter McLean:** The public's expectation would be managed by properly communicating the nature of what had been agreed and the way in which it was to be dealt with. Such matters depend on how what is eventually decided is communicated—the effectiveness of that communication will influence public expectation.

**Cara Henderson:** We should acknowledge that there is public expectation in relation to sectarianism. For too long now there has been a sense of apathy and resignation about the problem. We appreciate the specific difficulties relating to the definition of sectarianism, but the debate has proved to be fruitful; it will continue to be so. Public expectation can be a good thing, but it can put pressure on institutions and organisations. It can also put internal pressure on individuals to think about how their behaviour, language and actions contribute to sectarianism. Instead of considering public expectation as a negative thing in this context, we should welcome the fact that the environment is changing for the better and that people in Scotland expect more.

**Bill Aitken:** I have listened with great interest to what you have said about the scale of the problem and about the fact that your research has, by your own admission, been difficult. You appreciate that we cannot simply discuss the general terms of sectarianism—on which there would be a fair measure of agreement—and that we have to narrow the argument to deal specifically with the law and the application of amendment 148 to the law, which could be problematic. Would it be easier to categorise a racial incident than a sectarianism incident?

**Cara Henderson:** I listened to the earlier debate and I think that one of the inherent problems with sectarianism is its political element. I accept that that presents another level beyond the difficulties that are inherent in defining racism. Therefore, my answer to the question is yes—although Peter McLean may have different views.

**Peter McLean:** The answer depends on the situation. Racism and sectarianism can be equally difficult to define. We start by asking whether sectarianism needs to be addressed, which it does. Is having a law an effective way of addressing the matter? We are debating that

today. As we said, a law can be an effective way in which to address such matters.

The situation was the same for racism. When an individual of one colour attacks another individual of another colour, it is extremely difficult to define that as a racially motivated crime. In the same way, if an individual of one colour attacks another individual of the same colour, it is extremely difficult to prove sectarianism. It is of equal importance to define both situations. If one person stabs another and there is no evidence of any racial or sectarian element, proving such a motivation will not be possible. Sectarianism and racism are the same in that context.

Some “political parties”—I put that description in inverted commas—support issues that are against people who are of a different race. It could be argued that a member of such a party who committed a crime against somebody of that race might consider that to be a political crime, rather than a race crime, which would take us back to the same situation as that which sectarianism and politics are in.

16:30

**Bill Aitken:** I know that your research has been to some extent limited and that you have been inhibited by a lack of access to court records, but is it your impression that the court imposes a heavier penalty if a sectarian element is attached to an assault or a breach of the peace?

**Cara Henderson:** Are you asking whether that is our impression as a consequence of our research?

**Bill Aitken:** Yes.

**Peter McLean:** You ask whether we believe that, at present, the court imposes a heavier penalty if it believes that sectarianism is an element. The court does not do that.

**Cara Henderson:** I imagine that examples could be unearthed of individual judges who have taken it on themselves, given the context and perhaps as a consequence of the greater attention to sectarianism in recent years, to view the matter more seriously and to reflect that in a sentence. However, I understand that that is not applied uniformly.

**Peter McLean:** Generally, we have found little evidence to suggest that.

**Bill Aitken:** How many cases did you study?

**Peter McLean:** We examined about 12 to 15 cases.

**Cara Henderson:** In some cases—one case in particular, which I appreciate took place seven years ago—the context shifted somewhat and the

environment for the debate on sectarianism shifted. When Jason Campbell was found guilty of Mark Scott's murder, the judge referred in summing up to mindless violence. It is generally accepted that that was a sectarian attack, in the sense that the victim was identified because of a Celtic scarf. However, such evidence was not presented in the court, so when sentence was passed, no clear signal was given out to society that such a crime was wrong or that that was the reason why the victim was picked out.

**Bill Aitken:** Will you remind us of the punishment part of the sentence in that case?

**Cara Henderson:** It was life imprisonment. Jason Campbell's case came up for review as a consequence of the Human Rights Act 1998, because he had to be informed of a minimum sentence, which I think was set at 15 years.

**Bill Aitken:** Is not the average punishment part for a murder 12 years?

**Cara Henderson:** Yes, but the review of Jason Campbell's case to set the tariff as a consequence of his right to know how long he would serve was undertaken quite a long time after the initial trial. Perhaps the changed environment was in the judge's mind.

**Bill Aitken:** Yes, but Jason Campbell still got three years over the going rate. That is the point.

**Cara Henderson:** It is true that he was sentenced to more than 15 years but, at the time when he was sentenced, no specific mention was made of sectarianism.

**Peter McLean:** The three additional years that you are talking about were not necessarily related to sectarianism.

**The Convener:** What were the additional three years for?

**Cara Henderson:** The three years were additional to the average sentence and came up only when his sentence was reviewed.

**Bill Aitken:** The argument that I am putting forward is that, in most cases, the trial judge deals with the sentence. The judge in that case, in referring to the mindless violence that had been committed, clearly felt that the sentence should be more than the average of 12 years.

**Cara Henderson:** Jason Campbell was sentenced to life imprisonment. I do not have a precise understanding of the judicial process, but I know that it was not until recently that what is meant by “life imprisonment” was clarified. It is hard to make a judgment on what was in the mind of the trial judge.

**The Convener:** The committee is trying to take a neutral view of amendment 148 and to test it.

You have given us figures and we are trying to press you on them. The case of the murder of Mark Scott suggests that sectarianism was taken into account in sentencing because the sentence was three years longer than the average. That suggests that judges might already be doing what the amendment suggests they should do.

I have to discuss with the committee what we should do next, but it seems to me that we need to know what is in the minds of judges. You have given us excellent evidence, as has John McLean, but we cannot take your word or his word for it; we have to ask the people who make the decisions. However, it would be helpful if you could say how much extra time on a sentence you would expect sectarian aggravation to result in.

**Peter McLean:** The murder of Mark Scott was particularly brutal, but we have no idea of what was in the judge's mind when he increased the sentence to three years over the average. However, if the judge felt that sectarianism had played a part in a crime for which he was handing down a sentence that was longer than usual, it would be helpful if the judge could say something like, "You are receiving 12 years with a further three years because the crime was of a sectarian nature." If that happened, we would not be sitting here having this discussion today. That would make the situation quite clear and would send a powerful message to people who might be considering committing a crime similar to the one that Jason Campbell committed.

**The Convener:** Yes, and the committee is wondering whether that might already be happening.

**Peter McLean:** Inclusion of amendment 148 in the legislation would ensure that that would happen.

**Cara Henderson:** We accept the fact that tougher sentences might be being handed down because of aggravation by sectarianism, but we think that, if that is happening, it should be specifically stated.

**Brian Fitzpatrick:** I see the point that the committee is struggling with.

I commend Nil by Mouth, and Cara Henderson in particular, for their work in exposing Scotland's dirty little open secret and getting it on the political agenda.

I am struggling with the fact that I am unlikely to support Donald Gorrie's amendment 148, although I am sympathetic towards it. For the reasons that have been outlined, it is right that we should talk about Mark Scott, because we keep hearing about Jason Campbell. We hear about the people who perpetrate such awful crimes. The fact that we are discussing the issue is part of the work that follows

on from an event that I will never forget. I suspect that people across Glasgow, who suddenly realised that sectarianism had pulled up a chair in their homes and introduced itself, will never forget it either.

You asked whether the effects of sectarianism should be measured effectively, whether the challenges of sectarianism should be taken on board and whether offences of a sectarian nature should be sentenced more severely. I do not think that anyone would demur from those propositions. The issue that we are struggling with is that, before the Parliament comes to a decision on the bill, the committee needs to determine whether the evidence on the amendments that we are considering gives weight to the propositions that reasonable fiscals who exercise ordinary care are not already narrating the circumstances of sectarian offences, and that reasonable sheriffs who exercise ordinary care are not already taking account of the sectarian circumstances of some offences.

I would have no difficulty supporting consideration of the use of legislation and policy across the Executive's estate generally and I would support better measurement of the incidence of sectarianism in the criminal justice system.

I want to mention an issue that is slightly outwith the committee's remit. I want to find out where legislative change in relation to sectarianism fits into the priorities of a campaigning organisation such as Nil by Mouth. Legislation is not the only vehicle that we could use to declare that sectarianism is not acceptable in 21<sup>st</sup> century Scotland—we could use other vehicles to do that. For example, we could examine the collection of public health data on access and we could investigate the labour market. If we confine ourselves to the notion that sectarianism in Scotland is something that goes on between drunk men outside Parkhead or Ibrox on a Saturday afternoon, we are kidding ourselves. Sectarianism should be taken into account in relation to civil service recruitment and retention. We should not kid ourselves that sectarianism affects only working-class people on the west coast of Scotland—if only that were the case.

**The Convener:** I must interrupt you, not because I do not agree with everything that you said, but because I must press you to ask a question.

**Brian Fitzpatrick:** In your opinion, where does the weight of amendment 148 lie? Does its utility lie in the establishment of a legislative vehicle that declares that sectarianism is not acceptable? Perhaps you dispute the earlier evidence that we received from John McLean of Strathclyde police, who questioned the efficacy of the amendment.

Although the committee's members might all sign up to the general principle, we are wrestling with the particular legislative vehicle that would be created by amendment 148. The Parliament will have to wrestle with the issue in due course, one way or another.

**The Convener:** There is a question in there somewhere.

**Peter McLean:** I am sorry; I am not quite sure what the question was.

**Cara Henderson:** I will respond with another question. You said that you will not support amendment 148. Is that because you think that the present law is adequate in relation to the disposal of sentences? You indicated that sheriffs are already aware of the sectarian circumstances of some offences and that, because the sectarian nature of offences is already being taken account of, amendment 148 is not needed. If that is the case, would not it be beneficial to have a symbolic statement that sectarianism will not be tolerated? Surely your belief that sectarianism is already being taken account of in some way counters the difficulties that were raised in relation to definition. If sectarianism is being taken account of, sheriffs, judges and procurators fiscal must be grappling with the issue. The fact that that is happening shows that the problem of definition does not undermine the intention of amendment 148—it shows that the proposed legislative changes are feasible.

**Brian Fitzpatrick:** I am conscious of our time constraints, but if the convener is happy for me to do so, I would like to pursue that point.

**The Convener:** No. Although we are flexible on the matter, the purpose of the meeting is for the committee to question the witnesses and not the other way round. The witnesses have had the opportunity to put on the record some of their responses to the points that Brian Fitzpatrick made. Do you have another question or are you finished?

**Brian Fitzpatrick:** Is the efficacy of legislation or its declaratory benefits behind your position on amendment 148?

**Cara Henderson:** My personal opinion is that it is the former, which I believe to be important in its own right. I do not agree with the argument that was made earlier that the amendment undermines or detracts from the present operation of the law.

**Brian Fitzpatrick:** It sounds as if you prefer the declaratory aspect of the legislation.

16:45

**Cara Henderson:** Yes. I am sorry, that is what I meant.

**The Convener:** I call Donald Gorrie. I ask him to be brief.

**Donald Gorrie:** I presume that it is possible to wish for the declaratory aspects of legislative change as well as the effect of the law in prosecuting cases?

**Cara Henderson:** Yes.

**Donald Gorrie:** It is not an either/or situation. At the moment, do the courts pursue seriously the issue of sectarianism?

**Cara Henderson:** There is neither consistency nor uniformity of sentencing, and research has not been undertaken on how the courts pursue the matter, both of which are relevant to the debate. My impression is that the courts do not take a coherent approach to dealing with sectarianism.

**Peter McLean:** We have been unable to source evidence that suggests that such an approach is taken. So little evidence is available—full stop. As I said, our attempts to gather evidence show that it is very difficult to research the subject. Dr Elinor Kelly, who is a research fellow at the University of Glasgow, has also examined the subject and she has also been able to uncover very little evidence to suggest that sectarianism is taken on board in the courts.

**Donald Gorrie:** I think that an announcement will be made on Thursday by the all-party working group about the package of measures that should be taken to combat sectarianism. Would such a collection of measures to deal with sectarianism be more or less effective if amendment 148 was carried as part of that package?

**Peter McLean:** It would be more effective.

**Donald Gorrie:** Do you feel that amendment 148 would help in cases of religious hatred? I am thinking of the problems that are faced by Muslims and Jews in particular since last September. I know that you have expressed an interest in the problems that those people face. Would a visible legal protection to address what is now known in Scotland as sectarianism also be helpful to other religious groups?

**Peter McLean:** We deal with a wide range of religious groups—Sikh, Hindu, Muslim and so on. I understand that those communities feel strongly that such legal protection would be welcomed.

**The Convener:** I did not understand what was going on there. Does the strength of feeling relate to amendment 148?

**Peter McLean:** Yes.

**The Convener:** I do not understand—

**Peter McLean:** I think that the question was whether other religious groups such as Sikhs,

Hindus and Muslims would benefit from the provisions of amendment 148 and whether they would welcome it. Our research and findings indicate that that would certainly be the case. There would be strong support within those communities for amendment 148.

**The Convener:** That point puts the committee in a difficult position. We are testing something that we are due to debate and vote on very soon. I would like to hear more on that point and on some of the other issues that are involved. The committee can discuss that matter if it so wishes.

I want to return to your original statement to the committee. Like Brian Fitzpatrick, I commend the work of Nil by Mouth and other similar organisations; you have made sectarianism a live issue. Most people, when asked about sectarianism, would say that at least people's awareness of the issue has moved on from years gone by. Nowadays, there is at least a desire in our society to tackle the issue, which did not exist ten years or so ago.

You referred to football clubs and to organisations such as local authorities. Are they doing enough to raise awareness of sectarianism? That is the other aspect of how to tackle sectarianism.

**Peter McLean:** As the focus on the issue has become greater, steps have been taken in a number of areas in society to address sectarianism. Positive moves have been made by a number of organisations, including Celtic and Rangers and local authorities. Glasgow City Council has in particular to be commended for its work on homelessness. However, much more requires to be done. Although there is a lot of movement on the issue at the moment, we would like to see more action being taken.

**The Convener:** Those were all the questions that we have for you. I thank you very much for what was a very interesting, full and frank discussion and question and answer session. We want to commend you again for the work that you are doing, which I know you will continue to do. Thank you for coming before the committee today and for putting your thoughts on the record—we are grateful for that.

**Peter McLean:** Thank you for the opportunity.

**The Convener:** That brings us to the end of the meeting. We meet again in the chamber tomorrow at 9.45 am to continue our consideration of parts 8 to 11 of the Criminal Justice (Scotland) Bill. Before I close the meeting, I will return to the question that I posed earlier about members giving thought to whether we need to give further consideration to aspects of amendment 148.

It strikes me that some of the questions to which

members wanted answers may require us to take answers from procurators fiscal and perhaps the Sheriffs Association. I ask members to think about whether they need that information. If it is in order for us to do so, we could discuss the question tomorrow.

**Bill Aitken:** I would like to reflect on the matter overnight. I can see an argument for amendment 148, but I am not convinced that we need it.

**The Convener:** Okay. I thank Donald Gorrie and Brian Fitzpatrick for joining us this afternoon.

*Meeting closed at 16:51.*



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