JUSTICE 2 COMMITTEE

Tuesday 10 December 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
48th 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

WITNESS

Mrs Elish Angiolini (Solicitor General for Scotland)

THE FOLLOWING ALSO ATTENDED:

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab)
Robin Harper (Lothians) (Green)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Tuesday 10 December 2002

(*Morning*)

[THE CONVENER *opened the meeting at 10:17*]

Criminal Justice (Scotland) Bill

The Convener (Pauline McNeill): Good morning everyone and welcome to the 48th meeting in 2002 of the Justice 2 Committee. Please accept my apologies for the late start; we had a bit of administration to sort out before we began. It would be helpful if members would do the usual and switch off mobile phones and pagers.

As we agreed last week, the committee is taking evidence this morning on the amendments to the Criminal Justice (Scotland) Bill that relate to religious prejudice. I welcome Elish Angiolini, the Solicitor General for Scotland, and Andrew Richardson, who is the principal depute at the Crown Office and Procurator Fiscal Service. We are very grateful to you both for coming along this morning, given the extremely short notice that you were given. I am sure that you have a hectic schedule, but we felt that we should take evidence on the amendments before deliberating later this morning. We have a number of questions to put to you. You are welcome to make a short opening statement, or we could go straight to questions.

The Solicitor General for Scotland (Mrs Elish Angiolini): I am happy to go straight to questions.

The Convener: Thank you.

Bill Aitken (Glasgow) (Con): Good morning. I want to pose a case scenario to you. It is Saturday afternoon and on Edmiston Drive, near Copland Road, two groups are facing one another, shouting, bawling, cursing, swearing and challenging one another to a fight. Police officers hear such remarks as "Fenian bastards" and "Orange bastards". As a result, two men from each group are arrested. What would the complaint say?

The Solicitor General for Scotland: That is like an exam question on criminal law procedure. The answer would clearly depend on the facts and circumstances. What is libelled is not what would be in a police report—it would be substantially more detailed than a police report. If the conduct of the crowd was such that people were shouting, swearing and using epithets of the nature that Bill Aitken described, two options would be available, depending on the size of the crowd. One option would be a charge of mobbing and rioting and the other would be a charge of breach of the peace. If members of the crowd were assaulting each other during the course of the incident, there would also be the possibility of assault charges. In the context of a charge of breach of the peace, the accused would be libelled as having conducted themselves in a disorderly manner. Shouting, swearing and exchanging sectarian slogans is a breach of the peace.

Bill Aitken: That is my understanding, because I have seen many complaints of that type. Why would the Crown include in the libel the phrase, "You did utter or shout sectarian remarks"?

The Solicitor General for Scotland: The Crown would do so because such behaviour would be seen as an aggravation that would, because of the inflammatory and hate-filled nature of what was being exchanged, render more serious the breach of the peace.

Bill Aitken: Indeed, it would. What would the Crown expect the sheriff or magistrate to do with the case that I described, as opposed to what would happen in a straightforward breach of the peace in which the sectarian element was not present?

The Solicitor General for Scotland: I am not sure that there is such a creature as

"a straightforward breach of the peace".

As Bill Aitken knows, a huge range of conduct can come under breach of the peace, including sexual conduct. We would hope that a judge would reflect in a sentence the comparison with a breach of the peace that was simply shouting and swearing without the sectarian element.

Bill Aitken: In your experience, does that happen?

The Solicitor General for Scotland: My experience is mixed. Sometimes such distinctions have been difficult to discern. Unfortunately, I have had significant experience of prosecuting such cases over the past 20 years and in some, the magistrate or sheriff has, when sentencing, made an explicit statement that reflects the seriousness of the charge. It is probably by far the most common experience that the bench would deplore explicitly the sectarian element in such a case. In other instances, nothing has been said explicitly, but the sentence was imposed.

Bill Aitken: So, would it be fair to say that when a breach of the peace—or, indeed, an assault—of a sectarian nature goes to court, the sheriff or magistrate's penalty will reflect the sectarian element of the offence?

The Solicitor General for Scotland: Yes, it will do so to the extent that there are no other aggravations. It is sometimes difficult to discern the aggravations, because there might be aggravations other than the sectarian aspect. We would anticipate that the procurator fiscal would put before the court the aggravation as something that it wished the court to take more seriously; that would be the procurator fiscal's intention in libelling the matter.

Bill Aitken: The status quo would seem to hold to a situation in which, if there is a sectarian element to an offence, there exists the facility for the Crown to report that in a narrative if there is a plea of guilty.

The Solicitor General for Scotland: Yes.

Bill Aitken: The sectarian element would come out in the evidence in the course of a trial and—not invariably, but in the vast majority of cases—the bench would take that into consideration and would impose a higher penalty.

The Solicitor General for Scotland: That is difficult to know, because there is no statistical research, and there are no clear data, on the situation. From my experience, sheriffs would make comments that would reflect the fact that they were increasing a sentence because of the sectarian aspect, but that is not always the case.

Bill Aitken: Thank you.

The Convener: I want to ask a few questions about the definition of religious hatred. Where we are examining an addition to the law, I presume that you would think that it was important to define an aggravation of religious hatred.

The Solicitor General for Scotland: Amendment 148 proposes a definition that is, in my view, clearly workable. It is difficult to establish a precise specification of what amounts to a particular type of conduct until you see it. It is a bit like an elephant; you know it when you see it. A fiscal would recognise religious hatred in a report and can libel it as such. However, an overall specification is likely to be unhelpful. We could work with the definition, given its general nature.

The Convener: A lot of people have questions about the phrase "lack of religious belief". What might that be driving at?

The Solicitor General for Scotland: I have no particular difficulty with that phrase. If I were a profoundly convinced atheist who was concerned about the religious beliefs of others and wanted to speak from the top of a soap box in Bellahouston park, I might as a result be the subject of considerable acrimony and be shouted at. I could also be a member of a group that professed such a belief.

Equally, humanists are people who group together. They have ceremonies, such as naming ceremonies for children, to celebrate life. They are a profound and serious group that has no religious belief in God, but which has, nonetheless, a profound and sound philosophical code. Humanists are a quite distinct group.

The Convener: Has the Crown Office any experience of prosecuting such cases involving, for example, humanists?

The Solicitor General for Scotland: I cannot say that I can recollect in the course of my experience as a prosecutor someone ever being called a "humanist anything". However, with the growing diversity of Scottish culture and with people coming here from other areas of the world, it is important to recognise that there are other religions, traditions, cultures and beliefs that do not necessarily adhere to the principle of the existence of a god.

The Convener: We heard evidence from the Association of Chief Police Officers in Scotland, which was quite concerned about police officers' being required to make a judgment on the definition of religious hatred at the beginning of a procedure.

The Solicitor General for Scotland: Our system in Scotland is as strong as it is because police officers are not required to make such decisions. Such decisions are for procurators fiscal. When the police report a case, they simply take a stab at what they think the case looks like and report that to the procurator fiscal. Ultimately, the procurator fiscal would determine from the facts and circumstances that were reported by the police whether the case came within the legal definition that is proposed within amendment 148.

The Convener: Does it concern you that the evidence from ACPOS to the committee is that the police are concerned about having to make that initial judgment?

The Solicitor General for Scotland: I think the same difficulties were encountered when the charge of racial aggravation was first introduced. People asked how we would deal with a white person who stabbed a black person and whether that would, per se, be a racial incident. People struggled with whether those facts and circumstances would form the basis of an offence. Even over the course of the couple of years that that legislation has been in force, people have become increasingly professional in recognising such conduct, as the process has been developed by the courts. The same is likely to happen with offences that are aggravated by religious prejudice.

With any new offence, there is likely to be a period when there is development of the law,

which is a natural process and is no reason for not introducing an offence. The bottom line is that, if a police officer is unhappy or unsure, he need simply ask the procurator fiscal for advice during the course of making his report, and libel a breach of the peace of the common denominator.

Scott Barrie (Dunfermline West) (Lab): What is the current status of Crown Office guidance to prosecutors on sectarian offences?

The Solicitor General for Scotland: There is no such specific guidance. The matter is currently left to the discretion of individual procurators fiscal.

Scott Barrie: Last week, the Scottish Executive published a report that suggested that the Crown Office should update its guidelines to prosecutors to ensure that religious elements in offences that are brought before the courts are not withdrawn in return for an accused's pleading guilty to a lesser offence. Do you think that prosecutors would seek that sort of guidance?

The Solicitor General for Scotland: Ultimately, the directions that are given to prosecutors are matters for the Lord Advocate, who must reflect the public interest. If, following a report such as the report of the Scottish Executive working group, the Parliament determined that it wished to agree to an amendment on religious aggravation, the Lord Advocate would clearly need to reflect the Parliament's concern about the nature of such offences by ensuring that the guidelines to prosecutors reflected appropriately the new aggravation. He would also need to consider the extent of the problem, which is highlighted not only by that working group's report, but by the level of support for it from pressure groups, which have expressed concerns about that aspect of activity.

Scott Barrie: Given the fact that issuing guidance is a matter for the Lord Advocate, would an amendment on religious aggravation necessarily be required to be agreed to before the Lord Advocate could issue guidance?

The Solicitor General for Scotland: No. The Lord Advocate could currently, without legislation, issue guidelines to prosecutors to say that, in the event that such an aggravation is libelled, it should not be subject to plea negotiation or be deleted from the charge.

The Convener: The press have reported that, in the course of tackling sectarianism as a result of the report of the Scottish Executive working group, the Lord Advocate might not allow fiscals to delete charges of such aggravation. The Sheriffs Association, which has written to us with evidence, is concerned that that discretion might be taken away from fiscals. Can you confirm that that is merely how the press have reported the matter, or is that the intention of the Crown Office?

10:30

The Solicitor General for Scotland: The Lord Advocate and I will give consideration to the contents of the report, and the outcome of our consideration will depend very much on the outcome of today's proceedings and what Parliament decides regarding amendment 148. The Lord Advocate has it within his power to remove that discretion and to suggest that the aggravation should not be deleted from a charge. He has done that with racial aggravation; it is interesting to see the extent to which accused persons are motivated to have that specific aggravation eliminated from charges against them.

I suspect that a well-motivated accused would wish to have the label of "religious bigot" or "religiously aggravated offence" removed from his charge, which would in itself be quite telling. People do not want to be labelled in that way; severe stigma is attached to a conviction of racial aggravation and the force of the amendment is that that stigma would also attach to a conviction of religious aggravation. For that reason, the Lord Advocate would give serious consideration to whether or not the matter would be within the discretion of procurators fiscal. However, we would have to examine the facts and circumstances of each case.

I will give an example. Suppose that someone was to murder a person by stabbing them in the street, with no apparent sectarian motivation or aggravation associated with the crime. Suppose that, on leaving his victim, the murderer spotted someone wearing a Rangers top and said to him, "What are you looking at, you Rangers whatever?" I suspect that, in that instance, if the accused were to offer a plea of guilty to the murder but not to the collateral breach of the peace, we would consider the plea of guilty to the murder to be in the public interest.

One must examine the facts and circumstances. That is what we do with racial aggravations, and it is equally important that we do that with religious aggravations.

Mr Duncan Hamilton (Highlands and Islands) (SNP): I would like to pick up on a number of the points that you have made, before going on to talk about the statutory nature of the aggravation.

It strikes me that, to an extent, you are making a virtue of necessity on the questions relating to the definition. You do not really seem to be bothered about the fact that amendment 148 is quite wide ranging and quite general, because that could be quite useful. It could just be that, like everyone else, you would struggle to define what is meant by "aggravated by religious prejudice". The evidence from ACPOS at last week's meeting showed that it was not just a case of things being

a tad tricky for the first couple of weeks while parameters are worked out; rather, its evidence suggested that the amendment is unworkable. The people who will be responsible for making arrests and charges are suggesting that the amendment is not workable, which is a lot stronger than their saying that they need merely to find the right working practice.

Does the absence of a tight definition, or the inability of any of the organisations that we have heard from to come up with a workable definition, tell us anything?

The Solicitor General for Scotland: That tells us nothing at all. One of the great assets of the criminal law system in Scotland is its flexibility—prosecutors in Scotland are perfectly comfortable working within flexible definitions of the law. Breach of the peace, to give a common-law example, has in its definition the widest set of circumstances that can be taken into account. In so far as there is specification of the particular type of conduct included as an offence under the amendment, there is scope to take into account a wide range of sectarian prejudice or prejudice against people of other faiths, including Muslims, Sikhs or Hindus.

I cannot accept that amendment 148 is unworkable. There would be no difficulty in applying the aggravation, as we do at the moment. The amendment simply puts into statutory form and labels something that prosecutors already do day in, day out. Prosecutors recognise that type of conduct when they are prosecuting in court.

Mr Hamilton: You must understand the difficulty that the committee would be in if it were to implement such a change to the law—a change that is, by any definition, being rushed through by cutting short the consultation period—when the evidence that we have heard from the police is that the amendment is unworkable. You say that it is not. They say that it is.

The Solicitor General for Scotland: I have read Assistant Chief Constable McLean's evidence. In it, and in the original report, reservations were expressed about the creation of a statutory offence and its possible implications. Amendment 148 is very different in that it proposes a statutory aggravation. An aggravation that will not require corroboration is entirely different from proving a new crime whose motivation is racial and which requires corroboration.

Mr Hamilton: I wanted to come to that. You mentioned the absence of guidelines and I am curious as to whether that absence suggests that there has not previously been a problem in taking account of the aggravation. In its letter, the Sheriffs Association states:

"It is the duty of the procurator fiscal to bring … features"

such as the aggravating feature of an offence

"to the attention of the court and we do not consider that they are slow to do so."

The letter further states that,

"in imposing any sentence, sheriffs take into account and have regard to all the circumstances, particularly any aggravating feature of the case."

If there is no evidence that the aggravations are not being given due weight, we could be getting into a legal minefield for absolutely no reason.

The Solicitor General for Scotland: I agree that there is no extensive research that shows the extent of the problem, but that is an argument in favour of the amendment because agreement to it will mean that, in the future, we will know the extent of the behaviour. Again, the closest example is racial aggravation. If you asked me three years ago about the extent of racism in Scotland, I might have said that there was not a problem because we did not have any systematic evidence to suggest that there was. However, in the past year, there have been more than 1,300 offences and convictions for racial aggravation; we know that there is a problem.

Mr Hamilton: With respect, you are saying that you cannot quantify the problem and that there are difficulties in classifying the offences. Is not that an argument for more research—which I think was suggested in the consultation document—rather than for implementing a legal change without having fully thought it through?

The Solicitor General for Scotland: It is for members to decide whether they want to implement changes. I can, as a practitioner and prosecutor, say to you that if amendment 148 is agreed to, the prosecution will be able to use that change in prosecutions and it will be a useful part of our armoury in relation to such hate-filled offending. I do not think that it will prejudice the common law in any way, because it would be a common denominator.

Mr Hamilton: Am I right to say that you do not have any evidence that the law as it stands is being implemented incorrectly by sheriffs?

The Solicitor General for Scotland: We simply do not know whether it is.

Mr Hamilton: I presume that, to a certain extent, the burden of proof is on someone who proposes a change in the law to tell us why there is currently a problem.

The Solicitor General for Scotland: That is what I thought was the objective of the working group's report; indeed, that is what the work of the support groups that deal with the matter is about. They know a great deal about the matter and have

experience of it. As a prosecutor, I have extensive experience of prosecuting the type of offending in question, particularly in central and western Scotland. We cannot say that we have systematic evidence about the extent of the offending, because there is no method of labelling it. It is important to identify such behaviour—the example that supports that proposition is that of racial aggravation.

Mr Hamilton: You mentioned the working group. Is it right that we should pre-empt consultation on the matter? The point of bringing together many groups, putting together a document, producing a range of recommendations, including up-to-date guidelines to prosecutors, and identifying problems with which the committee should grapple was to try to build consensus. There was meant to be the possibility of consultation until 14 March 2003. Is it appropriate to pre-empt that consultation?

The Solicitor General for Scotland: That depends on how serious the Parliament thinks the problem is. I have read the working group's report and there seems to be a consensus that there is a need for legislation to reflect the extent of the problem. My view is that the sooner there is legislation, the better. I do not see a huge difficulty in respect of implementation—it would not be rocket science and procurators fiscal would not have to struggle with complex law, because the proposals are practical and workable.

Mr Hamilton: With respect, if that is true, why would the Sheriffs Association say that it would like to have the opportunity to come back with a considered response through the full consultation? That association is not exactly reactionary and we would like to have its criticisms, comments and suggestions on board; that is, I presume, the reason for consultation.

The Solicitor General for Scotland: I am sure that the luxury of time would be welcome. Ultimately, it is a matter for the committee and the Parliament to determine whether there is a sufficient basis to mark the seriousness of the offence as a specific aggravation.

Mr Hamilton: The Sheriffs Association says that there is not.

The Solicitor General for Scotland: That might be the case, but you have also had the benefit of a working group's report and expert evidence from various groups.

The Convener: You have said some things that I would like to return to. In my opinion, the committee's job is to test whether the law is needed. One of the issues that we are pursuing is that such a law might already exist, but we are not using it properly. We were asked to investigate that in respect of stalking and harassment and a range of new offences. It is not fair to say that whether the committee supports the amendment is a reflection of how seriously Parliament takes the matter. We might think that we take the issue seriously, but that we could deal with it in other ways. That is what we are trying to test this morning.

You also suggested that there is consensus, but I do not see that consensus. There is consensus that something ought to be done, but the committee has heard about a variety of ways in which it could be done. The Commission for Racial Equality suggested that we should not use amendment 148 and that we should use some other means and the working group's report does not recommend specific legislation. Do you accept that although there is consensus on sectarianism, there is not consensus about the form legislation should take? Is that a fair assessment?

The Solicitor General for Scotland: There is consensus among the witnesses from whom you have heard and in the working group's report that there is a problem that needs to be addressed. As a prosecutor, all I can say to the committee is that if amendment 148 is passed it will be very useful in so far as we would be able to identify the extent of the problem. The importance of that cannot be underestimated. It is one thing to be an accused person and receive a fine of, for example, £100 for a breach of the peace, which goes on the person's record. However, if that breach of the peace sentence has a bracketed statement at the end of it to the effect that there was racial or religious aggravation, that will make an important point.

The Convener: I wanted to press you on the point about there being consensus. You also said that the aggravation would not require corroboration.

The Solicitor General for Scotland: Yes.

The Convener: Can you explain the technicalities of that? My understanding is that the aggravation would require one source of corroboration. What does that mean?

The Solicitor General for Scotland: The concept of corroboration is that two independent sources of evidence to support any material fact in the proof of a charge are required. That does not necessarily mean two eyewitnesses, but it usually means evidence from two separate sources. In the context of the proposed aggravation, as I read amendment 148 only one source of evidence would be required to support the aggravation; that is not corroboration, because corroboration relates to two sources of evidence. If, on the other hand, after consideration of the working group's report, a statutory offence were created, that would require corroboration to prove religiously aggravated harassment, unless the Parliament determined

otherwise. In the case of amendment 148, the law would not be altered, because it is currently the common law that it is not necessary to prove by corroborated evidence an aggravation to a charge.

The Convener: What does that mean? Does it mean that if I shout something sectarian while committing a breach of the peace, it is my word against the other person's? What does it mean in lay terms?

The Solicitor General for Scotland: At this moment in time, if two police officers were to hear someone shout, "You something something X," one police officer could speak to having heard "You something something" and the other officer could speak to having heard "You something something X." If the X is the element of religious aggravation, that would be sufficient to prove the aggravation.

The Convener: I am not really getting this. Two police officers have heard the shout in that case.

The Solicitor General for Scotland: In respect of any crime of this nature, corroboration would be required to prove the substantive crime of assault or breach of the peace, but the aggravation of the crime would not require corroboration. It would not require a separate source or two sources of evidence to support that element of the crime.

Another example is that if I was to libel in a charge that the convener assaulted Bill Aitken by brandishing a hammer, striking him with a hammer and seizing him by the collar, the portion of the charge that requires corroboration by two sources of evidence is the nature of the attack; that is, that there was an attack and an assault. It is not required that each piece of that charge be corroborated to sustain a conviction in respect of each aggravation.

The Convener: I thought that I should press you on that point, because you said that corroboration would not be required.

The Solicitor General for Scotland: I apologise; I know that I am using jargon and it is very confusing. It is confusing for a great many people.

George Lyon (Argyll and Bute) (LD): Would you clarify exactly what you meant by the statement in paragraph 5.05 of "Tackling Religious Hatred"? It says:

"The Crown Office pointed to the dangers of a statutory offence paradoxically leading to fewer convictions than the present arrangements, as it would be more difficult to prove a statutory aggravation than an existing offence at common law."

The Solicitor General for Scotland: I understand that, at that stage, the Crown Office officials who gave evidence were concerned about the creation of a statutory offence that would require more proof than is required at the moment. However, the proposal before the committee is for an aggravation of an existing offence, not a new crime.

George Lyon: So we are talking about two separate issues.

The Solicitor General for Scotland: Yes. I suspect that that might have led to some of the difficulties that Assistant Chief Constable McLean mentioned when he said that the proposal was unworkable. I wonder whether he was referring to the requirement to prove and provide corroboration of motivation. In many circumstances, motivation can be quite difficult to prove; however, we do not have to prove it in relation to what is called the actus reus of any crime.

10:45

George Lyon: Thank you for that clarification.

In its submission, the Sheriffs Association said:

"If the law is to be changed, consideration should be given to giving the courts increased powers of sentence where an offence is aggravated by religious prejudice … If there were no increased power of sentence, anomalous results could follow."

What is your view on that?

The Solicitor General for Scotland: The Sheriffs Association cited the example of a case in which a maximum sentence would be imposed. I have some difficulty with that, because there are not many circumstances in which that would happen. However, the proposal would not necessarily lead to an increase in the sentence. Instead, it would prove useful by permitting and requiring the court to designate the part of the sentence that relates to the aggravation. In other words, it would require the bench to make an explicit statement on the portion of the offence that it considered to amount to aggravation. As far as the prosecutor is concerned, such an approach would lead to clarity and provide a clear message. The question whether there should be an increased power of sentence is not for me, as a prosecutor, to answer.

The Convener: While we are on the subject of the working group's report, I am puzzled by the fact that some organisations that submitted evidence or were involved in the working group's consultation have written to us to suggest that amendment 148 should be supported when the report's recommendations on changing the law are not very strong. I stress Duncan Hamilton's point that the consultation document asks the Executive to carry out more research on the matter. Why is that not reflected in the working group's report?

The Solicitor General for Scotland: I was not a member of the working group, which has now published its report. However, paragraph 5.03 says:

"There are many good arguments in favour of legislation."

The Convener: I am specifically referring to the recommendations.

The Solicitor General for Scotland: Which recommendations?

The Convener: There is a list of recommendations at the end of the report.

The Solicitor General for Scotland: The chapter entitled "The Way Forward: Conclusions and Recommendations" mentions in its introduction that

"There are many good arguments in favour of legislation"

and continues with a series of bullet points to support that statement. However, there is no specific recommendation on legislation. I am not quite sure why that is.

The Convener: If the Crown Office supports amendment 148, that means that the amendment reflects the Crown Office's position. Indeed, the Crown Office was represented on the working group. Why did it not push for such a recommendation in the report?

The Solicitor General for Scotland: I do not think that it is the prosecutor's role to push for a change in prosecution procedure that would favour the prosecutor. That is a matter for others to decide. All we can do is submit evidence on the practical reality of the situation and on any difficulties that might arise if the law were changed in a particular way. The Crown Office officials who gave evidence at the time were expressing a concern—with which I agree—that it would be trickier to establish guilt in a new crime of religiously motivated behaviour or harassment in isolation than in anything under the existing law or in any proposal in amendment 148.

The Convener: You take the point. Andrew Richardson is the representative of the Crown Office, which ruled out changing the legislation—it had a strong opinion on the matter—but what you are saying this morning does not seem to be reflected in the report.

The Solicitor General for Scotland: The report did not consider the amendment, and I cannot change what the group considered, which was an entirely different creature. Amendment 148 does not go as far as the proposal that was examined in the report.

George Lyon: As Duncan Hamilton suggested, is that not a good argument for waiting until the consultation process is completed before any such amendment is agreed to?

The Solicitor General for Scotland: That is a matter for the committee and the Executive.

George Lyon: I am looking for your opinion.

The Solicitor General for Scotland: As a prosecutor, I can only give evidence to the effect that I do not think that there are difficulties with amendment 148. I am focused on the amendment and have been asked to give evidence about whether it could work in the existing context or whether we anticipate difficulties with it. My answer is that I think that it could work and that prosecutors across Scotland could make it work.

George Lyon: Are you saying that the amendment is technically workable, without expressing support—or otherwise—for it?

The Solicitor General for Scotland: Yes. As a prosecutor, I welcome anything that highlights hatred offences and brings to the attention of the community the extent of the problem. There is a general concern about sectarian behaviour but no concrete evidence about its extent. That was the case with racial aggravation, but we now know differently.

George Lyon: That is expressed support for the amendment.

The Solicitor General for Scotland: Yes.

Bill Aitken: As we are aware, the bulk of the difficulties that surround sectarianism manifest themselves at football matches, particularly those involving Rangers and Celtic football clubs, and at the processions that are held almost exclusively in the west of Scotland. I am concerned about the workability of the proposal. Rangers and Celtic football grounds can contain from 50,000 to 60,000 people. Unfortunately, during a game, thousands of people may be uttering remarks that you and I would regard as sectarian. In practical terms, how would the police cope with such situations?

The Solicitor General for Scotland: That has always been, and will remain, a matter for police operations. In such circumstances, the priority is to maintain public order. If I was to go into any rock concert and decide to haul out 500 fans for a crime that might be taking place, that would be likely to have an impact on the crowd's order—the situation could develop into a riot. Those factors must be taken into account. The policing position will not change, but when the conduct is patent and ringleaders are identified through closed-circuit television operations, which is the existing practice, we will have the opportunity to stigmatise those ringleaders and communicate clearly to the football clubs why they have been convicted.

Bill Aitken: We should not exaggerate the difficulty, because we know that not everyone in that football ground will be shouting, bawling and uttering sectarian remarks. Unfortunately, a significant minority may be doing so, which presents an operational difficulty for the police; it also presents a difficulty for the crowd.

The Solicitor General for Scotland: At present, if there is conduct that could amount to a breach of the peace, a pragmatic operational decision has to be taken about how to regulate and order that conduct in a way that will not create more public difficulty or mayhem. That is a matter for the chief constables to determine. I do not think that the existence of the aggravation would alter the position for the police. If police officers determine that a particular group of individuals in the crowd are ringleaders in creating havoc and hatred, CCTV gives them the capacity to identify those individuals and take them out afterwards in a way that will not create public disorder. That operational issue is addressed at the moment, and I do not see why the aggravation would change that.

Bill Aitken: There would be added pressure on the police to do something about such conduct, which may or may not be a good thing.

The Solicitor General for Scotland: I am not sure why there would be added pressure. You prefaced your question with the suggestion that the bulk of such religiously aggravated conduct would take place at football matches. I am not sure that that would be the case. In my experience as a prosecutor, the bulk of that sort of conduct takes place under the influence of alcohol, in the streets, late at night, and is not necessarily associated with a football match. It often takes place on a Friday or Saturday, sometimes involving friends of different persuasions who have fallen out.

There are also attacks on religious temples, mosques and churches. Issues other than the football-related aspects have to be taken into account. The football-related aspects are significant but, although they are of great concern to a number of people, they are not the only manifestations of religious hatred. Football can be a focus, but it is much more widespread than that.

Bill Aitken: I disagree.

Mr Hamilton: I find your argument weak, Solicitor General. You argue that the proposal would not put the police under pressure to pursue offences with greater zeal. In your view, it would not lead to a greater number of arrests. That leads me to ask why we are bothering to change the law. You say that, ultimately, it will be an operational matter for the police. However, the evidence of the police, who will be responsible for taking operational decisions, is that they cannot operate a system that lacks definition. That suggests that we would be putting in place an ill thought through burden on the police. We might ask why we are considering the measures at all if the proposal will not increase the number of charges or convictions and there is no evidence that those who are found guilty will receive longer sentences.

The Solicitor General for Scotland: The police were struggling with the proposal to create an offence. The issue of definition is one for the prosecutor. A police officer may see conduct that he considers to be criminal in nature and which amounts to a breach of the peace, but it is for the prosecutor to determine whether that conduct amounts to racial or religious aggravation.

Even now, it is difficult to know whether we prosecute more people for racially aggravated offences than was the case hitherto. Perhaps the proposed legislation would give momentum and focus—racial or religious aggravation would certainly be foremost in the minds of police officers. As a result of the proposal, those who are arrested for such conduct—there may be the same number of arrests as has been the case until now—will be identifiable as people who have committed offences of religious hatred.

Mr Hamilton: With respect, nobody is suggesting that such people have not been identified already.

The Solicitor General for Scotland: If, as a prosecutor, I am given a sheet for an accused person that contains, say, 30 previous convictions for breach of the peace, assault and resisting arrest—that would not be an unusual number—I cannot determine whether the person concerned is of a particular disposition.

Mr Hamilton: You suggested that police officers might approach fiscals for guidance on how the measures might work. The evidence that we received last week suggested that, in many cases, a blind eye is turned, for example at old firm matches, because public safety is the predominant interest, and the police often forget about or say that they have not seen certain things.

If 5,000 people are chanting a song, how do we know whether they are inciting violence or aggravating a breach of the peace? Are they celebrating their culture? Are they just supporting their team? When the police cannot work that out and ask for advice, what would that advice be?

The Solicitor General for Scotland: With all due respect, I think that the police can work it out. From the evidence that I have seen, I do not think that the police have been turning a blind eye; they have taken deliberate, positive decisions based on operational, public-interest considerations.

Mr Hamilton: I believe that the phrase "turning a blind eye" was used.

The Solicitor General for Scotland: The prospect of arresting 5,000 persons and putting them before Glasgow sheriff court is not one that anybody would particularly look forward to. The reality is that the police have to take strategic, operational decisions about crowd control. The definition of the type of conduct that is determined to be criminal depends on the facts and circumstances.

I am not au fait with the detail of the particular songs that are sung, but if they contain inflammatory messages or messages of great hate, they equate to conduct that could amount to a breach of the peace.

Mr Hamilton: Would

"Hello, hello, we are the Billy boys …
We're up to our knees in Fenian blood"

count?

The Solicitor General for Scotland: That would depend on the circumstances. If that song was sung in private in the company of people of a similar disposition, such conduct would not amount to a breach of the peace. If it was sung with the intention of provoking the alarm of other persons, and if singing it achieved that intention, I suspect that that conduct could amount to a breach of the peace.

In reality, most people who go to those football matches expect each side to sing such songs, although they may not know whether the other side or faction is truly alarmed by the singing of the songs. That they have heard them often and expect them is a matter of fact.

Mr Hamilton: Somebody who was attending a football match for the first time might be more alarmed than someone who had been going for 20 years.

11:00

The Solicitor General for Scotland: Certainly. I would not be very happy to hear that song being sung next to me if I had brought a young child to a football match.

Mr Hamilton: What do you do? You cannot arrest the Govan stands. If I am there with kids who are at their first football match, or a young person or an old person, and they are alarmed, are you saying that that would be a breach of the peace?

The Solicitor General for Scotland: It could be, if those persons were especially disturbed by the conduct. Such incidents are not usually isolated. They do not take place just with the traditional words of a song; they can be accompanied by other epithets and swear words. That is my experience of attending some football matches. However, the practical reality is that the police would have to determine what was operationally possible and what could be dealt with while maintaining public order.

The criminal law is not a panacea to solve the social problems of a society or, indeed, those particular problems.

Mr Hamilton: Perhaps that is the point.

The Solicitor General for Scotland: As I understand it, the suggestion forms part of a much wider package of measures that would include education and encouragement from the football clubs. I do not think for one minute that it will create a solution to the problems; it will simply form part of an armoury to tackle that conduct.

The Convener: I welcome Brian Fitzpatrick, Robin Harper and Donald Gorrie. Do you have any questions to put to the Solicitor General?

Brian Fitzpatrick (Strathkelvin and Bearsden) (Lab): In relation to Mr Gorrie's amendment, I want to state that it is already part of the law of Scotland that hallmarks of sectarian circumstances, or circumstances indicating religious hatred, might be treated as an aggravating factor for sentencing purposes.

The Solicitor General for Scotland: Yes.

Brian Fitzpatrick: And, as far as fiscals and deputes are concerned, that ought to be narrated and, if need be, should be led in evidence.

The Solicitor General for Scotland: Yes.

Brian Fitzpatrick: If one were to proceed against an individual on indictment in serious cases, the penalty for that at common law might be anything up to and including life imprisonment.

The Solicitor General for Scotland: Yes.

Brian Fitzpatrick: Crown Office officials participated in the four meetings of the working party. Is that correct?

The Solicitor General for Scotland: I am not sure whether they were present at all four meetings, but they certainly participated.

Brian Fitzpatrick: At what level did officials in the Crown Office participate?

The Solicitor General for Scotland: The policy group participated.

Brian Fitzpatrick: They were officials from the Crown Office policy unit?

The Solicitor General for Scotland: Yes.

Brian Fitzpatrick: I turn to the conclusions of the working party report at paragraph 5.05 on

page 21. The previous narration at paragraph 5.04 deals with circumstances as far as the common law is concerned.

Paragraph 5.05 states, and George Lyon touched on this:

"Participants from the Association of Chief Police Officers in Scotland and from the Crown Office both told us that, in their view, legislation on the lines proposed would, in practice, make their pursuit of offences involving religious hatred more difficult."

It goes on to say:

"it would be more difficult to prove a statutory aggravation than an existing offence at common law."

The statutory aggravation that is being contemplated there is some version of the Crime and Disorder Act 1998. You are not thinking of it just as a sentencing aggravation.

The Solicitor General for Scotland: No. My understanding is that the officials, when relating to that particular problem, were considering the problems of a specific offence of religiously aggravated harassment.

Brian Fitzpatrick: So, as far as sentencing is concerned, you are quite content that the common law in Scotland can deal with aggravation. The issue is how you establish the incidence of such offences and whether data are collected in relation to such offences.

The Solicitor General for Scotland: As far as contentment is concerned, it is like many other issues. It is a matter for the discretion of the court. Sometimes it can be useful to have parameters or an emphasis placed on a particular aspect of a matter. However, as I said earlier, the answer is that we simply do not know, although it is certainly competent for the court to take those matters into account.

Brian Fitzpatrick: You are not suggesting that reasonable fiscals, reasonable sheriffs or, dare I say it, reasonable High Court judges—if there is such a beast as a reasonable High Court judge—whether in the west of Scotland or elsewhere, are not already taking account of aggravating circumstances in relation to sentencing.

The Solicitor General for Scotland: I would not think that that was the case, but I do not know whether it is.

Brian Fitzpatrick: You could find out—the Crown Office could collect that data without any legislation.

The Solicitor General for Scotland: It would be extremely difficult to do that, because we would have to find some way of labelling the information. You might be aware that we are computerising our system to make it consistent with the police's system. That labelling would go elsewhere in the system. If I, as a prosecutor, were to determine that racial or religious aggravation was a factor in a conviction, the most effective way of marking that in some way would be to ensure that the information appeared on someone's record. That has legal implications.

Brian Fitzpatrick: You said that your experience was mixed—in some cases an explicit statement was made in sentencing and in others no explicit sentence was imposed. That is not to say that sheriffs or magistrates are not taking account of such issues; it means simply that they are not making it explicit that they are doing so.

The Solicitor General for Scotland: That is right.

Brian Fitzpatrick: I want to ask about amendment 148. We are talking about offences aggravated by religious prejudice. An offence would be deemed to have been aggravated by religious prejudice if the offender's behaviour was

"based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation".

It is suggested that the presumption would be in the eye of the offender.

The Solicitor General for Scotland: That is correct.

Brian Fitzpatrick: How do you envisage that that presumption would be established if the accused were to deny the basis of the presumption?

The Solicitor General for Scotland: The mens rea of any offender is always in their mind. I suppose that only the devil could get inside a person's mind and know what they were thinking. The way in which we attempt to attribute the mens rea of a crime is by an objective evaluation of the offender's conduct and of what they said before, during or after a crime.

Brian Fitzpatrick: Let us suppose that I decided to hit Bill Aitken over the head with a hammer—a wonderful prospect—and that I insisted that I was not interested in his membership of a religious group. My motivation was more to do with the fact that he was wearing a Rangers top, which I took to mean that he was a loyalist, or with the fact that he was wearing a Celtic top, which I took to mean that he was a republican. In other words, my motivation was nothing to do with his religious affiliation; it was to do with my perception of his political affiliation. Would my offence be captured as an aggravated offence under the terms of amendment 148?

The Solicitor General for Scotland: That would depend. You have given me a fairly crude assessment of a particular scenario. A police

report is much more detailed than that. The procurator fiscal will look forensically at every aspect of a crime to determine what the circumstances are.

Very few offences of violence take place in silence. Most of them are accompanied by uncomplimentary epithets that give an indication of what the offender was thinking at the time. Although a person might not be motivated to assault someone because they know what their victim's religion is, they might consider that their victim fits the bill on the ground that they look like or take the form of someone who belongs to a particular religious group or who is affiliated to a particular religious group. That might be sufficient motivation for the offender's action. There would have to be material evidence to support that.

Brian Fitzpatrick: If there was a statutory aggravation that could not be dropped from the complaint or the indictment, that would create a premium in relation to the efforts to suggest that I was motivated not by religious prejudice, but by some other motivation.

The Solicitor General for Scotland: You might approach someone because you want to steal from them. As you take the purse from them, you might notice a crucifix or some Jewish relic of significance and might shout, as you walk away, "You deserve that, you X or Y." That would be an aggravation. That is an example of an offence that was not motivated by religious hatred, but was aggravated by such hatred.

Brian Fitzpatrick: You do not accept the concerns of the Sheriffs Association, for example, which suggested that the establishment of the statutory aggravation that would be achieved by amendment 148 might create a perverse incentive for people not to plead.

The Solicitor General for Scotland: That issue would need to be considered. No one wants to be convicted of a racially aggravated crime. When solicitors approach procurators fiscal, their intention is often to remove the racial aggravation element. I suspect that most people—there might be some exceptions—will not want to be convicted of an offence with religious aggravation. The fact that there will be a motivation to seek to have the religious aggravation removed indicates the significance that would be attached to offences of that type. That represents an argument in favour of legislating for religious aggravation.

The Convener: You have not had the opportunity to see the Sheriffs Association's written submission to the committee, but I will read from it. The Sheriffs Association says that,

"in imposing any sentence, sheriffs take into account and have regard to all the circumstances, particularly any aggravating feature of the case. The type of conduct that is referred to in the proposed section 59(2)(a) would be regarded as an aggravating feature of an offence. It is the duty of the procurator fiscal to bring such features to the attention of the court and we do not consider that they are slow to do so."

The cross-party working group's guidelines talk about the need for research, and the Sheriffs Association urges the Executive to conduct that research first before reforming any law.

There you have it. The Sheriffs Association is saying to us that sheriffs already take those features into account. Does that sound fair to you?

The Solicitor General for Scotland: Yes. I am sure that many sheriffs and justices take those features into account. I am not sure of the extent to which they do that or how they do it and how it is reflected.

If research were to be done, one issue would be how long that research would take and how it would be facilitated. One of the major difficulties is that identifying such cases is very difficult because we do not research them at the moment. Once research is introduced, evaluation will be much more readily facilitated, as it is now with racially aggravated offences. We can examine those offences readily because of the way in which they are flagged up.

The Convener: What would stop us doing that now for religiously aggravated offences under the guidance that the Lord Advocate can issue? I referred earlier to whether stalking and harassment should be a separate offence. The committee recommended that there should not be a separate offence—I think that support for that was wide—but that some categorisation of incidents of breach of the peace would be helpful so that judges would have an idea of what previous convictions for breach of the peace were for. Would it be possible to get the information that we want without any change to the law, if we categorised breach of the peace?

The Solicitor General for Scotland: If we are going to label an offence as religious aggravation or racial aggravation, an accused would want to have the capacity to challenge that. Although the issue at the moment is whether more trials might be held, I suspect that people might wish to resist having such an epithet against their convictions because it is repugnant. There is, therefore, a possibility that more people will plead not guilty.

However, significant numbers of accused persons plead not guilty at the moment. I am not sure that we have reached capacity, because it seems that most people who are prosecuted plead not guilty. Eventually, people may plead guilty at a later diet—sometimes at the trial diet—but the reality is that, in most cases, the prosecution is put to the test.

On categorising breach of the peace for a religiously aggravated offence, if an accused person was to have such a conviction served on him and was sentenced or disposed of in a new way, he might wish to challenge the basis on which that designation was made. That has a legal implication, because the next time that the accused is sentenced, that conviction would be before the court and the issue would be highlighted for the court. We may have a debate at that stage if we do not have it at the earlier stage.

Robin Harper (Lothians) (Green): If I have read your evidence correctly, you have indicated that you would be entirely content with Donald Gorrie's amendment 148 being agreed to. I have not heard you utter any particular reservations on that amendment, which relates to offences aggravated by religious prejudice.

The substitute section 96 of the Crime and Disorder Act 1998, which my amendment 156 proposes, is entitled "Offences aggravated by prejudice". In essence, the amendment would add four further categories on top of racial prejudice and religious prejudice to the Crime and Disorder Act 1998. Those categories are

"gender, sexual orientation, disability or age".

Do you, as a prosecutor, have any problems with the definitions in amendment 156?

The Convener: I am willing to let the Solicitor General answer that, but you should know that we called her to speak specifically on Donald Gorrie's amendment 148. However, if the Solicitor General wishes to answer your question, I do not have a difficulty with that.

The Solicitor General for Scotland: If someone were attacked on the basis of their sexuality, age or infirmity, those aggravations would be considered to be similar to religious aggravation. We have had very little time to consider amendment 156, but I have some sympathy with it. Some horrific crimes are committed against vulnerable people by dint of those factors. Nevertheless, it would be useful if we had more time to consider the issue and the way in which the offence would be addressed.

Robin Harper: Thank you. I quite understand.

11:15

George Lyon: It was suggested to us by Assistant Chief Constable McLean that amendment 148 might raise public expectation that he believed could not be satisfied. Do you have concerns about that? For example, when there was an Orange walk through Dunoon, in my constituency, there was a huge outcry from the local population. I imagine that, if the amendment is agreed to and the bill is passed, there will be an expectation next July that the police will be able to do something about those who march through the streets. Do you have any concerns about public expectation being raised and subsequently not being satisfied?

The Solicitor General for Scotland: It is important that the nature of amendment 148 is communicated clearly. The most obvious aspect is that the police already have it in their power to arrest. The public should not expect the bill to offer something different. What would the amendment give the public? The labelling of individuals, so that this type of repugnant conduct would be categorised and stigmatised much more clearly than it is at present. Equally, it would enable us to measure the extent of the problem. Once the convictions were recorded, the extent of the problem would become clear, as it has in relation to racial aggravation. That would inform the other important measures that have been recommended by the group, in relation to education and other aspects of social reform.

It will be for the Executive to manage the expectations. However, it would add to the armoury of the police and the prosecutor if there were a disincentive to some—although not to all—of risking becoming categorised in this way, as the impact of that on future job applications and emigration would be significant.

George Lyon: So, you believe that the amendment would have an impact on the behaviour of those who participate in Orange walks.

The Solicitor General for Scotland: I do not believe for a moment that the existence of any criminal sanction wholly deters people from offending behaviour; that comes from education about tolerance in the home, at school and among one's peers. It is part of a person's social education. Nevertheless, if someone could be labelled a racist or a religious bigot for a significant length of time, that might have an impact on those who might be tempted to stray into that type of conduct. They might be persuaded to do otherwise.

The Convener: There are no further questions. I thank the Solicitor General for Scotland for answering our questions; it has been very helpful. I also thank Andrew Richardson for his attendance.

I propose a break of 15 minutes to allow members to consider the evidence that they have heard before we proceed to our stage 2 consideration.

11:18

Meeting suspended.

11:43

On resuming—

The Convener: Given that the committee has just taken helpful fresh evidence from the Solicitor General, are members happy to proceed now with agenda item 2, which is stage 2 consideration of the Criminal Justice (Scotland) Bill? We will deal with amendment 148, in the name of Donald Gorrie, and amendment 156, in the name of Robin Harper, and I want to ensure that members have had enough time to take on board this morning's evidence.

George Lyon: I suggest that the committee delay its stage 2 consideration. The Solicitor General's evidence is extremely important, and the committee has had little time to consider all the comments that were made and the evidence that was submitted. There is a great danger of the committee's being forced into making a hasty decision and I suggest that, to allow members to reflect on the evidence overnight, the stage 2 debate be delayed until tomorrow's meeting.

Bill Aitken: I concur with that view. The committee had an important evidence session this morning, on which I would like to reflect. Papers for the amendment were circulated quite late in the day and, in the interests of fairness, it is important that they are examined and the evidence is considered before the committee debates such an important amendment. I agree with George Lyon that the discussion should be put on hold until tomorrow.

Mr Hamilton: I am happy to support George Lyon's proposal. Members must consider that the process so far amounts to a truncated consultation period and contradictory evidence. In other words, there is a great deal of food for thought. One of the Parliament's jobs is to provide a necessary break from that, and members would benefit enormously from time for mature reflection to review their papers and to think about the evidence that the committee heard today.

Stewart Stevenson (Banff and Buchan) (SNP): I apologise for not being here for the evidence session; the Public Petitions Committee was hearing a petition on the white fish industry, and I felt it necessary that I attend that meeting. I would appreciate time to allow me to consult my colleagues on the evidence that the committee received today. That would be extremely useful. I stand second to no one in my desire to see sectarianism in Scotland addressed, but it is important that the committee takes the right way forward in the criminal justice system. A pause for breath would be very welcome.

The Convener: If we stop now, we will go through the amendments in order when we meet tomorrow. The committee will have to meet next Wednesday, which is the last day on which it can consider the bill. There is a possibility that the committee could consider the bill further in January, but we had hoped that the process would be completed in December. Delaying stage 2 consideration of the bill until tomorrow is manageable and, as convener, I want to give members that option.

I apologise to the minister and his team for bringing them to the meeting. They will understand that the committee has had a heavy responsibility placed on it in a short time, and members want to reflect on the evidence that they heard this morning. My apologies also go to Donald Gorrie and Robin Harper, but I know that they can attend tomorrow's meeting. We will meet tomorrow at 9.45.

Meeting closed at 11:47.

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