JUSTICE 2 COMMITTEE

Wednesday 11 December 2002
(*Morning*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 2 COMMITTEE
49th 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:

Robin Harper (Lothians) (Green)
Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Irene Fleming

ASSISTANT CLERK

Richard Hough

LOCATION

The Chamber

Scottish Parliament

Justice 2 Committee

Wednesday 11 December 2002

(*Morning*)

[THE CONVENER *opened the meeting at 09:50*]

The Convener (Pauline McNeill): Welcome to the 49th meeting of the Justice 2 Committee in 2002. I invite everyone to turn their mobile phones off, as I have done.

Item in Private

The Convener: Do members agree to take item 5 in private, as it relates to our examination of a paper that Duncan Hamilton has prepared as part of our inquiry into the Crown Office and Procurator Fiscal Service?

Members *indicated agreement.*

Subordinate Legislation

Act of Sederunt (Fees of Sheriff Officers) 2002 (SSI 2002/515)

The Convener: I refer members to the note from the clerk on the Act of Sederunt (Fees of Sheriff Officers) 2002 (SSI 2002/515), which is a negative instrument. Do we agree simply to note the instrument?

Members *indicated agreement.*

Draft Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2002

The Convener: The draft order is an affirmative instrument, which is why the minister is with us this morning. I invite the minister to speak to and to move motion S1M-3681.

The Deputy Minister for Justice (Hugh Henry): I commend to the committee the draft order and the associated draft code of practice. The Subordinate Legislation Committee considered the draft order last week and was content.

The Proceeds of Crime Act 2002 contains a comprehensive package of measures to recover and confiscate the ill-gotten gains of criminals and their associates. An important part of the package is an extended scheme for the search, seizure and forfeiture of cash that is suspected to be the proceeds of crime or to be intended for use in criminal activity.

The act provides for a minimum amount of cash in respect of which the search and seizure powers may be exercised. Following consultation with the Scottish ministers, the Home Secretary has laid an order before the Westminster Parliament setting that minimum amount at £10,000.

At present, the police in Scotland have no clear power to search for suspected cash. They may seize cash where it is to be used in evidence relating to a crime, but that might not always be the case. The act, therefore, introduces in section 289 a specific power to search for suspect cash.

In recognition of the sensitivity of search powers, the new search power is subject to a number of safeguards. Prior judicial authority must be sought wherever practicable. Where that is not possible, and a search is undertaken that results either in no cash being found or in the cash being returned, the police officer involved must make a report to an independent person appointed by the Scottish ministers detailing why he did not obtain prior consent. That independent person is required to submit an annual report to Parliament detailing how the power is being exercised. We will shortly

be announcing the appointment of the independent person.

As a further safeguard, section 293 of the act requires Scottish ministers to prepare a draft code of practice governing the way in which constables in Scotland operate the new search powers. As required by the act, we issued a draft code for consultation in August, made it available on the Scottish Executive website, sent it to the police, HM Customs and Excise, judicial bodies and civil liberties groups. We have subsequently amended the draft code in light of comments received.

To assist the committee's consideration of the matter we forwarded, on 26 November, to the committee clerk a summary of the responses received and details of how we have subsequently amended the code. Also forwarded were copies of the draft order, the draft executive note and the revised draft code.

The draft code is intended to be self-explanatory and easily understood. Members of the public will be able to consult it in police stations and police offices at ports.

The code sets out clearly the procedures that are to be followed by constables in operating the new search powers. Paragraph 3 places an obligation on police to ensure that the code is publicly available at all police stations and police offices at ports, which will ensure that the public is aware of the powers and of the expected conduct of officers conducting searches.

Paragraphs 5 and 6 stress a constable's obligation, under the Human Rights Act 1998 and the Race Relations (Amendment) Act 2000, to ensure that the powers to search and detain are used fairly, responsibly and without discrimination.

Paragraphs 7 to 10 define clearly the scope of the powers to search persons and premises, and paragraphs 11 to 13 stress that constables must have reasonable grounds for suspicion before undertaking any search.

Paragraphs 14 to 19 make it clear that, where practical, a police officer must obtain prior authority from a court before undertaking a search for suspect cash. If that is not possible—which we would expect to be the exception—or if no cash is seized or if cash is subsequently returned, a report must be made to an independent person who will scrutinise the police officer's use of the power.

The remaining sections of the code deal with the steps that a police constable should take before a search, the procedures for searching a person and premises and the recording of such searches. They are designed to ensure that people are involved in and made aware of a police officer's purposes and powers; dealt with fairly and openly; and that the powers that the officer exercises are proportionate.

The draft order brings the code of practice in to operation on 30 December, and UK cash provisions are to be commenced on that date.

The code of practice is an important safeguard in ensuring that the new search power contained in the Proceeds of Crime Act 2002 is used in a fair and proportionate way.

I move,

That the Justice 2 Committee, in consideration of the draft Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2002, recommends that the Order be approved.

Stewart Stevenson (Banff and Buchan) (SNP): What recourse does a member of the public whose cash is confiscated have against the police force if the cash is returned because it is established that it is not the proceeds of crime? I am thinking of the opportunity costs, rather than the interest that that person may have lost through not putting the cash in the bank. For example, if a person had £12,000 for a deposit on a house and, because of the confiscation, lost the opportunity to put the deposit down and therefore missed out on the house, what recourse would he or she have?

I ask that question merely for clarity. I am very much in favour of measures to confiscate the proceeds of crime. However, I want to ensure that such measures will operate in a way that does not unduly disadvantage people who are wrongly subjected to those searches and confiscations.

The Convener: Before the minister replies, I should remind members that this is a debate, not a question-and-answer session. I am happy for the minister to clarify that point after other members who wish to speak have had the opportunity to do so.

Bill Aitken (Glasgow) (Con): The Proceeds of Crime Act 2002, which has been exhaustively debated in another place, is justified legislation, and I fully support it. The minister will answer Stewart Stevenson's question in his wind-up. However, it is, perhaps, appropriate to reflect that it is unlikely that a £12,000 deposit for a house in Scotland would be the subject of the action. It is more likely to be a £1 million deposit for a villa in Marbella or thereabouts. The 2002 act is targeted at big-time drug dealers, not small-time criminals, and because there is a social imperative to attack such people, I support the legislation enthusiastically.

Hugh Henry: A range of sums of money could be involved. Bill Aitken is right that, often, significant amounts of money are involved in major criminal activities, but it is right to put that in the context of the act, which applies to amounts over £10,000. Stewart Stevenson's point could apply, for example, where the police had stopped a car for another reason, had discovered £12,000 or

£15,000 in cash as part of the search of the car and had thought that there was no good reason for it to be there. This power would kick in in that situation. The amount of money in question could range.

The safeguard is that the matter must be brought before the courts within 48 hours or the cash is returned. The loss of interest in that period is likely to be minimal. There is also provision for compensation in section 302 of the 2002 act. If the court decides that the cash is not the proceeds of a crime, compensation could well apply.

10:00

The Convener: The question is, that motion S1M-3681 be agreed to.

Motion agreed to.

That the Justice 2 Committee, in consideration of the draft Proceeds of Crime Act 2002 (Cash Searches: Constables in Scotland: Code of Practice) Order 2002, recommends that the Order be approved.

Criminal Justice (Scotland) Bill: Stage 2

The Convener: This is our seventh meeting at stage 2. Members will have the bill and marshalled list in front of them.

Section 59—Public defence

The Convener: Amendment 69 is grouped with amendment 70.

Bill Aitken: The provisions of the Legal Aid (Scotland) Act 1986 include that to set up the system of the public defender. It was some time after 1986 before the proposals were implemented on the basis of a pilot scheme. The latest indications are that the pilot scheme is likely to be continued, but amendment 69 seeks to provide that if the pilot comes to an end, the appropriate arrangements will be in force to ensure the protection of the clients being dealt with by the public defenders office.

It is important that that protection for clients be enshrined in statute, because it is clear that clients could be in difficulty if the plug were pulled on the pilot and they were left without legal representation, perhaps half way through work being done in connection with a complex criminal matter.

Amendment 70 provides for research input. Clearly research on everything in life is important, but research on this aspect of the law is particularly important. Amendment 70 seeks to set up a research advisory group and it details the types of individuals who should serve on that group. They come from disparate parts of society and include somebody from the Scottish Legal Aid Board, somebody from the Law Society of Scotland, somebody who has experience of consumer affairs and someone who has operated within business and commerce. In order to be conducted properly, any research under that heading should have the appropriate input from those who have the knowledge and experience to be able to provide that input. Amendment 70 would create a structure to ensure the appropriate basis for the research.

I move amendment 69.

The Convener: I have a few comments to make. I was quite interested in the public defenders office, although I am not a great supporter of it. I had to question Jim Wallace when he came to the committee about why we were having another pilot study when the first one did not seem to achieve anything. I have accepted his explanation, but Bill Aitken makes the fair point that there should be reassurances that those clients who are represented by the public

defenders office—I believe that they are being selected by their date of birth—should have the normal protections should the pilot scheme end.

Hugh Henry: I am advised that the issue of the date of birth, which you raised, is not correct. That went out in July 2000. I hope that that concern no longer pertains.

I understand some of the issues that Bill Aitken has raised and what drives him on this matter, but I will deal with amendment 69 first, and show why it is wrong in concept and unnecessary. The retention of section 28A(13) of the Legal Aid (Scotland) Act 1986 would be illogical, in that it requires the existence of section 28A(11), which is being repealed. On that basis alone, amendment 69 is flawed.

Amendment 69 is also unnecessary. There is already statutory provision to deal with the transfer of cases in the event that the Public Defence Solicitors Office is wound up. First, the provisions relating to the transfer of solicitors will apply to PDSO clients by virtue of the Criminal Legal Aid (Scotland) Regulations 1996 (SI 1996/2555) as read with regulation 5(a) of the Scottish Legal Aid Board (Employment of Solicitors to Provide Criminal Legal Assistance) Regulations 1998 (SI 1998/1938). If that is not adequate, Scottish ministers can use the power under section 28A(8) of the Legal Aid (Scotland) Act 1986, which is not being repealed, to make any necessary consequential provisions.

There are a number of reasons why amendment 70 should not be accepted. First, it seeks to prescribe who would be involved in what is known as a research advisory group. The group is really just a management tool to allow the research to progress and to provide expert guidance as necessary. Its membership will depend on the circumstances and needs at the time, and I would be uneasy about prescribing it in the bill, and so far ahead of the research project itself. There was a research advisory group—a RAG—for the original PDSO research report, and the Law Society of Scotland and the Scottish Legal Aid Board were represented on it.

However, and more important, amendment 70 is flawed and problematic because, as worded, it would mean the involvement of a SLAB board member, rather than an official of the board. That could cause practical problems, as well as potential conflicts of interest, as the most appropriate board member would likely be a solicitor, which could put him or her at odds with the Law Society. I understand that the Law Society's representative on the previous RAG was an economist, but amendment 70 would preclude such an appointment and restrict the appointment to members of the Law Society—effectively solicitors. If it is felt that an economist or some other person with knowledge that could assist the RAG should be co-opted onto the group, it must be asked, why have the amendment? The original RAG for the PDSO research comprised, among others, Glasgow Bar Association, Edinburgh Bar Association, the Sheriffs Association, the District Courts Association, the Crown Office and the Faculty of Advocates. All those would be excluded.

I also have concerns that the number of people who undertake that kind of research is limited. That problem arose during the original research. It would be odd to appoint someone to the RAG with little or no experience in the field. Amendment 70 could mean requiring someone to exclude themselves from tendering for the work. That could be unfair. It is not clear what would happen if the Executive could not obtain the services of those prescribed.

Amendment 70 would severely limit the size of the RAG. The original group had up to 20 members, because of the large number of interested parties. It is not clear whether the local bar associations would be content to be excluded. Amendment 70 would not even allow for a Scottish Minister or an official of the Executive to be a member of the group. Amendment 70 would limit the practical operation and effectiveness of the RAG. That would be undesirable. I assure the committee that the Law Society of Scotland will be associated with the research project, and if a RAG is set up it will be a member of that group, alongside other stakeholders.

All in all, I recommend that amendments 69 and 70 be rejected.

Bill Aitken: I am aware that there appears to be a slight inconsistency in my argument, in that I am seeking amendments and some protections in respect of the legislation that set up the public defender system—a system that I opposed at the time, and with which I am far from satisfied. I do not think that it is an appropriate way of providing a defence to an accused person, although I appreciate that the purpose of setting up the system was to cut the cost of legal aid.

I do not entirely accept some of the arguments that the minister made. In respect of amendment 70, I do not think that a situation of conflict would necessarily arise with an individual who is appointed to the group and who is also a member of the Law Society.

I would have thought that the Law Society would have been big enough to be able to recognise that, if one of its members takes a stance contrary to Law Society view or policy, that person acts as an individual rather than as a member of the Law Society.

It is of interest that the minister confirmed that the lottery system by which people are subject to the public defender system is no longer drawn alphabetically. I cannot now remember how the system currently operates, but it nevertheless works on the basis of chance, which is not a satisfactory way of operating. Will the minister provide that information?

Hugh Henry *indicated agreement*.

Bill Aitken: I note that the minister is indicating that he will write to me on that.

Given all those circumstances, and having heard what the minister said, I still think that amendments 69 and 70 have some merit. I intend to press amendment 69.

The Convener: The question is, that amendment 69 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
Lyon, George (Argyll and Bute) (LD)
Morrison, Mr Alasdair (Western Isles) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 69 disagreed to.

Amendment 70 not moved.

Section 59 agreed to.

After section 59

The Convener: Amendment 148 is grouped with amendments 156, 152 and 172. I call on Donald Gorrie to speak to the amendments and to move amendment 148.

Donald Gorrie (Central Scotland) (LD): I recognise that we start with the problem that, having pursued the issue for two years, during which there have been three rounds of consultation, I feel comfortable with the whole thing, whereas the Justice 2 Committee, because of the Parliament's rules, is faced with an amendment rather than a member's bill and so has not had the normal opportunity to consult on the proposal on its own behalf. I recognise that people may therefore feel that they are being speeded up into agreeing to something with which they are not entirely comfortable. I hope that the arguments that I advance and those of the Solicitor General and Nil by Mouth will convince you that you should support the proposal.

My three rounds of consultation focused more and more on the fact that the best way forward was in relation to aggravation. There was wide support for that. I circulated around 500 consultation booklets on the proposed bill on protection from sectarianism and religious hatred and received 100 responses. Among churches and other faith groups, there was almost unanimous support for the proposal, particularly as regards taking the aggravation route. They were keen that there be something in statute relating to religious hatred. The only strong opponent was the Free Church of Scotland, whose annual report described me as the "anti-Christ".

Support for the inclusion of aggravation in the legislation came not only from the churches, but from others with clear views of the situation. The responses, including those from the Law Society of Scotland, several councils, colleges, voluntary organisations and so on, were four to one in favour of taking the aggravation route.

As we have heard recently, there was also support from the First Minister and the Minister for Justice—who obviously have a personal commitment to the issue—and the rest of the Cabinet. The Solicitor General made it quite clear that she supports the idea and that the various arguments that have been advanced against it are misconceived.

The cross-party working group on religious hatred supports the idea, but I think that some people might not have read the report correctly. Paragraph 5.09 says:

"In light of our detailed consideration of the issues involved, we believe that there is a strong case for some form of legislation to ensure that aggravation based on religious prejudice is taken into account when sentencing the accused. However, we also believe strongly that legislation should form part of a package".

It then goes on to make four recommendations as to what would comprise the package that would accompany the legislation. Some people have argued that, because legislation did not feature in any of the red headings, the matter was not considered seriously. However, the working group, which included Assistant Chief Constable McLean and two MSPs who were hostile to the idea to start with, unanimously produced the report containing the paragraph that I just read out.

10:15

There is widespread support for the proposal. Everyone agrees that legislation must be part of a package, including work in education, improvements in the legal system and ensuring closer work between the police and the football clubs. The package would be weakened if the legislation were not passed, as we would be seen to be asking other people to do things while doing

nothing ourselves. Passing the legislation would send a clear message to the people of Scotland that crimes motivated by religious hatred were not acceptable. That was the strongest reason for the support of the churches and faith groups.

The proposal is good in itself. As the Solicitor General indicated, it would help in many ways in the development of the law. It would put religious hatred on the same level as racial hatred. There is a gap in our legislation in Scotland—a gap that does not exist in England—because racial hatred is specifically dealt with but religious hatred is not.

The proposal is focused. It does not create any new offence. It would not lead to any additional prosecutions. The police would decide whether a crime had been committed and the procurator fiscal would decide whether it was an aggravated crime, and that would be included in the charge. It would not lead to fewer convictions because the charge of breach of the peace, or whatever, would stand even if the aggravation were withdrawn or not proved. As the Solicitor General made clear, the proposal has the benefit of naming and shaming bigots, which they would not like.

Unison and Elinor Kelly have produced research that shows that the violence that we are concerned with arises not so much at football matches but in the pubs and on the streets. The proposal does not create new complexities for the police, as a policeman does not have to make an instant decision about whether a crime is religiously motivated; he has only to decide whether there is a crime. The proposal would ensure consistent treatment by the judges. There is plenty of anecdotal evidence that suggests that some judges—not the majority—do not take the issue seriously. It is surely good that the law should provide consistent treatment and not rely on the good will of particular judges.

The proposal would also ensure that there was a proper recording of statistics, which does not happen at the moment. The argument that the system works okay at the moment is unsustainable. If any of you went to visit a branch of your political party and its members told you that they were all extremely keen on canvassing but could not produce any canvassing records when you asked for them, you would not be impressed. The same thing applies to the proposal that we are discussing. The opponents of my proposal tell us that everything is marvellous at the moment and that people take the issue seriously, but the fact that there are no figures to back that up demolishes that argument. The same arguments were advanced when it was suggested that there should be legislation to deal with racial hatred. As the Solicitor General made clear, there has been a great advance in that regard: having the crime on the statute books allows us to see the extent of the problem clearly.

There has been extensive consultation on the proposal. There is overwhelming support for it from religious and other organisations. It would give an historic signal: for the first time in Scots law, it would say that religious hatred is not acceptable. The various counter-arguments that have been advanced, as the Solicitor General made clear, have been based on a misapprehension as to what the amendment proposes.

I move amendment 148.

Robin Harper (Lothians) (Green): I shall keep my remarks brief, because I intend to bring amendment 156 back at stage 3. There are indications that the Executive and the committee are not quite ready for such an extensive amendment to the bill. However, I want to say, just in case the Executive is disposed to accept the amendment, that there is an enormous amount of support for the amendment outside the Parliament. For instance, I have received in the past 24 hours support from the Scottish Association for Mental Health and Capability Scotland.

The simple argument behind amendment 156 is that the European Union identifies six groups of people who are routinely subject to discrimination in various ways. Those groups are mentioned in my amendment. The United Kingdom Government is already amending employment legislation to protect all six groups, so it seems to me to be eminently sensible and, in fact, consequential that Scots law be eventually amended to give those six groups extra protection against offences that are aggravated by the victim's disability, sexual orientation, gender or age.

I will restrict my remarks to that and await the Executive's response.

Stewart Stevenson: I find myself in something of a dilemma about Donald Gorrie's amendment 148. I support his direction and the objectives on which he seeks to deliver. I have led a relatively sheltered life in that, being educated in Cupar in Fife, I did not know that there was such a thing as freemasons, for example, until I went to university. I did not realise that religions did not get on with each other. My school's end-of-term service was successively held by the Catholics, the Baptists, the Episcopalians and the Free Church of Scotland—everybody went to school together. It came as a great shock to me when I moved to West Lothian later in life to discover that such behaviour existed. It is not a problem that necessarily covers all of Scotland, but it is nonetheless important.

I have a couple of points to make that I would very much welcome Donald Gorrie addressing in his summing up. Subsection (5) in amendment

148 is modelled on similar legislation that covers racial discrimination. The amendment states:

"For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice."

Because of the Scots tradition of corroboration, that stirs a great deal of discomfort in my mind. I am interested to know whether it has been necessary to allow a single source of evidence for racial discrimination in existing legislation or whether that legislation would permit a victim to assert evidence in the hope of achieving, through the aggravation of an offence, a greater charge for the accused.

There is a sense in which victims cannot be regarded as wholly free from malice, for understandable reasons, but if race legislation has already led to difficulties, in that it allows the victim alone merely to assert that an attack is racially motivated, would the same problem arise in the context of proposed subsection (5) in Donald Gorrie's amendment 148? The same could be said of Robin Harper's amendment 156.

I wonder about another point, which Donald Gorrie might be able to help us with. For racial discrimination we have the Commission for Racial Equality, as well as legislation that provides for aggravated offences. To what extent has the CRE delivered an improved environment, and to what extent has it required that kind of legislation? How do the two interact? In the case of the bill, we are looking only at potential legislation without the infrastructure that might deliver an improvement in our society.

I will reserve my position until I hear how the debate progresses, but I do so only in respect of amendments 148 and 156; I absolutely support measures that people can convince me will reduce religious hatred or, for that matter, hatred that is aggravated by prejudice.

Scott Barrie (Dunfermline West) (Lab): I wish to follow on from Stewart Stevenson's last point. I am sure that everyone on the committee wishes to see a reduction in any sort of violence against any members of society, in particular those who are being singled out for any reason. However, given that we are discussing two amendments, we have to address what is on the marshalled list.

I wish to raise a couple of points on amendment 148, which I would like Donald Gorrie to come back to in his summing up. I assure him that I read thoroughly the report by the Scottish Executive, called "Tackling Religious Hatred", which was published last week. Paragraph 5.09, which Donald Gorrie quoted, is preceded by paragraph 5.08, which states:

"As a Group, we feel that there is a great deal which could and should be done whether or not there is legislation to deliver a strong message of reassurance and deterrence. In the context of the criminal law, we believe that the police should always record any evidence of religious motivation or hatred when an offence is alleged. We also believe that prosecutors should always bring this matter to the attention of the court."

That is an important point, because one of the difficulties that we have had, albeit in the limited time that we have had to consider the matter—Donald Gorrie said that he has been studying the issue for a long time, but the committee has taken evidence on it in seven days—is that we do not know the extent to which such matters are not being properly brought to the courts' attention at the moment. Some of the evidence that we have received suggests—although it might not conclusively reveal—that those matters are taken into account at the moment.

I have sat in court on a number of occasions—albeit never in the dock, I hasten to add—so I know that the way in which the prosecutor leads evidence and describes how things occurred gives a clear picture of what actually happened. If somebody chants sectarian slogans, that will be brought clearly to the court's attention. One can only assume that, if the person is found guilty, that will affect the sentence in some way.

That brings me to proposed subsection (4) in amendment 148, which, if the committee and the Parliament pass it, will mean that

"the court must state the extent of and the reasons for"

any difference in sentencing. I have some difficulty with that and seek reassurance from the Executive. That proposal seems to be a departure from what would normally happen in court. I presume that one would normally be told what the sentence was for the offence and then what the subsequent extra bit was for the aggravation. We might run into difficulties if a sheriff was already about to impose the maximum possible sentence. Perhaps we need to concentrate on that issue.

I am also concerned about the proposed new subsection (7)(a), which was touched on briefly in the convener's questioning of the Solicitor General yesterday. The subsection mentions

"religious belief or lack of religious belief".

I have thought about this for the past week or so. As someone who holds no religious beliefs, I find it difficult to think of circumstances in which someone like me could be the victim of an aggravated offence because of their lack of religious beliefs. We must consider that part of the amendment carefully; I am concerned about its being included in the proposed new section.

10:30

I am glad that Donald Gorrie did not concentrate solely on football when he spoke to amendment

148. The issue is too easily characterised as a problem in Scottish society that is associated only with football and with two football teams in particular. However, the issue runs much deeper than that and is much more insidious. In the football context, the problem is at least open and obvious, but a great deal of hidden sectarianism permeates a large part of Scottish society. We must at least acknowledge that.

On amendment 156, I have a great deal of sympathy with Robin Harper and although I have picked up on only the bits of amendment 148 on which I wanted to comment, I have a lot of sympathy with what Donald Gorrie is trying to do. Likewise, I have a lot of sympathy with what Robin Harper is trying to do; people are unduly discriminated against not only through religious sectarianism but for a variety of other reasons, which should also be acknowledged. However, Robin Harper acknowledged that amendment 156 is drafted in such a way that its provisions are incredibly wide and far ranging. I will reserve my position on amendment 156, because I want to see what comes back at stage 3 before I come to a firm conclusion on the matter.

Mr Duncan Hamilton (Highlands and Islands) (SNP): First, let me say that it was correct for us to decide to break yesterday to allow us time for more reflection. That has certainly been useful for me.

I commend Donald Gorrie for lodging amendment 148, because it has forced the Parliament to have a debate that we might not otherwise have had. I note what Donald Gorrie said about the wide support for anti-sectarian measures that he has managed to pull together. However, that is hardly surprising. If one were to ask civic Scotland whether it was pro-sectarianism or anti-sectarianism, it would obviously be against it, just as all members of the committee would say that they were anti-sectarianism.

However, the committee has a different role from that of the participants in the consultation. Our role is to pass or not pass the amendment on the basis of whether it will add something that does not already exist and of whether it will address a problem through legislation that cannot be addressed by other means. That is where my problem lies.

I have looked through the evidence that we have received and I do not think that the case for amendment 148 has been conclusively made. Donald Gorrie mentioned the report of the cross-party working group on religious hatred, but Scott Barrie rightly pointed out that a paragraph in that report makes the point that there is a complication about how to find the right legislation. That is a job not for the working party but for the committee and Parliament. That is why we must today consider the specifics of the proposed legislation.

It is interesting to note that the working party made the clear recommendation that the Lord Advocate could produce guidelines. That would be a sensible and constructive approach to addressing the problem of sectarianism.

I am convinced also by the Sheriffs Association's written contribution, which flatly contradicts some of Donald Gorrie's remarks. He suggested that members who said that the current legal position was adequate were wrong and that the burden of proof was on us to make our case. However, the Sheriffs Association says:

"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."

In other words, sheriffs have no problem with identifying the aggravation and giving it due weight, and fiscals have no problem with bringing that aggravation to the courts' attention. Therefore, I am unclear where the alleged problem is in the process. Under the burden of proof, the lodger of the amendment must tell the committee why the current situation is wrong and how the proposals would make things better.

Yesterday, the Solicitor General said that there are two reasons why the committee should pass amendment 148, one of which is that to do so would send a message to the people of Scotland that such behaviour is unacceptable. I do not accept that legislation is the only, or the best, way in which to do that. I come back to a point that was made in several contributions, in particular the Sheriffs Association, which queried the need for the amendment. It said:

"We suggest that the policy of law reform should be to improve the law in areas where it needs improvement, rather than to facilitate ancillary ends".

That sentiment is right. The committee must be clear about what it is doing.

The Solicitor General said that aggravation cases are often dropped because people do not want the social stigma of being associated with sectarianism or racism. There is an easy solution to that problem, which does not involve legislation. As the working party said, the Lord Advocate should advise fiscals that such charges should not be dropped. If that measure is a way to get around the problem without the use of legislation, the committee must consider it. However, it is not a persuasive argument for why the law should be changed.

Donald Gorrie also said that it is wrong for the police to suggest that the proposals would not be workable and that they would add to the

complexity of their job. With the greatest respect to Mr Gorrie, I will take Assistant Chief Constable McLean's evidence of whether it is more complex or difficult before I take evidence from him. Police officers are at the sharp end.

If the committee is to pass legislation that the sheriffs and the police have said is either unworkable or unnecessary, members must be careful. There is a real burden of proof that has not been discharged. As was said yesterday, if the committee is to legislate based on mature reflection, members must be clear about the problem, what they will do about it—the problems of definition are still to be resolved—and why the legislation will make it better. I have not heard enough evidence to say with confidence that the legislation should be passed.

If the committee passes more poor and unnecessary legislation, the reputation of the Parliament will not be augmented; rather, the case of those who seek to detract from the Parliament will be strengthened.

We are all anti-sectarian and I support absolutely the suggestion that further guidelines should be introduced. I support measures, other than legislation, that would improve the situation. If we need to combat sectarianism through sport or culture, so be it. However, it is wrong to legislate simply because we have the power to do so and to assume that that legislation will make an improvement, all the while knowing that the evidence from those in the system tells us that it will not make a blind bit of difference.

George Lyon (Argyll and Bute) (LD): I congratulate Donald Gorrie on his tenacity in running with the issue for the past two years. In the past few months, members have seen the First Minister, who for a long time did not seem to be supportive of the campaign, suddenly taking a keen interest and pushing the issue. Donald Gorrie must be congratulated for at least allowing there to be a debate and for moving the issue up the political agenda.

I have grown up in a society in my home town that tolerates religious bigotry. There is no doubt about that. The matter is not about football matches or anything else; it is about society's attitude to religious bigotry and discrimination, which are often tolerated in the pub or at work every day among colleagues, when such remarks will be made many times over. It usually takes the form of slagging off another person not because there is anything wrong with that individual, but because of their religious background.

The incident that really crystallised the matter for me took place at a stag night Burns supper. A leading figure in our community announced halfway through the evening that it was time that we heard from the Catholic in our midst. No one, but no one, blinked an eyelid at that. If such a comment had been made on racial grounds, all hell would have broken loose. We do tolerate religious bigotry and the question for us all is whether we are serious about tackling the issue.

It can be argued whether amendment 148 is the right way forward, but there is no argument about the fact that we must do something. As I said, it is not a dark secret; there is open religious hatred in many areas of society and no one bats an eyelid about it. It is time that we sent a signal that sectarianism will not be tolerated and there exists a range of measures that can tackle it.

The Solicitor General made it quite clear yesterday that amendment 148 is workable. The evidence that was led by Assistant Chief Constable John McLean appeared to suggest that the amendment could not be implemented and that it would cause severe difficulties that would lead to fewer convictions. The Solicitor General made it quite clear that she does not acknowledge that as being a problem. She also explained that she does not believe the lack of any clear definition to be a barrier to the legislation working. It would operate on a case-by-case basis, and the evidence presented in each case would be evaluated.

The Solicitor General went a fair way towards suggesting that John McLean's evidence was flawed because he seemed to suggest that it would be up to the police to make a decision at the time as to how a case would proceed. He seemed to be under the impression that the amendment would create a new offence, rather than tack on an aggravation to existing offences.

Donald Gorrie made a good point in his presentation; consistency will arise from the legislation. The argument has been made that sheriffs already take religious hatred into account. Agreement to the amendment will mean that every sheriff will have a consistent approach to a case involving sectarian aggravation.

The strongest argument for supporting amendment 148 was led by the Solicitor General. Yesterday, she pointed out that a specific sentence for the religious aggravation element of a conviction would be on the individual's record for the rest of that person's life. That crystallised for me that that individual would be clearly labelled as a religious bigot because of that conviction. That sends a strong signal to everyone in society that such behaviour will not be tolerated any more. Therefore, I will support the amendment.

10:45

Mr Alasdair Morrison (Western Isles) (Lab): Compared with every other committee member, I

am at a distinct disadvantage, in that I did not hear the evidence given by John McLean or Elish Angiolini. I would respect whatever Elish Angiolini said—a view that I am sure all committee members share.

I have great sympathy with the analyses given by Duncan Hamilton and Scott Barrie and, indeed, I have great sympathy with amendment 148. None of us questions the value of tackling crime and violence that are inspired by sectarianism. We all agree that such crime and violence is a cancer in society and that we must tackle it. However, it is important that we, as legislators, put in place the best framework to deal with it and we must ask ourselves whether amendment 148 is the best route that is open to us.

Duncan Hamilton and Scott Barrie raised a number of delicate questions. I certainly have a number of delicate questions, which I hope the minister and Donald Gorrie will be able to address. One concern, which is on the margins of the discussion, is about the recording of statistics on crime that is inspired by sectarianism. Do we need legislation for that? I suspect that we do not.

Scott Barrie dealt with proposed subsections (4) and (7)(a) and it is not necessary to rehearse his arguments. However, given the delicate questions that members who sat through yesterday's evidence have raised, would a better way forward be for the minister to lodge a robust amendment that takes us down the avenue that we all want to go down? The minister is best placed to address that question. Such an amendment could deal with the issues coherently and in a properly framed way. Is the Scottish Executive—the minister and his officials—best placed to draft such a robust amendment? If so, that would require Donald Gorrie to withdraw amendment 148, which is a question for Mr Gorrie.

As I said, I speak with the distinct disadvantage of not having heard John McLean and Elish Angiolini. Other colleagues have raised and highlighted issues. I reserve my position until I hear Donald Gorrie's and the minister's responses, but I will not support Robin Harper's amendment 156.

Bill Aitken: That the matter is in some respects difficult and complex goes without saying. Donald Gorrie and my colleagues on the committee have dealt with it sensitively and sensibly.

Donald Gorrie is to be congratulated on his efforts. I totally understand why he seeks to amend the bill. Similarly, I understand the Executive's attitude. We would delude ourselves were we to say other than that sectarianism has for far too long been a serious problem, particularly in west central Scotland. Although it might be true to say that evidence exists to suggest that the problem is diminishing, the issue nonetheless requires to be dealt with.

Sectarianism has no place in contemporary Scotland. However, as Alasdair Morrison stated, that is not the issue that the committee is required to address today. We are required to consider whether Donald Gorrie's amendment 148 will make a significant impact. We must also consider whether amendment 148 would be workable. Both those issues must be considered against the background that, as Duncan Hamilton properly said, the onus of justifying any change in the law must rest firmly on those who propose that change.

I listened to the evidence carefully, as did every committee member. There appear to be inconsistencies in the Crown's position, as evidenced in the working group's recent report and the oral evidence that the Solicitor General for Scotland gave yesterday. It is clear that, until comparatively recently, the Executive felt that the matter could not be dealt with appropriately by legislation. Apart from the evidence that Nil by Mouth gave—which was very credible—I am unable to ascertain any evidence that the committee has heard that would lead me to the conclusion that the Executive's initial misgivings were wrong.

I also listened with great care to what Donald Gorrie said this morning. I accept that, as he says, the evidence from church and faith groups has been overwhelmingly in favour of amendment 148. At the same time, we are required to base our judgment on the evidence that we have heard and read.

The evidence from those at the sharp end of the system, as Duncan Hamilton called it, is that amendment 148 is flawed. In particular, Assistant Chief Constable McLean pointed out the difficulty of enforcement. The evidence that I found to be particularly compelling was the written evidence from the Sheriffs Association, which pointed out the potential for difficulty. Sheriffs work in the courts daily and deal with the relevant issues. They know what is happening.

At present—and I speak from experience—where a sectarian element is libelled in a complaint and where that is confirmed by the evidence in a trial, or in the Crown narrative, the sheriff or magistrate will, if the accused has pled guilty, inevitably and invariably reflect the sectarian aspect in their disposal of the case. Of course, it is quite correct to suggest, as George Lyon did, that there might be inconsistencies from time to time, but those inconsistencies are not restricted to cases involving sectarianism. Where there is a human element in the administration of law and justice, there will inevitably be inconsistencies. However, the status quo clearly

enables and encourages judges to operate on the basis that, where there is a sectarian element in a crime or an offence, that must result in a heavier penalty.

I was not convinced by the Solicitor General's evidence that the recording of a sectarian element in a conviction would act as a greater deterrent. I point out to George Lyon that the Rehabilitation of Offenders Act 1974 would preclude that information from following the offender for the rest of his life. I also found the Solicitor General's argument about the recording of statistics involving sectarian crimes to be, with all due respect to her, spurious. Ensuring that those statistics are recorded does not require legislation.

There are many ways in which to tackle the wider problem of sectarianism and, like everyone else, I would be more than happy to co-operate in implementing the appropriate measures. However, I do not feel able to support amendment 148. The law in its present form is perfectly adequate when it comes to dealing with misbehaviour aggravated by sectarianism, which is the nub of the matter.

Robin Harper's amendment 156 is, similarly, well thought out and, again, was lodged sincerely. It attempts to afford wider protection to the more vulnerable sections of our society. However, if the new section that the amendment proposes were to be included in the bill as it is worded, who would be left unprotected? Very few people. If we were to take that line, few sections of society—basically, people who had no religious faith and were heterosexual and white—would not be protected. I do not think that that is what Robin Harper seeks to achieve. He wants to protect the vulnerable but, in doing so, he would create so large a group of protected people that there would be a minority of people who were not protected. The amendment does not commend itself to me.

Sometimes, there are debates that reflect well on the Parliament. This has been one such debate. There is little that I have heard with which I could profoundly disagree. Members have given the matter the fullest possible consideration and that means that we will inevitably end up with legislation that is well thought out.

However, I do not think that legislating on this matter would be appropriate. The law is already perfectly capable of dealing with the issue. The onus of proof for any change in legislation must rest firmly with those who recommend it and I cannot say that that onus has been exercised to my satisfaction.

The Convener: Like all members, I believe that the best way in which to tackle religious hatred and other hate crimes is to change attitudes and raise awareness through education. Such an approach is probably more important than a change in the law. I commend the work of Glasgow City Council and many of the large clubs in Scotland, although I believe that they could do more. I hope to see more work. The intent to do more is well reflected in the working group's report and in Donald Gorrie's report, which, because committee members were not given it officially, I have not had the opportunity to read.

Donald Gorrie has given a good account of his feelings and I am glad that he recognises the position of the Justice 2 Committee. The committee would normally report on such a change in the law at stage 1, debate with Parliament the evidence that it believed to be appropriate, take feedback from other MSPs and consider the change at stage 2. Unfortunately, we were not able to do that, because the nature of a criminal justice bill means that any criminal justice matter can be introduced at stage 2. There is nothing untoward about that, but it makes the committee's examination of amendment 148 slightly different from the approach that we have taken with previous legislation. The committee has done its best to take written and oral evidence to guide it on the best way of proceeding.

Donald Gorrie said that amendment 148 would put religious hatred on a par with race crimes. That is true to some extent, but my understanding is that two pieces of legislation deal with racism: the Criminal Procedure (Scotland) Act 1995 and the Crime and Disorder Act 1998, on which Donald Gorrie's amendment is modelled. The committee is most concerned with the Crime and Disorder Act 1998. Amendment 148 seems to be taken from it word for word, except for the inclusion of religious groups.

In that context, I echo Scott Barrie's comments about the construction of the amendment. I am not satisfied that the committee received an adequate explanation from the Solicitor General yesterday about the meaning of the phrase "lack of religious belief". I am not sure why it has been included. The committee heard evidence that the phrase may have been included to refer to humanists, or, I suppose, Scott Barrie—I feel that I can use him as an example because he made an example of himself.

Stewart Stevenson made the valid point that proposed subsection (5), which refers to

"evidence from a single source",

requires a fuller explanation. My understanding is that the evidence of the aggravation is not separated out—one speaks to the whole offence and, to that extent, the evidence does not require to be corroborated. However, just because there is a similar provision in the Crime and Disorder Act 1998 does not mean that it is right. It is a departure from the normal law in Scotland and

must be discussed further to ensure that we are not agreeing to anything out of the ordinary.

On proposed subsection (4), I share Scott Barrie's concern about asking sheriffs to state and explain the additional time that they would add to a sentence for an aggravated offence. I understand that the Executive strongly supports amendment 148—we will hear from the minister in a minute—but does it expect that part of the measure to apply to all crimes? Apart from cases taken under bail legislation, I cannot think of another situation where a sheriff would be expected to state the additional time that was added to a sentence for the use of a weapon or another aggravating factor.

Duncan Hamilton correctly said that the committee must assess the evidence of the Solicitor General against the evidence of the Sheriffs Association. Both made strong arguments. The Sheriffs Association stated that sheriffs already take account of aggravated crimes, including those of religious hatred.

As I told the Solicitor General yesterday, I am concerned about press reports saying that the Lord Advocate might remove the procurator fiscal's flexibility to delete such charges. It is clear that the Crown Office wishes to take the aggravated offence seriously, but I am concerned by the suggestion that the procurator fiscal's flexibility could be removed. That would very much interfere with what a procurator fiscal does and any such change would have to be justified.

The committee must consider the workability of such a provision. To use Duncan Hamilton's phrase, how would it add value to the law? It is not enough to say that it would collate statistics—that is a very poor argument, although I agree that it would be useful for statistics to be compiled. Although I accept the genuine nature of the evidence from Nil by Mouth, the organisation's research did not stand up to any real cross-examination.

11:00

The arguments about tolerance, especially those used by the Solicitor General, are persuasive to a point. I agree with Bill Aitken that we must watch what we are doing with regard to labels and labelling people. For very good reasons, we have other laws to protect people. The suggestion is that the aggravation provision would cover all crimes. It would not just apply to the crime of assault; presumably, it would apply to murder and rape. The argument that being labelled a bigot would be more serious than being labelled a murderer does not hold.

There may be some merit in the provision. The extent of any additional sentence would have to be stated, so the onus would be greater on the Crown and sheriffs to consider additional sentences where that could be justified when an aggravated offence had been committed.

This has been an excellent debate. Members have given the matter much thought and consideration, despite the pressures on us. One pressure is that, not having considered the provision at stage 1 and not having allowed other MSPs to make an input, we must decide the fate of the provision here and now. I admit that I do not understand all the rules of stage 3 procedure. The Presiding Officer has powers to rule in or rule out amendments and I do not always entirely understand on what basis he does that. [*Laughter*.] I am sure that I am not alone in that. One of my worries is that, if we completely dismissed amendment 148, the Parliament as a whole would not have the opportunity to ascertain its general attitude to the matter. We have a heavy responsibility. To be honest, I believe that that is a bit unfair, but that is our position. That is why all committee members have deliberated on the issue within a short time scale and in a very considered manner.

I do not want to sound as though I am giving Robin Harper's amendment 156 less attention, but it is fair to say that we have had slightly less time to consider the valid points that he has made. I feel very strongly about the groups that he mentioned, especially the group defined by sexual orientation. Serious hate crimes are perpetrated against that part of the community and there will be a commitment to examine the issue in the future. However, the issue must be given careful consideration because, after all, we are constructing the law. In almost four years of deliberating, mainly on the criminal law, we like to think that the committee has given a considered view before passing any laws. That is exactly what we will do this morning.

Hugh Henry: I echo what the convener said about the debate. Indeed, Bill Aitken was correct to say that the debate has reflected well both on the committee and on the Parliament. The arguments that have been advanced have been well thought out, well articulated and given the seriousness that they deserve. The committee is in a difficult position and I do not underestimate the difficulties that it faces.

What has impressed me about the debate is that the committee is not taking its responsibilities lightly. The Justice 2 Committee is trying to do its job of scrutinising proposed legislation to ensure that the Parliament passes effective legislation. At the same time, it is clear that the committee is aware of the broader agenda, which is reflected in the debate that is being held in the country. To some extent, the committee's deliberations cannot take place in isolation from that wider debate.

Amendment 148 may be in the name of Donald Gorrie, but neither he, the committee nor the Parliament operates in a vacuum. We are discussing the issue because of concerted pressure from campaigners in recent years in response to some of the appalling incidents that we have read about and witnessed on our streets.

It is a credit to those who have bravely taken a stand against sectarianism that parliamentarians are responding to their courageous campaigning. I hope that the Parliament will be able to reflect the sentiments that have been expressed by a wide spectrum of opinion in the country.

I refer to George Lyon's comment about his experience of sectarianism. He rightly said that amendment 148 would not eliminate sectarianism per se. However, we hope that we can introduce legislation to tackle some of the clear manifestations of religious prejudice and sectarianism where they are linked to other unlawful activities.

The working group report sets out clearly that a much bigger campaign is needed to change the hearts and minds of people across Scotland. We need to change attitudes, cultures and behaviour. Although the thoughtless and hurtful comments to which George Lyon referred would not lead to a prosecution under the provisions of amendment 148, they are nevertheless pernicious and damaging to the type of Scotland that we want to see.

Unfortunately, we cannot say that those comments are an isolated incident. They are the type of comment that is repeated at gatherings in villages, towns and cities throughout Scotland. Perhaps we all need to consider the comments that we make and the effect that they can have in sustaining unacceptable behaviour.

I am sure that some parliamentarians have made unacceptable comments about people's religious beliefs, activities and associations. I am sure that some of those comments could be regarded as hurtful and not constructive. I hope that the debate will help all of us to reflect carefully before we speak in future.

The committee has a specific task today. Donald Gorrie rightly referred to the recommendations of the working group. He emphasised that its proposals must be an essential part of the package that is put in place. He also rightly said that the debate will give an historic signal to the people of Scotland that we are not prepared to tolerate religious hatred and sectarianism and that we are prepared to do something about it. I hope that we can make a contribution to that process during the debate on the passage of the bill.

I have a number of specific points and a general comment to make on behalf of the Executive. With the convener's indulgence, I would also like to pick up on some of the specific points that members have raised, although Donald Gorrie will sum up.

I want to make it clear that the Executive supports amendment 148. We set up the cross-party working group on possible legislation to tackle religious hatred in November 2001. The report, of which members have copies, was published for consultation on 5 December this year.

The main argument against legislation is that such aggravations are already covered by common law, as several members have highlighted. However, among the people to whom the group spoke and to whom Donald Gorrie spoke, there was a powerful perception that it is too easy within the current legal framework for religious motivations never to see the light of day in a court case.

I cannot speak for the Lord Advocate or the Solicitor General about what they will or will not do to the court system, but I can say that we want to ensure that religious motivations are given manifestation and are evident in the process by their being recorded. That should not just be left to chance and individual whim. Through court proceedings, we want to build evidence that we are tackling the problem; not evidence to give us cause to do something, but evidence to demonstrate that we are tackling the issue effectively. As I said, it is unfortunate that that does not always happen.

The working group listened carefully to the views of representatives of religious faiths, Celtic and Rangers football clubs and the anti-sectarian charity Nil by Mouth, which has been mentioned. They were invited to various meetings. Many representatives of faith groups, especially ethnic minority faith groups, made it clear that they want to see legislation of this type. I know that Donald Gorrie had a huge response to his original proposals for an anti-sectarianism bill.

The group concluded that, on balance, there would be advantages in legislation but, as Donald Gorrie and I have said, only as part of a balanced package of other measures. The group recommended a range of measures, on which the Executive is now consulting. The Executive considered that, as Donald Gorrie had already tabled an appropriate amendment to the bill, it would be a suitable opportunity to have the measure introduced swiftly, and one that we should take. It would have been remiss of us had we chosen not to do that. Therefore, we thought that it was right to assist Donald Gorrie in drafting his amendment. I will return to some of the more technical issues later.

On amendment 156, we are sympathetic to the issues raised by Robin Harper. There can be no

doubt that manifestations of intolerance and the crimes that are driven by that intolerance must be tackled effectively. However, the working group only considered religious hatred.

Several other members have spoken to me about the possibility of adding related provisions to the bill, but it would be premature to do so and slightly rushed. I do not know whether we will be able to do that at stage 3, but I have given an assurance to Scott Barrie and other members that we will consider future legislation to see what can be done to introduce effective proposals. I do not think that this stage, or even stage 3, is the time to do that, but we will consider it.

I will explain further why the Executive is minded to support amendment 148. Donald Gorrie's amendment would oblige courts to take religious prejudice into account where it has been a motivating factor in a crime. As Donald Gorrie and the Solicitor General have said, it does not create a new offence. We are not suggesting that the police should arrest anyone they would not have arrested previously; however, amendment 148 will oblige the courts to move religious prejudice up the agenda, and it will ensure that people of all faiths and those of no faith are clearly protected by the law.

Scott Barrie and the convener raised concerns about including people of no faith. It is possible that, in the society in which we live, people of no faith could receive the same type of harassment as religious people. Religious fundamentalism is unfortunately a hallmark of modern society in a number of countries, not only the most obvious ones. In major democracies such as America, we see religious fundamentalism on the march.

11:15

Unfortunately, religious fundamentalism is also a hallmark of some in this country. Whether or not we agree with what others are doing, we could anticipate a situation in which humanists or atheists were arguing about separate schools, abortion or any of a range of issues on which they hold firm views. We could imagine people of strong religious beliefs—not just fundamentalists—taking a line in opposition to that. If those of strong religious beliefs take such a line, that is fine. When they move beyond that, as fundamentalists in other countries have sometimes done, and attack those with atheist or humanist views because of what they say, those atheists and humanists are in the same situation as those who face religious harassment. Not only could atheists and humanists be assaulted, and not only could someone with religious beliefs cause a breach of the peace in demonstrating against what atheists and humanists say, but it is right that atheists and humanists should have the same protection as those with religious beliefs as far as aggravation is concerned.

Intolerance, acts of criminality and unlawful acts can sometimes happen when religious people act against those with no religious beliefs. That is why we consider it right to consider similar protection for those with no religious beliefs, although we understand what members have said.

Amendment 148 sends a strong signal to potential offenders that crimes motivated by religious hatred and sectarianism will be seen as aggravated crimes and dealt with accordingly. During the committee's evidence gathering, a number of reservations were raised. In response to the point about religious aggravation already being covered by common law, the committee might bear in mind the fact that we have no way of knowing how often such aggravation is taken into account in sentencing. Proposed subsection (3) would require the court to take religious aggravation into account. That is in line with the statute law on racial aggravation.

Another change from the existing common-law provisions is that proposed subsection (4) would require judges to make clear the part of the sentence that is attributable to the aggravation of religious prejudice. That provision will provide transparency that does not currently exist and a strong reassurance to the public about how the courts treat crimes aggravated by religious prejudice.

I understand that some concerns have been raised that amendment 148 will make religious aggravation more difficult to prove and might result in fewer convictions. We do not believe that that is the case. The Solicitor General answered that point effectively yesterday. Where the court finds no proof of religious aggravation as libelled in an indictment or specified in a complaint, the other elements of the charge—for example, assault or breach of the peace—do not fall.

It has also been suggested that a statutory basis will somehow make it more difficult to prove the circumstances of an aggravation. Proposed subsection (5) provides that evidence from a single source will be sufficient to prove that an offence is aggravated by religious prejudice. Stewart Stevenson raised concerns about corroboration. Common-law aggravation does not require corroboration, nor does the law on racial aggravation. Therefore, amendment 148 is in line with the standard of proof for common-law aggravation, and indeed with the statute on racial aggravation.

The terms of the libel or indictment will still be the procurator fiscal's responsibility and will still be based on the circumstances that police reported to the procurator fiscal. The police are already

expected to report all relevant evidence to the procurator fiscal. I emphasise that we are not asking the police to determine from the outset whether religious prejudice was involved. That will still be a matter for the court. What the police will have to do is to report the relevant evidence, for example the fact that the accused uttered sectarian remarks during the commission of an offence. I do not see how that is different from the way in which the police operate best practice under current law or in respect of racial aggravation, both of which are enshrined in statute.

In the past year, prosecutors received 1,315 cases from the police that included either charges of racially aggravated harassment and behaviour or separate statutory racial aggravations. Proceedings that included either a statutory charge or aggravation were taken by procurators fiscal in 95 per cent of those cases.

I understand that there has been discussion around defining sectarianism. I stress that the word "sectarian" does not appear in the amendment. In using that phrase, we have been addressing a wide issue, as members of the committee have acknowledged. The amendment deals with offences that are aggravated by religious prejudice, which is defined extremely carefully in terms of malice or ill will based on membership of a religious group or of a social or cultural group with a perceived religious affiliation. Proposed subsection (7) further defines the term "religious group". We are satisfied that the definition is sufficiently inclusive.

The convener and Scott Barrie referred to bail legislation, and there is a precedent there, as that has elements that are similar to those in the amendment. Unlike Duncan Hamilton, I think that the Solicitor General gave a clear explanation of the misunderstandings that were expressed by John McLean. George Lyon was right to refer to that. I do not accept what Bill Aitken said about there being inconsistencies in the Crown position.

On the point that Alasdair Morrison raised, the working group recommended that the Crown Office should establish suitable methods to record incidents of religious motivation, offences prosecuted and the outcome of each case. We hope that that work will continue regardless of the legislative situation. However, the proposed legislation will enable us to identify specifically offences in which aggravation because of religious prejudice plays a part. It will ensure not only that the information is recorded but, more important, that it is acted on.

The convener and Alasdair Morrison asked about the Executive's intentions for stage 3. I cannot speak for the Presiding Officer, and the question that was raised is entirely a matter for him. I presume that he will attempt to reflect the mood of the Parliament at stage 3, but it would be improper of me to try to suggest what might happen at that stage.

Alasdair Morrison asked about the possibility of Donald Gorrie withdrawing amendment 148 and the Executive lodging at stage 3 an amendment to address the weaknesses in amendment 148 that members have highlighted. With respect, that is a matter for Donald Gorrie and the committee, not for me.

I make it clear that the Executive intends to do something about the problem that we are discussing. We think that there is an opportunity to do that today. If the committee does not take that opportunity, we will return to the issue at stage 3.

Whether the committee believes that it would be best to defer to consider a different amendment at stage 3 is a matter for the member who lodged the amendment and the convener. All that I am making clear is that the Executive is fully committed to a change in the law. We will take the opportunity that is presented today. If that opportunity is not taken, we will take the opportunity at stage 3. We are committed to doing something, but the tactics of it are a matter for Donald Gorrie and the convener.

Committee members have shown far better than I could the determination to do something about the scourge of sectarianism, religious intolerance and religious prejudice. Donald Gorrie defined the issues well and encapsulated the mood. Religious hatred is an ugly blot on the Scottish social landscape. Intolerance and prejudice have no place in a modern Scotland and we want to eradicate them.

We support the amendment and will do whatever is required at whatever stage to advance that position effectively.

The Convener: I have a few points of clarification. I did not expect the minister to give an answer on what the Presiding Officer might say. I was just pointing out the committee's responsibility, which we must consider. If we strike out the amendment, we do not know whether the Executive will be allowed to bring it back in a similar form. The Presiding Officer has allowed that on previous occasions. I highlighted the issue for the purposes of the debate; I was not expecting an answer.

One of my concerns, which Scott Barrie shares, is about the court stating the extent of, and the reasons for, the difference. Is the minister saying that the Executive is not absolutely stuck on the format? Does it just want a provision of some kind? Will we ask sheriffs to state what the sentence is based on for all aggravated offences?

Hugh Henry: No. We believe that it is important that the fact that there is religious aggravation is not just referred to, but acted upon—that is an important element of Donald Gorrie's amendment. We want the sentence to reflect the inclusion of an element for religious aggravation.

The Convener: I do not disagree with that, but why must the sheriff state it? Why must the format be such that the court must state the extent of and the reasons for the difference in sentence?

Hugh Henry: Because otherwise the situation would continue as it does currently, with some sheriffs claiming that they state the extent. As the Solicitor General pointed out yesterday, there is no evidence to demonstrate that that is done. Some of the arguments that you raised with the Solicitor General would probably be more appropriately referred in that direction. She accepts that it happens on some occasions, but she made it clear that, on too many others, it is not stated. We want to see the aggravation specifically included not just to demonstrate that we are doing something about the issue, but to send out a powerful message that those who behave in that way will suffer an aggravated penalty.

The Convener: I understand the arguments. I am trying to get to the bottom of why you would not trust the sheriff to state that the religious hatred element of a crime has been taken into account and the person has been sentenced accordingly. I want to tease out why you want the sheriff to go that stage further and sentence someone to five years for one element and two years for another. I am worried about that. I do not have a difficulty with the sheriff stating that there is an aggravated offence and taking the aggravation into account when sentencing. I am questioning going that stage further.

Hugh Henry: As I said, it is a question of transparency. As we know, that does not happen currently. We want to see it happen, and the amendment is a useful tool in ensuring that it does.

George Lyon: The strong argument for going ahead and supporting amendment 148 is that, for the first time, a defined sentence could be handed down for the religious aggravation element of an offence. That is the clinching argument for supporting amendment 148.

I return to the point that I made previously. I want to correct something that Bill Aitken said. Perhaps I did not make it clear when I spoke earlier, but I repeat that I believe that the strongest argument for the amendment is that sentences will be handed down for the religious aggravation element of an offence. Individuals who are convicted on that basis will carry that stigma for the rest of their lives. That is not necessarily a record and I apologise if I misrepresented my views or did not put them across clearly.

For the first time individuals would have to carry the stigma of having been convicted and sentenced—

11:30

The Convener: I have to stop you there, George. At this point, I allow only points of clarification and not second speeches. It would be helpful if you could say something that you have not already said.

George Lyon: I am sorry—thank you for that, convener. My last point is on a question about which there has been some debate, which is whether we return to the issue at stage 3. I am not clear about the argument for reintroducing the amendment or delaying the debate until that time. One technical concern has been raised about proposed subsection 7(a). The minister explained the intention behind that provision reasonably well.

The other issue is whether the amendment should carry Donald Gorrie or Hugh Henry's name. If I am honest, I consider that to be irrelevant. The question is whether there is the strength of argument to support the amendment. I think that that support exists.

Mr Hamilton: I want to take the minister back to something that I am sure that he did not mean to say a minute ago. If he meant to do so, I relish the opportunity to receive evidence on the subject, as I am sure would the rest of the committee. I heard the minister say that there is no evidence to suggest that sheriffs take aggravation into account at present, but we heard evidence from the Sheriffs Association that sheriffs do take it into account.

The association said that fiscals bring aggravation to their attention and that they deal with it. We have received no evidence to suggest that either part of that process breaks down. Will the minister clarify that he did not suggest that sheriffs do not take aggravation into account? Will he also clarify whether he has evidence that that is the case?

Hugh Henry: My comments were very much in line with those made by the Solicitor General, which is that sheriffs have said that they do. They are, however, unable to demonstrate that they do.

Mr Hamilton: Can you demonstrate that they do not?

Hugh Henry: We could be here all day arguing about that. The Solicitor General made it quite clear that we are unable to demonstrate that they do. I am sorry but I cannot advance the argument further. I am simply repeating the point that was made by the Solicitor General.

Mr Morrison: I have a couple of points to make on the issue that relates to the Presiding Officer. If the committee were to vote down amendment 148, the Presiding Officer could—quite rightly—reintroduce it at stage 3, as he has done on other occasions when committees have voted down amendments. I recall that an amendment relating to fox hunting and the matter of compensation was defeated at committee but reintroduced for full and extensive debate at stage 3.

I am grateful to Hugh Henry for his initial comments, as he filled in a lot of the gaps in the debate for members such as me, who were unable to attend the committee yesterday. I do not want to see the issue shelved. We all want to see significant movement on the matter. The important question for the committee is how we get there.

George Lyon mentioned the question of whose name appears above or below the amendment. I agree that it is highly irrelevant. We want competent, robust legislation—something that, at the end of the day, will make a difference. The reason why we are all here is to make a difference. I am grateful to the minister for his clarification of the points at issue.

Bill Aitken: We are all knocking at the same door. It is clear that the minister's view is that sectarian offences should attract a higher penalty. I totally agree with that view. Has he considered that more serious cases of sectarian involvement could be pursued on indictment under the present law? If that route were pursued, higher sentences could be imposed, which would be much more serious than having a complaint under summary procedure placed on an accused's criminal record.

Hugh Henry: I am happy to discuss that suggestion with my colleagues and if it can contribute to what we intend to do, it will be seriously considered. The Executive has made it clear that we intend to pursue amendment 148 through Parliament. If we can take other measures through the present legal system to enhance and strengthen sentencing, we will do so. However, Bill Aitken's suggestion does not detract one iota from what Donald Gorrie proposes in amendment 148.

The Convener: No other members have points, so Donald Gorrie can wind up. It might be useful for members if you could also reflect on issues to do with the construction of amendment 148.

Donald Gorrie: The debate was thoughtful and shows people who have been pressing for attention to be paid to sectarianism that we have advanced from the position of two years ago. We are progressing. The problem is one of changing attitudes and I am convinced that amendment 148 would help to change attitudes.

I will deal with some specific points. Subsection (5) of the new section proposed by amendment 148 refers to "a single source". The Solicitor General made it clear that in Scots law there must be two witnesses to a blow being struck. However, amendment 148 proposes that only one witness is necessary to prove that an offence was aggravated by religious prejudice. As was explained, that is already the position for legislation on racial hatred. The Executive's legal advisers and I agreed the wording of the amendment and they were keen for subsection (5) to be included. I think that it is a reasonable proposal, which does not change the position that the initial offence still needs two witnesses.

The proposal in subsection (4) to increase any penalty was a new proposal by the Executive's lawyers. I thought that it was a good proposal and credit for it should go where it is due. If we want to send out a message to people—I know that some people here do not want to, but I do not understand that position—it would be better if, in each case in which a judge had agreed that there was aggravation and taken it into account, it were spelled out which part of the penalty related to it. I think that subsection (4) is helpful.

The Solicitor General made it clear that the introduction of the crime of racial hatred has had a definite effect. Because figures on such crimes are available, the public and the legal system take racial hatred more seriously. The minister read out figures that show the extent of the problem. In all our other activities, we seek to find out the extent of a problem before doing something about it. We must have information first. For example, as an MSP, I might agitate for additional modern languages teachers because I say that there is a need for them. I might be asked how I could prove that. If I said, "No figure is available for whether we have modern languages teachers or not," the response would be that I could not prove that we needed them, so I should go away.

That is an extremely bad argument. If information on religious hatred offences were available, it would indicate that people took the matter seriously. If information is not available, the clear message, for anyone with common sense, must be that the matter is not taken seriously. As the minister said, the religious hatred element in some prosecutions does not see the light of day.

Many of the arguments relate to the ability of the police to record information. Will a policeman, who is busy and harassed, note voluntarily a religious or sectarian element if it does not relate to the law? That is an additional duty, and it is unlikely that police officers will welcome it unless it is a law. It is much more sensible to have a law that ensures that such details are recorded in the normal way than to have elaborate schemes to register and record details in an obscure way. Such schemes will not work.

Duncan Hamilton implied that the churches are in favour of doing something, which is good, but are not in favour of the amendment. On two occasions, the churches have confirmed that they support the amendment and feel that it is the right way forward.

Mr Hamilton: That was not what I was suggesting. I was trying to identify the different roles for the participants in the process. It is right, and to Donald Gorrie's great credit, that he has built a consensus, but I was emphasising to the committee that none of those organisations is in a position to legislate. That is the committee's job and, perhaps, is why members are looking at the issue through a different prism.

Donald Gorrie: I accept that argument but, if people who have considered the issue think that the amendment would help, that is a relevant argument of which the committee must take account. They may not be right but, if many people who have a deep concern and thorough knowledge of the issue think that the amendment would be helpful, that is a relevant argument in its favour.

The sheriffs have argued that there does not need to be a law and that everything is okay. It is understandable that a group of people who feel threatened will take a defensive position, and there is an implication that not all sheriffs take the amendment seriously. No one is arguing that all sheriffs do not pay attention, but there is plenty of anecdotal evidence to suggest that some sheriffs do not. It is inconsistent, and as no evidence is available, because no one takes the issue seriously enough to collect it, the implication cannot be proven. The committee must make a change to ensure that all sheriffs take the issue seriously.

The practicability of the amendment has been questioned. The Solicitor General explained that it would work and said that some of the opposition was based on a misunderstanding of the bill's purpose. Members cannot argue that the Solicitor General is not in the front line of dealing with such matters and she has put her reputation on the line by saying that the system under her can deliver amendment 148.

What message is the committee sending out? Will the parliament state that, although it takes the amendment seriously, it does not intend to legislate for it? Will it send the message that it is going to ignore the legislation to which all the advice has pointed? That approach will not help in our drive to change attitudes.

The Convener: In your wind-up will you address some of the more technical points to which members referred? Each member has considered the issue and wants to do something about it, but we need to decide on the best way forward. Some members are trying to be constructive by asking you to reflect on the technicalities of amendment 148.

Donald Gorrie: I am somewhat at a loss. I thought that I had dealt with the technical issues that were raised, including the single source of evidence and specifying the penalty. Will you remind me of the technical points that I have not answered?

The Convener: Some people suggest that you should be a bit more flexible in your approach. Will you consider some of the comments that were made? Perhaps at stage 3 you might be able to get the thrust of amendment 148 passed if you were willing to reflect on the strong points that Scott Barrie, for instance, made. I am a bit concerned about what proposed subsection (4) says on the extent of and the reasons for a difference in sentencing. We are trying to be constructive.

11:45

Donald Gorrie: I have dealt with that. It is helpful for the court to explain the additional penalty that it is giving for the religious hatred element to the crime and the reasons for that. I am not a lawyer, but that seems to me a sensible proposal that would help to send out the message that we all wish to send out.

Amendment 148 would add value to all the other elements. It is workable and will help to change attitudes, which is what the debate is about. If, at the first opportunity that I have had to propose provisions after working on the matter for three years, I do not propose provisions, that will not help to change attitudes.

The committee must have a chance to vote on the issue. Parliament should also have a chance to vote on it, whatever the outcome is today. If members dislike the amendment or if they think that it is unworkable or premature, they can vote accordingly. I will press amendment 148. What happens thereafter, various people can talk about. The issue is serious. Parliament should be seen to debate it and vote on it.

The Convener: I apologise to Robin Harper. I did not see you indicate that you wanted to speak. However, I am willing to be flexible and allow you a minute to make your point.

Robin Harper: It is an indication of how seriously I take the matter that I am missing a discussion of my Organic Farming Targets (Scotland) Bill in the Transport and the Environment Committee.

I will reply to Bill Aitken's point. Article 14 of the European convention on human rights identifies

six groups in European society that are regularly subject to discrimination. The European Union, in its wisdom, does not have any problem with that being too cumbersome or too wide ranging.

There is a serious problem. I believe that, if we knew the full figures, violence against people due to their sexual orientation might be shown to be even worse than violence due to religious prejudice. In a recent study in Edinburgh, 52 per cent of gay and lesbian people who were interviewed had been victims of physical assault at some time, and 36 per cent had been victims of physical assault in the year that preceded the study. That is a huge problem. The comparative figure for the rest of the population is 2.5 per cent.

I intend to bring amendment 156 back at stage 3, but I hope that the Executive will have some message of hope for the four social groups that will otherwise be excluded from the bill's provisions on aggravation. The Executive must justify that exclusion. It must give some kind of message of hope about other things that it will do in the interim before those groups are, as I hope they will be, included in the provisions at some point in future. There can be no excuse for leaving those groups out in the long term, because any argument that supports amendment 148 supports amendment 156.

Hugh Henry: I will clarify the Executive's position for the avoidance of doubt. We support amendment 148. We believe that, as the Solicitor General said yesterday and I have repeated, it is workable and will have an effect. A number of members have raised concerns about some technicalities. I hope that I have addressed why we have a different view on issues such as including those with a lack of religious beliefs.

We support amendment 148, but we are clear that if the committee chooses not to support it, we are determined to come back—as Donald Gorrie is—at stage 3.

The Convener: The question is, that amendment 148 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)

ABSTENTIONS

Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 4, Against 2, Abstentions 1.

Amendment 148 agreed to.

Amendment 156 not moved.

Section 60 agreed to.

The Convener: I propose a five-minute break. Are members agreed?

Members *indicated agreement*.

11:50

Meeting suspended.

12:04

On resuming—

The Convener: I propose to continue until around half past twelve. We need 10 minutes in private to discuss Duncan Hamilton's paper, and he has to leave at 12.40 pm. If possible, I will finish at an appropriate point without interrupting anyone.

Section 61—Police custody and security officers

The Convener: Amendment 157 is grouped with amendment 158.

Mr Hamilton: I lodged amendments 157 and 158 in an attempt to meet the concern that police custody and security officers would fall outwith the control and remit of police authorities. In a sense, my proposals attempt to combat the contracting out of the services. Later in the section, we read that PCSOs will be given considerable powers. My amendments propose that such persons should be employed rather than appointed, which would get round the problem of contracting out. I am not in favour of contracting out those jobs and I want to give the committee the opportunity to support that view.

I move amendment 157.

Bill Aitken: The interesting aspect to these amendments is the question of the category of individual who would carry out the role. In many of our discussions, it has not been clear who should service the courts. One of the problems that concerns me is that many of the police officers who operate in the courts might not be fit for full duties. Is it envisaged that the type of individual who would carry out PCSO duties would be a retired police officer? If so, such officers could walk out through one door on a Friday afternoon and walk in through another on Monday morning. I shall listen with interest to what the minister has to say.

The Convener: We will come to my amendments later, so I will try to restrict my comments to amendments 157 and 158.

Duncan Hamilton and I had a number of questions about section 61 and the new powers that would be given to PCSOs. If the objective of allowing chief constables flexibility to remove some police officers from court duties is to be achieved, the people who replace those officers should be managed by the police. I feel strongly about that. My only reason for not supporting Duncan Hamilton's amendments is not that I do not agree with them but that I do not think that the service should be contracted out at all. I would much prefer the police to manage the service, as that would create more opportunities to tackle issues such as certification and training. However, it is fair to say that Duncan Hamilton's concerns are similar to mine.

Hugh Henry: I am aware of the time constraints, so I will limit my remarks.

The Executive's amendments to section 61 and the convener's amendment 159, which we will discuss when we reach the next group of amendments, would provide all the additional safeguards that are necessary to address the concerns previously expressed by the committee and others with an interest. In particular, the only concerns that have been raised about contracting out relate to contracting out in the courts. We will have an opportunity to examine that issue when we discuss amendment 159.

Mr Hamilton: The convener is right to say that she and I are coming at the matter from the same perspective. I do not think that anybody has a problem with civilians being used in the police force for appropriate duties; our problem is with who would be in control of those civilians. I am marginally confused about what the convener just said about her desire to remove the possibility of PCSOs being contracted out. I share her concern, but my understanding of the impact of amendment 157 is that it would delete the following text from section 61:

"appoint for such purposes as such officers persons provided under a contract for services entered into by the authority with some other person."

The removal of that text would be the principal way of preventing the contracting out of PCSOs. If amendment 157 is not agreed to, we could try to tighten the provisions up—the minister's amendments would achieve that purpose, as would the convener's amendment 159. Unless I have misunderstood the effect of amendment 157, I would argue that that is where we could make that principled stand.

The Convener: Can you help us as to whether there is any practical difference between the amendments, minister? Our problem is that the groups are set out in such a way that we cannot debate amendments 157 and 158 with amendment 159.

Hugh Henry: Let me be clear that we resist amendments 157 and 158. As I said, we believe that subsequent Executive amendments and, in particular, amendment 159 address the concerns that have been articulated.

Mr Hamilton: Amendment 159, which is in the next group, simply states:

"except that no officer provided as is mentioned in subsection (1)(b) above shall have those powers and duties in the premises of any court or in land connected with such premises."

To an extent, that would be an operational matter. The effect might be the same, but the point of amendments 157 and 158 is to ensure that the appointment, and the contracting out, would not be allowed as provided for in the bill. If we are to remove that provision, I suggest that these are the amendments with which to do so.

The Convener: I ask the clerks for clarification. If we were to support Duncan Hamilton's amendments, would it still be possible for us to support amendment 159? The clerks are nodding in agreement.

Mr Hamilton: I sense a compromise coming.

Hugh Henry: Amendment 159 would stop contracting out in the courts; amendments 157 and 158 would stop contracting out altogether.

Mr Hamilton: With the greatest respect, that is the point that I have been making all along. Our principled position is that we are worried about contracting out, which my amendments would deal with. I am not saying that I would not be minded to support the safeguard position, which would prevent contracting out in the courts. My problem is not with civilians doing the work of PCSOs—I agree that they should be able to do so—but that, as a matter of principle, that work should not be contracted out.

Hugh Henry: I understood that concerns had been raised over security, safety and identifying the employers of PCSOs specifically in relation to contracting out in the courts. The convener's amendment 159 seeks to address those concerns. We resist Duncan Hamilton's proposals.

Mr Hamilton: With respect, minister, amendment 158 deals with the question of employment—that is its purpose. All PCSOs must be employed rather than appointed under a contract. On the other concerns that have been raised, there is a range of amendments on the specific functions of PCSOs that we will be able to debate. However, the principle is bolted into amendment 158. That is why it proposes the deletion of the phrase "or appointed".

The Convener: Is there any practical difference between amendments 157 and 159?

Mr Hamilton: The difference is that, as the minister has said, the proposal in amendment 159 that officers should not be able to exercise those powers on the premises of the court or on land connected with such premises may be more narrow than the proposal in my amendments.

Hugh Henry: I repeat the point that the essential argument is whether contracting out should be prohibited in relation to work that goes on in the courts, which I understood the committee to be concerned about, or whether contracting out should be prohibited elsewhere. I did not think that the latter was as much of an issue for the committee.

Duncan Hamilton's amendments 157 and 158 would prevent contracting out beyond the courts, whereas the convener's amendment 159 would prevent contracting out only in the courts, which is the line that we seek to pursue.

The Convener: Given that contracting out exists at present, do the practical effects of amendments 157 and 158 go beyond the Executive's intention of removing police officers from court in order to allow them to undertake duties outside court?

12:15

Hugh Henry: We are prepared to accept the convener's amendment 159 as a compromise that reflects the committee's concerns about who would employ such staff. Otherwise, the proposed civilian staff would have been left open to a tendering process, which could have removed them from the employment of the court. The net effect of amendment 159 would be to allow civilians to be employed by the police. Duncan Hamilton's proposals go much further than that; they would reach outwith the courts into police stations and other areas.

Amendment 157 would remove the prospect of the service being contracted out at all, irrespective of where it was located. Amendment 159 would allow contracting out, but only in specific areas such as the courts. Amendment 159 would not apply to some of the escorting or turnkey services that are handled at police stations. I was led to believe that the committee did not view those services in the same way as it viewed the issue of services in the courts.

By supporting amendment 159, the Executive is attempting to address the particular concerns that the committee expressed about the courts.

Mr Hamilton: I think that the minister and I are in agreement as to the meaning of the various amendments. That augments my position, for the simple reason that an anomaly would be created between services if my amendments were disagreed to. We are not asking police officers to take over those duties; we are saying that civilians in those roles should be under the authority of the police. If that is to be true in the case of PCSOs who are in the courts, should it not also be true for PCSOs elsewhere?

Section 61(1C) lists PCSOs' powers. Who can say that their role would not expand in future? If that were to happen, I would like the bill to ensure that civilian officers operated under the police.

The Convener: Do you intend to press amendment 157?

Mr Hamilton: After all that, of course I will.

The Convener: The question is, that amendment 157 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
Morrison, Mr Alasdair (Western Isles) (Lab)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 157 agreed to.

Amendment 158 moved—[Mr Duncan Hamilton].

The Convener: The question is, that amendment 158 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Aitken, Bill (Glasgow) (Con)
Hamilton, Mr Duncan (Highlands and Islands) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Lyon, George (Argyll and Bute) (LD)
Morrison, Mr Alasdair (Western Isles) (Lab)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 158 agreed to.

The Convener: Amendment 159, in my name, is grouped with amendments 160, 155, 161, 162, 47, 133, 134 and 48.

In moving amendment 159—

Hugh Henry: May I raise a procedural point? Given the result of the previous two votes, will the convener rule on the competence of amendment 159?

The Convener: I asked that question before members voted and was advised that amendments 157 and 159 are compatible. One does not pre-empt the other, and, therefore, it is legitimate for the committee to debate amendment 159. Amendment 159 relates only to the section 61 provisions on custody officers.

George Lyon: It may be procedurally correct, but, given that the committee has voted against contracting out, it does not make sense to debate amendment 159. It would be a debate about something that will never happen.

The Convener: There is no guidance on what the committee should do in such circumstances, but common sense should prevail. Are members suggesting that by agreeing amendment 157, the committee has agreed the net effect of amendment 159?

George Lyon: Yes.

The Convener: Despite all that has been said, it seems that, to follow procedure, the committee must debate amendment 159. Of course, members may vote against it if they feel that it has been covered.

Stewart Stevenson: Perhaps I am rather dim, but to what do the words "subsection (1)(b)" in amendment 159 now refer?

The Convener: That is why the committee needs to debate the amendment.

Stewart Stevenson: It is merely a factual question; I am not trying to make a point. Before the debate starts, I want to understand the subject to which members will be referring. To be honest, I am not sure what the meaning of subsection (1)(b) would have been had the committee not passed amendment 157.

The Convener: Do any members object to a debate?

Members: No.

The Convener: Amendment 159 highlights my concerns about such powers being placed outwith the management of the police. I feel strongly that, if the force is to be civilianised, the police should retain those powers.

I have taken advice about the way in which that should happen. I was told that, although, in effect, section 61 provides for duties to be contracted out, certain powers could not be given to a private contractor who employs civilians. Therefore, there is no point to section 61 as drafted, because a person could not work as a custody officer without those powers. Amendment 159 would ensure that the police, rather than a private contractor, manage the custody officers.

I have made my views known since the bill's introduction. The committee must be sure about the powers that it proposes to give to civilians. There must be proper training and monitoring, and, as I have said, the police are best qualified to manage that.

The executive wants to give chief constables the powers to remove police officers from courts so that they can be used for other duties, and, with amendment 159, that objective can be achieved.

My only other concern is that the committee must get assurances that the mix of police officers and custody officers in courts will be subject to appraisal. The committee heard from sheriffs, fiscals and others, who said that police officers must retain a proper presence in courts, alongside others who may do some of the more practical administrative duties.

I move amendment 159.

Mr Hamilton: Before I start, convener, I have a technical question. Amendment 161 is in my name, but that is not what is on my sheet.

The Convener: A revised marshalled list was issued.

Mr Hamilton: That is fine. I shall speak to amendments 160, 161 and 162 of the group of amendments in my name. The groupings perplexed me somewhat, because amendment 162 regards training, which I will come back to and which we will discuss in the next section.

Amendment 160 attempts to ensure that any custody and security guard is accompanied by a constable or another police custody and security officer—a PCSO. That is simply a reflection of the fact that the bill gives considerable power to custody and security officers. It is meant as a safeguard to ensure that, given the lower level of training that we can assume that custody and security officers would have, there would at the very least be another officer there to give a degree of public confidence. The best case scenario would be to have a constable present, but I am aware that that may be slightly more difficult. However, the amendment ensures that there is not just one custody and security officer who is not particularly well trained.

Amendments 161 and 162 attempt to consider proposed new section 9(1C)(f) of the Police (Scotland) Act 1967, which members will note is the power

"to search any person who is in legal custody or is unlawfully at large".

Amendment 162 refers to proposed new section 9(1C)(j), on the use of reasonable force, especially the use of handcuffs.

Both searching and reasonable force require more specialised skills than many people understand. Those are fairly substantial powers.

My amendments seek to ensure that the level of training for police custody and security officers is adequate and that there is a degree of public confidence. Members will remember from previous evidence sessions that we were not satisfied about what training would or would not be applied. The amendment attempts to ensure that not only does training happen, but that it is guaranteed on the certificate that is issued to ensure that such people had been fully checked before those substantial powers are given to them.

Hugh Henry: Amendment 159 seeks to prevent police authorities from contracting with a third party for the provisions of PCSOs to provide services in courts. The only PCSOs who would operate in courts would be those employed by a police force. Obviously, the vote on amendment 157 has already ensured that to some extent.

I listened to Duncan Hamilton's arguments for amendments 160, 161 and 162 and I understand why he is advancing them, but I am not sure that they stand up to scrutiny. The central issue underlining the three amendments is whether PCSOs would be properly trained. Amendment 161, for example, relates to training on search powers. Amendment 162 relates to training in the use of restraint. I assure the committee that such training will be undertaken. PCSOs will be fully and professionally trained to deal with the circumstances in which they will be operating.

In his letter of 3 December, Jim Wallace indicated to the convener that court custody officers employed by Lothian and Borders police undergo some six weeks of training for the relatively limited range of duties in courts, including a safety course in restraint techniques.

The chief constable of Strathclyde, in his letter to the committee of 9 December, confirmed on behalf of the Association of Chief Police Officers in Scotland that appropriate job-specific training would be provided to PCSOs. Although it is not possible to be specific about the training programme because it is not yet in place, I understand that such a programme is likely to involve induction training, close supervision working alongside experienced police officers, assessment by those officers of on-the-job performance and on-the-job monitoring.

To quote again from Willie Hay's letter of 9 December,

"The same professional standards adopted in other areas of the force would apply equally to PCSOs. On top of this, forces have clear guidelines when undertaking searches. Those guidelines will apply no less to PCSOs."

I hope that, with that reassurance, the committee will accept the arguments about the level of training and why amendments 160, 161 and 162 are unnecessary.

Amendment 155 provides PCSOs with the power to remove a person from the courtroom or other public area within the court if they are causing a disturbance or a nuisance and detain that person in the court cells. As currently drafted, the bill allows the PCSO to remove a person from the court. The amendment will ensure that, where that person is causing a disturbance or nuisance, the PCSO can not only remove the person from the court, but take them into legal custody on court premises by detaining them in the court cells. That is a further sensible step to ensure court security.

Amendment 47 is a technical amendment. It provides for a clearer definition of "relevant premises" in that, as well as meaning any court, prison, police station or hospital and any other place to which a person in legal custody may require to be taken, it includes transfers between such places. The definition of "relevant premises" was intended to make it clear that premises will also be relevant premises when a prisoner is being taken to or from Scotland to other relevant premises in the British isles. The section as presently drafted does not achieve that.

Amendment 133 seeks to insert a new duty for PCSOs that would require them

"to act with a view to preserving good order in the premises of any court and in land connected with such premises".

The amendment ensures that PCSOs employed by police forces under the direction of the chief constable—and appointed, in the words of the chief constable of Strathclyde police, with the same robust recruiting, vetting and professional standards as are currently in place for the recruitment of police and support staff—and given the appropriate job-specific training, will be able to deal with any public unrest in a court. Of course, their public order powers will not extend beyond the court premises. The maintenance of public order in other areas is properly a matter for constables.

10:30

Amendment 134 is, again, a technical amendment. Amendment 133 would insert a new duty for PCSOs in courts to act with a view to preserving good order, but only in the premises of the court. Amendment 134 simply makes it clear that the duty to ensure good order on the part of persons in the custody of PCSOs—which is established by proposed new section 9(1E)(d) of the Police (Scotland) Act 1967, which would be inserted by section 61(2)(b) of the bill—applies whether or not PCSOs are in the premises of any court.

Amendment 48 would insert a new subsection to make it clear that a PCSO is not to be regarded as acting in the execution of his or her duty unless he

or she is readily identifiable as a PCSO, whether by means of a uniform or a badge. There is already a precedent for this type of provision in other legislation. We would expect all PCSOs to be in uniform and it is reasonable to expect them to be readily identifiable. That better distinguishes them from and to any other person in a court premises, especially those who might be there to cause trouble.

I support amendment 159.

Stewart Stevenson: I have been carefully reading what the effect of amendment 159 would be. I am trying to determine to what the reference in amendment 159 to the changes to section 9 of the Police (Scotland) Act 1967, which were made by section 61(2)(a) of the bill, which has now been deleted, can refer. The only thing that "subsection 1(b)" in amendment 159 can refer to is the whole of subsection 1 of section 9 of the 1967 act, because the bill no longer breaks that section down into various parts because we agreed amendment 157. It appears to me that, if we were to agree amendment 159, it would have the effect—if it had any effect at all—of preventing those employed by the police force as PCSOs from having powers or duties in the premises of any court or in the land connected with such premises. I do not think that it would have any other effect. Purely on technical grounds, it would be unwise to proceed without examining the issue more closely. Because of the effect of amendment 157, the only people mentioned are officers who are employed. On that basis, it would be technically risky to proceed with the amendment, although I support what it is trying to achieve.

Bill Aitken: Bearing in mind the earlier vote, we are talking in a vacuum in relation to amendment 159. The minister will be aware that the committee expressed serious reservations about a number of the workings outlined under section 61. I acknowledge that the Executive has gone some way towards allaying some of those fears.

Courts are, by definition, fraught places. Trouble can break out at the drop of a hat. We must have appropriate protection for judges, and for witnesses in particular. That was the issue that exercised the committee in our earlier considerations of the section.

It would seem that, to a greater or lesser extent, all the Executive amendments and those in Duncan Hamilton's name strengthen the provisions that the committee sought to impose. The issues are difficult. We must remember that, if the proper running of the courts is not ensured, the administration of justice will be impinged upon. There could be—indeed, there are—frequent attempts within court premises to pervert the course of justice. We clearly want to avoid that and to ensure that the appropriate safeguards are in place.

The Convener: I do not perceive a large disagreement between committee members and the Executive on what we—certainly I—want to achieve in section 61 on custody officers. I did not realise until Duncan Hamilton spoke to amendment 157 that, if he is correct, that amendment would apply to other services. I want to be consistent: if we civilianise jobs that are done by the police, I would wish those jobs to be managed by the police.

I ask for members' indulgence on the way in which the amendments have been ordered. To agree the groupings is, as members know, my job as convener. The clerks will vouch for the fact that I have always complained about the lack of time that we get to see the groupings. With hindsight, amendment 159 should not have been in a separate group from amendment 157. We have now needed to debate them separately.

Of course, we desire to be consistent, but there is no pre-emption. There is no reason why members could not support amendment 159 and, if there is some common ground on the matter, resolve it at stage 3.

Before I press the amendment, will the minister respond—

Stewart Stevenson: I am sorry, convener. Just for absolute clarity, as proposed new section 9(1)(b) of the Police (Scotland) Act 1967, which would have been inserted by section 61(2)(a) of the bill, has been deleted from the bill, will you give us your view as to what amendment 159 now refers? My point is technical. I am not trying to cut across what you are trying to achieve. I have serious concerns about what would happen if we passed amendment 159. I am getting a lot of nodding heads from the minister's advisers.

George Lyon: I agree with Stewart Stevenson's point. The convener needs to demonstrate why amendment 159 should be pressed to a vote. It makes no sense. The committee agreed to Duncan Hamilton's amendment 157, so proposed new sections 9(1)(a) and (b) of the 1967 act have been taken out. Why are we progressing with amendment 159 at all? The sensible solution would be for the convener to withdraw the amendment and acknowledge that the matter has already been dealt with, unless she can give us a good argument as to why we should progress.

The Convener: With amendment 159, I aim to do what I said when I spoke to and moved it, which is to ensure that the police manage the new custody officers. That is my policy objective. If that has already been achieved, I will not press amendment 159.

Amendment 159, by agreement, withdrawn.

Mr Hamilton: We have just agreed an amendment that says that all those mentioned in section 61 will be employed by the police. Is it the minister's understanding that, as a consequence of that decision, training matters and decisions as to whether another custody officer should be in attendance in the situations to which amendments 160 to 162 relate will already be covered, now that such people will be directly employed? Is it his understanding that those will be matters exclusively for the chief constable? If that is the case, I will not move amendments 160 to 162.

Hugh Henry: That is my understanding.

Amendment 160 not moved.

Amendment 155 moved—[Hugh Henry]—and agreed to.

Amendments 161 and 162 not moved.

Amendments 47, 133, 134 and 48 moved—[Hugh Henry]—and agreed to.

The Convener: We will defer discussion of item 5 until next week.

Meeting closed at 12:41.

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ISBN 0 338 000003 ISSN 1467-0178