Justice Committee

6th Report, 2009 (Session 3)

Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill

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The Scottish Parliament

Justice Committee

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The Scottish Parliament

Justice Committee

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2nd Meeting, 2009 (Session 3), Tuesday 13 January 2009

Tim Hopkins, Policy and Legislation Officer, Equality Network;
James Morton, Project Coordinator, Scottish Transgender Alliance;
Christina Stokes, Communications Officer, Stonewall Scotland;
Norman Dunning, Chief Executive, ENABLE Scotland;
Faye Gatenby, Campaigns, Parliamentary and Policy Manager, Capability Scotland;
Charlie McMillan, Director of Research, Influence and Change, SAMH.

3rd Meeting, 2009 (Session 3), Tuesday 20 January 2009

Euan Page, Parliamentary and Government Affairs Manager, The Equality and Human Rights Commission;
Superintendent David Stewart, Project Manager of ACPOS Diversity Strategy Project, and Inspector Dean Pennington, Secretary of ACPOS Diversity Strategy Project, Association of Chief Police Officers in Scotland;
Alan McCreadie, Deputy Director Law Reform, Raymond McMenamin, Criminal Law Committee, and David Cabrelli, Equalities Law Sub-Committee, The Law Society of Scotland.

4th Meeting, 2009 (Session 3), Tuesday 27 January 2009

Andrew McIntyre, Head of Victims and Diversity Team, and Linda Cockburn, Principal Procurator Fiscal Depute, Victims and Diversity Team, Policy Division, Crown Office and Procurator Fiscal Service;
Patrick Harvie MSP, Sara Stewart, Criminal Law and Licensing Division, Sentencing Policy Unit, Jetinder Shergill, Solicitor, Scottish Government Legal Directorate, and Marie-Claire McCartney, Trainee Solicitor, Scottish Government Legal Directorate, Scottish Government.

Written evidence is published separately on the Committee's webpage at:

http://www.scottish.parliament.uk/s3/committees/justice/inquiries/Offencesoffencesindex.htm

The Scottish Parliament

Justice Committee

Remit and membership

Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
Paul Martin
Stewart Maxwell

Committee Clerking Team:

Douglas Wands
Anne Peat
Andrew Proudfoot
Christine Lambourne

The Scottish Parliament

Justice Committee

6th Report, 2009 (Session 3)

Stage 1 Report on the Offences (Aggravation by Prejudice) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. The Offences (Aggravation by Prejudice) (Scotland) Bill was introduced as a Member's Bill to the Scottish Parliament on 19 May 2008 by Patrick Harvie MSP. The Policy Memorandum explains that the policy objective of the Bill is to—

> "… to create new statutory aggravations to protect victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability. Similar statutory aggravations already exist to protect individuals and groups targeted on racial or religious grounds. No new criminal offences are created."[1]

2. The Scottish Government had previously confirmed on 15 January 2008, in a response to a parliamentary question lodged by Patrick Harvie MSP[2], that it would support the proposed Bill, at that time known as the Sentencing of Offences Aggravated by Prejudice (Scotland) Bill. The Scottish Government also confirmed that the Bill would be taken forward as a 'Handout Bill', a Member's Bill which is sponsored and supported by the Government. Kenny MacAskill MSP, Cabinet Secretary for Justice, said at the time—

> "No one in Scotland should be targeted or victimised because of their sexual orientation, transgender identity or disability. Our clear aim is to prevent and deter crimes. But where crime does happen it will not be tolerated."[3]

Committee scrutiny

3. The Parliament designated the Justice Committee as the lead committee and the Equal Opportunities Committee as the secondary committee in consideration

[1] Offences (Aggravation by Prejudice) (Scotland) Bill. Policy Memorandum, paragraph 3. Available at: http://www.scottish.parliament.uk/s3/bills/09-AggPrej/b9s3-introd-pm.pdf

[2] S3W-8323 Patrick Harvie: To ask the Scottish Executive whether it will support the proposed Sentencing of Offences Aggravated by Prejudice (Scotland) Bill.

[3] Scottish Government. (2008) *Hate crime laws to be extended*. Press release 15 January 2008. Scottish Government. Available at: http://www.scotland.gov.uk/News/Releases/2008/01/15105227

of the Bill at Stage 1. The Justice Committee agreed to examine the Bill's proposals to extend hate crime legislation to cover crimes motivated by malice and ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability, while the Equal Opportunities Committee decided to consider whether similar provisions concerning age and gender should also be included in the Bill.

4. The Equal Opportunities Committee published its report to the Justice Committee on 18 December 2008. The report of the Equal Opportunities Committee is contained in Annexe A to this report. The issues raised by the Equal Opportunities Committee are considered in paragraphs 132 - 147 of this report.

5. The Finance Committee agreed at its meeting on 30 September 2008 to adopt level one scrutiny in relation to the Financial Memorandum of the Offences (Aggravation by Prejudice) (Scotland) Bill. Applying this level of scrutiny means that the Finance Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations. The correspondence from the Finance Committee and the associated written submissions are included in Annexe B of this report. The financial impact of the Bill is considered in paragraphs 148 - 157 of this report.

6. The Subordinate Legislation Committee considered the delegated powers provisions in the Bill at Stage 1 at its meetings on 3 and 17 June 2008. The report of the Subordinate Legislation Committee is also contained in Annexe A to this report. The issues raised by the Subordinate Legislation Committee are considered in paragraphs 158 - 160 of this report.

BACKGROUND

Working Group on Hate Crime

7. In December 2002, Donald Gorrie MSP lodged an amendment to the Criminal Justice (Scotland) Bill to make provision for the statutory aggravation of an offence by religious prejudice. This was one of the conclusions of a Cross-Party Working Group on Religious Hatred[4]. The amendment was agreed and became section 74 of the Criminal Justice (Scotland) Act 2003. This section requires the courts to take any such aggravation into account when determining sentence, and also to state the extent of, and reasons for, any consequent difference in sentence.[5]

8. Robin Harper MSP later lodged a similar amendment to the Criminal Justice (Scotland) Bill to make provision for statutory aggravations of any offence motivated by prejudice against someone's actual or presumed gender, sexual orientation, disability or age. While Robin Harper's amendment was not accepted, the then Justice Minister, Jim Wallace MSP, announced—

[4] Scottish Government. (2002) *Tackling Religious Hatred: Report of Cross-Party Working Group on Religious Hatred.* Page 22. Edinburgh: Scottish Government. Available at: http://openscotland.gov.uk/Resource/Doc/46932/0027034.pdf

[5] Scottish Parliament Information Centre. (2008) Offences (Aggravation by Prejudice) (Scotland) Bill. SPICe Briefing 08/41. Available at: www.scottish.parliament.uk/business/research/briefings-08/SB08-41.pdf

> "… after discussions with Robin Harper and equality representatives, we are persuaded that such issues would best be examined by an Executive working group. Accordingly, I announce our intention to have further, suitable consultations with the equality groups and to convene such a working group."[6]

9. In June 2003, the Working Group on Hate Crime was established to consider the most appropriate measures needed to combat crime based on hatred towards particular social groups. Chaired by Richard Scott, Head of Criminal Justice Division, Scottish Executive, the Working Group was made up of representatives of the Crown Office and Procurator Fiscal Service, police, Equal Opportunities Commission, Disability Rights Commission and gender, sexual orientation, disability and age interest groups. The Working Group's remit was—

> "To look at the current criminal justice system and consider improvements, including legislation, which might be made to deal with crimes based on hatred towards social groups."[7]

10. The Working Group on Hate Crime published its report on 8 October 2004 and made 14 recommendations covering legislation, criminal justice agencies and other areas outside the criminal justice system. The report's first recommendation was that the Scottish Executive should:

> "… introduce a statutory aggravation as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability."[8]

11. The report also agreed a definition of hate crime—

> "Crime motivated by malice or ill-will towards a social group."[9]

Response to the Working Group on Hate Crime

12. The Scottish Executive published its response to the Working Group's report in June 2006. Prior to its publication, Patrick Harvie MSP asked the Scottish Executive—

> "It is 18 months since the working group on hate crime reported its 14 or so recommendations, and a full year since the Executive told me that it would respond in due course. Will the minister confirm when the Executive will respond to all the recommendations, and not only to the three recommendations that relate to new legislation?"[10]

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[6] Scottish Parliament. *Official Report, 19 February 2003,* Col 18470.
[7] Scottish Government. (2004) *Working Group on Hate Crime Consultation Paper*. Page 7. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/consultations/justice/wghc.pdf
[8] Scottish Government. (2004) *Working Group on Hate Crime Report*. Page 9. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/26350/0025008.pdf
[9] Scottish Government. (2004) *Working Group on Hate Crime Report*. Page 2. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/26350/0025008.pdf
[10] Scottish Parliament. *Official Report, 27 April 2006,* Col 25046.

13. The then Deputy Minister for Justice, Hugh Henry MSP, replied—

> "… We have given very careful consideration to all the proposals. I assure Patrick Harvie that we will issue a formal response to the working group in the near future."

14. When the Scottish Executive's response was published, it rejected the Working Group's recommendation to introduce a statutory aggravation. The Executive instead stated—

> "Our preferred approach to this issue is to consider how the courts should deal with hate crime in the context of a wider and more comprehensive look at sentencing generally. The Sentencing Commission are considering ideas on improving consistency in sentencing and will report in August."[11]

15. The Sentencing Commission's report,[12] published in September 2006, made a total of 25 recommendations but none were on hate crime specifically. The Scottish Executive brought forward no proposals for the introduction of statutory aggravations prior to the end of Session 2 in March 2007.

JUSTICE COMMITTEE CONSULTATION

16. The Committee issued a joint call for evidence with the Equal Opportunities Committee on 11 September 2008, inviting responses by 18 November. The Justice Committee received 26 responses. These can be found on the Committee's website at:

http://www.scottish.parliament.uk/s3/committees/justice/inquiries/Offences/Offencessubmissions.htm

17. In addition, the Committee held three oral evidence sessions. These evidence sessions were preceded by a short background briefing session on 6 January 2009 by the Scottish Government Bill team who are supporting Patrick Harvie MSP. This session was held in private.

18. The oral evidence can be found at Annexe X to this report. The oral evidence sessions were arranged as follows—

13 January 2009

> Tim Hopkins, Policy and Legislation Officer, Equality Network
>
> James Morton, Project Coordinator, Scottish Transgender Alliance
>
> Christina Stokes, Communications Officer, Stonewall Scotland

[11] Scottish Government. (2006) *Response to the Recommendations of the Working Group on Hate Crime*. Page 4. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/Topics/Justice/crimes/8978/17915/Response

[12] The Sentencing Commission for Scotland. (2006) *The scope to improve consistency in sentancing*. Available at: http://www.scottishsentencingcommission.gov.uk/docs/consistency/Consistency%20Report%20-%20Final.pdf

Norman Dunning, Chief Executive, ENABLE Scotland

Faye Gatenby, Campaigns, Parliamentary and Policy Manager, Capability Scotland

Charlie McMillan, Director of Research, Influence and Change, SAMH

20 January 2009

Euan Page, Parliamentary and Government Affairs Manager, The Equality and Human Rights Commission

Superintendent David Stewart, Project Manager of ACPOS Diversity Strategy Project, and Inspector Dean Pennington, Secretary of ACPOS Diversity Strategy Project, Association of Chief Police Officers in Scotland

Alan McCreadie, Deputy Director Law Reform, Raymond McMenamin, Criminal Law Committee, and David Cabrelli, Equalities Law Sub-Committee, The Law Society of Scotland

27 January 2009

Andrew McIntyre, Head of Victims and Diversity Team, and Linda Cockburn, Principal Procurator Fiscal Depute, Victims and Diversity Team, Policy Division, Crown Office and Procurator Fiscal Service

Patrick Harvie MSP

Sara Stewart, Criminal Law and Licensing Division, Sentencing Policy Unit, Jetinder Shergill, and Marie-Claire McCartney, Scottish Government Legal Directorate, Scottish Government

STATUTORY AGGRAVATIONS

19. Courts can and do take account of a wide range of factors, in addition to the type of offence committed, when determining the appropriate sentence for a particular offender (eg any previous convictions the offender may have, the age of the offender, the motivation of the offender, the vulnerability of the victim and the particular impact on the victim). Some of these may be regarded by courts as mitigating factors (possibly leading to a lesser sentence) whilst others may be seen as aggravating factors (possibly leading to a greater sentence).

20. In some instances, legislators may decide that to send out a clear message, to courts and more generally, a particular factor should be considered in terms of aggravating an offence. This can be achieved by legislation to make it a statutory aggravation of some other offence (or offences). Where the circumstances of a particular case give rise to a statutory aggravation, there may also be other aggravating (or mitigating) factors which are relevant in determining sentence. However, by making something a statutory aggravation, this will ensure that it must be taken into account in passing sentence.

Background

21. Much of the Committee's consideration of the Bill focussed on the new statutory aggravations which would be created and whether these were the appropriate method to address offences motivated by prejudice against people because of their actual or presumed sexual orientation, transgender identity or disability.

22. The Bill is split into three sections. Section 1 makes provision for an aggravation for prejudice relating to disability while section 2 contains the aggravations for prejudice relating to sexual orientation or transgender identity. Both sections are widely similar with any differences based on specific definitions of each aggravation. Section 3 deals with the Bill's proposed commencement date and short title.

23. The next part of the report looks at existing statutory aggravations in Scotland and the rest of the United Kingdom before considering whether the specific aggravations in the Bill are appropriate, or whether the existing common law in Scotland is capable of effectively dealing with offences of this sort.

Existing statutory aggravations in Scotland

24. Statutory aggravations in relation to crimes motivated by racial and religious prejudice already exist in Scotland. Section 96 of the Crime and Disorder Act 1998 ("the 1998 Act") makes provision for the racial aggravation of offences, requiring courts to take such aggravations into account when determining sentence. Section 96 of the 1998 Act provides that the court shall, on convicting a person, take the aggravation into account when determining sentence but does not require the court to state the extent of, and reasons for, any consequent difference in the sentence imposed.

25. As stated previously, the Criminal Justice (Scotland) Act 2003 ("the 2003 Act") made provision for an offence to be aggravated by religious prejudice. Section 74 of the 2003 Act requires the courts to take any such aggravation into account when determining sentence, and also to state the extent of, and reasons for, any consequent difference in sentence.

Existing statutory aggravations in other parts of the United Kingdom

26. In England and Wales, statutory aggravations relating to sexual orientation and disability were introduced by the Criminal Justice Act 2003. Similar provisions were introduced in Northern Ireland in 2004. These statutory aggravations in England, Wales and Northern Ireland sit alongside racial and religious statutory aggravations.

Common law aggravations

27. The common law system in Scotland already allows details of aggravating factors to be included in charges. The Working Group on Hate Crime's consultation paper provided an overview of how the common law system in Scots law works in relation to offences motivated by prejudice—

> "If you are the victim of an offence like assault where there is no evidence of it being a hate crime, the accused will usually be prosecuted under the

> common law. However, if the assault appears to be motivated by racism, the crime would be prosecuted under specific statutory provisions for racist offences. If the assault appeared to be motivated by, for example, homophobia, the case would still at present be prosecuted under common law with a common law aggravation of homophobia."[13]

28. The Working Group went on to state that one of the main advantages of common law is its flexibility and ability to cover a vast variety of criminal situations and conduct—

> "Prosecutors currently can and do include details of aggravating factors in common law charges and the existence of aggravating factors has a bearing on decisions about which level of court to prosecute in. These factors can include the fact that the victim was assaulted or otherwise victimised because of membership, or perceived membership, of a particular social group. The aggravation involved in offences motivated by prejudice or hate is therefore already covered in the common law."[14]

Statutory aggravations proposed in the Bill

29. The statutory aggravations proposed in the Bill relate to offences aggravated by an individual or group's actual or presumed sexual orientation, transgender identity or disability. The Policy Memorandum for the Bill outlines the advantages of using statutory aggravations over the common law—

> "These new statutory aggravations ensure that the courts must consider the offender's hatred towards these groups and sentence the offender accordingly. As such, these aggravations send a clear message that such prejudice and hatred towards these groups is unacceptable and will not be tolerated.
>
> "The provisions will also allow the existence of the aggravations to be recorded at all levels in the criminal justice system from the initial recording of a crime through to the charging stage, prosecution, conviction and eventual sentence. Upon conviction, where the sentence is different as a result of the aggravation, the court will be required to state and record the extent of, and reasons for, that difference. This will enable Government and practitioners to build up an accurate picture of the extent of these particular hate crimes in Scotland and inform policy accordingly."[15]

Statutory aggravations versus the common law

30. As the common law system in Scotland already allows for aggravating factors to be taken into account when courts determine sentencing, the Committee was

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[13] Scottish Government. (2004) *Working Group on Hate Crime Consultation Paper*. Page 5. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/consultations/justice/wghc.pdf

[14] Scottish Government. (2004) *Working Group on Hate Crime Consultation Paper*. Page 7. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/consultations/justice/wghc.pdf

[15] Policy Memorandum, paragraphs 8 and 9.

interested to explore whether the Bill's provisions would improve the current situation.

31. Many interest groups were supportive of the introduction of statutory aggravations. Stonewall Scotland stated in its written evidence—

> "Since the introduction of the statutory aggravation for racist crime in 1998 and for crime motivated by religious prejudice in 2003, the criminal justice system has been able to deal more consistently and appropriately with those hate crimes. This bill would extend the same consistent handling to crimes motivated by homophobia, transphobia, or anti-disabled hate."[16]

32. Christina Stokes, Stonewall Scotland's Communications Officer, added during oral evidence that—

> "The common law cannot send a clear message that such crimes are unacceptable in a modern Scotland … The statutory aggravations will address the motivation behind such crimes, which the common law cannot do."[17]

33. The Equality Network stated in its written evidence—

> "The statutory aggravations act as flags attached to charges. This will enable consistent and appropriate police reporting and prosecution policies to be applied across the country, as is already the case for race and religious hate crimes.
>
> "The clarity of the statutory aggravation in the complaint or indictment will support sheriffs and judges in sentencing hate crime appropriately and consistently."[18]

34. When questioned during oral evidence on how the Bill would improve the current situation, Tim Hopkins, Policy and Legislation Officer for the Equality Network, remarked that—

> "It is theoretically possible to deal with the kind of aggravations that we are concerned with under the common law, but that is not happening. Nobody has reported to us that an offence against them has been dealt with in that way."[19]

35. In terms of a statutory aggravation for disability, Faye Gatenby from Capability Scotland, who was satisfied with the definition of disability in the Bill, stated—

> "We have spoken to lots of disabled people about their experiences, and we are not aware of any cases of aggravated crimes being prosecuted. Although

[16] Stonewall Scotland. Written submission to the Justice Committee.
[17] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1485.
[18] Equality Network. Written submission to the Justice Committee.
[19] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1484.

> the common law is available, it is perhaps not being used in a way that really deals with the issue.
>
> "A lack of consistency is also a problem, because the common law can be applied or interpreted in different ways and there are different understandings of what hate crime is. The bill will send a clear message about what hate crime is and how it should be dealt with, which will be replicated across Scotland, leading to the other steps that will be necessary to tackle the problem effectively."[20]

36. Also appearing before the Committee, Norman Dunning from ENABLE Scotland said—

> "The common law may be adequate, but it has to be given proper effect so that the issue of aggravated crime is brought to the fore. The issue has to be in front of the police when they investigate a case, in front of the prosecution authorities when they take the case forward and in front of the court when it makes its decisions and determinations. The court should be able to make an explicit determination in relation to the aggravation. The bill therefore represents a step forward from the common law."[21]

37. Charlie MacMillan, Director of Research, Influence and Change at SAMH added—

> "If we consider the incidence figures for victimisation and hate crime, we see the common law's lack of effectiveness."[22]

38. The Equality and Human Rights Commission also expressed support for the Bill. In its written evidence, the Commission considered that "statutory aggravations have the potential to be one effective measure of addressing these crimes." The Commission went on to state that—

> "Statutory aggravations can prove valuable for a number of reasons. They underline the specific seriousness of crimes motivated by prejudice and ill will and allow police and prosecutors to identify and flag such offences consistently. They increase victims' confidence about the response of criminal justice agencies and therefore encourage victims of targeted attacks to come forward. And crucially, they are central to identifying and addressing offending behaviour, allowing for more focused and tailored responses to offenders and their motivation."[23]

39. When questioned by the Committee about how the Bill would help to address hate crime against Lesbian, Gay, Bisexual and Transgender (LGBT) and disabled people, Euan Page, Parliamentary and Government Affairs Manager for the Equality and Human Rights Commission, replied—

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[20] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1499.
[21] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1499.
[22] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1499.
[23] The Equality and Human Rights Commission. Written submission to the Justice Committee.

> "The bill will do that in a number of ways. The thinking behind statutory aggravation is that it requires—over and above the flexibility and the provisions in the common law—a necessary response from the various actors in the criminal justice process: the police, the Crown Office and Procurator Fiscal Service and the courts. It gives weight to a particular type of criminal offence and concentrates minds in the police, the prosecutors and the judiciary."[24]

40. The Association of Chief Police Officers in Scotland (ACPOS) also welcomed the new legislation, stating in its written submission—

> "The successful introduction and approval of such a bill will increase the public perception and awareness of prejudice/hate crime in addition to the racist and religiously motivated issues which are at the forefront of such crimes."[25]

41. ACPOS also argued that the Bill would provide a consistency of approach with the rest of the United Kingdom—

> "Similar legislation currently exists in England, Wales and Northern Ireland, therefore in terms of progression under the direction of the Scottish Government this overt enhancement of our approach would be a welcome addition to the Scottish Police Service in line with the rest of the UK."

42. The Committee also invited representatives from the Crown Office and Procurator Fiscal Service (COPFS) to give oral evidence on the Bill. In its written evidence, COPFS stated that as the independent prosecution service it would be inappropriate for it to offer a view on the principle of the Bill, but it was able to provide advice in relation to practical implications. [26]

43. During the oral evidence session, the Committee asked COPFS officials whether they agreed that the common law is capable of dealing with the aggravations in the Bill and, if so, why they thought that the Bill was necessary. Andrew McIntyre, Head of Victims and Diversity Team, replied—

> "… the common law covers the range of offences that we expect the bill to deal with if it is enacted. The bill does not propose any new offences, and we will continue to prosecute the same kinds of crimes in broadly the same manner as we do now.
>
> "However, if the bill is enacted, an important distinction will be created in the explicit recognition that certain crimes are motivated by hatred of a particular group because of an aspect of their identity. That will be explicitly recognised through the nomen juris and the reference to the aggravation. An important point is that the impact of the aggravating factor on the court's handling of the case, particularly on sentencing, will be clear. To be clear and to reassure, however, I say that if crimes are aggravated by elements that current legislation covers, that is recognised in the charges that we bring and the

[24] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1509.
[25] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[26] Crown Office and Procurator Fiscal Service. Written submission to the Justice Committee.

> information that we provide to the court. If it is clear that a crime is aggravated by such a feature, that makes it worse than if it is not, and we draw such an aggravating feature to the court's attention."[27]

44. When later questioned on whether the Bill would raise the profile of aggravations among the police and courts, Andrew McIntyre stated—

> "… providing for such aggravations in legislation raises their profile, allows us to be clear about what amounts to an aggravation and gives us a much clearer framework in which to operate and be clear about what we expect from the police and how we can bring the aggravation to the courts' attention. The courts will have to take into account the fact that Parliament has said that crimes are necessarily worse if they are motivated by certain prejudices. Referring to aggravations in legislation therefore gives them a much higher profile and clarifies for us what we are dealing with and what is expected."[28]

45. Andrew McIntyre was also asked whether COPFS would expect the Bill to impact on what the police do on the ground and how it recorded information. He responded—

> "Filling in forms sounds like an unimportant exercise, but the way in which the system works is that we, as prosecutors, can bring to the court's attention and rely on in trials evidence that the police reports bring to our attention. It is therefore important to focus on gathering evidence of aggravation if that kind of evidence is to come to the attention of courts in Scotland. If Parliament legislates as proposed, that will have an impact on how the work is undertaken because we, as prosecutors, will look afresh at how we handle such cases. We will issue guidance to prosecutors around the country about what impact such evidence will have on their decisions, and we will offer guidance to the police about how they should deal with such evidence if they come across it."[29]

Is there a need for new statutory aggravations?

46. While the majority of the evidence which the Committee received and heard supported the Bill, concerns were expressed to the Committee over the introduction of new statutory offences. The Scottish Police Federation, in its written submission, was of the view that the existing common law is used by courts to take the motivations of an offender into account and quoted a Federation representative as saying—

> "… we have always had aggravations to crimes where the victim's status was taken into account making the crime more serious. If the courts dealt with cases where there were aggravations, in the appropriate manner, then there would be no need for new legislation."[30]

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[27] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1556.
[28] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1557.
[29] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1557.
[30] The Scottish Police Federation. Written submission to the Justice Committee.

47. The Scottish Police Federation also stated that from its experience of enforcing existing statutory aggravations, the police time and resources required to record these aggravations would exceed the initial estimates.[31]

48. The Law Society of Scotland meanwhile stated in its written submission that the current common law system provides flexibility and considered that—

> "… the creation of a new statutory aggravation of a crime or offence may detract from this flexibility and impose evidential burdens upon the Crown which would not apply at common law."[32]

49. During oral evidence, the Committee questioned the Law Society of Scotland on whether the aggravations that are proposed in the Bill are currently being highlighted by judges and prosecutors. Raymond McMenamin responded–

> "The issues are highlighted, but not with a great degree of consistency. It comes down to the specifics of the case and the approach that the prosecutor takes in presenting it. For example, if an assault was clearly motivated by homophobic attitudes, I would be surprised if there is a procurator fiscal in the land who would not bring that to the attention of the court."[33]

50. The Committee also asked the Law Society of Scotland whether the common law is sufficiently equipped to deal with crimes against people on the basis of their sexual orientation, transgender identity or disability. David Cabrelli stated—

> "… the common law could deal with these issues, but the committee should remember that the benefit of the bill is that it will send a positive message to society and the public; on the other hand, however, it will mean a loss of some of the flexibility that is inherent in the common law. Those two competing requirements have to be balanced."[34]

51. Patrick Harvie MSP, when appearing before the Committee, responded to such perceived difficulties arising from the new legislation—

> "We should work through any issues that arise, rather than use them as a reason not to put in place legislation. We could continue to rely on the common law and perhaps introduce some additional guidance, but it is clear that that would be a less effective system for dealing with these crimes. It would also perpetuate a situation in which we deal with hate crimes in different ways. We might talk about the workload of various organisations such as the police or the Crown Office, but having different systems introduces additional complexity, and the system is not particularly easy to deal with anyway. That would also reinforce the view that some offences or forms of prejudice are less significant and worthy of attention than others."[35]

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[31] The Scottish Police Federation. Written submission to the Justice Committee.
[32] The Law Society of Scotland. Written submission to the Justice Committee.
[33] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Cols 1528-1529.
[34] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1527.
[35] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1575.

52. Mr Harvie went on to say—

> "I agree with the witnesses who have argued that we require legislative change to ensure that there is an appropriate response to offences that are committed, and that courts pass appropriate sentences and give reasons for them: that is the bill's core purpose."[36]

Conclusion

53. The Committee is clear that the common law system in Scotland already allows for aggravating factors to be taken into account by courts when determining sentences and that courts do use these powers. The Committee also acknowledges the flexibility of the current system and the concerns raised that this legislation might impose unnecessary burdens on the police or hinder in any way the independence of the judiciary.

54. Nevertheless, the Committee has heard and received a considerable quantity of evidence supporting the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill. The Committee also notes the previous introduction and enforcement of statutory aggravations for offences motivated by race or religious prejudice and supports measures to deal more consistently and appropriately with offences motivated by a victims actual or presumed sexual orientation, transgender identity or disability.

55. **The Committee therefore believes that on balance the new statutory aggravations are an appropriate response to crimes motivated by hatred towards victims targeted as a result of their actual or presumed sexual orientation, transgender identity or disability.**

CORROBORATION

56. The Bill provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to disability, sexual orientation or transgender identity.

57. During oral evidence, COPFS described this as a very important provision as it does not extend the burden of proof further than that which the common law already imposes. Andrew McIntrye also confirmed that the prosecutor will still require corroboration of the offence—

> "We will still require corroboration of the fact that the crime has been committed and of the perpetrator's identity, but, as with the common law, particular features of an account and particular aggravations will not require corroboration. It is important that a standard is set that will allow us to admit that evidence but which is not unreasonable or unachievable."

58. This provision was supported by ACPOS in its written submission—

> "Whilst the common law statutory offence attached to the aggravation will still require corroboration, an individual person's perception of motivation for an

[36] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Cols 1575-1576.

> offence will be sufficient for the aggravation to be competent. It is noted that the current race aggravation under the Crime and Disorder Act 1998, Section 96 contains the same provision, and therefore the Bill will extend the provision across all diversity related areas."[37]

False accusations of offences being aggravated by prejudice

59. During oral evidence, the Committee questioned ACPOS on whether, in its experience of dealing with racial and religious aggravations, they have given rise to false accusations that offences were aggravated by prejudice. Superintendent David Stewart responded that he was not aware of any such false accusations in relation to racial or religious aggravations. Superintendent Stewart added—

> "Our officers have experience of dealing with aggravated offences […] such as those to which you have alluded, so it will be their responsibility to highlight within police reports to the Crown Office any concerns in relation to aggravated offences. I would like to think that police officers will be sharp enough to identify the aggravations at any point. As I say, there is nothing to suggest that the existing statutory aggravations have had a negative effect."[38]

60. The Committee posed a similar question to the Law Society of Scotland. Raymond McMenamin responded—

> "I have encountered such accusations in relation to racially aggravated charges. It has been contended—and I have good reason to believe—that accusations about the use of racist language have been made when that might not have happened, or that such aspects have been exaggerated, to ensure that a prosecution followed."[39]

61. Mr McMenamin went on to comment on the frequency of such cases, believing that—

> "In about one in five cases there is an issue about the veracity of the accusation."[40]

62. COPFS, during oral questioning, stated that in the absence of evidence with regard to racial aggravations, it was unable to put a figure on false or aggravated claims. Andrew McIntyre went on to say—

> "With any crime, we as prosecutors have to examine the evidence carefully and take into account any suggestion that the complaint is ill-motivated or not founded on credible and reliable evidence. However, it is safe to say that our anxiety over people making false allegations with regard to this type of crime

[37] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[38] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1526.
[39] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1533.
[40] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1534.

> is no greater than our anxiety over such allegations in relation to other types of crime."[41]

63. Patrick Harvie MSP told the Committee that the statutory aggravations included in the Bill were modelled on the existing racial and religious aggravations. Mr Harvie added—

> "Let us imagine that we are thinking about a new offence to deal with a serious crime that we had become aware of. We might be worried about false accusations in the area of sexual offences, for example. I do not think that we would consider that a reason not to legislate. If false accusations are made, our systems would be perfectly adequate to deal with that. Courts will be perfectly capable of making their minds up on the basis of the information that is before them, and I do not think that that would overload the system. When it comes to racial and religious grounds, I do not think that that is causing a problem."[42]

Conclusion

64. **The Committee notes the provisions of the Bill which state that corroboration is not required to prove that a crime was aggravated by prejudice relating to disability, sexual orientation or transgender identity. The Committee acknowledges that these provisions are consistent with existing racial and religious aggravations. The Committee is therefore content that corroboration should not be required to prove that a crime was aggravated by prejudice.**

65. **The Committee recognises that, as with any offence, false allegations can arise but that it is for police, prosecutors and courts to decide their legitimacy.**

SENTENCING

66. The Bill requires that, where an aggravation relating to prejudice on the grounds of disability, sexual orientation or transgender identity is proved, the court must take that aggravation into account when determining sentence. The Bill does not, however, include provision for mandatory sentencing; rather it leaves it to the discretion of the court whether or not to impose an additional sentence.

67. The approach taken in the Bill was summarised in a briefing on the Bill by the Equality Network—

> "If the motive of malice and ill-will is proved in court, the judge or sheriff will take the motivation into account as an aggravating factor in setting the sentence. That might mean a heavier sentence, for example, or it might

[41] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1565.
[42] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Cols 1582-1583.

> mean a specific choice of community sentence to suit the nature of the offence. The choice of sentence remains entirely up to the judge or sheriff."[43]

68. During its oral evidence session, COPFS told the Committee that if enacted, the Bill's provision on sentencing would match how offences that are aggravated by racial or religious prejudice are currently dealt with. When questioned further on whether sentences should be more punitive in cases where an aggravation is proved, Andrew McIntyre stated—

> "By its very nature, an aggravation is something that makes an offence worse than would have been the case if that aggravating factor were not present, so one would expect that reflecting the aggravation in the sentence would have an impact on the severity of the sentence that was imposed."[44]

69. Evidence received regarding likely sentencing outcomes supported the Bill as drafted. In its written evidence, SAMH considered it appropriate to leave sentencing to the courts—

> "Passing this Bill would give the police, prosecutors and courts a tool to handle those disability-related offences more effectively, without detracting from the flexibility of the justice system or the independence of judges and sheriffs to decide sentences."[45]

70. Stonewall Scotland's submission meanwhile stated—

> "The bill will introduce no new offence or sentencing arrangements, but will simply bring consistency to the handing and sentencing of hate crimes, bringing them into line with other crimes motivated by prejudice and hate." [46]

71. Faye Gatenby, giving evidence on behalf of Capability Scotland, added—

> "It is important for sheriffs to have the flexibility to apply the most appropriate sentence. They have all the information about what happened, and the decision is for them."[47]

72. The Committee questioned Christina Stokes from Stonewall Scotland on whether the lack of a mandatory sentence could mean that the Bill will not send out a message to potential offenders that such behaviour is unacceptable. Ms Stokes responded—

> "We need to bear in mind the fact that the sentence is not the only way to send a message. A judge's very firm remarks on passing a sentence will also

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[43] Equality Network. (2008) *Briefing on the Offences (Aggravation by Prejudice) (Scotland) Bill.* Available at: http://www.equality-network.org/Equality/website.nsf/articleattachments/74A0CB38AEC1399F802574CE00441DFE/$FILE/Briefing%20on%20Offences%20(Aggravation%20by%20Prejudice)%20Bill.pdf [Accessed 6 February 2009]

[44] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1558.

[45] SAMH. Written submission to the Justice Committee.

[46] Stonewall Scotland. Written submission to the Justice Committee.

[47] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1500.

> achieve that. I would like to leave sheriffs that flexibility—they are the experts, after all."[48]

73. This view was supported by the Scottish Transgender Alliance. In its written evidence it was of the view that statutory aggravations would aid the courts in determining an appropriate sentence—

> "The clarity of the statutory aggravation in the complaint or indictment will assist sheriffs and judges to select an appropriate sentence without any reduction of their sentencing decision-making power. More appropriate sentencing could result in less repeat hate crime."[49]

74. Tim Hopkins, giving evidence on behalf of the Equality Network, was content that the Bill did not make provision for a mandatory sentence—

> "The underlying offence could be any one of a broad range of offences, from quite minor offences that would be dealt with by a community sentence up to murder. Specifying a tariff for the change that the aggravation would make to the sentence would be difficult.
>
> "It is right that the sheriff or the judge should have the discretion to decide what the final sentence should be. In murder cases, we would certainly expect the judge to say that they were increasing the number of minimum years that the person had to spend in prison because of the aggravation. That has happened in England. For more minor offences, we would be keen on appropriate community sentences."[50]

75. This view was supported by Patrick Harvie MSP—

> "What we must have, as Tim Hopkins from the Equality Network has said, is the appropriate response. In some circumstances, that will be a severe sentence; in other cases, it might be a different sentence. It is for the court to determine the response that is appropriate for the offender. That is what we should be looking for."[51]

76. **The Committee acknowledges that the Bill contains no provision for mandatory sentences for crimes aggravated by prejudice as a result of the victims' actual or presumed sexual orientation, transgender identity or disability. Due to the breadth of potential offences to which aggravations could apply, the Committee agrees that the court should retain the discretion of whether or not to impose a greater (or different) sentence, based upon the facts and circumstances of an individual case.**

Community sentencing

77. The Committee heard evidence from some witnesses (COPFS, Enable Scotland, Equality and Human Rights Commission Scotland, Equality Network,

[48] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1488.
[49] Scottish Transgender Alliance. Written submission to the Justice Committee.
[50] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Cols 1485-1486.
[51] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1579.

SAMH, Scottish Transgender Alliance and Stonewall Scotland) that for less serious offences which have been aggravated by prejudice, appropriate community sentences may help to address the underlying causes of such prejudice. Norman Dunning, when giving evidence on behalf of ENABLE Scotland, spoke of the need to educate offenders—

> "Occasionally, deterrent sentencing is appropriate, at the judge's discretion. However, in many situations, we want to educate people. We have found in some of our work on tackling bullying by young people that the best way to tackle it is to confront the young people with people with learning disabilities, so that they see them as real people and hear what their lives are like. That starts to break down the barrier and the prejudice. Community sentences that bring in such direct, face-to-face contact with victims, to show the human face and ensure that people are seen as people, are one of the best ways forward. We are looking not necessarily for an increased tariff but for an appropriate tariff that helps to change people's attitudes and perceptions."[52]

78. Charlie McMillan from SAMH added—

> "We can build on programmes throughout Scotland to challenge offending behaviour and its root causes. In this case those causes are prejudice and discrimination, possibly conflated with anger management issues, and the relationship between discrimination, prejudice, anger and hatred in committing offences. In challenging that, we are talking about rehabilitating offenders and about change, which are critical in sentencing. Sentencing should absolutely be guided by the judiciary, but we must develop a range of sentences that goes to the heart of the issue."[53]

79. Tim Hopkins of the Equality Network, when appearing before the Committee, also supported such sentences for those convicted of offences as a result of their hatred of the victim's actual or presumed sexual orientation, transgender identity or disability—

> "Last year, the deputy convener of the committee [Bill Butler MSP] lodged a written parliamentary question about crimes with a religious aggravation. In his reply, the Minister for Community Safety said that the Government is considering rehabilitation programmes for offenders who commit such crimes. We are certainly interested in appropriate community sentences that would help to address the underlying prejudice that causes a person to commit such a crime. That approach has already been tried out in England, and it is being considered in relation to racist crime in parts in Scotland. We like the idea of flexibility."[54]

80. The Committee later questioned Euan Page from the Equality and Human Rights Commission on whether rehabilitative arrangements such as anger management courses were available to change offenders attitudes. While unable to state whether such courses were on offer, Mr Page replied—

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[52] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1500.
[53] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1500.
[54] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1486.

> "If we in Scotland are to address in the round what we expect sentencing to achieve, this is exactly the time to have such a debate in order to ensure that provisions are in place to address offending behaviour appropriately. In the case of somebody who has committed a series of aggravated breaches of the peace, it will have become obvious that that person has an issue or problems with a particular social group. How can that be turned around effectively to stop that behaviour, thereby giving more confidence to other potential victims?"[55]

81. When questioned by the Committee on whether community sentences would be more effective in tackling the underlying reason why people commit offences aggravated by prejudice, Andrew McIntyre for COPFS said it was difficult to predict sentences due to the range of offences covered by the provisions in the Bill. However, Mr McInyre added—

> "Equally, it is important to look at the range of disposals that exist—we in the prosecution service, at least, are always open to that—and to think creatively about whether particular community-based disposals are appropriate for particular categories of offending. When we are dealing with vulnerable groups or groups that are targeted because of a particular feature of their identity, the paramount consideration must be safeguarding the interests of those groups. It is easy to see how many community disposals might not safeguard the interests of a group that has been the focus of the perpetrator's hatred, but we are always open-minded about the options that are available, and the courts should be, too."[56]

82. Patrick Harvie MSP gave an example of community sentencing working in practice—

> "An offender who assaulted a gay man in Brighton was ordered to spend a short time working with a local gay magazine, with a probation officer present throughout. That was reported as having positive results."[57]

83. Mr Harvie went on—

> "That approach would not be appropriate in every case. The courts would have to decide whether such opportunities should be explored. However, in some situations, it would be appropriate for the court to pass a sentence that engages with the reasons why an offence was committed, rather than one that merely responds or reacts to the offence."

84. **The Committee recognises that it is for the court to decide what sentence to impose for a crime aggravated by prejudice. The Committee encourages the Scottish Government to work with criminal justice partners to ensure that across the country disposals can, where practicable, include elements which aim to address attitudes leading to hate crime.**

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[55] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1514.
[56] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1558.
[57] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1581.

PROVISIONS TO RECORD STATUTORY AGGRAVATIONS

85. The Bill requires that courts, when recording a conviction which includes an aggravation relating to prejudice on the grounds of disability, sexual orientation or transgender, must record the conviction in a manner which shows that the offence was motivated by one of these aggravations.

86. LGBT Youth Scotland, in its written submission, stated that the recording of aggravations at all stages of the criminal justice process would ensure that—

> "… a clearer picture of the true extent of disability-related, transphobic and homophobic hate crime will emerge, and trends will be traceable over time and inform future strategies to effectively respond to such crimes."[58]

87. In its written submission, SAMH stated that the recording of aggravations would mean that—

> "… victims can be supported accordingly, sentences can be appropriate, and repeat hate crime offenders can be identified. It would also allow for statistical monitoring, as is already possible for racist and sectarian crime."[59]

88. The need for improved monitoring was also emphasised by Stonewall Scotland in its written evidence—

> "Exact statistics for racist and religious-prejudice crimes are now available for every stage of the justice system. Because no such figures are available for homophobic, transphobic and anti disabled hate crimes, we have no idea of the number of reported crimes, the number of prosecutions or the conviction rates. Clear recording of hate crimes will also allow the identification of repeat offenders."[60]

89. These views were supported by COPFS. Principal Procurator Fiscal Depute, Linda Cockburn, said during oral evidence—

> "We can incorporate aggravation elements under the common law, but we cannot monitor how many such cases there are in a year because the aggravation is included in the text of the charge. The bill will allow us to monitor such cases and to count how many we deal with in a year."[61]

90. ACPOS too was supportive of the recording of aggravations, stating in its written submission—

> "A more accurate view and understanding of the causes and fear of crime will be enhanced in conjunction with any statutory aggravation which would allow for statistical work to be carried out and introduce an intelligence led approach to combat and manage all aspects hate crime. […] Crime targeted

[58] Lesbian, Gay, Bisexual and Transgender Youth Scotland. Written submission to the Justice Committee.
[59] Scottish Association for Mental Health. Written submission to the Justice Committee.
[60] Stonewall Scotland. Written submission to the Justice Committee.
[61] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1556.

> at people because of their race, religion, disability or sexual orientation is predominantly under reported and it is thought that the introduction of a statutory aggravation may give victims of such crime a ' voice' in the criminal justice system by reinforcing the seriousness that such crimes are regarded and dealt with. This may give reassurance to victims/witnesses of crimes of prejudice, along with added confidence to report any incidents."[62]

91. ACPOS acknowledged in its written evidence that the Bill would have an impact on the recording, reporting and monitoring of offences. However, it considered that this would "allow for the consistent and appropriate processes to be identified in conjunction with those processes already in place for race and religiously motivated crimes."[63]

92. During oral evidence, ACPOS sounded a note of caution that if the Bill was enacted the number of crimes reported would increase until an accurate baseline was established. Superintendent David Stewart added—

> "Once we know what the baseline is, the role of the police and our partners is to address the issues and try to reduce the crime level. So one thing that the legislation will do is allow us to have a baseline. It might not be accurate, due to underreporting, but at least it will be a baseline."[64]

93. **The Committee recognises that under the common law the recording of offences committed against victims who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability is not sufficiently robust. The Committee therefore welcomes the provisions in the Bill that will ensure the accurate recording of aggravated offences from the initial reporting of an offence through to prosecution, conviction and eventual sentence.**

Training for the police and prosecutors

94. In its written evidence, ACPOS stated that Police would require training should the Bill be passed—

> "The introduction of such legislation would require training provision for police staff, particularly operational police officers and custody staff in relation to dealing with such instances. This would ensure the required level of commitment and robust practice of implementation necessary for these offences."[65]

95. When later giving oral evidence, Superintendent David Stewart expanded on training requirements for the police—

> "When any legislation comes into force, ACPOS seeks guidance from the Crown Office on its implementation internally. Once that guidance is received, it is circulated among the Scottish forces. I agree with Mr Page

[62] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[63] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[64] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1523.
[65] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.

> [Parliamentary and Government Affairs Manager, The Equality and Human Rights Commission] about the size and scale of the bill—it might be a far-reaching piece of new legislation, but it is written in a fairly clear and straightforward way. ACPOS believes that the bill will not have a huge impact on training, although there will be more to do on the awareness side."[66]

96. Charlie McMillan, when giving oral evidence on behalf of SAMH, responded to a question concerning the importance of training and guidance given to the police and COPFS in relation to the implementation of the provisions in the Bill—

> "We work quite closely with ACPOS and the Crown Office and Procurator Fiscal Service. They have been at the forefront of addressing many of the equality issues in the United Kingdom and Scotland for the past 10 years or so. They are committed to learning more, working with voluntary sector organisations and challenging the responses of their own officers, because they accept that it is not always the case that the best response is given. There is an openness to the issues and a willingness to develop the guidance by building on what is already in place."[67]

97. **The Committee recognises the need for appropriate training to ensure the police and COPFS staff can implement the provisions proposed in the Bill. The Committee also notes the assurances from ACPOS that the impact on resources for police training will not be significant.**

OTHER ISSUES

Concerns about reporting crimes

98. The concern of victims to report crimes was raised by witnesses. Christina Stokes from Stonewall Scotland said during oral evidence—

> "People need to be certain that if they report an incident it will be taken seriously and addressed properly. There must be a point to reporting such incidents; otherwise, people are sacrificing their time and making a short incident last much longer. People need to believe that if they report an incident, it will be taken seriously."[68]

99. James Morton from the Scottish Transgender Alliance added—

> "In 2007, the Scottish Transgender Alliance carried out a survey of 71 transgender people in Scotland. People gave two key reasons for not reporting incidents to the police. One was fear of being laughed at by the police and the criminal justice system and of being told, "What do you expect if you're transgender? It just goes with being trans." They were fearful of having their identity mocked.
>
> "The other reason was that people have an internalised expectation that it is their own fault if they experience transphobic hate crimes, which happen

[66] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1525.
[67] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1505.
[68] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1490.

> because they have failed to pass as sufficiently non-trans. […] Sending out a message through establishing a statutory aggravation for transphobic hate crime would help to counter those responses and to improve expectations that incidents will be taken seriously if people report them."[69]

100. The Royal National Institute for Deaf People Scotland, in its written submission, stated—

> "… deaf and hard of hearing people are even less likely to report crimes against them because some find it difficult to access police services. For example, police stations may struggle to find interpreters at short notice when deaf people who use BSL as a first language want to report a crime. As a young deaf man who tried to report a crime at his local police station recalls: "I had to wait for an interpreter at the police station from 4.30pm to 10pm and in the end, I was tired.""[70]

101. ACPOS, in its written submission said—

> "Crime targeted at people because of their race, religion, disability or sexual orientation is predominantly under reported and it is thought that the introduction of a statutory aggravation may give victims of such crime a 'voice' in the criminal justice system by reinforcing the seriousness that such crimes are regarded and dealt with. This may give reassurance to victims/witnesses of crimes of prejudice, along with added confidence to report any incidents."[71]

102. During oral evidence, ACPOS outlined what action it was taking to improve the reporting of such crime–

> "The Scottish police forces work very closely with all diverse communities and organised groups locally and nationally to try to encourage people to come forward. Individual forces and ACPOS are looking at an online third-party reporting system, which would allow people to report hate crime to the police via the internet if they were concerned about coming to police stations.
>
> "Someone commented last week from the transgender community that there were concerns that people might be made fun of if they came forward to report an incident, so we are trying to introduce systems and to implement new IT systems that may positively impact upon people's ability and willingness to report crime to us."[72]

103. **The Committee recognises that some victims who are targeted as a result of their actual or presumed sexual orientation, transgender identity or disability can have concerns about reporting the crime. The Committee supports the initiatives being developed by Scottish police forces to tackle this issue. The Committee also hopes that the provisions of the Bill may**

[69] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1491.
[70] The Royal National Institute for Deaf People Scotland. Written submission to the Justice Committee.
[71] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[72] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1521.

encourage persons who have been victims of such crimes to come forward and report.

Plea bargaining

104. The Law Society of Scotland, in its oral evidence, was asked by the Committee whether, through plea bargaining, statutory aggravations can be negotiated away, and if so to what extent. Raymond McMenamin answered—

> "In racially aggravated cases, procurators fiscal were instructed—and may still be instructed—not to desert cases or to accept not guilty pleas, so their hands were tied; they had to run with those cases, regardless of their personal view. Their independence as prosecutors was compromised in that regard; not many practitioners in the courts see that as healthy. There will always be situations in which charges may be diminished, for want of a better term, as the defence will always challenge the charges."[73]

105. In its written evidence, COPFS provided its current policy on accepting a plea where this is an aggravating factor—

> "… current policy and practice within COPFS is to treat with seriousness any crime which can be shown to have been motivated or aggravated by prejudice, discrimination or hate. In practice this means that in cases aggravated by prejudice the prosecutor will take action where there is sufficient evidence in law to prove the crime. Where criminal proceedings are taken there is a presumption against accepting a plea which will result in the removal of the aggravating factor, which ensures that decisions at all stages result in the full circumstances of the crime being made known to the court. This approach is supported by guidance and training and compliance is monitored. Current examples of this approach are our robust policies on the prosecution of crimes aggravated by racial and religious prejudice."[74]

106. During oral questioning, Andrew McIntyre of COPFS provided the Committee with an illustration of how this policy might be used in practice—

> "For example, if there is a racist element in a breach of the peace, it is clearly in the interests of the accused person to seek to agree a plea of guilty to the breach of the peace under deletion of the racist aggravation. We have given very clear guidance on policy to indicate that that is not generally in the public interest. That is an interesting aspect of our policy, because it is clear and it has been in force for a number of years. If you asked people across the prosecution service how they are to approach racist crime, you would find that that policy is clear in their minds. There is a universal understanding of what it is intended to achieve."[75]

107. The Committee also asked Andrew McIntyre whether, if a victim is not keen to give evidence, COPFS still retains discretion in cases in which it is manifestly in the interests of the victim that a plea be negotiated. Mr McIntyre responded—

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[73] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Col 1529.
[74] Crown Office and Procurator Fiscal Service. Written submission to the Justice Committee.
[75] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1560.

> "We have policy on a range of crimes and how they should be treated. Our policy in this instance is clear and it is regarded as being a very strong policy, which is to be departed from only in the most exceptional cases. Our overriding duty is to prosecute cases in the public interest. That means that we must always take account of all the circumstances of the case; there can be a number of unforeseen factors in cases and we have to be open to considering them. In the example that you give, if the witness had particular anxieties, our first option would not be to delete the aggravation or to discontinue the proceedings but to give advice and support to the victim to help them through the prosecution, so we would have recourse to, for example, special measures and the range of other support mechanisms that are there to make the process better for victims. We feel strongly, particularly when vulnerable groups are targeted, that it is generally not in the public interest to allow the fear that the perpetrator has brought to bear on a witness to bring proceedings to an end, but a different approach sometimes has to be taken in very extreme cases."[76]

108. Patrick Harvie MSP, during his oral evidence session, said—

> "I am sure that in some circumstances someone might be uncomfortable about the inference that might be drawn about their transgender identity or sexuality based on an aggravation, but we should remember that the aggravation is about the offender's motive, not the victim's status or identity. In such cases, there must be appropriate support through victim support agencies and organisations, but that is no reason for not recognising that, in many cases, victims are angry and assertive, or for not having the aggravation.[77]"

109. **The Committee acknowledges that COPFS has a policy in place to ensure that there is a presumption against accepting a plea which will result in the removal of the aggravating factor. The Committee is satisfied that such decisions remain at the discretion of prosecutors who can alter their approach depending on the individual circumstances of the case.**

Freedom of speech

110. The European Convention on Human Rights (ECHR) is intended to provide a common standard across European nations in respect of the protection of fundamental rights and freedoms. Articles 9 and 10 of ECHR are relevant when considering freedom of speech. Article 9 provides for the right to freedom of thought, conscience and religion while Article 10 provides for the right to freedom of expression

111. The Bill's Policy Memorandum states that the proposals do not give rise to any issues under ECHR. It goes on to say that there may be circumstances where Articles 9 and 10 are engaged. However, it considers that—

[76] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1561.
[77] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Cols 1579-1580.

> "… any interference is justified as being necessary in a democratic society in the interests of, among other things, the protection of the rights and freedoms of others and the prevention of disorder and crime."[78]

112. In written submissions to the Justice Committee, concerns were expressed by religious organisations (The Christian Institute and CARE for Scotland) that the Bill's proposals could undermine freedom of speech and religious liberty. The Christian Institute's written evidence said—

> "The Institute is concerned that new aggravating factors regarding sexual orientation and transgender identity may be coupled with laws covering breach of the peace to prosecute those who speak out against homosexual practice or transsexualism. We are concerned that Christians could be criminalised for saying homosexual practice or gender reassignment is morally wrong."

113. The Committee asked a number of witnesses their views on whether freedom of speech would be threatened by the proposed aggravation relating to sexual orientation or transgender identity. Tim Hopkins of the Equality Network said—

> "The first point to make is that the bill will not introduce any new offence through the statutory aggravation. Something will be an offence only if it is already an offence; the aggravation will simply be attached as a label to the charge, to make clear what the motivation was and that there was evidence for it. No new offences will be introduced and it will still be lawful to say anything that it is lawful to say now. For example, it is perfectly legal for a preacher to say that homosexuality is wrong and a sin—that is as it should be, and nothing in the bill will change that."[79]

114. Representatives of COPFS were given an example by the Committee of a church organisation that distributes pamphlets outside a gay bar that contain material about sexuality that some people might perceive to be alarming or upsetting. The Committee asked whether this might lead to a charge of aggravated breach of the peace. Andrew McIntyre answered—

> "In the first instance, our primary function will be to decide whether a substantive crime has been committed. It is worth while to look at the definition of breach of the peace, which requires a standard of conduct that would be "alarming or seriously disturbing to any reasonable person in the particular circumstances.
>
> "Taking account of that definition, it would be for us to consider the facts and circumstances and decide whether the conduct amounted to a breach of the peace. One view would be that distributing leaflets is simply a legitimate expression of freedom of speech. I think there would need to be something more—something in the nature of what was said in the leaflets or about the way in which the protest was undertaken or a view was expressed—for an incident to meet the definition of breach of the peace.

[78] Policy Memorandum, paragraph 22.
[79] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1495.

> "On the basis of a bald scenario, it is impossible to say whether a breach of the peace would be committed, but we are clear that the definition of breach of the peace sets a certain standard that goes beyond someone expressing their views freely and legitimately.
>
> "Where expression of views goes further and breaks the law, not only could it conceivably be a breach of the peace—as is the case at present—but it could be a breach of the peace that is aggravated by one of these specific aggravations.
>
> "If the bill is passed, there will be no significant change, and there should be no greater anxiety over such situations than exists at present. As prosecutors, we have to weigh up such dilemmas in taking decisions. However, we recognise the difference between the legitimate and lawful expression of views and a breach of the peace."[80]

115. Patrick Harvie MSP, when questioned on the possible threat to freedom of speech, said—

> "I believe strongly in freedom of speech, and I do not believe that the bill infringes on it at all. The organisations that have submitted written evidence expressing that concern have done so on the basis of fear and apprehension, rather than on the basis of actual experiences. […] If aggravations could be misused in the way that has been suggested, examples would have occurred in England and Wales, but that is not the case."[81]

Malice and ill-will

116. The Bill states that an offence is only aggravated by prejudice if the offence is motivated by malice and ill-will. As mentioned previously, this term was accepted by the Working Group on Hate Crime.

117. The Committee questioned COPFS on whether the Bill's definition of prejudice as malice and ill-will is sufficiently clear for prosecutors. Andrew McIntyre answered—

> "I think so. The expression "malice and ill-will" is quite old fashioned, but it is used daily in the courts and we are familiar with it. It says what it sounds like it says, and it is something that we can recognise generally when we see it in the evidence. We are not uncomfortable with the test. It does not change the standard to any significant degree. Importantly, the root offences will continue to be the same, so our handling of them will be the same as it is now. However, if there is evidence of a particular motivation, that will be highlighted differently under the bill."[82]

118. **The Committee acknowledges that the proposed Bill will not introduce any new offences and believes that it presents no threat to freedom of speech, this includes groups who hold traditional, mainstream beliefs about marriage and sexuality.**

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[80] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Cols 1567-1568.
[81] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1583.
[82] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1569.

Hierachy of rights

119. The Committee received written evidence (The Evangelical Alliance Scotland and CARE for Scotland) raising concerns about a hierarchy of rights; providing greater protection for some groups than others. The Evangelical Alliance Scotland said—

> "… we would first and foremost hope and argue for an idealism within the law which highly regards holistic equality of the individual regardless of any particular strand of equality."[83]

120. It went on to say—

> "The Evangelical Alliance Scotland are also concerned that selecting specific groups for greater protection potentially undermines another equality strand, creates inequality between the strands or promotes the development of a hierarchy of rights. We would be concerned if the public perception of such legislation would be seen to make some individuals more equal than others within the eyes of the law."

121. The Scottish Police Federation, in its written submission, also raised the issue—

> "Whilst this consultation is well meaning, the SPF has long held the view a 'hierarchy of victim' is incompatible with the basic principle of everyone being equal in the eyes of the law."[84]

122. The Committee raised such concerns with oral witnesses. Charlie McMillan from SAMH responded to a question on whether the legislation would mean that some groups received greater protection than others—

> "I totally disagree. The bill is highly targeted to deal with a specific problem. It addresses the needs of the community, based on people's experience. I do not accept that the bill would create a hierarchy of rights. Existing legislation deals with issues relating to race and religion, and the bill will deal with issues relating to disability, sexual orientation and so on. It follows the European and international lead in terms of equality and diversity."[85]

123. Norman Dunning from ENABLE Scotland stated that—

> "People with learning difficulties are very much an unrecognised group and have had a pretty raw deal in the past. The bill represents an attempt to address that specifically."[86]

124. Faye Gatenby from Capability Scotland added—

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[83] The Evangelical Alliance Scotland. Written submission to the Justice Committee.
[84] The Scottish Police Federation. Written submission to the Justice Committee.
[85] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1505.
[86] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1505.

> "One of the strengths of the bill is that it protects everyone. It focuses not on the individual's circumstances but on the other person's motivation. As was said by the previous panel, if there is a hierarchy, it is in the mind of the perpetrator. I do not believe that there is a hierarchy of individuals."[87]

125. James Morton from the Scottish Transgender Alliance also said—

> "The bill is about the attacker's motivation, not the victim's identity, so it does not create a special class of people. If I were mugged for my mobile phone, the fact that I was transgender would not be relevant and it would not be appropriate to add a statutory aggravation. However, if someone grabbed me and my friend because they saw us coming out of a transgender organisation's event and they beat us up while yelling transphobic language at us then, even if my friend was not transgender, we would both be victims of a transphobic assault. That is the structure in the bill and we welcome that."[88]

126. **The Committee notes the concerns raised by groups about the creation of a hierarchy of rights. However, the Committee considers on balance that the proposals to provide additional protection for victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability are appropriate in these circumstances.**

Consolidating statutory aggravations

127. In both its written and oral evidence, ACPOS raised the issue of whether hate crime statutory aggravations should be consolidated into a stand alone piece of legislation—

> "By making the addition contained within the proposed Bill, there will exist four separate pieces of legislation in relation to aggravated hate crime offences. In order to simplify the operation of hate crime aggravations, giving a clear picture to the public and ease of use to criminal justice agencies, it would be helpful if aggravations for all existing and proposed hate related areas were included in a single piece of aggravation legislation."[89]

128. ACPOS stated that this would be particularly helpful to ease confusion regarding racial prejudice allegations—

> "Whilst a statutory aggravation for race related incidents exists under the Crime and Disorder Act 1998, and the proposed Bill aims to apply broadly similar provisions across other diversity areas, there may be the potential for growing confusion regarding relevant offences and aggravations in use. Currently, racially aggravated offences can be dealt with under a specific statutory offence of Section 50A Criminal Law Consolidation (Scotland) Act

[87] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Cols 1505-1506.
[88] Scottish Parliament Justice Committee. *Official Report, 13 January 2009,* Col 1493.
[89] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.

> 1995, or by way of common law or statutory crimes and offences aggravated by the statutory racial aggravation under the Crime and Disorder Act 1998."[90]

129. When questioned further on this by the Committee during oral evidence, Superintendent David Stewart said—

> "I reiterate that ACPOS does not wish to delay the process in any way, but we wish there to be, at some future date, a single piece of stand-alone legislation that covers all hate crime, whether it involves aggravators and/or criminal offences."[91]

130. **The Committee is grateful to ACPOS for highlighting these potential difficulties. While the Committee considers that the criminal law often develops in this way, consolidation of provisions at an appropriate point in time may be helpful.**

131. **The Committee recommends that the provisions of the Bill, if agreed by the Parliament, should be reviewed, no earlier than three years following implementation by the Scottish Government, to consider whether the proposed statutory aggravations have been effective.**

EQUAL OPPORTUNITIES COMMITTEE

132. As stated previously, the Parliament designated the Equal Opportunities Committee as the secondary committee in consideration of the Bill at Stage 1. The Equal Opportunities Committee agreed to consider whether the Bill's proposals to extend hate crime legislation to cover crimes motivated by malice and ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability should be extended to include similar provisions concerning age and gender. Along with race and religion, if the Bill is passed statutory aggravations would exist for all six equality strands.

133. The Equal Opportunities Committee looked at gender and age separately and made recommendations on each. The Equal Opportunities Committee also considered whether a provision to introduce a statutory instrument should be included in the Bill to extend protection to other groups at a later date, if required.

Gender

134. During an oral evidence session with women's groups (Engender, Rape Crisis Scotland and Scottish Women's Aid), the Equal Opportunities Committee heard that the groups were—

> "… opposed to including a gender aggravation in the Bill, on the basis that it was not the correct way to address the complexities of violence against women."[92]

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[90] Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
[91] Scottish Parliament Justice Committee. *Official Report, 20 January 2009,* Cols 1525-1526.
[92] Scottish Parliament Equal Opportunities Committee. 3rd Report, 2008 (Session 3). *Report on Offences (Aggravation by Prejudice) (Scotland) Bill* (SPP 187)

135. While the Equal Opportunities Committee recognised that violence against women is a very serious issue, it recommended that the Bill should not be amended to include a gender aggravation as, on balance, it considered that would "not be the most effective means of addressing the range of violence against women based on this evidence."

Age

136. The Equal Opportunities Committee heard from groups that work directly with older people that they were not in favour of the Bill being amended. As the report stated—

> "Some argued that it would detract from the main aims of the Bill; others felt that an age aggravation was inappropriate, as crimes against older people were more often motivated by their perceived vulnerability rather than malice or ill-will towards older people as a social group."[93]

137. Accepting such evidence, the Equal Opportunities Committee recommended that the Bill should not be amended to include an age aggravation. The Committee did however welcome suggestions made by witnesses for tackling crimes against older people.

Provision to extend statutory aggravations by statutory instrument

138. When recommending that statutory aggravations be introduced for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability, the Working Group on Hate Crime also stated that—

> "The legislation should be framed in such a way as to allow this protection to be extended to other groups by statutory instrument over time if appropriate evidence emerges that such other groups are subject to a significant level of hate crime."[94]

139. The Equal Opportunities Committee heard evidence from a number of groups (including Engender, Scottish Women's Aid, Rape Crisis Scotland and UNISON Scotland) supporting such a move. However, concerns were also raised (Evangelical Alliance Scotland, CARE for Scotland and Help the Aged in Scotland) about the lack of parliamentary oversight should such a provision be included in the Bill.

140. The Equal Opportunities Committee recommended that—

> "… the Justice Committee considers amending the Bill to include a delegated power provision that would allow protection to be extended to other groups

[93] Scottish Parliament Equal Opportunities Committee. 3rd Report, 2008 (Session 3). *Report on Offences (Aggravation by Prejudice) (Scotland) Bill* (SPP 187)
[94] Scottish Government. (2004b) *Working Group on Hate Crime Report*. Page 9. Edinburgh: Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/26350/0025008.pdf

> by statutory instrument if evidence emerged that such groups would benefit from the measures being proposed in the Bill."[95]

141. So that there is an element of parliamentary scrutiny, the Equal Opportunities Committee also stated that any future statutory instrument should be subject to affirmative procedure, "which would allow committee examination and parliamentary approval."

142. When giving evidence before the Justice Committee, Patrick Harvie MSP stated—

> "When I introduced the bill, my intention was to base it on the key recommendation of the working group on hate crime; I did not intend to express a view on whether it was appropriate to extend the legislation to age or gender. The Equal Opportunities Committee has taken the view not that that is necessarily appropriate but that the option should be left open to ministers. The Justice Committee may feel that the proposed power is very broad."[96]

Other issues

143. The Equal Opportunities Committee also highlighted two potential practical implications of including additional aggravations in the Bill which were raised in written evidence.

144. Firstly, COPFS highlighted that as its current IT system is only capable of recording a certain number of aggravations against each charge, the potential inclusion of gender and age could have significant implications. Secondly, the Scottish Police Federation had concerns about the practical implications of the Bill on police time and resources—

> "Our experience has shown that the police time and resource demanded as a consequence of dealing with the inevitable measurement tools such legislation demands, to be far greater than estimates laid down in previous similar consultations."[97]

Justice Committee conclusion

145. The Justice Committee is grateful to the Equal Opportunities Committee for their consideration of whether the Bill's proposals should be extended to include similar provisions concerning age and gender.

146. **The Justice Committee shares the Equal Opportunities Committee's concerns about widening the Bill to include similar statutory aggravations for age and gender and therefore agrees with its recommendations regarding these proposals. The Justice Committee also notes the issues highlighted by the Equal Opportunities Committee on the potential**

[95] Scottish Parliament Equal Opportunities Committee. 3rd Report, 2008 (Session 3). *Report on Offences (Aggravation by Prejudice) (Scotland) Bill* (SPP 187)
[96] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1584.
[97] Scottish Police Federation. Written submission to the Equal Opportunities Committee.

implications for the COPFS IT system and concerns raised by the Scottish Police Federation on the potential for the proposals to underestimate initial resource estimates.

147. **However, the Justice Committee does not support the recommendation to amend the Bill to include a delegated power provision that would allow protection to be extended to other groups. The Committee believes that any proposed extension to criminal legislation should only be established through primary legislation.**

FINANCIAL IMPACT OF THE BILL

148. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill's Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

IT system costs

149. The Financial Memorandum[98] states that the majority of costs associated with the Bill are one-off IT upgrades for the police (£10,000), Crown Office and Procurator Fiscal Service (£20,000) and the Scottish Court Service (£5,000). The Memorandum also states that the Scottish Court Service will incur ongoing administration costs estimated at £23,000 per annum. All these costs will be met from existing budgets and will not require the allocation of additional funding.

150. In its written submission to the Justice Committee, COPFS highlighted concerns regarding its IT system. While COPFS was confident that the proposed statutory aggravations within the Bill could be accommodated within its existing system, it commented that any further aggravations may require significant work in changing the underlying database. Questioned by the Committee during oral evidence, Linda Cockburn from COPFS said—

> "When the question whether to introduce age and gender aggravations was raised by the Equal Opportunities Committee, our IT department started to think about the situation. We will run out of space for aggravations if they keep being added. The implication is that our whole system would have to be rewritten. I am told by the information systems division that that would cost £300,000 for us alone. The courts and the police would also have to realign their computer systems so that we could all work in unison, as we do now."[99]

151. **The Committee thanks COPFS for bringing the matter to its attention. The Committee considers that costs associated with the COPFS IT system as a consequence of the Bill to be acceptable. However, the Committee considers that it would be prudent for COPFS to make budgetary provision for a future system upgrade within the current spending review period.**

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[98] Offences (Aggravation by Prejudice) (Scotland) Bill. Explanatory Notes, paragraphs 20-32. Available at: http://www.scottish.parliament.uk/s3/bills/09-AggPrej/b9s3-introd-en.pdf

[99] Scottish Parliament Justice Committee. *Official Report, 27 January 2009,* Col 1570.

Scottish Prison Service

152. The Financial Memorandum also considers the impact on the Scottish Prison Service (SPS) should offenders convicted of an aggravated offence spend longer in custody than if the offence had not been aggravated. The Memorandum states that—

> "The effect may be a slight upward pressure on the prison population."[100]

153. However, the Financial Memorandum concludes that any such increase will be "accommodated within normal fluctuations in prison population at marginal cost only"[101] and will be met from existing SPS budgets.

154. As stated earlier in the report, the Finance Committee sought written evidence from affected organisations. The Committee received two submissions, from ACPOS and SPS. The SPS submission was drawn to the Justice Committee's attention.

155. The SPS submission agrees with the Financial Memorandum's view that the overall impact on the prison population is expected to be very slight. However, the SPS stated that—

> "… the unprecedented high level of the prison population means that any additional costs incurred as a result of the impact of the proposals set out in this Bill could not be met within SPS' existing budgets and would require the allocation of additional funding."[102]

156. The SPS also estimated that—

> "… the recurring annual cost per prisoner place, if additional capacity were required, is £40,000 in addition to the capital cost of accommodation."

157. **The Committee notes the concerns raised by the SPS and invites the Scottish Government to confirm whether it will provide additional funding to the SPS should the Bill's provisions result in an increase in the prison population.**

SUBORDINATE LEGISLATION COMMITTEE

158. The Subordinate Legislation Committee has considered the delegated powers provisions in the Offences (Aggravation by Prejudice) (Scotland) Bill and submitted its report to the Justice Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

Section 3: Commencement and short title

159. The Justice Committee notes that the Subordinate Legislation Committee sought clarification on two points from the Member in charge in regard to the

[100] Explanatory Notes, paragraph 27.
[101] Explanatory Notes, paragraph 28.
[102] Scottish Prison Service. Written submission to the Finance Committee.

commencement provision. The Subordinate Legislation Committee welcomed the responses from Patrick Harvie MSP.

160. **The Justice Committee notes that the Subordinate Legislation Committee is satisfied with the delegated powers in the Bill.**

EQUALITY IMPACT ASSESSMENT

161. The Committee notes from the Policy Memorandum that an Equality Impact Assessment (EIA) has been carried out for the Bill. The Justice Committee previously welcomed the adoption by the Scottish Government of EIAs for assessing the potential equality impact of legislation during its scrutiny of the Sexual Offences (Scotland) Bill at Stage 1.

162. Nevertheless, the Committee was disappointed that the EIA for the Offences (Aggravation by Prejudice) (Scotland) Bill was not made available at the beginning of its scrutiny.

163. **In light of the recent introduction of EIAs, the Committee recommends that in future an EIA should be submitted to the lead committee scrutinising a Bill as a matter of course by either the Scottish Government or the Member in charge.**

CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

164. **The Committee believes on balance that it is appropriate to create new statutory aggravations to protect victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability.**

165. **The Committee is content to recommend that the Parliament agrees to the general principles of the Bill.**

ANNEXE A: REPORTS FROM OTHER COMMITTEES

Equal Opportunities Committee Report on the Offences (Aggravation by Prejudice) (Scotland) Bill at Stage 1

The Committee reports to the Justice Committee as follows—

Introduction and background

1. The Offences (Aggravation by Prejudice) (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament by Patrick Harvie MSP on 19 May 2008.

2. The policy objective of the Bill is to create new statutory provisions to protect victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability. No new criminal offences are created, but, where it can be proven that an offence has been motivated by malice or ill-will based on the victim's actual or presumed sexual orientation, transgender identity or disability, the court must take that motivation into account when determining sentence. In common law, it is already possible for the courts to take the motivations of an offender into account when determining sentence, but it is not obligatory.

3. The Parliamentary Bureau designated the Justice Committee as lead committee and the Equal Opportunities Committee as secondary committee in consideration of the Bill at Stage 1. As lead committee, the Justice Committee decided to consider the Bill's main proposals to extend hate crime legislation to cover sexual orientation, transgender identity and disability. The Equal Opportunities Committee agreed to focus its consideration of the Bill on whether similar provisions concerning age and gender should also be included in the Bill, to cover all six equality 'strands' (similar legislation already exists to protect individuals and groups targeted on racial or religious grounds).

4. The Committees issued a joint call for written evidence on 11 September 2008. The Equal Opportunities Committee received twelve written responses and correspondence from Patrick Harvie MSP, member in charge of the Bill, and from Kenny MacAskill MSP, the Cabinet Secretary for Justice.

5. The Committee held two oral evidence sessions on the Bill on:

- gender on 4 November 2008 with Scottish Women's Aid, Rape Crisis Scotland and Engender; and
- age on 18 November 2008 with the Equality and Human Rights Commission (EHRC), Evangelical Alliance Scotland, Help the Aged in Scotland, CARE for Scotland, and UNISON Scotland.

6. The Committee would like to thank those who submitted written evidence and who participated in the oral evidence sessions.

Structure of report

7. The report addresses the issues that have arisen in the course of the Committee's Stage 1 consideration, examining in turn the arguments in favour and against including aggravations on gender and age within the scope of the Bill, and providing recommendations on each of these issues to the Justice Committee.

8. The report also provides some background information on the Working Group on Hate Crime report, which was published in September 2004.

Working Group on Hate Crime

9. A Working Group on Hate Crime ("the Working Group") was set up by the previous administration in June 2003 to consider the most appropriate measures needed to combat crime based on hatred towards particular social groups. The Working Group had the following remit:

> "To look at the current criminal justice system and consider improvements, including legislation, which might be made to deal with crimes based on hatred towards social groups."[1]

10. The *Working Group on Hate Crime Report*, published in September 2004, defined hate crime as "crime motivated by malice or ill-will towards a social group"[2]. The Working Group made 14 recommendations, including one recommendation for the statutory aggravation of offences based on the sexual orientation, transgender identity or disability of the victim:

> "Recommendation 1) The Scottish Executive should introduce a statutory aggravation as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. The legislation should be framed in such a way as to allow this protection to be extended to other groups by statutory instrument over time if appropriate evidence emerges that such other groups are subject to a significant level of hate crime. The legislation should ensure the recording of hate-motivated incidents (by the police), and reports and decisions of proceedings (by Crown Office and Procurator Fiscal Service) and convictions (by Scottish Criminal Records Office)."[3]

11. The Working Group also considered statutory aggravations in relation to gender and age, and concluded that these were "more complicated areas"[4] in which to legislate for statutory aggravations.

[1] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/26350/0025008.pdf [Accessed 2 December 2008]
[2] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.
[3] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.
[4] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.

GENDER

Context

12. The following paragraphs provide background information on the Committee's consideration of whether the Bill should contain an aggravation on gender.

Statistics on gender crime in Scotland

13. Domestic abuse statistics in Scotland show a clear gender divide: in 2006-07 incidents with a female victim and male perpetrator represented nearly 87% of all incidents of domestic abuse, where this information was recorded.[5]

14. In 2006-07, the overall homicide rate for males was 40 victims per million population, nearly six times the rate for females of seven victims per million population. In the past ten years, 62% of male victims aged 16-69 were killed by an acquaintance and 19% were killed by a stranger. Fifty three percent of the female victims of homicide aged between 16 and 69 were killed by their partner, 25% were killed by an acquaintance and 14% were killed by a stranger.[6]

Working Group on Hate Crime conclusions

15. In its report published in 2004, the Working Group did not reach agreement on whether a statutory aggravation on grounds of gender could be used effectively to "tackle these complex, inter-related and diverse issues … in particular it was felt that there would be practical difficulties in gathering evidence in individual cases of malice and ill-will on gender grounds"[7]. It did, however, recommend that the Scottish Executive review the area of criminal law on violence against women and that it consider a statutory aggravation for domestic abuse. In October 2007, the Scottish Government announced that it was developing a National Violence Against Women Strategy and an action plan for broader work on violence against women.[8]

Offences (Aggravation by Prejudice) (Scotland) Bill

16. The Policy Memorandum on the Bill stated that gender was a broad issue in relation to crime:

> "The Working Group's consultation revealed a lack of consensus over whether domestic violence should be considered a hate crime. As a result, the arguments in favour of a statutory aggravation aimed at tackling violence against women and gender based violence remain unconvincing."[9]

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[5] Scottish Government. (2007) *Domestic Abuse Recorded by the Police in Scotland, 2006-07*. Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/204518/0054432.pdf [Accessed 2 December 2008]

[6] Scottish Government. (2007) *Homicide in Scotland, 2006-07*. Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/207004/0054998.pdf [Accessed 2 December 2008]

[7] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.

[8] Scottish Parliament, Parliamentary Question S3W-5991, asked on 23 October 2007, answered on 31 October 2007. Available at:http://www.scottish.parliament.uk/Apps2/Business/PQA/Default.aspx

[9] Offences (Aggravation by Prejudice) (Scotland) Bill. Policy Memorandum, paragraph 17. Available at: http://www.scottish.parliament.uk/s3/bills/09-AggPrej/index.htm

17. In written evidence, Patrick Harvie MSP indicated that he would be "remaining neutral on the inclusion of other categories"[10], as his intention was to implement a key recommendation of the Working Group on Hate Crime, which covered only sexual orientation, transgender identity and disability.

18. In a written response, the Cabinet Secretary for Justice outlined the Scottish Government's support for the Bill and explained in relation to the issue of a gender aggravation that:

> "In line with the conclusions of the Working Group, we do not feel that it is appropriate to attempt to deal with it within the context of this Bill, particularly given the lack of consensus amongst women's organisations on the best approach".[11]

19. The Crown Office and Procurator Fiscal Service (COPFS) provided a written explanation as to how cases are presently handled: "There is recognition of gender issues in our training and domestic violence is regarded as an aggravated form of assault which is flagged up to the court accordingly".[12]

Evidence gathered by the Committee

20. In the written evidence gathered by the Committee on whether a gender aggravation should be included in the Bill, the issue of violence against men did not arise. Therefore, the focus of the Committee's oral evidence was on women.

Including gender as an aggravation within the Bill: in favour

21. Various respondents to the Committee's call for evidence were in favour of including gender as an aggravation within the Bill, on the grounds that all six equality strands should be treated equally.

22. The Association of Chief Police Officers in Scotland claimed that "an all inclusive Bill covering all six strands should be considered, as malice or ill-will can be evident in all"[13] and Victim Support Scotland thought that the Bill should include protection for all social groups.[14] Care for Scotland stated that "it is imperative that the Scottish Parliament introduces legislation which applies equally to all equality strands and does not create the perception of a hierarchy of rights".[15]

23. The Evangelical Alliance Scotland was concerned that "selecting specific groups for greater protection potentially undermines another equality strand, creates inequality between the strands or promotes the development of a hierarchy of rights".[16]

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[10] Patrick Harvie MSP, Written submission to the Equal Opportunities Committee, 29 October 2008
[11] Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Equal Opportunities Committee dated 22 September 2008
[12] Crown Office and Procurator Fiscal Service, Written submission to the Equal Opportunities Committee
[13] Association of Chief Police Officers in Scotland, Written submission to the Equal Opportunities Committee
[14] Victim Support Scotland, Written submission to the Equal Opportunities Committee
[15] Care for Scotland, Written submission to the Equal Opportunities Committee
[16] Evangelical Alliance for Scotland, Written submission to the Equal Opportunities Committee

Including gender as an aggravation within the Bill: against

24. During the oral evidence session, women's groups indicated that they had changed their collective position on a gender aggravation since the Working Group consultation in 2004. They were now opposed to including a gender aggravation in the Bill, on the basis that it was not the correct way to address the complexities of violence against women.

25. They highlighted potential difficulties in proving that a crime was committed against someone purely because of their gender, and for women to appear as witnesses to such crimes when, for example, they may not be aware that the behaviour that had been perpetrated against them was domestic abuse. There were also concerns that a gender aggravation could lead to a two-tier system, whereby some cases of violence against women were allegedly motivated by gender hatred and others were not.

26. Louise Johnson from Scottish Women's Aid argued that the wording of the Bill might be inappropriate for a gender aggravation and that "including gender as an aggravation would imply that only some forms of violence against women, are because of their gender", when in fact "all violence against women is due to the endemic misogyny in society". She further reiterated Scottish Women's Aid's support for a domestic abuse aggravation to be contained in future legislation and suggested that the Committee may wish to examine the New Zealand Domestic Violence Act 1996 for details of how such an aggravation might be framed in legislation and how it might work in practice.[17]

27. According to Niki Kandirikirira from Engender, "a gender aggravation would imply that some forms of violence against women, including some crimes of sexual violence against women, are not misogynistic, therefore proof of the misogyny that is inherent in sexual violence against women would be reliant on other forms of evidence".[18] She also highlighted that current statutory provisions were usually used in relation to crimes committed in public, whereas violence against women could occur in both public and private situations.

28. Sandy Brindley from Rape Crisis Scotland raised concerns that including a gender aggravation that was unworkable could give women false hope. She suggested that instead it would be worth considering establishing an offence of incitement to hatred against women in relation to, for example, pornography that was linked to sexual violence.[19] However, the Policy Memorandum on the Bill states that "an offence of incitement to hatred could well risk penalising legitimate freedom of speech and expression. Furthermore, incitement to commit any crime is already an offence under Scots common law, making a new incitement to hatred offence somewhat unnecessary".[20]

29. Niki Kandirikirira from Engender provided background information on other countries which had introduced gender aggravations. In Canada and the nineteen US states where a gender aggravation existed, few gender-based crimes had

[17] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Cols 680 and 686
[18] Scottish Parliament Equal Opportunities Committee, *Official Report*, 4 November 2008, Col 682
[19] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Col 681
[20] Policy Memorandum, paragraph 15

been reported and the offence had been largely reserved for cases in which perpetrators did not know their victims. She found "no evidence that legislation in any of those jurisdictions is making a difference".[21]

30. Some members of the Committee questioned witnesses on whether, without a gender aggravation in the Bill, there would be no obligation to improve recording and monitoring of gender crimes. In response, Niki Kandirikirira from Engender argued that the gender duty itself offered the opportunity to demand good-quality gender disaggregated data on conviction rates and on reporting at all levels.[22] Louise Johnson from Scottish Women's Aid suggested that the Committee could recommend to the Scottish Government that the Office of the Chief Statistician undertake work in that area.[23]

31. During oral evidence on 18 November 2008, Euan Page indicated that the Equality and Human Rights Commission (EHRC) would shortly be commissioning research on criminal justice and other responses to gender-based crime. The research will focus on the various manifestations of gender-based crime, including sexual violence and domestic abuse, and may also stray into the areas of human trafficking, prostitution and pornography as an incitement to violence.[24]

32. In written evidence, the EHRC said that "at this time, a gender aggravation is not the priority in developing more effective criminal justice responses to gender-based crime". It argued that "the range of manifestations of violence against women is so wide and the structures of gender inequality so insidious, that a gender aggravation could be seen as addressing symptoms rather than underlying causes". The EHRC also questioned whether applying a gender aggravation to rape and other crimes of sexual violence "would have the unintended consequence of confusing the issue, by implying that some crimes of sexual violence may not be aggravated by malice and ill-will towards women". It further suggested that "a gender aggravation could imply that the misogyny inherent in crimes of sexual violence against women is in fact contingent and reliant on other evidence".[25]

33. In written evidence, the Scottish Trades Union Congress (STUC)[26] and Unison Scotland[27] also indicated that they were opposed to the inclusion of gender as an aggravation within the Bill, on the basis that it would distract from the main focus of the Bill or may not be the most effective method of tackling violence against women or gender inequalities.

[21] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Col 702
[22] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Col 697
[23] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Col 699
[24] Scottish Parliament Equal Opportunities Committee, *Official Report,* 4 November 2008, Cols 724-725
[25] Equality and Human Rights Commission, Written submission to the Equal Opportunities Committee
[26] Scottish Trades Union Congress, Written submission to the Equal Opportunities Committee
[27] Unison Scotland, Written submission to the Equal Opportunities Committee

Conclusions and recommendations

34. The Committee, in considering whether a gender aggravation should be included within the Offences (Aggravation by Prejudice) (Scotland) Bill, has paid particular attention to the views of women's groups, who work closely with women affected by violence.

35. Whilst recognising that violence against women is a very serious issue that must be addressed, on balance, the Committee supports the views of women's groups that including a gender aggravation within this Bill would not be the most effective means of addressing the range of violence against women. The Committee was not convinced by evidence that a "hierarchy of rights" could be created if legislation does not apply equally to all six equality strands.

36. The Committee therefore does not consider that the Bill should be amended to include a gender aggravation.

37. However, the Committee does welcome the positive suggestions made by witnesses for tackling the complex issue of violence against women and recommends to the Justice Committee that it consider the following issues within the context of its scrutiny of the forthcoming Criminal Justice and Licensing (Scotland) Bill:

- **how a domestic abuse aggravation might be framed in legislation and how it could work in practice, by examining the New Zealand Domestic Violence Act 1996;**
- **the merits of introducing an incitement to hatred offence against women in relation to, for example, how pornography might be linked to sexual violence;**
- **whether to recommend to the Scottish Government that the chief statistician undertake work on gender crimes data; and**
- **using EHRC-commissioned research and any other relevant research on gender-based crime.**

AGE

Context

38. The following paragraphs provide background information on the Committee's consideration of whether the Bill should contain an aggravation on age.

Statistics on age crime in Scotland

39. The 2006 Scottish Crime and Victimisation Survey showed that those aged 16-24 (both men and women) were most likely to become victims of personal crime. Twenty one per cent of men and 19% of women in this age group had been the victim of a personal crime. The risks for this age group were significantly higher than the risks for 25 to 44 year olds, where 9% of men and 6% of women had been victims of personal crime.

40. The survey also showed that 18% of 16 to 24 year old men had been the victim of a violent crime in 2005/06, compared with 6% of 25 to 44 year old men. Those aged 60 or over were the least likely to have been the victim of either personal or household crime.[28]

Working Group on Hate Crime conclusions

41. The Working Group concluded that age was a very complex issue in relation to crime:

> "There needs to be more consideration of the extent of crime motivated by malice and ill-will against people of particular ages because of their age, in consultation with organisations working in the age field, before extending hate crime legislation to cover age".[29]

Offences (Aggravation by Prejudice) (Scotland) Bill

42. The Policy Memorandum on the Bill referred to the Working Group's conclusions in relation to age:

> "While it might seem obvious that someone who is elderly, vulnerable and less physically able to defend themselves is likely to be more susceptible to crime, evidence suggests that young men between the ages of 16 and 24 are in fact most likely to be the victims of crime, in particular violent crime. Two of the three age organisations which responded to the Working Group's consultation exercise were opposed to an age based aggravation".[30]

43. As explained in paragraph 17 of this report, Patrick Harvie MSP stated in his written submission that he would be "remaining neutral on the inclusion of other categories".[31]

44. The Cabinet Secretary for Justice's written evidence reflected the findings of the Working Group and the conclusions in the Policy Memorandum:

> "The Working Group on Hate Crime also concluded that age (like gender) is a much more complex issue in relation to crime, particularly since 16-24 year olds are most likely to be both the victims *and* perpetrators of violent crime. Furthermore, a number of the age organisations which responded to the Working Group's consultation were opposed to an age based aggravation. In light of this, we are not convinced that such an aggravation is necessary."[32]

45. The COPFS provided a written explanation as to how crimes against elderly people are presently handled: "In relation to the elderly, in prosecutions where it is considered that they have been deliberately targeted, this fact will be indicated to

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[28] Scottish Government. (2006) *Scottish Crime and Victimisation Survey: Main Findings.* Scottish Government. Available at: http://www.scotland.gov.uk/Resource/Doc/200037/0053443.pdf [Accessed 3 December 2008]

[29] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.

[30] Policy Memorandum, paragraph 16

[31] Patrick Harvie MSP, Written submission to the Equal Opportunities Committee

[32] Scottish Government. Letter from Cabinet Secretary for Justice to the Convener of the Equal Opportunities Committee dated 22 September 2008

the court in the narration of facts to the court, which is of course, considered during the sentence".[33]

Evidence gathered by the Committee

Including age as an aggravation within the Bill: in favour

46. As with the gender aggravation, ACPOS, Victim Support Scotland and the Evangelical Alliance Scotland were in favour of including age as an aggravation within the Bill, on the grounds that all six equality strands should be treated equally.

47. In its written submission, the Evangelical Alliance Scotland (EAS) was concerned that "selecting specific groups for greater protection potentially undermines another equality strand, creates inequality between the strands or promotes the development of a hierarchy of rights".[34] However, during oral evidence, Alistair Stevenson from the EAS appeared less convinced: "we have the opportunity now to add the other two equalities strands to the bill, but I suppose it is a question of weighing up whether this is the best opportunity to do that".[35]

48. In written evidence, Care for Scotland (CfS) argued that "it is imperative that the Scottish Parliament introduces legislation which applies equally to all equality strands and does not create the perception of a hierarchy of rights".[36] In oral evidence, Dr Gordon Macdonald from CfS said that "I have come to the view that that concern [creating a hierarchy of rights] can probably be addressed adequately in implementation of the eventual legislation, rather than necessarily by applying the same legislation to all six equality strands". He also highlighted the effects of crime on elderly people: "elderly people might be the least likely to be the victims of crime, but the effect on them could be significant; a crime could lead to an older person dying when they would not have if they were of a different age".[37]

Including age as an aggravation within the Bill: against

49. Four organisations - including two groups representing older people - who responded to the call for written evidence, were opposed to the inclusion of age as an aggravation within the Bill. Some argued that it would detract from the main aims of the Bill; others felt that an age aggravation was inappropriate, as crimes against older people were more often motivated by their perceived vulnerability rather than malice or ill-will towards older people as a social group.

50. As with a gender aggravation, the STUC suggested that including age within the scope of the Bill might "… divert from the focus which is long overdue on the consequences of harassment and criminal offences against LGBT and disabled people in our society".[38] Unison Scotland argued that this would dilute and detract from the focus of the legislation and that groups covered by the Bill were at present more vulnerable. It suggested that "physical attacks against older people

[33] Crown Office and Procurator Fiscal Service, Written submission to the Equal Opportunities Committee
[34] Evangelical Alliance for Scotland, Written submission to the Equal Opportunities Committee
[35] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 716
[36] Care for Scotland, Written submission to the Equal Opportunities Committee
[37] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 720
[38] Scottish Trades Union Congress, Written submission to the Equal Opportunities Committee

in Scotland are very rare but do generate an enormous amount of media publicity, precisely because they are so rare and therefore shocking. And this media spotlight has the effect of frightening older people unnecessarily."[39]

51. The EHRC argued in written evidence that "while there may be some value in looking at an age aggravation where there is evidence of persistent problems of, for example, verbal abuse in public places, it may be less useful for dealing with persistent abuse in a domestic or care setting, or fraudulent or high-pressure door-to-door selling".[40]

52. On the issue of vulnerability, Age Concern Scotland claimed that, "whilst it is clear that older people are often targeted for crime because of perceptions about their vulnerability, there is little or no evidence that suggests people are targeted for crime because of their age alone".[41] Similarly, Help the Aged in Scotland did not believe that an aggravation in respect of age should be included in the Bill:

> "Although older people are often specifically targeted by perpetrators of crime, we believe … such crimes are most often directed towards older people because of their perceived vulnerability". Crimes often targeted at older people, such as bogus calling, distraction theft and mugging, tend to be motivated by the perceived gullibility, vulnerability or weakness of older people, rather than a particular hatred of them as a social group".[42]

53. During the oral evidence session, Dr Gordon Macdonald from CfS argued that "if people are particularly vulnerable and are targeted for whatever reason because of their vulnerability, that [a vulnerability aggravation] should be an aggravation that the courts take into consideration".[43] Euan Page from the EHRC highlighted that the courts already have common-law provisions to deal with crimes when a perpetrator has targeted a victim because of a real or perceived vulnerability.[44]

54. During oral evidence, Nick Waugh from Help the Aged in Scotland quoted paragraph 3.5 from the Working Group report, which highlighted the distinction to be made between vulnerability and malice or ill-will:

> "it should be an essential element of a hate crime to prove that a crime has been motivated by malice and ill-will ... because of a presumed membership of a social group rather than because of their vulnerability. For example, if someone is attacked, but because of their disability is unable to run away, the crime occurred because the individual was vulnerable and this would not constitute a hate crime."[45]

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[39] Unison Scotland, Written submission to the Equal Opportunities Committee
[40] Equality and Human Rights Commission, Written submission to the Equal Opportunities Committee
[41] Age Concern Scotland, Written submission to the Equal Opportunities Committee
[42] Help the Aged in Scotland, Written submission to the Equal Opportunities Committee
[43] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Cols 711-712
[44] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Cols 712-713
[45] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 718

55. Some organisations suggested alternative measures that could be more effective than an age aggravation at tackling crimes against older people. During oral evidence, Nick Waugh from Help the Aged in Scotland argued that including an aggravation related to age within the Bill would probably not address many of the crimes older people face, such as elder abuse, nor would it make a difference to how safe they feel. He was minded to pursue other measures instead, such as educating the elderly, "in that many old people probably do not realise that they should no longer be subjected to pressure selling".[46]

56. In written evidence, Age Concern Scotland agreed with the Working Group's suggestion that extending hate crime legislation to cover age required further consideration with organisations in the age field. However, it also suggested that better enforcement of current legislation would be of more benefit to older people than a statutory age aggravation:

> "Of the many crimes that older people can be victims of it is the largely hidden crime of elder abuse that we believe needs to be tackled more effectively within the current framework."

57. The EHRC stated that "to take elder abuse, one option may be to look at what changes could be introduced to the law to better identify and punish appropriately individuals who abuse older people, people to whom they often have family or caring obligations".[47]

58. Another alternative suggested was the need for more intergenerational work. Euan Page from the EHRC highlighted "the appalling gulf in this country between young people and older people; we have two sets of people who just do not interact". He stated that the EHRC was considering how to facilitate intergenerational dialogue "so that people can get over some of the deeply ingrained misconceptions on both sides".[48]

59. While the majority of evidence received within the context of considering an age aggravation focused on older people, the Committee was also keen to hear from organisations representing children and young people on this issue. While the Scottish Commissioner for Children and Young People and the Scottish Youth Parliament were unable to provide a response, Barnardo's Scotland stated in a written response that it was opposed to adding age as an aggravation within the Bill:

> "We appreciate this is complex and not totally clear cut but, on balance, our view is that [an age aggravation] would be very difficult to specifically prove in line with the intended spirit of the Bill. Whilst children and young people are most definitely subjected to abuse or acts of violence; and may face or be involved in other forms of physical attack or punishment with other children/young people and at times with adults; and are more likely to be victims of personal crime compared to older people – this is not in of itself evidence that such acts or offences are motivated by prejudice because of the

[46] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 715
[47] Equality and Human Rights Commission, Written submission to the Equal Opportunities Committee
[48] Scottish Parliament Equal Opportunities Committee, *Official Report,* 18 November 2008, Col 722

young person's age. Young People may be particularly vulnerable at certain times in their lives, but being vulnerable and someone abusing a position of trust is not in itself evidence of the said person's motivation".[49]

CONCLUSIONS AND RECOMMENDATIONS

60. In considering whether to recommend that a statutory age aggravation be included in the Bill, the Committee paid close attention to the views of groups that work directly with older people. These groups were not in favour of the Bill being amended. The arguments in favour of an aggravation were based on the principle that all six equality strands should be treated equally in legislation. The Committee is not convinced of the strength of this argument.

61. Whilst recognising that crimes against older or younger people can have a very serious impact, the Committee accepts the views of the majority of witnesses that such crimes may not be motivated by the victim's age. On this basis, the Committee does not consider that the Bill should be amended to include an age aggravation.

62. The Committee does, however, welcome the suggestions made by the witnesses for tackling crimes against older people. In particular, the Committee recognises the importance of intergenerational work aimed at combating misconceptions amongst older and younger people and looks forward to taking evidence from the EHRC on its research into this issue.

PROVISION TO INTRODUCE A STATUTORY INSTRUMENT

63. The Working Group, in Recommendation 1 of its report, stated that "the legislation should be framed in such a way as to allow protection to be extended to other groups by statutory instrument over time if appropriate evidence emerges that such groups are subject to a significant level of hate crime".[50] This recommendation has not been reflected in the Bill.

64. When asked whether they had any views on including a provision in the Bill that would allow protection to be extended to other groups at a later date by statutory instrument, representatives from Engender, Scottish Women's Aid and Rape Crisis Scotland said that having such a provision would be useful to allow a discussion on the most workable options.[51]

65. Alan Cowan from UNISON Scotland was firmly in favour of including provision for a statutory instrument in the Bill, on the grounds that "solutions do not always keep pace with the legislative framework; this would take account of the realities, and would allow the bill to be passed".[52] Fife Men Project, in its written submission, agreed that there should be scope to introduce a statutory instrument at a later date.[53]

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[49] Barnardo's Scotland, Written submission to the Equal Opportunities Committee
[50] Scottish Executive. (2004) *Working Group on Hate Crime Report*. Scottish Government.
[51] Scottish Parliament Equal Opportunities Committee, *Official Report*, 4 November 2008, Col 693
[52] Scottish Parliament Equal Opportunities Committee, *Official Report,* 18 November 2008, Col 725
[53] Fife Men Project, Written submission to the Equal Opportunities Committee

66. In written evidence, the Evangelical Alliance Scotland stated that "if the Scottish Parliament does proceed to restrict the bill to sexual orientation, transgender identity or disability we would agree with the Working Group's recommendation 1".[54] However, during oral evidence, Alistair Stevenson from the Evangelical Alliance Scotland indicated that "listening to the arguments against from around the table, my thoughts on the subject are mixed. The fundamental issue, however, is parliamentary oversight".[55]

67. In oral evidence, Dr Gordon Macdonald from CfS argued that "providing for a statutory instrument might be a pragmatic way forward if evidence emerged but, in principle it is not, as a change in the law should come before Parliament".[56] Alan Cowan from UNISON Scotland argued that the converse was also true: "waiting until we have enough evidence because enough crimes have taken place should not prevent us from legislating to protect people who are targeted as victims of crime".[57]

68. Euan Page confirmed that the EHRC did not have a position on the matter, although he personally shared Dr Macdonald's concerns about the removal of parliamentary oversight.[58] Nick Waugh from Help the Aged in Scotland stated that "we will probably sit on the fence on that one, although I am personally slightly minded towards the Parliament having ultimate oversight".[59]

69. The Committee recommends that the Justice Committee considers amending the Bill to include a delegated power provision that would allow protection to be extended to other groups by statutory instrument if evidence emerged that such groups would benefit from the measures being proposed in the Bill. The Committee believes that there should be an element of parliamentary scrutiny and considers that the best way to achieve this would be to specify that any statutory instrument introduced under this delegated power must be subject to affirmative procedure, which would allow committee examination and parliamentary approval.

Other issues

70. The Committee also wishes to highlight to the Justice Committee the following practical implications of including additional aggravations in the Bill, which have been raised in written evidence.

71. COPFS explained that, on a practical level, the extension of the Bill to include aggravations in respect of gender and age could have significant implications for its information technology systems, as the current system is only capable of recording a certain number of aggravations against each charge.[60]

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[54] Evangelical Alliance Scotland, Written submission to the Equal Opportunities Committee
[55] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 725
[56] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 720
[57] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 721
[58] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 724
[59] Scottish Parliament Equal Opportunities Committee, *Official Report*, 18 November 2008, Col 725
[60] Crown Office and Procurator Fiscal Service, Written submission to the Equal Opportunities Committee

72. The Scottish Police Federation also raised concerns about the practical implications of the Bill: "Our experience has shown that the police time and resource demanded as a consequence of dealing with the inevitable measurement tools such legislation demands, to be far greater than estimates laid down in previous similar consultations".[61]

[61] Scottish Police Federation, Written submission to the Equal Opportunities Committee

APPENDIX

EXTRACTS FROM THE MINUTES OF THE EQUAL OPPORTUNITIES COMMITTEE

11th Meeting, 2008 (Session 3), Tuesday 9 September 2008

Decision on taking business in private: The Committee agreed to take items 3, 4 and 5 in private.

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee agreed its approach to the scrutiny of the Bill at Stage 1.

15th Meeting, 2008 (Session 3), Tuesday 4 November 2008

Decision on taking business in private: The Committee agreed to consider a draft report to the Justice Committee on the Offences (Aggravation by Prejudice) (Scotland) Bill in private at future meetings.

Decision on taking business in private: The Committee agreed to consider a work programme in private at its next meeting.

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Niki Kandirikirira, Executive Director, Engender;
Sandy Brindley, National Co-ordinator, Rape Crisis Scotland;
Louise Johnson, National Worker - Legal Issues, Scottish Women's Aid.

16th Meeting, 2008 (Session 3), Tuesday 18 November 2008

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1, in a roundtable discussion, from—

Dr Gordon Macdonald, Parliamentary Officer, CARE for Scotland;
Euan Page, Parliamentary and Government Affairs Manager, Equality and Human Rights Commission (EHRC);
Alistair Stevenson, Public Policy Officer, the Evangelical Alliance Scotland;
Nick Waugh, Policy Officer, Help the Aged in Scotland;
Alan Cowan, LBGT Committee Member, UNISON Scotland.

17th Meeting, 2008 (Session 3), Tuesday 2 December 2008

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee agreed to defer its consideration of a draft report to the Justice Committee to its next meeting.

18th Meeting, 2008 (Session 3), Tuesday 16 December 2008

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The Committee considered a draft report and agreed various changes. The Committee decided to agree its final report by correspondence.

Subordinate Legislation Committee Report on the Offences (Aggravation by Prejudice) (Scotland) Bill at Stage 1

The Committee reports to the lead committee as follows—

Introduction

1. At its meetings on 3 and 17 June 2008, the Subordinate Legislation Committee considered the delegated powers provisions in the Offences (Aggravation by Prejudice) Scotland Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

2. Patrick Harvie MSP, the Member in charge of the Bill, provided the Parliament with a memorandum on the delegated powers provisions in the Bill[1].

3. The Committee's correspondence with the Member in charge is reproduced in the Appendix.

Delegated Powers Provisions

Section 3: Commencement and short title

4. At its meeting on 3 June, the Committee indicated that it was content with the delegated powers in the Bill, however it sought clarification on two points from the Member in charge of the Bill. The delegated powers are limited to the commencement provision.

5. Firstly, the Committee noted that, under section 3(1) of the Bill, the Act comes into force on a "day" appointed by Scottish Ministers by order. It asked the Member in charge whether there was any intention or prospect of sections 1 and 2 of the Bill requiring to be commenced on different days; and whether reliance was being placed on schedule 1, paragraph 3(c) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379).

6. The response from the Member in charge has confirmed that the Scottish Government has no intention of commencing sections 1 and 2 of the Bill on different days. The Committee welcomes this clarification.

7. Secondly, the Committee considered that it was important that persons potentially committing offences should have sufficient notice of the commencement date of the provisions of the Act. It noted that the Bill does not provide for any minimum number of days between the date of making the commencement order, and coming into force of the sections. The Committee asked the Member in charge to confirm to the effect that, although section 3(1) is drafted in the usual terms for a commencement order provision, and does not specify any minimum period between the date of the making of an order and

[1] Delegated Powers Memorandum

coming into force, the Scottish Government will observe a suitable minimum period, as and when the commencement order is made.

8. In his response, Patrick Harvie MSP has confirmed that the Scottish Government have advised that, in line with standard practice, it does not intend to commence the provisions any earlier than 2 months after Royal Assent. The Committee welcomes this confirmation.

9. **The Committee is satisfied with the delegated powers in this Bill, and draws the attention of the lead committee to its correspondence with the Member in charge for information.**

APPENDIX

Correspondence between the Subordinate Legislation Committee and Patrick Harvie MSP

Letter from the Subordinate Legislation Committee to Patrick Harvie MSP

The Committee asks if there is an intention or prospect of sections 1 and 2 requiring to be commenced on different days, whether reliance is being placed on The Scotland Act 1998 (Transitory and Transitional provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, Schedule 1, para 3(c).

The Committee also notes that in line with normal drafting practice, the Bill does not specify how many days are required between making the commencement order/s and the appointed day/s, and asks whether a suitable minimum period will be left, for the purposes of allowing sufficient notice of commencement to those potentially affected by the Bill.

Response from Patrick Harvie MSP

Thank you for your letter dated 4 June 2008. Scottish Government officials have given me assistance in relation to the questions raised by the committee.

They advise that the Scottish Government has no intention of commencing the provisions on different days. Therefore, no reliance is placed on the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, Schedule 1, paragraph 3(c).

They advise that, in line with standard practice, the Scottish Government does not intend to commence the provisions any earlier than 2 months after Royal Assent.

I trust that this answers the questions raised by the committee.

ANNEXE B: FINANCE COMMITTEE CONSIDERATION OF THE FINANCIAL MEMORANDUM

Finance Committee
Convener: Andrew Welsh MSP

Bill Aitken MSP
Convener, Justice Committee
Via email

Room T3.60
The Scottish Parliament
EDINBURGH
EH99 1SP

Direct Tel: (0131) 348 5451
(RNID Typetalk calls welcome)
Fax: (0131) 348 5252
(Central) Textphone: (0131) 348 5415
finance.committee@scottish.parliament.uk

25 November 2008

Dear Bill

Offences (Aggravation by Prejudice) (Scotland) Bill – Financial Memorandum

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 30 September 2008, the Committee agreed to adopt level one scrutiny in relation to the Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received two submissions, from the Association of Chief Police Officers in Scotland and the Scottish Prison Service. I would draw your Committee's attention to the comments made by the SPS.

If you have any questions about the Committee's consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: allan.campbell@scottish.parliament.uk.

Yours sincerely

Andrew Welsh MSP
Convener

Finance Committee

Scrutiny of Financial Memorandum – Offences (Aggravation by Prejudice) (Scotland) Bill

Submissions received

SUBMISSION FROM ACPOS

I refer to your correspondence dated 22 October 2008 in connection with the above subject, which has been considered by the Diversity and Finance Management Business Areas, and can advise that members are content that the response reflects their views.

John Pow
Interim General Secretary

SUBMISSION FROM THE SCOTTISH PRISON SERVICE

QUESTIONNAIRE

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Offences (Aggravation by Prejudice) (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee's scrutiny.

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

   Yes.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

   Yes.

3. Did you have sufficient time to contribute to the consultation exercise?

   Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

   The Financial Memorandum correctly states that the overall impact on the prison population is likely to be very slight, but that SPS estimates that the recurring annual cost per prisoner place, if additional capacity were required, is £40,000 in addition to the capital cost of accommodation. However, the unprecedented high level of the prison population means that any additional costs incurred as a result of the impact of the proposals set out in this Bill could not be met within SPS' existing budgets and would require the allocation of additional funding.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

   No. See 4 above.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

N/A

Mike Ewart
Chief Executive

ANNEXE C: EXTRACTS FROM THE MINUTES OF THE JUSTICE COMMITTEE

29th Meeting, 2008 (Session 3), Tuesday 25 November 2008

Decision on taking business in private: The Committee agreed to take item 4 in private. The Committee also agreed to take future consideration of draft reports on the Sexual Offences (Scotland) Bill in private. Finally, the Committee agreed to take consideration of written evidence submitted in response to the call for evidence and its approach to oral evidence on the Offences (Aggravation by Prejudice) (Scotland) Bill in private at its next meeting.

30th Meeting, 2008 (Session 3), Tuesday 2 December 2008

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The committee agreed to accept all written evidence received in response to the call for evidence and also agreed its approach to oral evidence on the bill at stage 1, including a background briefing from the bill team in private at a future meeting.

31st Meeting, 2008 (Session 3), Tuesday 16 December 2008

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The committee agreed to accept written evidence received after the deadline for submission of evidence.

1st Meeting, 2009 (Session 3), Tuesday 6 January 2009

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The Committee received a background briefing on the Bill.

2nd Meeting, 2009 (Session 3), Tuesday 13 January 2009

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Tim Hopkins, Policy and Legislation Officer, Equality Network;
James Morton, Project Coordinator, Scottish Transgender Alliance;
Christina Stokes, Communications Officer, Stonewall Scotland;
Norman Dunning, Chief Executive, ENABLE Scotland;
Faye Gatenby, Campaigns, Parliamentary and Policy Manager, Capability Scotland;
Charlie McMillan, Director of Research, Influence and Change, SAMH.

3rd Meeting, 2009 (Session 3), Tuesday 20 January 2009

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Euan Page, Parliamentary and Government Affairs Manager, The Equality and Human Rights Commission;
Superintendent David Stewart, Project Manager of ACPOS Diversity Strategy Project, and Inspector Dean Pennington, Secretary of ACPOS Diversity Strategy Project, Association of Chief Police Officers in Scotland;
Alan McCreadie, Deputy Director Law Reform, Raymond McMenamin, Criminal Law Committee, and David Cabrelli, Equalities Law Sub-Committee, The Law Society of Scotland.

4th Meeting, 2009 (Session 3), Tuesday 27 January 2009

Decision on taking business in private: The Committee agreed to consider an options paper and draft report on the Offences (Aggravation by Prejudice) (Scotland) Bill in private at future meetings.

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Andrew McIntyre, Head of Victims and Diversity Team, and Linda Cockburn, Principal Procurator Fiscal Depute, Victims and Diversity Team, Policy Division, Crown Office and Procurator Fiscal Service;
Patrick Harvie MSP, Sara Stewart, Criminal Law and Licensing Division, Sentencing Policy Unit, Jetinder Shergill, Solicitor, Scottish Government Legal Directorate, and Marie-Claire McCartney, Trainee Solicitor, Scottish Government Legal Directorate, Scottish Government.

5th Meeting, 2009 (Session 3), Tuesday 10 February 2009

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence sessions, in order to inform the drafting of its report.

6th Meeting, 2009 (Session 3), Tuesday 24 February 2009

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

7th Meeting, 2009 (Session 3), Tuesday 3 March 2009

Offences (Aggravation by Prejudice) (Scotland) Bill (in private): The Committee agreed its Stage 1 report. In so doing, various changes were agreed to.

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

10:02

The Convener: Today is the first formal evidence-taking session on the Offences (Aggravation by Prejudice) (Scotland) Bill. On the first panel of witnesses we have Tim Hopkins, the policy and legislation officer for the Equality Network, James Morton, the project co-ordinator for the Scottish Transgender Alliance, and Christina Stokes, the communications officer for Stonewall Scotland. I thank everyone for their written submissions. Having read them, we can go straight to the questions.

Bill Butler (Glasgow Anniesland) (Lab): The committee is aware that, under the common law in Scotland, it is already possible for courts to take the motivations of an offender into account when determining sentence. Is there any evidence to suggest that the common law is inadequate in that regard? If so, how will the bill significantly improve the current situation?

Tim Hopkins (Equality Network): It is theoretically possible to deal with the kind of aggravations that we are concerned with under the common law, but that is not happening. Nobody has reported to us that an offence against them has been dealt with in that way.

A number of things need to change. Measures relating to racial and religious aggravation that were put in place through legislation include: a system that ensures that the police take the offence seriously, deal with it as a hate crime and report it in the standard police report as a hate crime; guidance for the police from the Lord Advocate; a system to ensure that, when the complaint or indictment is prepared, it clearly specifies the aggravation; the rule that the court must take into account the element of aggravation when passing sentence and must state publicly what the result of the aggravation is; and a system inside the Crown Office and Procurator Fiscal Service that regulates how procurators fiscal deal with those aggravated offences—for example, in relation to racial and religious aggravation, the guidance is that the aggravation element should not usually be bargained away.

At the moment, none of those things is in place for homophobic, transphobic and disability-related hate crimes. There might be other ways of putting arrangements in place for some of those crimes—the Lord Advocate could issue guidance to the police, for example—but legislation is needed for some aspects. It is needed to require the court to take the aggravation into account and state the

result. Therefore, we think that the bill is the simplest way to get the whole package.

Another advantage of the bill, of course, is that the system that it will put in place to deal with homophobic, transphobic or disability-related hate crimes, which are the areas in which the evidence shows that there is a problem, will be identical to that which already exists to deal with racist and religious aggravations. There is great benefit in having consistency in those different areas of hate crime.

Bill Butler: That is clear. Thank you.

Does James Morton want to add anything?

James Morton (Transgender Alliance): No, I have nothing to add.

Bill Butler: What about Christina Stokes?

Christina Stokes (Stonewall Scotland): The common law cannot send a clear message that such crimes are unacceptable in a modern Scotland—I suspect that that matter will be addressed later. The statutory aggravations will address the motivation behind such crimes, which the common law cannot do. That said, I completely agree with Tim Hopkins.

Bill Butler: So the bill will send an educational message to the public.

Christina Stokes: Yes. However, we also know that the underreporting of such crimes is a huge problem. Many gay people think that being subject to such offences is simply part of being gay and is nothing serious, but I think that we all agree that such crimes can be horrific and that they need to be dealt with seriously. If the bill sends out a clear legal message—and other messages are sent out thereafter in judgments and so on—that such crimes will be taken seriously, people will realise that they will be taken seriously and will be encouraged to come forward. They will realise that the substantial stress and hassle of reporting a crime, which obviously prolong the agony to a certain extent, are worth it.

Bill Butler: That is clear. Thank you.

Paul Martin (Glasgow Springburn) (Lab): Good morning, colleagues. The bill does not make provision for a mandatory sentence to be attached where an aggravation has been proven. What kind of sentencing tariffs should be available in order to send out the message that the panel wants to send out?

Tim Hopkins: The Equality Network is quite happy with how the bill is drafted in that respect. The underlying offence could be any one of a broad range of offences, from quite minor offences that would be dealt with by a community sentence up to murder. Specifying a tariff for the change that the aggravation would make to the sentence would be difficult.

It is right that the sheriff or the judge should have the discretion to decide what the final sentence should be. In murder cases, we would certainly expect the judge to say that they were increasing the number of minimum years that the person had to spend in prison because of the aggravation. That has happened in England. For more minor offences, we would be keen on appropriate community sentences.

Last year, the deputy convener of the committee lodged a written parliamentary question about crimes with a religious aggravation. In his reply, the Minister for Community Safety said that the Government is considering rehabilitation programmes for offenders who commit such crimes. We are certainly interested in appropriate community sentences that would help to address the underlying prejudice that causes a person to commit such a crime. That approach has already been tried out in England, and it is being considered in relation to racist crime in parts in Scotland. We like the idea of flexibility.

The question whether the proposed sentencing council would recommend how the aggravation might affect the sentence depends on how the sentencing council would work and the detail of its recommendations. In England, the Sentencing Guidelines Council does not specify how much a sentence is changed as a result of any aggravating or mitigating factor, but the guidelines specify a central point for the sentence, and a range. They then list the aggravating and mitigating factors that might apply—hate crimes are on that list—and say that those factors will shift the sentence within a range, rather than specifying, for example, an extra year for an aggravating factor in a serious crime.

Paul Martin: Do you accept that it could be viewed as unhelpful for there not to be any specifics with regard to the type of offence? You talked about community sentences. Are there examples of those in relation to these crimes that you would present as best practice in challenging such behaviour?

Tim Hopkins: It is still early days. I am aware of one particular case down south, in Brighton, in which someone committed a relatively minor homophobic attack. Their community sentence for that crime involved working for one of the lesbian, gay, bisexual and transgender community organisations in Brighton.

However, that kind of thing has to be done with care: one would not want to send a violent homophobic attacker into an organisation that provides support for vulnerable LGBT people, any more than one would do the same with a racist

attacker. However, such community work is the kind of thing that we have in mind. It will take time to develop, and it will require partnership between the community justice people and voluntary organisations in different areas of Scotland.

Paul Martin: Christina Stokes made the point that we want to send out a message. You say that particular proposals are still being developed, so what are we equipped with to send that message? The legislation will be passed with batteries not included—we have something that we can use, but we are not sure how we will implement it to send out a clear message about behaviour because we do not have anything that will deal with that behaviour.

Tim Hopkins: There is more than one way to send a message. If the crime is serious, it is likely that the penalty will be higher because of aggravation. A good example with regard to sending messages is the murder that took place a few years ago in England on Clapham common, in which a gay man was the subject of a homophobic attacked and killed. Statutory aggravation was already in place in England and the charge was one of homophobic murder. The judge described the offence as one of "homophobic thuggery", passed a minimum sentence of 28 years and said that he had increased the sentence because of the homophobic element.

That sentence was widely reported in the news and in editorial pages in the gay press; it was one of the first well-covered cases in England after statutory aggravation was brought in. People commented that it was unique and new: for the first time, a judge had recognised the homophobic nature of an attack, which had an effect on the sentence. I have a file of reports from the English gay press on a range of offences of greater or lesser severity in which judges have said, "This is a homophobic attack and I have taken that into account."

That is the most important way to send the message. I am certainly not saying that if the sentence is custodial or if a fine is imposed, the aggravation should not be taken into account from the start: it should. I am saying that much positive work on rehabilitation could be done through community sentences, and it will take time to develop the best ways of doing that.

The Convener: Do Christina Stokes and James Morton have anything to add to that? Do you adopt those arguments?

James Morton: I agree with Tim Hopkins. This is about maintaining the judge's flexibility to set the appropriate sentence. The community sentencing options do not all need to be in place from the start—they can be developed in time, and aggravation can still be taken into account for custodial sentences. I do not view it as something that is not yet ready for adoption—the approach is already successful in England, and a similar approach is being taken to race and religious hate crimes. All the possible community sentencing options were not in place when the legislation on race and religious hate crimes was implemented—they are still in development—but the approach still has an effect in terms of sending a message.

Christina Stokes: I largely agree with my colleagues—in fact, I entirely agree. We need to bear in mind the fact that the sentence is not the only way to send a message. A judge's very firm remarks on passing a sentence will also achieve that. I would like to leave sheriffs that flexibility—they are the experts, after all.

Angela Constance (Livingston) (SNP): In their written evidence, the witnesses provided details of the extent of hate crime in Scotland that is motivated by prejudice based on sexual orientation and transgender identity. Will the bill have a significant impact in reducing the level of homophobic and transphobic hate crime and, if so, how? I wonder whether, as she touched on the issue earlier, Ms Stokes could respond first.

10:15

Christina Stokes: I have to say that, although we have evidence, it is not of brilliant quality, partly because the justice services have no consistent means of recording hate crimes. The first thing that the bill would do would be to provide that means, which would allow us to examine the level of such crimes year on year and, indeed, to track trends. That is very difficult at the moment.

We will have to see whether the bill will reduce the incidence of these crimes, because the statistical evidence varies hugely from area to area. However, if sheriffs do not make it clear that attacks on people because of their sexual orientation or gender identity are wrong and unacceptable and will be taken seriously, there will be no reduction.

James Morton: The bill will be particularly important in dealing with transgender hate crimes, because at the moment there is a lack of public awareness of transgender people's rights simply as human beings. Indeed, the public tend to see transgender people as less than human, and sending the message that hate crimes against people because of their transgender identity are unacceptable would be a major step forward in raising public awareness. After all, not being able to tell someone's gender clearly does not give anyone the right to attack them in the street. The bill is important because, without it, people will continue to think that transgender people do not

count in equality terms. The point has certainly been overlooked in the past.

Tim Hopkins: I agree with my colleagues. As Christina Stokes has pointed out, one of the bill's first effects will be to encourage more people to report crimes. It is likely that in the first couple of years after the bill is passed—if, of course, it is passed—we will see the same thing that happened when the religious aggravation element was introduced, which is that the number of aggravated crimes that are reported to procurators fiscal and prosecuted will go up as people get more confident about reporting them to the police.

Comparing the existing statistics for the proportion of LGBT people who have said that they have been, for example, physically attacked with the number of those incidents that have been reported to the police clearly shows that there has been a lot of underreporting. As I say, I expect the bill's initial effect to be a rise in the number of cases reported.

I think that for a number of reasons the bill will in the long term reduce the amount of such crime. As a result of increased reporting to the police, detection will improve, because some offenders attack more than one person. Moreover, as with racist crime, more publicity will increase the stigma attached to committing such crime, which will, I hope, act as a deterrent.

However, the broader issue around reducing discrimination, prejudice and hate crime in Scotland on any of these grounds is that we need to improve attitudes towards minorities and reduce prejudice in general. The bill is one part of the action that needs to be taken in that respect. For example, we are very pleased that, late last year, the Scottish Government issued its response to the report published earlier in the year on ways of reducing prejudice against LGBT people. The whole swathe of work recommended in that report will eventually have more of an effect on attitudes, prejudice and hate crime than the bill will on its own. After all, the bill is more about getting justice for individuals than it is about sending a message to the wider public about reducing prejudice.

Angela Constance: Mr Hopkins has anticipated my next question. Can Mr Morton and Ms Stokes give us their views on the other measures that are required to reduce hate crime in Scotland?

Christina Stokes: Tim Hopkins alluded to the LGBT hearts and minds agenda group report, which is a tremendous piece of work that took an awful lot of time to put together and sets out various ways of addressing certain matters in different areas of life. The short answer to the question is that there must be leadership. We must make it very clear that, in every area of life, homophobia and transphobia are unacceptable and that everyone has rights and deserves to be treated decently.

James Morton: I strongly agree with the points that Christina Stokes has made. Dealing with transgender equality issues and reducing discrimination and harassment against transgender people are primarily a matter of taking a lead in educating the public about transgender people and their existence and the fact that they are not people to be feared or to be prejudiced against—they are just trying to get on with their lives. I am really pleased to see the Scottish Government leading on that.

Stuart McMillan (West of Scotland) (SNP): The reporting of crimes has been touched on. I am keen to get more information about other reasons why people do not report crimes.

Christina Stokes: You should bear in mind how recently homosexuality was legalised in Scotland. I was born in 1981, when it had been legal for only a year. People grew up not trusting the police, and they had good reason not to. It takes a lot of time to re-establish trust, and we know that all police forces are working hard to deal with that. However, we start off on the back foot. Given that it was not so long ago that being gay was illegal, if someone is attacked for being gay, their instinct is not going to be to run to the justice services.

People have to consider whether reporting a crime is worth it. Someone might choose to ignore constant, low-level abuse, such as being spat at in the street or having verbal abuse hurled at them as they walk by, or they might report it. If they ignore it, it will soon go away; if they report the matter, it will go on for a lot longer. People need to be certain that if they report an incident it will be taken seriously and addressed properly. There must be a point to reporting such incidents; otherwise, people are sacrificing their time and making a short incident last much longer. People need to believe that if they report an incident, it will be taken seriously.

Tim Hopkins: We have conducted a number of hate crime surveys among LGBT people in the Equality Network, and one of our questions was why people do not report incidents to the police. Christina Stokes is absolutely right: a lot of people do not report incidents because they do not think that anything will happen or that the justice system will deliver. Some people do not report incidents because they do not trust the police.

More specifically, somebody might be afraid of being outed by the criminal justice process. The bill does not deal with that directly, but we have had discussions with the Crown Office and the Judicial Studies Committee about ways of addressing the matter, for example through the

application of reporting restrictions when cases are heard.

There is another, common reason. People will say that something has happened to them just because they are LGBT and might not consider it a crime. We have heard a number of descriptions of things that have happened to people, including repeated harassment. People have told us that they did not report an incident because they did not see it as a crime or because it was just something that they expected was going to happen to them. One person who was repeatedly verbally harassed did not report it to the police but said that they were lucky because they had not been physically attacked. People think that such things happen to them because they are LGBT. Often, it will not even occur to them that they could report an incident to the police.

James Morton: In 2007, the Scottish Transgender Alliance carried out a survey of 71 transgender people in Scotland. People gave two key reasons for not reporting incidents to the police. One was fear of being laughed at by the police and the criminal justice system and of being told, "What do you expect if you're transgender? It just goes with being trans." They were fearful of having their identity mocked.

The other reason was that people have an internalised expectation that it is their own fault if they experience transphobic hate crimes, which happen because they have failed to pass as sufficiently non-trans. That has sometimes been reinforced through medical services: as part of going through real-life experience prior to being allowed hormones or surgery, transgender people must prove that they can live as the other gender. Any experiences of discrimination can count against them, because they have failed to blend in enough. There are a lot of internalised issues there, such as the idea that it is the person's fault, that they deserve what they get and that nobody will back them up or consider any incidents to be serious. They think that they will just be laughed at, and that they are at fault.

Sending out a message through establishing a statutory aggravation for transphobic hate crime would help to counter those responses and to improve expectations that incidents will be taken seriously if people report them.

Stuart McMillan: I have a final question for Ms Stokes. Paragraph 4.2 of Stonewall Scotland's written submission states:

"An assailant may assume someone is gay because they are walking past a gay bar".

Do you have any evidence of people being attacked as a result of someone assuming that they were gay because they were walking past a gay bar?

Christina Stokes: I cannot bring a case to mind at the moment, but I can easily get back to you on that. We certainly know of cases in which people were spotted near gay clubs on Elm Row and then beaten up, although the assailant did not know whether the person was gay or straight. I work in the LGBT centre for health and wellbeing in Edinburgh, which is known as a gay building. If I was attacked walking out of the offices, the assailant would not know my sexual orientation, but they would still be committing a homophobic crime. They would not know anything about me; they would simply believe that I was gay but have no evidence to back that up.

Tim Hopkins: Christina Stokes is right. It is fairly well known that there are a number of gay bars near the top of Leith Walk. Trouble often kicks off there late at night and people are attacked because they are waiting at the taxi rank. In such attacks, the attacker does not know whether the person is gay, but the attack is clearly homophobic because of what is said.

A clear and serious example from England is the attacks by the London nail bomber almost 10 years ago. As members will know, one of the attacks took place in a gay bar—the Admiral Duncan—but some of the people who were caught in the attack were heterosexual people who were there with gay friends celebrating a wedding. Had the statutory aggravation been in place in England, those attacks would undoubtedly have been prosecuted as crimes aggravated by homophobia, although the victims were not LGBT.

The Convener: As the point about bars was mentioned in Stonewall's written evidence, I ask Christina Stokes to get back to us with the specific instance.

Christina Stokes: If I can find a specific case, I will certainly get back to you with it.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): It has been suggested that the bill would create a hierarchy of rights, with some groups of people having more rights than others. How do you respond to that suggestion?

Tim Hopkins: I have two points. First, as we have just discussed, the bill is not about the victim's identity; it is about the attacker's motivation. The bill will protect everybody from such attacks whatever their identity, just as the law on racial aggravation protects everybody, whatever their race. That is the first point. I am sorry, I had a second point, but I will have to pass over to one of my colleagues. It is always dangerous to say that you have two points.

The Convener: A few of us have been caught out in that way in the past.

James Morton: From the perspective of transgender people, we are really pleased that the bill is not framed around somebody having to prove their identity to receive justice and that it is about the motivation of the attacker—whether they targeted somebody because they thought that that person was possibly transgender. There are cases in which people who are not transgender have been targeted because they were assumed to be transgender. For example, an ordinary woman who is simply tall with a deep voice might be accused of being a transsexual woman because she does not fulfil expectations about height and voice. There have been situations in which people going to a venue or working for an organisation have been targeted because assumptions were made about their identity.

The bill is about the attacker's motivation, not the victim's identity, so it does not create a special class of people. If I were mugged for my mobile phone, the fact that I was transgender would not be relevant and it would not be appropriate to add a statutory aggravation. However, if someone grabbed me and my friend because they saw us coming out of a transgender organisation's event and they beat us up while yelling transphobic language at us then, even if my friend was not transgender, we would both be victims of a transphobic assault. That is the structure in the bill and we welcome that.

10:30

Christina Stokes: I agree with my colleagues. The bill addresses the motivation for the attack. If there is a hierarchy of victims or rights, it exists only in the mind of the attacker, who clearly thinks that some people have less right to walk unmolested. That is the attitude that we are trying to attack. It is not about the victim; obviously, all victims are equal in the eyes of the law.

Tim Hopkins: Is it all right if I come back in with my second point?

The Convener: Yes. I thought I saw recognition dawning there.

Tim Hopkins: The bill addresses a particular problem or crime hot spot. The evidence shows that certain kinds of hate crime—racist, sectarian, homophobic, transphobic and disability-related hate crimes—are more prevalent and certain kinds of people are more likely to be attacked. We are talking about a targeted criminal justice intervention to deal with a crime hot spot.

Although the intervention is different, another example of a response to a particular problem is in the area of domestic abuse. People do not usually complain about there being a hierarchy of court systems because there is a special domestic abuse court in Glasgow. Just as that is an appropriately chosen response to the big problem of domestic abuse, the bill is an appropriately chosen response to the big problem of crime that happens because the offender's motive is one of prejudice.

Robert Brown (Glasgow) (LD): I will follow up on a couple of points before I ask my main question. There are many parallels between what the panel said about the underreporting of hate crime and the evidence that the committee has heard for the Sexual Offences (Scotland) Bill in relation to the underreporting of rape and other such sexual offences—to do with the likelihood of conviction and factors such as embarrassment. Is there any research or other evidence to indicate that the level of underreporting of hate crimes, for example against gay people, is different from the level of underreporting of more general sexual crimes or of assaults, which are also underreported?

Tim Hopkins: A survey of 924 LGBT people across Scotland found that only 17 per cent of people who had been victims of harassment or physical attack had reported it to the police. That one data point suggests that there is significant underreporting.

The other bit of evidence is more indirect. When the religious statutory aggravation was introduced in Scotland, there was a significant increase in the number of reports to police during the first few years. The same thing happened in England after the sexual orientation statutory aggravation came into force in 2005. There was a big increase in the number of reports to the Crown Prosecution Service via the police.

Robert Brown: So your argument is that, regardless of the comparative levels of underreporting, the introduction of an aggravation has had an obvious effect on the problem of underreporting.

Tim Hopkins: Yes.

Robert Brown: On my more general question, we have had submissions from a number of religious organisations that say that freedom of speech might be threatened by this aggravation, particularly for those who hold what have been described as traditional Christian beliefs. There is obviously an element of overlap between hate crimes of this kind and views that, for example, homosexuality is wrong. What are your observations on that point and its implications for the bill? It is quite an important point.

Tim Hopkins: That is something that we have thought carefully about over the five years for which the Equality Network has been working on the hate crime issue and on possible legislation. It is an important concern to address.

The first point to make is that the bill will not introduce any new offence through the statutory aggravation. Something will be an offence only if it is already an offence; the aggravation will simply be attached as a label to the charge, to make clear what the motivation was and that there was evidence for it. No new offences will be introduced and it will still be lawful to say anything that it is lawful to say now. For example, it is perfectly legal for a preacher to say that homosexuality is wrong and a sin—that is as it should be, and nothing in the bill will change that.

I notice that, in the Christian Institute's written submission, there is a report of something that happened in England. The Bishop of Chester gave an interview in which he made certain comments about homosexual activity. The Christian Institute asks whether, if the bishop made that statement in Scotland after the bill has been passed, he would be committing an offence. My answer is that he would definitely not be committing an offence now and would not be committing an offence after the bill has been passed.

The Christian Institute goes on to ask what guarantee will be given that freedom of speech will be protected for people who say that kind of thing. I would answer that in two ways—I hope that I will remember them both this time.

First, a similar question can be raised in relation to the religious prejudice aggravation. A hardline Protestant preacher might say quite negative things about some parts of the Catholic faith, and that is lawful. The introduction of the religious prejudice aggravation will not make that unlawful. However, if somebody stands in the street and shouts sectarian abuse at passers-by, which is a breach of the peace anyway, that will become a breach of the peace aggravated by religious prejudice. We expect the aggravation relating to sexual orientation or transgender identity to apply in just the same way. If a preacher says that homosexuality is a sin and that LGBT people are going to hell, that is lawful and will continue to be lawful. However, if somebody stands outside a gay bar and shouts homophobic abuse at everybody who comes out, that is already a breach of the peace and it will become an aggravated breach of the peace under the bill.

Robert Brown: Do you believe that there needs to be guidance for the police and the prosecution authorities? These are quite complex issues that could pose significant problems for someone who is not acquainted with the area, which could lead to the sort of things happening that everyone agrees should not be happening. Do you have any thoughts on that?

Tim Hopkins: Yes. The issuing of guidance to the police will be very important. The Lord Advocate and the Crown Office have already said, in the Crown Office's written submission on the bill, that they will prepare guidance for the police. The Association of Chief Police Officers in Scotland has said that it would welcome that and would work with the guidance. If the bill is passed, there should definitely be guidance for the police, and we are told that it will be forthcoming.

The United Kingdom Government was asked similar questions last year when the UK Parliament considered the offence of incitement to hatred on the ground of sexual orientation—an offence that is not being proposed in Scotland. It considered some of the cases that the Christian Institute has highlighted, none of which resulted in convictions. The UK Government said that it thought that the police had gone rather too far in some of those cases and that it would issue guidance to the police in England. We would be happy for guidance to be issued to the police.

The second reason why we believe that there will be complete protection of freedom of speech and religious expression is the requirement, under the Scotland Act 1998, for any legislation that the Scottish Parliament passes to comply with the European convention on human rights. Under the Scotland Act 1998, Scottish legislation is not law if it is not ECHR compliant. Furthermore, prosecutions can be brought by the Lord Advocate only if they comply with the ECHR. That is a guarantee that the bill will not be used in association with existing offences to prosecute for things that are protected under the ECHR on the ground of freedom of religion or freedom of expression.

Robert Brown: You make a reasonable point that the cases that are cited by the Christian Institute did not result in convictions. Does Mr Morton or Ms Stokes have any points to make in support of, or in addition to, those comments?

James Morton: I support Tim Hopkins's comments and do not have anything to add.

Christina Stokes: I agree with Tim Hopkins. The point to remember is that the bill will not create a new offence. A concerned preacher would have to have broken the law already—for example, through a breach of the peace—before the bill would affect them in any way. That is quite a strong test. It is not a question of someone reading from the Bible or preaching a sermon; it goes a bit further than that.

Robert Brown: I have a final question on that point. The written submission from the Christian Institute states:

"Introducing prejudice based on sexual orientation as an aggravating factor could give gay rights groups a legal mechanism for targeting those who disagree with them. It could undermine free speech and religious liberty."

Do you have any comment or further observation to make on that?

Tim Hopkins: I read that part of the submission, but I did not really understand it. The police investigate crime in Scotland; the procurator fiscal prosecutes; and the courts decide on the sentence—none of that is done by gay activists.

There is some confusion in the submission between the criminal law, which the bill is about, and the civil law. There are civil provisions dealing with harassment at work, for example, whereby an individual can take a civil case if they feel that they have been harassed because of their sexual orientation. However, that is not what we are talking about here; we are talking about criminal cases, in which gay activists like us would have no say in whether something was prosecuted or whether someone was convicted.

Nigel Don (North East Scotland) (SNP): Good morning. I want to pick up on something that is not in the bill. You will be aware that the Equal Opportunities Committee considered the possibility of including similar provisions on age and gender but decided not to do so. Do you have any comments to make either for or against that decision? It was not a decision of the Justice Committee, but we are interested in your views on it.

James Morton: The view of the Scottish Transgender Alliance is that there are different issues for the minority of people who experience transphobic hate crimes and for people who are the targets of more general sexist crime and domestic abuse because of their gender, rather than their gender non-conformance. We were happy to go with the views of the wider gender equality organisations on whether it would be helpful to include provisions on gender. We do not have a strong opinion on that. We want protection from transphobic hate crime in particular.

We recognise that domestic abuse tends to happen in private homes, rather than on the street, whereas transphobic hate crime is committed by one stranger against another stranger, usually in public spaces. The two things are different, so it is appropriate to deal with them differently at times.

Tim Hopkins: The Equality Network's view is that gender-based crime is a huge problem in Scotland, given that 50,000 or so cases of domestic abuse are reported to the police per year, the majority of which involve men abusing women. It is a question of what the right response is. I agree with James Morton that what the gender-based organisations have decided seems to make a lot of sense.

There are certain things that characterise hate crimes, whether they are racist, sectarian/religious, homophobic, transphobic or disability related. Such crimes are normally committed either by complete strangers who attack the victim in the street or by people who might not know the victim but who live near them and know that they are LGBT, for example, and therefore vandalise their house. Another characteristic of hate crime is that it is often accompanied by expressions of hatred, such as racist or homophobic language.

Gender-based crime tends to be different from that. A lot of it happens within the home. Quite often, it is not accompanied by expressions of gender hatred—or at least language that the court would accept as an expression of gender hatred. Those are a couple of the reasons why the women's organisations in particular felt that a similar provision on gender was not the right answer to gender-based crime. However, that does not mean that such crime should not be taken seriously. Other options should be looked at.

Christina Stokes: I do not have much to add. I know that my colleagues in gender organisations have considered that issue over a great deal of time, so I will follow their lead on it.

Nigel Don: Thank you for confirming that.

The Convener: I thank the panel for coming to see us this morning and for giving their evidence in such a clear and succinct manner. The committee is very grateful indeed.

10:44

Meeting suspended.

10:45

On resuming—

The Convener: We now welcome our second panel of witnesses. Norman Dunning is chief executive of Enable Scotland and a fairly regular attender at this committee; Faye Gatenby is campaigns, parliamentary and policy manager at Capability Scotland; and Charlie McMillan is director of research, influence and change at the Scottish Association for Mental Health. Ms Gatenby, gentlemen, good morning and welcome. We will go straight to questions.

Bill Butler: Good morning, colleagues. The committee is aware that, under the current law of Scotland, it is already possible for courts, when determining sentence, to take an offender's motivation into account. Is there any evidence to suggest that the common law is inadequate in that regard? If so, how will the bill improve the situation?

Who would like to answer first?

Norman Dunning (Enable Scotland): I will kick off, if you like.

Bill Butler: As a regular attender.

Norman Dunning: As a regular attender, but not one who has come this morning to make terribly many contentious points.

The committee heard comprehensive answers from the previous panel of witnesses. The common law may be adequate, but it has to be given proper effect so that the issue of aggravated crime is brought to the fore. The issue has to be in front of the police when they investigate a case, in front of the prosecution authorities when they take the case forward and in front of the court when it makes its decisions and determinations. The court should be able to make an explicit determination in relation to the aggravation. The bill therefore represents a step forward from the common law.

The committee heard from the previous panel that not many aggravated crimes are prosecuted, which suggests that a shortcoming exists. I reinforce that point from Enable's perspective.

Faye Gatenby (Capability Scotland): We echo points made by the previous witnesses. We have spoken to lots of disabled people about their experiences, and we are not aware of any cases of aggravated crimes being prosecuted. Although the common law is available, it is perhaps not being used in a way that really deals with the issue.

A lack of consistency is also a problem, because the common law can be applied or interpreted in different ways and there are different understandings of what hate crime is. The bill will send a clear message about what hate crime is and how it should be dealt with, which will be replicated across Scotland, leading to the other steps that will be necessary to tackle the problem effectively.

Bill Butler: That was a nice, clear answer.

Charlie McMillan (Scottish Association for Mental Health): I totally agree with my two colleagues and with the previous witnesses. If we consider the incidence figures for victimisation and hate crime, we see the common law's lack of effectiveness.

Stuart McMillan: Good morning. The bill does not make any provision for mandatory sentencing when an aggravation has been proven. Do you have any views on the types of sentence that offenders should receive when an aggravation has been proven?

Norman Dunning: We again agree with what has already been said. Flexibility is necessary because of the different sorts and levels of crime. Regrettably, there have been two or three cases of very serious crime—torture, rape and murder—against people with learning disabilities. However, such cases are extremely rare, and our members and our surveys tell us that the main issue is low-level crime, such as breach of the peace, verbal abuse, low-level assault and damage to property. While it is low-level crime, it is serious for the people involved, because it creates fear in them and encourages a general attitude towards them in the community.

Occasionally, deterrent sentencing is appropriate, at the judge's discretion. However, in many situations, we want to educate people. We have found in some of our work on tackling bullying by young people that the best way to tackle it is to confront the young people with people with learning disabilities, so that they see them as real people and hear what their lives are like. That starts to break down the barrier and the prejudice. Community sentences that bring in such direct, face-to-face contact with victims, to show the human face and ensure that people are seen as people, are one of the best ways forward. We are looking not necessarily for an increased tariff but for an appropriate tariff that helps to change people's attitudes and perceptions.

Faye Gatenby: The tariff should be appropriate and the prejudice aspect of the offence should be recognised. As has been said, an offence can be anything from a serious matter to what might seem to be less serious. Most of the cases that we have come across have been at what is perceived as a lower level but, as Norman Dunning said, they are important to the people involved.

It is important for sheriffs to have the flexibility to apply the most appropriate sentence. They have all the information about what happened, and the decision is for them.

Charlie McMillan: We can build on programmes throughout Scotland to challenge offending behaviour and its root causes. In this case those causes are prejudice and discrimination, possibly conflated with anger management issues, and the relationship between discrimination, prejudice, anger and hatred in committing offences. In challenging that, we are talking about rehabilitating offenders and about change, which are critical in sentencing. Sentencing should absolutely be guided by the judiciary, but we must develop a range of sentences that goes to the heart of the issue.

Angela Constance: Your submissions refer to the extent of disability hate crime. Why do you believe that the bill will significantly reduce hate crime and how will it do so?

Charlie McMillan: If the bill is passed, we hope that it will significantly reduce hate crime. The incidence of such crime against people with

experience of mental health problems is completely unacceptable in Scotland in 2009. In some surveys, 71 per cent of respondents said that in the past two years they had experienced hate crime or behaviour that they believed to constitute hate crime. Is that the kind of Scotland that we want to have? People with experience of mental health problems need to believe that they belong to Scotland, too.

Such crime is completely unacceptable. The legislation will set the baseline and say, "This behaviour is no longer acceptable. We will not put up with it as a country." We will have to work from there. A reduction in hate crime is absolutely needed, but we will all need to address the behaviour, beliefs, values and attitudes that feed it.

Faye Gatenby: I agree with Charlie McMillan that the bill is an important first step that needs to be taken before we can go down the other roads. We—Scotland, the criminal justice system and voluntary organisations—need to understand what hate crime is and what motivates it. With a consistent understanding and a consistent way of recording, collating and analysing information, we can all start to work together to develop innovative ways of addressing the issue.

As Tim Hopkins said, I fully expect—although I do not quite hope—that the number of reported incidents will increase in the first few years after the bill is passed, because people will feel able to report them and will feel that a tool exists to address the situation that they are experiencing. I hope that the system will be geared up to deal with such cases more effectively. When that happens, we can start to take the further steps that need to be taken. The bill will introduce what was asked for in Scope's "Getting Away with Murder" report, which we submitted in evidence. We can now consider the next steps that need to be taken, of which there are many. Although the bill is vital, it alone will not change matters. However, we need to implement the bill to get other things to happen.

Norman Dunning: People with learning disabilities talk to us about bullying rather than crime specifically. We did two limited surveys of people with learning disabilities and found that 65 per cent of adults and more than 90 per cent of children reported being bullied, which suggests that the problem is widespread.

We regard the bill as only part of the solution, but it is an important part because, as other colleagues have said, it will raise awareness and allow better reporting. Indeed, it will test some of our statistics, which we know are quite weak. However, we are involved in other initiatives, such as working with the anti-bullying network that the Scottish Government promotes. We need more public education on all such issues. In that respect, we were rather envious of the one Scotland and see me campaigns. We have not had equivalent campaigns to try to raise public awareness of people with learning disabilities.

The bill fits with much else that the Government is doing to help people with learning disabilities to get into mainstream life and work more visibly in the community and so on. All such approaches help to break down prejudice. We have much to do to tackle prejudice at the school level as well. For us, the bill is just part of the jigsaw. It is an important part that says clearly that we want to educate and to change attitudes, but that some things will simply not be accepted, for example prejudice that is part of a criminal act. The bill, therefore, fits with the total solution.

Angela Constance: Do Mr McMillan or Miss Gatenby want to say anything about measures in addition to the bill, as Mr Dunning did?

Charlie McMillan: Mr Dunning touched on a number of measures. The bill links across to the societal response to the see me campaign and other on-going anti-stigma campaigning work and wider social marketing work that the Scottish Government undertakes. There is a real argument that that campaigning work needs to come closer together to address the similar issues with which we deal. When we deal with discrimination and prejudice, whether it is homophobia, sexism or to do with disability issues, the object of the prejudice does not matter as much as the constructs that people use. There are ways of addressing that in campaigning work. SAMH is heavily involved, for similar reasons, in the see me campaign and the respect me campaign, which is the anti-bullying service that the Scottish Government funds.

We want to change behaviours, because we want to change values and attitudes—there is a continuum. Work must be done across the public, private and voluntary sectors and the wider community to open up discussion about difference and what it means. All our organisations engage in that wider equalities work. The jigsaw is complex and has a huge number of pieces, but it is important that we start to create the bigger picture of what we want Scotland to look like. We can then challenge the behaviours that need to be challenged.

Faye Gatenby: I agree with my colleagues. When we read accounts of crimes that are motivated by prejudice towards disabled people, what comes through awfully clearly is the perception of disabled people as being much less valuable than and not equal to other people in our society. As colleagues have said, that is the nub of the problem, therefore we must change hearts and minds and bring the public and society around. That is done by seeing more disabled people in our communities and in employment, for example

working at the desk next to us. It is about familiarity and seeing disabled people not as the other who just goes off to the day centre on the edge of town but as valued members of our community. That issue must be addressed.

There is also a perception that disabled people are inherently vulnerable and that that is why they experience so much crime. That might be appropriate in some cases, but it comes through clearly in the Scope report that it is important that disabled people are not perceived in that way. Just like any of us, their vulnerability comes from certain situations; it is not that disabled people are less able to live their lives than are non-disabled people.

11:00

Charlie McMillan: A critical point is that we perceive and define people through their difference. There needs to be a huge debate about that in Scotland, because any one of us could become or might be disabled. We cannot assess somebody by just looking at them. In the case of sexual orientation, there is also a fear factor. Many people might be wrestling with their sexual orientation, and how that comes out could be perceived as an attack on others. One in four of us will have a mental health problem at some point in our lives, which means one in four of us in this room. We really need to get away from thinking about people with differences as those people over there and start thinking about us and our society. That is critical and should underpin the baseline that is proposed in the bill.

Robert Brown: This is a difficult area. I was struck that Mr Dunning used the word "bullying" to describe the core of what he was trying to put across. Bullying straddles the ideas of both vulnerability and prejudice against people with disabilities. Is it easy to distinguish between the two and is there a need to give advice about that to those who need to interpret the law practically?

Norman Dunning: People need to take bullying seriously. As I said, most acts of bullying that are reported to us are crimes, although they are not reported as such. There is a variety of reasons for that, but one is that the people to whom the reports are made do not take the matter seriously. That is an issue.

Additionally, people with learning disabilities often expect such treatment as part of their life experience. If 90 per cent of children with learning disabilities have experienced some form of bullying, they will see it as an everyday experience. People with learning disabilities are particularly vulnerable and might not understand that they can do more about the situation—certainly, they might not understand that they have experienced a criminal act. That is another barrier. They also expect not to be believed—we touched on that in other evidence to the committee. Again, that is their life experience. That situation is exacerbated by prosecution authorities that often do not regard people with learning disabilities as credible witnesses. There is a good deal of evidence to support that.

Robert Brown: That is the essence of what concerns me. We are trying to craft a law that works practically and makes a difference in the areas that you so graphically described.

When actions are taken against people who happen to have a disability, I presume that it is difficult to establish whether that person has been assaulted, bullied or whatever as a consequence of prejudice against their disability or because they are vulnerable and easily got at. Is it enough, for example, that someone has perceived a difference? Presumably, you would need more than that.

Norman Dunning: In many of the situations reported to us, it is clear that the disability is more of a factor than the vulnerability, because of what accompanies the bullying. That is demonstrated by the language used about people, the things that are scrawled on the windows of their homes and the names that they are called, which are clearly disablist. There is strong evidence that such incidents occur not just because the person is easy to pick on, although there will be an element of that too. One of the bill's strengths is that it does not rely on whether the person is disabled; one has to prove the perception of the offender. That seems right to me.

Faye Gatenby: This is a good example of the need for a consistent approach to hate crime in all its forms, which we referred to earlier. We also need a way to work with the criminal justice system and society in general to develop a clear understanding that can be applied consistently across the board.

Charlie McMillan: I reinforce what Norman Dunning said about bullying. The behaviour that is understood by the term "bullying" has almost gained acceptability—it is seen as a normal part of growing up. That is what we hear time and again from young people who are being bullied. We need to be careful about that, because bullying is unacceptable, whenever it happens. It would be unfortunate if we got caught up in the definitions of bullying and hate crime, as the two behaviours are equally unacceptable.

I also reinforce that, when people experience bullying, it involves the language that is used about people and the behaviours that they are perceived to exhibit. For people with mental health problems, for example, bullying is very clearly

associated with their perceived mental health problem and the behaviours that are explicitly linked to that.

Robert Brown: Given those complex issues, is it important that training and guidance be given to the police, the Crown Office and Procurator Fiscal Service and so on in relation to the implementation of the legislation?

Charlie McMillan: We work quite closely with ACPOS and the Crown Office and Procurator Fiscal Service. They have been at the forefront of addressing many of the equality issues in the United Kingdom and Scotland for the past 10 years or so. They are committed to learning more, working with voluntary sector organisations and challenging the responses of their own officers, because they accept that it is not always the case that the best response is given. There is an openness to the issues and a willingness to develop the guidance by building on what is already in place.

Paul Martin: Are you satisfied with the definition of disability in the bill?

Faye Gatenby: We are happy with it. That was an easy question.

The Convener: We are glad to get that on the record.

Cathie Craigie: It has been suggested, to this committee and to others, that the legislation might create a hierarchy of rights, which would mean that some groups received greater protection than others. What are your views on that?

Charlie McMillan: I totally disagree. The bill is highly targeted to deal with a specific problem. It addresses the needs of the community, based on people's experience. I do not accept that the bill would create a hierarchy of rights. Existing legislation deals with issues relating to race and religion, and the bill will deal with issues relating to disability, sexual orientation and so on. It follows the European and international lead in terms of equality and diversity.

Norman Dunning: People with learning difficulties are very much an unrecognised group and have had a pretty raw deal in the past. The bill represents an attempt to address that specifically. We have come a long way by moving people out of institutions and trying to get them more accepted in the community, but we have to do more to get the community to accept them to an even greater extent. The bill is one measure that can be used to do that.

Faye Gatenby: One of the strengths of the bill is that it protects everyone. It focuses not on the individual's circumstances but on the other person's motivation. As was said by the previous panel, if there is a hierarchy, it is in the mind of the perpetrator. I do not believe that there is a hierarchy of individuals.

Nigel Don: As I did with the previous panel, I conclude by asking about extending the debate to introduce the issues of age and gender. You will be aware that, for various reasons, the Equal Opportunities Committee dismissed the idea of including aggravations based on age and gender. Do you have any observations to make about that?

Faye Gatenby: I do not have anything to add. The experts considered the matter both in committee and at the working group back in 2004 and I am happy to stand by their recommendations.

Norman Dunning: Having read the evidence that the Equal Opportunities Committee took, we are perfectly content.

Nigel Don: Thank you for confirming that.

The Convener: As there are no further questions, I thank you for your clear and concise evidence. It is greatly appreciated.

11:10

Meeting suspended.

Scottish Parliament

Justice Committee

Tuesday 20 January 2009

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

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to switch off mobile phones. We have received apologies from Cathie Craigie MSP.

Today's meeting is the second formal evidence-taking meeting on the Offences (Aggravation by Prejudice) (Scotland) Bill. On the first panel, sitting in splendid isolation, is Euan Page, who is the parliamentary and government affairs manager for the Equality and Human Rights Commission. We move straight to questions. Bill Butler will open.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Mr Page. In your written evidence, you state:

"LGBT and disabled people are significantly more likely to be targets of various types of crime, including harassment, abuse and assaults".

How will the provisions in the bill help to address that situation?

Euan Page (Equality and Human Rights Commission Scotland): The bill will do that in a number of ways. The thinking behind statutory aggravation is that it requires—over and above the flexibility and the provisions in the common law—a necessary response from the various actors in the criminal justice process: the police, the Crown Office and Procurator Fiscal Service and the courts. It gives weight to a particular type of criminal offence and concentrates minds in the police, the prosecutors and the judiciary.

The seriousness that aggravation lends to the type of offences that we are talking about in relation to the bill feeds through to give the victims of such crimes the confidence that they will get an adequate response from the criminal justice system. It is, importantly, a useful tool in mapping patterns of offending behaviour, whether that involves dealing with particular hotspots—as was mentioned during last week's evidence—or with individuals.

If someone repeatedly comes up before the court for minor public order offences with aggravating factors, we can begin to identify patterns of behaviour that might require an intervention such as an altered sentence or an increased tariff. However, the other important point is that the approach gives people in the criminal justice social work sector the evidence that they need to tailor interventions better to get to the root of an individual's behaviour.

Bill Butler: Are you saying that the bill will, in addition to concentrating minds and tracking trends in offending behaviour, help with the rehabilitation of offenders?

Euan Page: Absolutely. It will help not only with rehabilitation but with early identification of patterns of offending behaviour. Such behaviour being addressed earlier can lead to better outcomes for offenders and victims.

Bill Butler: Do you know of any other legislation that supports rehabilitation and aids offenders in that way?

Euan Page: The approach might not be appropriate in all circumstances, but there is evidence that, for certain offenders who have been prosecuted for less serious offences with an element of homophobic aggravation, courts have used the homophobic aggravation offence that is set out in the Criminal Justice Act 2003 to pass sentences involving work with or for lesbian, gay, bisexual and transgender organisations. In that way, they have sought to turn an individual around or to reorient the attitudes to sexuality that lie at the root of their offending behaviour.

Bill Butler: How much of that evidence is there and what is the success rate of such an approach? Is it simply too early to say? Is all the evidence just indicative at the moment?

Euan Page: To the best of my knowledge, the evidence is indicative. I am sure that research on the subject has been carried out by people who are better qualified than I am to do so. However, this debate is very timely in Scotland and I am sure that the committee will be fully engaged in debates on addressing offending behaviour through more appropriate and imaginative sentencing. There is scope for tying our debate about statutory aggravations to that debate to ensure that we take into account not only punishment, which is obviously part of the mix, but rehabilitation. If we can address some of the root causes of an individual's offending behaviour, we can turn their life around and make society safer.

Bill Butler: That is very clear. Thank you.

The Convener: It could be argued that what you suggest could happen under the existing process. A social inquiry report, for example, might highlight an offender's difficulties so that he might, as a result, be put on probation on condition that he will undergo the type of counselling and attitude-changing processes to which you have referred.

Euan Page: That argument is perfectly valid and brings us back to the debate on the relative merits of common law versus statutory aggravations. A statutory aggravation ensures concentration of the minds of all the actors involved and inspires in victims the confidence to come forward. As we know, there is underreporting of certain classes of crime.

It would, of course, be theoretically possible to meet the bill's aims through common law. However, all the evidence suggests that that is not happening.

Angela Constance (Livingston) (SNP): In your submission, you state:

"This type of targeted crime would also appear to have a more profound and lasting impact on the victim than other types of crime."

Will you elaborate on that comment?

Euan Page: The point is important, because we must not get caught up in a false debate over whether we are seeking to give greater weight to certain classes of offence based on a victim's identity. That is not what the bill will do.

Organisations such as Victim Support Scotland have responded to the bill at stage 1. All victims of crime must have their needs, concerns and reaction to the crime taken seriously—they need full support—but there is compelling evidence that when an individual is targeted by an offender because of who they are or what they represent, there can be an additional psychological impact that we must take into account in addition to the complex psychological responses that any victim of crime has.

Victims of violent crime often go through various stages in coming to terms with what happened. Part of that involves self-recrimination: they ask why they were so stupid, why they took a certain route home or why they did not get a taxi. That can lead to their altering their behaviour or being trepidatious about going out at night. Academic studies have suggested that the problems are compounded for victims of targeted crime, who can feel that there is nothing they can do to change who they are. They can change their behaviour or where they go out, but being attacked because of a core aspect of one's identity can present additional problems in coming to terms with being a victim.

Angela Constance: So, you are saying that a specific trauma is associated with a victim being singled out rather than being just a random victim of crime.

Euan Page: Yes. Every victim's experience of crime is unique, but there can be a specific trauma.

Nigel Don (North East Scotland) (SNP): I want to return to your comment that most of what the bill seeks to achieve could be dealt with under the common law, which does not seem to be working. Those are my words, not yours. Is the bill the right legislative way forward?

Euan Page: Yes, it is. However, it is important that we do not think about the bill in isolation. We are not talking about an all-or-nothing debate—a statutory aggravation is not the only way in which to deal with disability, homophobic and transphobic hate crime. It is one useful criminal justice response, but it must be placed in a mix of responses, some of which will be through the criminal law, some through the civil law and others through policy and attitudes in public authorities.

Nigel Don: I am sure that you agree that the bill will send a message, but will it send the right message? Is there any way in which we could amend the bill to improve the message?

Euan Page: The bill has the virtues of brevity and great clarity. I am sure that that is not always the case with proposed legislation that comes before the committee—I am thinking ahead to the criminal justice and licensing bill, which will be a slightly more weighty document. It is important to send out a message, as witnesses at last week's meeting said. One consequence of the bill is that it will send out a message, but the Equality and Human Rights Commission does not support it primarily because it has that role. If we simply wanted to send out a message, there are other ways in which to do that, for example, by education or public awareness campaigns. We support the bill because it will provide an important extra dimension in criminal justice agencies' responses to particular types of targeted crime. As a consequence, it will undoubtedly reinforce messages about what constitutes civilised behaviour. However, sending out a message is not the paramount concern in making any change to the criminal law.

Robert Brown (Glasgow) (LD): I will examine the purpose of the aggravation a little further. It is often helpful in such cases to consider what the mischief is and what the possible remedy would be. The convener touched on existing sentences of the court. Do you know of any research that shows that sheriffs do not take aggravations under the common law as seriously as they should? I appreciate that there is underreporting, but that is a slightly different issue.

10:30

Euan Page: I am anxious not to appear to be berating sheriffs for their responses. One can point to some slightly surprising instances or, rather, one can point to responses that have been given

by sheriffs in cases where there has clearly been a homophobic element to a serious crime. For example, there was the homophobic murder of a man in Perth a couple of years ago. The sheriff mentioned that there may have been "a homophobic element" to the murder: the circumstances were that two young men murdered a man in a public park in Perth and were witnessed bragging about the murder at a party later that night, using explicitly homophobic language.

We can compare and contrast the response of the sheriff in that case, who made a slightly ambiguous statement about the possibility of "a homophobic element" to the murder—most of us would say that homophobia lay at the heart of that offence, its motivation and execution—with the response to the murder in England of Jody Dobrowski on Clapham common a few years ago, following the introduction of the Criminal Justice Act 2003, in which the judge explicitly referred to the convicted murderer having committed an act of "homophobic thuggery". I do not want to criticise sheriffs; it was right that the sheriff in Perth suggested that there was an "element" of homophobia, but an aggravation would have made the matter much more explicit from the start and would have allowed an opportunity to explore much more fully the motivation behind that offence.

Robert Brown: I wish to explore that element of aggravation, on which you have started to give your views. Let us consider the high level, and a murder with either a disability or homophobia aspect to it. Would you expect there to be a higher minimum sentence in that situation? What would the purpose of the aggravation be for such a serious level of crime?

Euan Page: One of the virtues of the bill is that the purpose of the aggravation is determined by the seriousness of the offence. In the case of the most serious of all crimes—murder—we would consider the response of an increased tariff, to take account of the motivation for the murder, as was the case with the Clapham common murder, in which case two individuals went out with the express purpose of finding somebody who was gay, or whom they believed to be gay, in order to cause them serious harm.

The nature of the aggravation will differ with less serious offences. That goes back to the points that were discussed earlier about how we can use the bill as an effective intervention for dealing with offending behaviour.

Robert Brown: I want to explore that further. That touches on the example of somebody committing breaches of the peace, with an element of the sort that we have been discussing attached. Prison might not be the obvious remedy in such cases, but something could perhaps be done to change the offender's attitudes. Do you have any information about the availability of rehabilitative arrangements—for example, anger management courses or courses that attempt to change people's attitudes and which might be relevant to such offences. Are facilities in place to allow the courts to do something effective with offenders at that level?

Euan Page: I return to the point about this being a timely discussion. If we in Scotland are to address in the round what we expect sentencing to achieve, this is exactly the time to have such a debate in order to ensure that provisions are in place to address offending behaviour appropriately. In the case of somebody who has committed a series of aggravated breaches of the peace, it will have become obvious that that person has an issue or problems with a particular social group. How can that be turned around effectively to stop that behaviour, thereby giving more confidence to other potential victims?

I would have to get back to you on whether particular facilities are available. However, the issue is perhaps more how we start to ask such questions as part of the policy debate in Scotland. The bill might offer a useful opportunity to explore such matters.

The Convener: You referred to the Perth case, which you quite rightly described as an horrific crime. It is important to stress that the case was dealt with not in the sheriff court but in the High Court. Indeed, Lord Macphail, who was the sentencing judge, passed a fairly exemplary sentence.

Euan Page: That is absolutely right. I bow to your greater knowledge of the matter, convener. I did not mean any criticism; I was simply giving an example of a case in which the homophobic element was perhaps underplayed, given the remarks from the bench about such an element being a possibility.

The Convener: The sentence was eloquent testimony to the seriousness with which the judge took the case.

Euan Page: Yes, indeed.

Stuart McMillan (West of Scotland) (SNP): The committee has heard that underreporting of crimes is a particular issue for lesbian, gay, bisexual and transgender people and for disabled people. Will you elaborate on the reasons for that and explain how the situation would be improved if the bill were passed?

Euan Page: There is evidence of significant underreporting among all the groups who are affected by such crimes. In addition, much work has been done on how disabled people,

particularly people with learning disabilities, internalise and come to accept as being part of their lived experience crimes that target them, which they cannot do anything about. Such an attitude has sometimes permeated organisations' responses to crimes.

That brings me back to what I said about the virtue of creating a statutory aggravation. If people have confidence that they and their concerns will be taken seriously, they will be much more likely to come forward to the police, which should create a virtuous circle. For example, after the Clapham common incident there was an upturn in complaints to the police down south about homophobic incidents because people had more confidence that the police, prosecutors and courts would take their concerns seriously.

Stuart McMillan: The committee will take evidence from the Association of Chief Police Officers in Scotland later in the meeting. In its submission, ACPOS said that under the proposed new arrangements

"an individual person's perception of motivation for an offence will be sufficient for the aggravation to be competent."

Might the bill be used in a negative way? Could a person's perception be used to justify convicting someone of an aggravated offence although there was no aggravation?

Euan Page: Are you suggesting that victims might feel that there was aggravation or even that they might maliciously insist that there was aggravation?

Stuart McMillan: Yes.

Euan Page: The trigger for the police to identify a crime as aggravated would be victim led, as is the case for statutory aggravations in general. Currently, if a person says that they have been the victim of a racist or sectarian incident, the police will regard the incident as such.

The wider point, which was picked up when the committee took evidence on the bill last week, is that given the nature of such offences it is possible to draw broad conclusions about where they occur and under what circumstances. They tend to take place in public places, and the victim and the perpetrator tend not to be known to each other. Often, they involve public order offences.

There is little evidence, to my knowledge, of serious problems of corroboration emerging from existing statutory aggravations, or evidence that there have been widespread inappropriate or malicious appeals to statutory aggravations on the part of witnesses. I will always be alive to such concerns, but evidence suggests that they might not be particularly well founded at this stage.

Bill Butler: In your written evidence, you comment on suggestions that police and prosecutors in England and Wales are only now beginning to recognise the scale of disability-related aggravations, despite legislation having been in force for some time. Are there any particular reasons for that, and what should be done to prevent a similar situation arising in Scotland?

Euan Page: That is an important and complex question, which I will endeavour to cover coherently.

There are particular issues attached to effective implementation of the disability-aggravation provisions down south, because implementation is intimately tied to wider public and organisational perceptions of disabled people. The two impairment groups that are most likely to be victims of this type of crime are people with learning disabilities and mental health service users. In the past, some organisations have exhibited a cultural reluctance to see such crime as being motivated by prejudice or malice towards a social group—people have less resistance to identifying racist or homophobic crimes, but people tend to see crimes that target disabled people as being motivated by their real or perceived vulnerability rather than by hostility towards a particular social group.

As I said, this is a complicated area, but we have invaluable learning to build on from implementation of the aggravation provisions down south. It is less a question of legislation than it is of organisational and wider public attitudes to disability.

My submission refers to the words of the former director of public prosecutions in England, Sir Ken Macdonald. It was refreshing to hear someone in such a senior position in the criminal justice system in Great Britain exploring the issues as passionately and compellingly as he did.

I say—at the risk of sounding jargony—that we need to draw a distinction between situational and inherent vulnerability. When people raise objections to the use of a statutory aggravation provision for crimes that are motivated by prejudice towards disabled people, the stock scenario that they come up with involves a frail old woman with a visual impairment who has her bag stolen. The objection runs that the person who committed the crime did so because that individual was vulnerable, not because the criminal had any particular animus towards disabled people. That is perfectly true, and I think it likely that, if such a case reached the courts, an appropriate common law response would be used to reflect the particularly callous nature of that crime.

10:45

However, we are dealing with another phenomenon, as we have to draw a distinction between people who are inherently vulnerable and people who are in vulnerable situations. To illustrate that, it is worth considering a series of appalling murders of young people with learning disabilities that have taken place both north and south of the border. In those cases, a clear failure on the part of the social care regime allowed those young people to get into vulnerable situations. However, it would have been unacceptable to treat the victims as being inherently vulnerable so that, no matter how serious the offence that they endured, the issue was treated as primarily a matter of social care rather than of rights and justice, as would be the case for any other citizen.

If failures in the social care regime allow a person with learning disabilities to fall in with an inappropriate crowd who exploit the person financially, sexually or in others ways—in a number of those cases, there was a clear pattern of the vulnerable individual being exploited on many different levels and in ways that systematically stripped away their humanity to the point where it became easy for the perpetrators to take the final step of murder—the fact that the person was murdered and was targeted because of a disability is a matter not simply of social care but of rights and justice. The issue should be treated as a criminal justice matter. We can learn from what has happened in a number of such cases down south, of which I am sure the committee is aware.

Bill Butler: In your opinion, have the various agencies down south improved their appreciation of the fact that such cases involve inherent vulnerability rather than situational vulnerability?

Euan Page: An encouraging development since we submitted our written evidence has been my discussions with people in the Crown Prosecution Service down south who have done valuable work on hate crime policy. I recommend a paper that Joanna Perry of the CPS published some years ago that explores some of the issues. I would be happy to forward that paper to the committee as background information.

Bill Butler: It would be helpful to have that paper, convener.

The Convener: Absolutely.

Euan Page: An enormous amount of work is taking place, so there are encouraging signs. As I said, when a former DPP takes a lead on an issue, that changes the environment in which the debate takes place.

I should also flag up work that the commission is doing at GB level that makes a number of recommendations on disabled people's physical safety and security. That work sees the issue in terms of the spectrum that I have talked about, by considering not only the failures in social care regimes that help to create vulnerable situations but the attitudinal barriers that make people reluctant to see these crimes as matters of justice and rights rather than simply failures in a care regime.

Bill Butler: Thank you, Mr Page. That is very clear, although the issue is complex.

Paul Martin (Glasgow Springburn) (Lab): Good morning, Mr Page. As you will be aware, the Equal Opportunities Committee's report on the bill concluded that aggravation based on age and gender should not be included in the bill. What are your views on that?

Euan Page: The commission gave evidence on that point to the Equal Opportunities Committee during its deliberations. Our recommendation was that introducing statutory aggravations for gender and age would not be an appropriate response for a number of reasons. However, the question opens up an interesting but complicated issue.

As I pointed out earlier, statutory aggravations are one—but not the only—response to particular manifestations of crime. The commission feels that particular issues would arise with an aggravation based on age. Although older people are statistically least likely to be victims of crime, they face particular issues of fear of crime, isolation and disconnectedness from wider communities and other generations. Older people can be victims of particular types of crime, such as confidence crimes and so forth. However, taking the lead from our partners in the age sector, we feel that an aggravation would not be the most useful way to target such crimes.

Gender is a complicated area. There are passionately held views on both sides of the debate, but we have taken our steer from the women's sector in Scotland. We think that a gender aggravation is not the most urgent response that is needed to crime that is based on prejudice or malice towards women. The debate is complicated, and we are dealing with a wide range of offences.

That takes us back to the crude typology in relation to how the current statutory aggravations work and the types of crime that will be covered by the bill. Gender-based crime can fit within the model of a public order offence or a crime that takes place in public, but that does not get to the heart of domestic abuse or many crimes involving sexual violence, for example. Our approach is less a case of saying yes or no to including aggravations based on age and gender in the bill

and more a case of asking whether that would be the most appropriate response.

We have used the debate as a starting point in commissioning research from the University of Glasgow on current policy and legislative responses to gender-based crime in Scotland in the round. Recommendations on future action will be made and, because of the Equality and Human Rights Commission Scotland's role, there will be particular emphasis on the impact that the gender equality duty can have on public authorities' responses to gender-based crime.

Paul Martin: You talk about the matter being complex. If you look back at *Official Reports*, you will find that we have all said that on a number of occasions. You recognise that the proposed legislation is complex and that it deals with a number of complex areas, and you also say that dealing with age and gender issues is complex. Does the bill represent an opportunity to consider all the issues? You recognise that age and gender crimes take place, so perhaps there is a missed opportunity. Is there a missed opportunity that we can act on?

Euan Page: I absolutely recognise that the crimes take place, and the work of the Equal Opportunities Committee and the Justice Committee is testimony to the fact that an opportunity is being grasped to explore issues further. The commission's work was born out of the debate on the viability or otherwise of a gender aggravation and will be carried forward. The debate on more appropriate and effective responses to how crime manifests itself and is experienced by different sections of society will not by any means begin and end with a discussion of the provisions of the Offences (Aggravation by Prejudice) (Scotland) Bill.

The Convener: Thank you, Mr Page. That was very clear and helpful. It would also be helpful if you gave the clerk details of the Joanna Perry document. Thank you very much for coming to the meeting.

I suspend the meeting briefly while the panel changes.

10:53

Meeting suspended.

10:54

On resuming—

The Convener: I welcome the second panel, who represent the Association of Chief Police Officers in Scotland. We have with us Superintendent David Stewart, project manager, and Inspector Dean Pennington, secretary, of the ACPOS diversity strategy project. We will move straight to questions.

Bill Butler: Good morning, gentlemen. In your written evidence, you state that the bill, if passed, will have an impact on the Scottish police service in terms of recording, reporting and monitoring mechanisms. Will you elaborate on that and explain how the police in Scotland currently record crimes that are motivated by prejudice relating to disability and sexual orientation?

Superintendent David Stewart (Association of Chief Police Officers in Scotland): On the first part of your question, there will be two impacts on the police service. First, there will be additional information technology requirements, which come with any new legislation that is passed—IT systems need to be upgraded—but, on a positive note, the bill will allow for accurate and consistent recording across all the Scottish police forces.

That also relates to the answer to the second part of your question, which is that, at this time, given that no specific statutory aggravation exists and that no criminal legislation is in place, the recording systems for crimes that relate to LGBT and disability issues vary from force to force.

Bill Butler: Will you give me some examples of that variability?

Superintendent Stewart: Yes. In Strathclyde Police, homophobic crime is recorded via the vulnerable persons database, which aims to record the impact of particular crimes on victims. Similar crimes or incidents that are recorded on that system include domestic violence and racial incidents. However, no disability-related incidents are recorded on the database at the moment.

Other forces in Scotland record hate crime across all strands of diversity through the STORM command and control system by applying specific codes to incidents. In certain forces, a crime management system has been implemented, with upgrades such as specific markers against certain types of crime, which allow the system to be searched. There is inconsistency throughout Scotland, which ACPOS thinks the introduction of a statutory aggravation will address.

Bill Butler: That is very clear.

You said that there will be two impacts. What is the second one? You have told us about the information and communication technology impact.

Superintendent Stewart: The ICT impact on the police service relates to amending systems to record certain types of crime.

Bill Butler: Were you referring to the culture that will come with our creating a statutory aggravation?

Superintendent Stewart: I did not really mean the culture but the means of examining the scale of such crime and getting a baseline throughout Scotland. One of the issues that the service faces is determining the levels of hate crime. We can tell you the levels of race crime, and some forces can tell you the levels of homophobic crime, but there is no consistency across all the Scottish forces on the whole hate crime agenda.

Bill Butler: Thank you for that. Inspector Pennington, do you have anything to add?

Inspector Dean Pennington (Association of Chief Police Officers in Scotland): No. Superintendent Stewart has covered everything.

Bill Butler: Okay. Thank you.

Robert Brown: We have heard evidence on underreporting, which is linked to what you have said, and on which you gave evidence in your written submission. Do you have a perspective on why there should be problems with underreporting? What action are the police taking to try to improve the situation?

Superintendent Stewart: Inspector Pennington will certainly be able to add to this answer. ACPOS feels that the vast majority of hate crime is underreported. As we say in our written submission, that could be down to the unwillingness of people to come forward to the police, which is an issue for us to address, but there could be another issue with confidence in the criminal justice system from end to end.

You asked what we are doing to improve the situation. The Scottish police forces work very closely with all diverse communities and organised groups locally and nationally to try to encourage people to come forward. Individual forces and ACPOS are looking at an online third-party reporting system, which would allow people to report hate crime to the police via the internet if they were concerned about coming to police stations.

Someone commented last week from the transgender community that there were concerns that people might be made fun of if they came forward to report an incident, so we are trying to introduce systems and to implement new IT systems that may positively impact upon people's ability and willingness to report crime to us.

11:00

Robert Brown: I would like you to elaborate on third-party reporting, as I am not sure what is involved. We are talking about reporting by the victim, but at arm's length.

Superintendent Stewart: Yes. If there is a reluctance to approach the police directly, victims can go to a third-party organisation, which can take the report on their behalf and act as a mediator between them and the police in reporting the crime. Third-party reporting goes beyond hate crime—it is in place for domestic violence and a number of other crimes—but ACPOS currently has a focus on hate crime.

Robert Brown: Does it happen to any extent now? Will the bill make a difference to the extent to which it happens?

Superintendent Stewart: In respect of overall reporting or third-party reporting?

Robert Brown: Third-party reporting.

Superintendent Stewart: The point is that if members of, currently, the LGBT and disabled communities are aware that a statutory aggravation is available, and they see something coming out of that, they will have more confidence in reporting crimes. The better we are at taking reports individually and ensuring that systems are in place when people do not want to come directly to the police, the more that people will be encouraged to come forward.

Robert Brown: So the problem is slightly different from those that you have with rape and sexual offences, when there are evidential issues. The issue is not a poor conviction rate once you get cases to court—slightly different issues are involved.

Superintendent Stewart: Absolutely. The conviction rate when we go to court with hate crime incidents—racial crimes in particular—is fairly solid, but there is an issue about getting people to come forward and report the crime in the first place.

It was interesting listening to Mr Page talk about the issues around disability. We seem to take disability for granted, far more than transgender issues, but the impact on people coming forward to the police, the concerns about how they will be treated by the criminal justice system, and the concerns about publicity surrounding cases are important factors that must be taken into account.

Robert Brown: People probably do not know the nuances of the law when it comes to things happening to them personally. Will the introduction of the bill's statutory aggravations make a difference to the levels of reporting?

Superintendent Stewart: I would like to think so. The fact that at the conclusion of a trial the judge will comment specifically on the impact that the aggravation has had will send a strong message out to offenders, at whom the bill is aimed, and to victims, who will be encouraged to take their issues to the criminal justice partners.

One of last week's submissions suggested that the bill might lead to a reduction in the number of hate crimes. However, as with any new legislation, in the early years we should see an increase in the number of such crimes—we will be disappointed if we do not—until we get an accurate baseline. Once we know what the baseline is, the role of the police and our partners is to address the issues and try to reduce the crime level. So one thing that the legislation will do is allow us to have a baseline. It might not be accurate, due to underreporting, but at least it will be a baseline.

Robert Brown: You see third-party reporting as being important in improving confidence. To what extent are front-line police officers aware of the potential for bringing in third-party organisations or referring people on for support? Are you conscious of that in practice?

Superintendent Stewart: Yes. In all the Scottish forces, third-party reporting is usually co-ordinated by a specialist team, supported by front-line officers. In effect, front-line officers—community officers—are the day-to-day contacts with third-party reporting centres, but that is monitored centrally. In Strathclyde, for example, my unit monitors third-party reporting and supports front-line officers with training and familiarisation with third-party reporting centres.

The Convener: The committee has no difficulty in accepting that there is underreporting of this type of crime. Indeed, as you will be aware, the results of a recent survey indicated that, for various reasons, there is a great deal of underreporting of all types of crimes and offences. Has Strathclyde Police or any other force undertaken any research into whether there are particular problems with reporting this type of crime?

Inspector Pennington: The only research that I am aware of is on third-party reporting. Back in 2004, we introduced third-party reporting for reports of homophobic crime. A year later, research was undertaken into people's perceptions of the change, including whether it had resulted in increased confidence in reporting such crime. The response from the community was overwhelming: people told the researchers that, although they had not used the new provision to any great extent, the mere fact that it had been put in place gave them confidence that the police took such crime seriously and would deal with it.

Superintendent Stewart: On that point, interestingly, the Scottish police service found itself the subject of a tabloid headline only a matter of months ago. At the time, we were slapping ourselves on the back for succeeding in getting more people to come forward, but the paper spoke only of a shocking increase in homophobic crime.

If the bill becomes an act, the committee should expect the usual toing and froing from different perspectives on the reporting of recorded crime levels. From the police perspective, our emphasis will be on the fact that we view positively more people coming forward to report such crimes. That said, the public perception that I described, which is driven by the media, will remain.

The Convener: As Superintendent Stewart is well aware, you get credit for nothing.

Nigel Don: The statutory aggravations of racial and religious prejudice have been on the books for a while. In terms of the bill, what should we avoid and what lessons can we learn?

Superintendent Stewart: As we highlighted in our submission, there are minor differences between the bill's proposals and the racial prejudice aggravation. I refer specifically to what members of the judiciary say in court when summing up at the end of the judicial process. Consideration needs to be given to aligning the terminology for all statutory aggravations.

In considering the racial aggravation under the Crime and Disorder Act 1998, the main issue for the police is that there is another piece of primary criminal legislation on racially aggravated harassment and conduct—the Criminal Law (Consolidation) (Scotland) Act 1995—and we can report a racial crime as a stand-alone crime under sections 50A(1)(a) or 50A(1)(b) of it. If we do so, corroboration—two pieces of direct evidence—is required.

Again, as we said in our submission, ACPOS is extremely supportive of the bill and the putting into law of the statutory aggravations that it proposes. We do not wish in any way to delay the progress of the bill through the Parliament, but—longer term—we believe that consideration needs to be given to whether stand-alone criminal legislation similar to that which I have outlined is required for aggravations other than race. If not, given that in the 1998 act we have the stand-alone section 96 aggravator for racially aggravated offences, do we need to retain the other provision?

Nigel Don: While I acknowledge those technical arguments—my intention is not to disparage them by describing them as technical—are there any substantive problems with how we propose to proceed?

Superintendent Stewart: No.

Paul Martin: Good morning, gentlemen. Can you give us further details of the training and guidance that is provided on diversity and race hate crime?

Superintendent Stewart: Every new police officer in Scotland receives a week-long input in relation to equality and diversity during the first

week of their training at the Scottish Police College. Throughout the remainder of their time there, they receive input in relation to legislation across the board, which includes current legislation on race hate crime and the religious aggravation.

Over and above that, within each force there is on-going refresher training, specifically on diversity, in which any criminal aspects are brought to the fore. There is on-going training at a national level for first-line managers—sergeants, inspectors, chief inspectors and so on—as they progress through the ranks. It gives them a balanced view and, to a certain extent, helps them to understand why legislation such as the bill is important, because of the potential impact of diversity on the population.

Paul Martin: How would the legislation impact on the delivery of those training programmes? Would you have to reconfigure them? Would you require additional resources to deliver them?

Superintendent Stewart: When any legislation comes into force, ACPOS seeks guidance from the Crown Office on its implementation internally. Once that guidance is received, it is circulated among the Scottish forces. I agree with Mr Page about the size and scale of the bill—it might be a far-reaching piece of new legislation, but it is written in a fairly clear and straightforward way. ACPOS believes that the bill will have a huge impact on training, although there will be more to do on the awareness side. Some input will be needed to adjust our IT systems to take account of the legislation, but that will not be particularly onerous.

The Convener: In your reply to Nigel Don, you referred to your written evidence and said that it was possible that some aspects of the legislation could cause confusion. You dealt with the question of race hate crime, but would any other aspects cause similar difficulties?

Superintendent Stewart: I do not think that difficulties would be caused with the stand-alone aggravations as they are. I am here today representing ACPOS, which represents the interests of the front-line police officers who will have to implement the legislation. Although we understand that the legislation is offender focused, we are keen to ensure that the impact on the victim is taken into consideration by the first officers on the scene. When those operational police officers arrive on the scene, they have immediately to think about whether the incident is to be dealt with under section 50A of the Criminal Law Consolidation (Scotland) Act 1995, section 96 of the Crime and Disorder Act 1998, section 74 of the Criminal Justice (Scotland) Act 2003 or a section of the new legislation on offences aggravated by prejudice. I reiterate that ACPOS does not wish to delay the process in any way, but we wish there to be, at some future date, a single piece of stand-alone legislation that covers all hate crime, whether it involves aggravators and/or criminal offences.

The Convener: That is very clear.

Stuart McMillan: The bill states that evidence from a single source is sufficient to prove that an offence is aggravated by prejudice. In your written evidence, you state that that will have a positive effect on the police, because it will remove the need for a victim to have independent witnesses to the aggravation. In the words of your submission:

"an individual person's perception of motivation for an offence will be sufficient for the aggravation to be competent."

In your experience of dealing with racial and religious aggravations, have they given rise to false accusations that offences were aggravated by prejudice?

Superintendent Stewart: To my knowledge, there have been none in relation to racial aggravation. In general terms, many of the issues around race are obvious. In relation to religious aggravation, to my knowledge there have been no such cases. As I said earlier, clear guidance from the Crown Office will assist ACPOS and the police service in implementing the legislation.

As Mr Martin said, we must also consider how we inform our officers about the aggravations. Our officers have experience of dealing with aggravated offences, such as those to which you have alluded, so it will be their responsibility to highlight within police reports to the Crown Office any concerns in relation to aggravated offences. I would like to think that police officers will be sharp enough to identify the aggravations at any point. As I say, there is nothing to suggest that the existing statutory aggravations have had a negative effect.

The Convener: There are no other questions. I thank Superintendent Stewart and Inspector Pennington for coming to see us this morning. Your evidence has been useful.

11:15

Meeting suspended.

11:17

On resuming—

The Convener: I welcome the third panel of witnesses, who represent the Law Society of Scotland. We have with us Alan McCreadie, the deputy director of law reform; Raymond McMenamin, of the criminal law committee; and David Cabrelli, of the equalities law sub-

committee. Good morning, gentlemen, and thank you very much for coming. We will move straight to questions.

Angela Constance: Good morning, gentlemen. In your written submission, you express concerns about the effectiveness of the bill. Do you believe that the common law is sufficiently equipped to deal with crimes against people on the basis of their sexual orientation, transgender identity or disability?

Raymond McMenamin (Law Society of Scotland): The short answer is yes. The question is whether such an aggravation could be applied effectively when those issues arise in court. There is nothing in the bill that cannot be achieved through the use of the common law as it stands. What the bill does is highlight particular problems. It may be that those problems are not highlighted at present, which may have given rise to the need for such legislation. However, essentially, it is possible to deal adequately with such crimes at present under the common law.

Alan McCreadie (Law Society of Scotland): There is nothing that I can usefully add to that. In our written submission, we also refer to issues of evidence that must be discharged by the Crown if legislation is in force that adds a statutory aggravation. Under normal circumstances at common law, in disposing of a case the sheriff, judge or justice of the peace can take aggravating or, indeed, mitigating circumstances into account in arriving at a sentence. However, under the legislation on racial and religious aggravation, the matter must be proved.

David Cabrelli (Law Society of Scotland): I agree. As Mr McMenamin and Mr McCreadie have made clear, the common law could deal with these issues, but the committee should remember that the benefit of the bill is that it will send a positive message to society and the public; on the other hand, however, it will mean a loss of some of the flexibility that is inherent in the common law. Those two competing requirements have to be balanced.

Angela Constance: Mr McMenamin said that the current law needs to be applied more effectively. How could that be done? What are the advantages of the flexibility of common law?

Raymond McMenamin: Procurators fiscal and prosecutors more generally could be trained to highlight such issues when they come into court. Of course, that might be a matter for the Crown Office and Procurator Fiscal Service.

If these issues are to be highlighted in court, the prosecutor has to bring them to the attention of the presiding judge or sheriff. That approach could be coupled with training for the judiciary to recognise and deal with such issues when they arise. My understanding is that the intention behind the bill is partly to highlight these issues in court and ensure that, as with offences involving racism and sectarianism, they stand out from the norm. It is for the personnel in court to apply the current law and highlight these issues and for the judiciary to deal with the matter once it has been highlighted.

Alan McCreadie: I have nothing that I can usefully add to that.

David Cabrelli: A benefit of common law is that crimes such as breach of the peace and assault are drawn in fairly general terms and can be used at the instance of both the prosecution and the judiciary. With a statutory aggravation offence, however, defence solicitors might well challenge the prosecution's case with technical arguments over the meaning of particular words. As a result, those words will become frozen in time and the flexibility that is inherent in the more general common-law approach will be lost.

Angela Constance: Does the bill have any advantages? I believe that Mr Cabrelli was about to touch on those earlier.

David Cabrelli: Indeed. The bill sends a message to society about the statutory aggravation of offences based on sexual orientation, transgender identity or a victim's disability and puts the issue into the public consciousness. The issue might be inherent in the common-law system, but it is not so much at the forefront of it. Moreover, the relevant subsections of sections 1 and 2 will provide the impetus for better recording of these crimes by the judiciary.

Raymond McMenamin: We should bear in mind that the more you bring legislative aspects into the courts, the more opportunities you give the defence to challenge cases. You might find, for example, that, as with racially aggravated charges, cases go to trial on the aggravating factor alone, which means that witnesses have to go through the ordeal of giving evidence. We should not lose sight of the fact that it is not simply a case of highlighting the issue and the court rubber-stamping it—it will be open to challenge. I am not saying that that is an argument against the proposal, but it is worth considering.

Robert Brown: I want to get a clear view of the position with regard to solicitors in practice in the criminal courts. You have indicated that the common law can deal with these matters, but is that happening? Are judges and prosecutors highlighting such issues in the way in which the bill seeks? In your experience, is there a difficulty? Do the issues not always come through as strongly as they ought to?

Raymond McMenamin: Of the three of us, I am the most regular practitioner in the courts. The issues are highlighted, but not with a great degree

of consistency. It comes down to the specifics of the case and the approach that the prosecutor takes in presenting it. For example, if an assault was clearly motivated by homophobic attitudes, I would be surprised if there is a procurator fiscal in the land who would not bring that to the attention of the court.

Robert Brown: I want to pursue the point. You have touched on the issue of inconvenience to witnesses and the desire to get rid of cases without putting witnesses through the ordeal of giving evidence. The other side of the coin is that, through plea bargaining, something that ought not to be compromised on can be negotiated away. Does that happen at the moment and, if so, to what extent?

Raymond McMenamin: In racially aggravated cases, procurators fiscal were instructed—and may still be instructed—not to desert cases or to accept not guilty pleas, so their hands were tied; they had to run with those cases, regardless of their personal view. Their independence as prosecutors was compromised in that regard; not many practitioners in the courts see that as healthy. There will always be situations in which charges may be diminished, for want of a better term, as the defence will always challenge the charges.

Robert Brown: I am not sure that we are quite hitting the nail on the head. There is a fear that, if a substantial aggravation has been libelled in a case, presumably for good reason, that may be lost by a compromise, in effect, between the prosecution and the defence out of a well-motivated desire to save witnesses trouble. Is that happening to any significant extent in this area, or, based on your experience of professional practice, is it not an issue at the moment? The other witnesses may want to comment.

Raymond McMenamin: I cannot say that it happens on matters relating to disability, sexual orientation or gender, but it does happen—day in, day out. If we introduce an issue as an aggravating factor, under common law or statute, the defence will potentially use that as a bargaining tool to diminish the charge. That happens in other areas. A defence lawyer is under a duty to act in his client's best interests; if his client's instructions are to challenge the charge of aggravation, it is fair game.

Robert Brown: For the avoidance of doubt, are you expressing opposition to the view that the procurator fiscal's discretion should be compromised by statutory direction or direction from the Lord Advocate in such cases?

Raymond McMenamin: Yes. Generally, I do not think that it is healthy for prosecutors to have their hands tied in such situations. If there is be a professional, independent prosecutor in court, he or she should be able to act as such and use their discretion.

Robert Brown: Do the other witnesses have a view on the matter?

Alan McCreadie: As my colleague Mr McMenamin said, statutory aggravation can be used as a bargaining tool when dealing with the substantive offence. The accused may plead out to the charge under deletion of the statutory aggravation; I am sure that that happens day in, day out in all our courts.

David Cabrelli: I agree with what has been said and have nothing to add.

Paul Martin: Good morning, gentlemen. You state that the creation of a new statutory aggravation may impose additional burdens on the Crown. You have already touched on the issue, but could you describe those burdens in more detail?

Raymond McMenamin: Take the example of a situation in which one man hits another in the street, people intervene and pull them apart and, as they are being pulled apart, the person who is alleged to have committed the assault makes a remark to the other person concerning gender identity or disability. The onus is on the Crown not only to prove the assault but to tie in the alleged remark to the assault, in order to show that the assault was motivated by that person's views on gender, disability or whatever. All that adds to the burden on the Crown, and might, in some instances, make it harder for the prosecutor to secure a conviction on the aggravated charge. Of course, the substantive common-law charge is still there to fall back on, but the issue of aggravation can make everyone take the long way round to get to the final resolution. Touching again on what we said about challenges from the defence, I think that such a trial could end up being quite long and involved.

Paul Martin: However, as you said, the common-law charge of assault would still be there to fall back on.

11:30

Raymond McMenamin: Yes. That is the situation that currently exists with racial and sectarian aggravation.

Alan McCreadie: I have nothing to add to that. As Raymond McMenamin said, the issue here is simply the aggravation, which will have to be proved along with the substantive charge.

David Cabrelli: As was said earlier, with a statute, there are definitional issues that can be challenged at the instance of the defence. The

case has to fit with the wording of each of the subsections and various challenges can be made on the import, width and scope of particular words.

Paul Martin: Should we, as legislators, be concerned about the additional burdens that will be placed on the prosecutors? It is their job to prosecute on the basis of legislation that has been passed by Parliament. If the common-law charge is still there to fall back on, should we be concerned about how complex and challenging the situation will be for the prosecution? The prosecution will always face challenges, will it not?

Raymond McMenamin: That is right. Ultimately, the decision about how something is prosecuted is down to the Crown. I do not think that the concerns are a bar to legislating in this area, but they are a consideration. Practising lawyers will tell you that the more laws that are created and brought into courts, the more complex the job of presenting, prosecuting and defending cases becomes.

Bill Butler: Mr McMenamin, as a matter of interest, what is your view of racially aggravated offences and offences that are aggravated by sectarian behaviour?

Raymond McMenamin: Insofar as they are prosecuted in courts?

Bill Butler: Yes. What do you think is the efficacy of those charges?

Raymond McMenamin: They have been effective. In Scotland, we have particular issues in those areas, and the aggravations that have been brought before the courts following legislation have been useful in highlighting those cases in which those issues have arisen. However, there is a caveat to that, as I have seen cases in which those charges have been badly applied, and in which aggravations have been attached—and, indeed, pleas of guilty have been entered—even though the situation might not have amounted to terribly much.

For example, a case that I worked on in Glasgow involved a teenage male who had been arrested for a number of matters—there were a number of charges on the complaint. At the trial, after some evidence had been heard, the procurator fiscal decided not to proceed with the charges, save one. However, the accused pled guilty to a racially aggravated breach of the peace in a police station in Glasgow. One of the police officers who had been processing him at the police station had an English accent and, at one stage, well advanced into the processing, the youth, who was drunk, said something along the lines of, "You're an English bastard." The case was prosecuted as a charge of racially aggravated breach of the peace. Ultimately, as part of what was I suppose a plea bargain, the accused pled guilty. The case was dealt with as no more than a token breach of the legislation and a very small fine was applied. My view, which is shared by many practising lawyers in the courts, is that that is not a true use of the legislation and not the sort of situation that it is designed to attack. As I say, the caveat is that, although such legislation can in general be effective, it is only as effective as those who bring it into court and apply it can make it. To be frank, if the legislation is used poorly, it is at risk of being trivialised and not having as effective an impact as it can in more serious situations.

Bill Butler: Legislation can always be trivialised and we should try to ensure that that does not happen, but some might argue that, although the particular case that you mention was minor in nature, it was still an infraction and therefore rehabilitation or the salutary effect of a fine was appropriate. Earlier, Mr McMenamin said that the racial and sectarian aggravations of offences have in the main been effective. Why should the aggravation that we are considering not be effective and why should it not raise particular issues?

Raymond McMenamin: I do not think that I have ever said that it will not be effective.

Bill Butler: I beg your pardon. Why will it not be particularly effective, then?

Raymond McMenamin: I would not even subscribe to that. There are benefits in introducing the proposed legislation. The distinction that was made earlier was that the issue can be dealt with under the common law. We need to consider what the ultimate aim is. If it is just to punish people a bit harder, that is slamming the stable door after the horse has bolted. However, if the aim is to highlight a problem in our society for people with disabilities and gender issues, the bill can be effective along with other measures such as training and education. We must make available to the courts ways in which to tackle the issue after conviction. I am not convinced that simply hitting people with bigger fines or putting them in jail for longer will be effective, but if the bill is coupled with other steps, it can be effective.

Bill Butler: I agree with you on that.

Stuart McMillan: The committee is aware that some victims of hate crime might be reluctant to report such crimes for fear of being outed. Does the bill have the potential to focus unwanted attention on personal and confidential aspects of a victim's life if a case goes to court, which might, unfortunately, increase the level of non-reporting?

David Cabrelli: In the absence of clear statistics on the level of underreporting, it is difficult to conjecture about the effect that the bill will have on

that. To return to the bill's symbolic effect and the point about putting the issue into the public consciousness, one would hope that the bill will encourage persons who have been the subject of hate crime to come forward and report. As the ACPOS representatives mentioned, there has been an effect in the context of racially aggravated crime. However, I am not in a position to comment on the effect of the fact that individuals who have been the subject of hate crime will have to reveal various details about their personal life in court.

Alan McCreadie: We will have to see what happens. In our response, we talked about the need for effective monitoring. I endorse that point. The issue must be considered if the bill is implemented.

Raymond McMenamin: I agree that it is difficult to answer the question. Monitoring of the legislation would be important in that context.

Nigel Don: In the final paragraph of your written evidence, you mention the need for updated and refreshed diversity training, for police officers in particular. That is a statement of fact, to which I take no exception. Is it an unexceptional statement of what will be needed, or is there something more behind it, which perhaps relates to your experience of previous legislation?

David Cabrelli: There is no hidden agenda. We simply wanted to highlight best practice.

Alan McCreadie: It is an unexceptional statement.

Nigel Don: We will treat it as such.

The Convener: Given that court practitioners are here today, I will ask Mr McMenamin the same question that we asked ACPOS. In your experience, have you come across false accusations of racial or religious aggravation being made in an attempt to ensure that prosecution went ahead?

Raymond McMenamin: Yes. I have encountered such accusations in relation to racially aggravated charges. It has been contended—and I have good reason to believe—that accusations about the use of racist language have been made when that might not have happened, or that such aspects have been exaggerated, to ensure that a prosecution followed.

The Convener: Do you want to comment, Mr Cabrelli?

David Cabrelli: I have nothing further to say on that point.

The Convener: I take it that you are adopting the same position, Mr McCreadie.

Alan McCreadie: Yes.

Bill Butler: Mr McMenamin said that such instances have occurred in his experience as a practitioner. Do they occur often or once in a blue moon?

Raymond McMenamin: They are not infrequent. They do not happen daily or weekly, but they do arise. Very often when one is taking instructions from a client who has been charged, one gets the flavour of something that was said having been blown out of proportion. Very infrequently, one gets the impression that something has been made up altogether.

Bill Butler: "Not infrequent" is not very specific. What percentage of cases are you talking about, approximately?

Raymond McMenamin: In about one in five—

Bill Butler: That is a high proportion.

Raymond McMenamin: In about one in five cases there is an issue about the veracity of the accusation.

Bill Butler: That is helpful.

The Convener: If there are no more questions, I thank the witnesses. Your evidence was clear and will be extremely helpful to the committee.

11:43

Meeting suspended.

Scottish Parliament

Justice Committee

Tuesday 27 January 2009

[THE CONVENER *opened the meeting at 10:18*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome you to the meeting, and remind everyone to switch off their mobile phones. We have one apology this morning, from Cathie Craigie MSP.

Agenda item 1 is a decision on taking business in private. The committee is invited to consider whether an options paper and draft report on the Offences (Aggravation by Prejudice) (Scotland) Bill should be considered in private at future meetings. Is that agreed?

Members *indicated agreement*.

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

10:18

The Convener: Item 2 is the continuation of evidence taking on the Offences (Aggravation by Prejudice) (Scotland) Bill. Today is the final scheduled evidence-taking session. I welcome again Andrew McIntyre, head of the victims and diversity team; and Linda Cockburn, principal procurator fiscal depute in the victims and diversity team, policy division. Both are from the Crown Office and Procurator Fiscal Service.

We move straight to questions, which will be led by Nigel Don.

Nigel Don (North East Scotland) (SNP): Thank you, convener, and good morning. It has been pointed out to the committee by several witnesses that the common law is well capable of dealing with the issues that we have been discussing. Do you agree with that statement in general and, if you do, why do you think that the bill is necessary?

Andrew McIntyre (Crown Office and Procurator Fiscal Service): That is right—the common law covers the range of offences that we expect the bill to deal with if it is enacted. The bill does not propose any new offences, and we will continue to prosecute the same kinds of crimes in broadly the same manner as we do now.

However, if the bill is enacted, an important distinction will be created in the explicit recognition that certain crimes are motivated by hatred of a particular group because of an aspect of their identity. That will be explicitly recognised through the nomen juris and the reference to the aggravation. An important point is that the impact of the aggravating factor on the court's handling of the case, particularly on sentencing, will be clear. To be clear and to reassure, however, I say that if crimes are aggravated by elements that current legislation covers, that is recognised in the charges that we bring and the information that we provide to the court. If it is clear that a crime is aggravated by such a feature, that makes it worse than if it is not, and we draw such an aggravating feature to the court's attention.

Linda Cockburn (Crown Office and Procurator Fiscal Service): We can incorporate aggravation elements under the common law, but we cannot monitor how many such cases there are in a year because the aggravation is included in the text of the charge. The bill will allow us to monitor such cases and to count how many we deal with in a year.

Nigel Don: I understand. To an extent, you will just be ticking boxes, but it will be important and appropriate to do so.

Linda Cockburn: It will be very important because it will send out a message.

Nigel Don: Yes. However, we have heard from a number of folk who believe that the common law is not properly or extensively used because aggravations are not signalled to the court and possibly not even picked up by the police because they perhaps do not think that they matter. Is that a fair reflection of the world as you see it?

Andrew McIntyre: It is impossible to say what we do not know, because we get what the police identify and report to us. If these aggravating features were present in a case, it is safe to say that they would be regarded as such at the moment. However, you are right that providing for such aggravations in legislation raises their profile, allows us to be clear about what amounts to an aggravation and gives us a much clearer framework in which to operate and be clear about what we expect from the police and how we can bring the aggravation to the courts' attention. The courts will have to take into account the fact that Parliament has said that crimes are necessarily worse if they are motivated by certain prejudices. Referring to aggravations in legislation therefore gives them a much higher profile and clarifies for us what we are dealing with and what is expected.

Nigel Don: So you would expect the bill to impact on what the police do on the ground and how they fill in the forms that inevitably must be filled in.

Andrew McIntyre: Absolutely. Filling in forms sounds like an unimportant exercise, but the way in which the system works is that we, as prosecutors, can bring to the court's attention and rely on in trials evidence that the police reports bring to our attention. It is therefore important to focus on gathering evidence of aggravation if that kind of evidence is to come to the attention of courts in Scotland. If Parliament legislates as proposed, that will have an impact on how the work is undertaken because we, as prosecutors, will look afresh at how we handle such cases. We will issue guidance to prosecutors around the country about what impact such evidence will have on their decisions, and we will offer guidance to the police about how they should deal with such evidence if they come across it.

Robert Brown (Glasgow) (LD): The bill retains the discretion of the sheriff, other than in the need to give reasons, so there will be no mandatory sentence if an aggravation is established. Does that match how offences that are aggravated by racial or religious prejudice are currently dealt with?

Andrew McIntyre: The bill's provision on sentencing is the same as that for existing aggravations and we expect it to work in the same way. Obviously, the court is independent of the prosecution service, so we do not control what weight is placed on the aggravations. However, if the bill is enacted, we will get to know, as with existing offences, what weight is attached to the fact that an offence was motivated by an aggravating factor.

Robert Brown: On the basis of your experience of cases involving other aggravations, should sentences be more punitive in cases in which an aggravation is proved? Should the people who are found guilty of such offences receive longer prison sentences or bigger fines?

Andrew McIntyre: It is hard for us to say. We get to find out what the overall sentence is and how it reflects the aggravation. By its very nature, an aggravation is something that makes an offence worse than would have been the case if that aggravating factor were not present, so one would expect that reflecting the aggravation in the sentence would have an impact on the severity of the sentence that was imposed.

Robert Brown: We have had some evidence—from Mr Hopkins, for example—about community sentences and whether more satisfactory community sentences would be more effective in tackling the reason why people commit such offences. Would you expect more use to be made of community sentences to reflect and respond to aggravation by prejudice?

Andrew McIntyre: That is quite a difficult issue. We must be clear that such aggravation can attach to the whole spectrum of criminal offending, from breach of the peace—which, although it can be extremely serious, is an offence that is often regarded as being at the lower end of crime—to homicide. Aggravation does not apply only to particular crimes. We are talking about a range of crime, so it is difficult to predict what the disposals should be.

Equally, it is important to look at the range of disposals that exist—we in the prosecution service, at least, are always open to that—and to think creatively about whether particular community-based disposals are appropriate for particular categories of offending. When we are dealing with vulnerable groups or groups that are targeted because of a particular feature of their identity, the paramount consideration must be safeguarding the interests of those groups. It is easy to see how many community disposals might not safeguard the interests of a group that has been the focus of the perpetrator's hatred, but we are always open-minded about the options that are available, and the courts should be, too.

Robert Brown: In fairness, those are primarily matters for the judiciary rather than for you.

Andrew McIntyre: Exactly.

Robert Brown: On the basis of your experience of offences that have been aggravated by racial or religious factors, is it your impression that the people who have been found guilty of such offences have received more punitive sentences or that greater use has been made of community sentences for those offenders? Depending on the severity of the offence, a mixture of both forms of disposal might be used.

Andrew McIntyre: In general, I am not aware of a reliance on community-based sentences in such cases, although it is fair to say that, across the justice system, it is universally recognised by the prosecution service and by the courts that a crime that has been motivated by racial hatred, for example, is by its nature more serious than it would have been had it not been motivated by racial hatred. That is now part of the understanding of such crime.

Robert Brown: I am trying to get at the fact that there are a number of reasons for having aggravation by prejudice, but I presume that one of them is to strike at the heart of the cultural factors that underlie that prejudice and to reduce people's propensity to commit such offences in the first place. Such prejudice is sometimes associated with ignorance or other background factors such as attitudes. Do you accept the view that a number of people who have given evidence have expressed, which is that we should focus on trying to change people's attitudes and behaviour in that regard?

Andrew McIntyre: I think that that is right. We do that in a number of ways. For example, we do it by having a rigorous prosecution policy that brings into the public domain and to the attention of the courts how seriously such crimes should be treated. At the other end of the system, the courts have a range of powers. If there were a creative disposal that evaluation had shown to have an impact on the propensity of people to commit such offences, it would be extremely difficult to suggest that that was not an appropriate disposal in such cases, but we are dependent on the availability of schemes that have been evaluated so that we can be utterly confident that they will achieve what they seek to achieve.

Robert Brown: Do you have anything to add, Ms Cockburn?

Linda Cockburn: It depends entirely on the person who commits the offence. We could not say that someone who was guilty of such an offence would definitely get community service. It would depend on their record. As well as having a law that says that aggravation by prejudice is wrong, there must be a programme of education. People might need to be taught tolerance.

10:30

Robert Brown: On the role of the Crown Office and Procurator Fiscal Service, I think that I am right in saying that there is currently a policy—I am not sure whether it is a presumption, but there is an instruction—on accepting pleas that would result in the removal of an aggravating factor. What exactly is the policy?

Andrew McIntyre: There is a very logical policy, which makes it clear that when there is evidence of an aggravating factor, for example in relation to racist crime, that should be brought before the court's attention when possible. We should make full use of the statutory aggravations rather than rely on our previous powers to make the courts aware of the facts and circumstances of a crime. Thereafter, when we charge cases, we should ensure that we maximise the potential of the statutory aggravations and do not delete those key elements, the aggravating factors, from the case as part of plea negotiation. For example, if there is a racist element in a breach of the peace, it is clearly in the interests of the accused person to seek to agree a plea of guilty to the breach of the peace under deletion of the racist aggravation. We have given very clear guidance on policy to indicate that that is not generally in the public interest. That is an interesting aspect of our policy, because it is clear and it has been in force for a number of years. If you asked people across the prosecution service how they are to approach racist crime, you would find that that policy is clear in their minds. There is a universal understanding of what it is intended to achieve.

A caveat is that there can be cases when, for some evidential reason, we can no longer prove the aggravating factor. For example, if a breach of the peace is aggravated because, in the course of the shouting and swearing, a racist remark was made then, as with the bill, the aggravating factor may be proved on the basis of only one source of evidence. If, in the course of our case, we lose that source of evidence because the witness does not come to court, or for any other reason, we might still be able to proceed with the substantive breach of the peace and we might legitimately—in fact, we would have no choice but to—delete the aggravating factor. We do that on some occasions because there is no choice, but the policy is clear on how seriously racist cases, for example, should be taken to ensure that we maintain the evidence of the racist aspect throughout the proceedings and bring it to the court's attention.

Robert Brown: The committee follows that clearly, but what about situations when there is a particularly anxious complainer, who is definitely

not keen to give evidence—more so than in the average case—because of potential health damage or suchlike? Do you still retain discretion in cases in which it is manifestly in the interests of the victim that a plea be negotiated in suitable instances?

Andrew McIntyre: Absolutely. We have policy on a range of crimes and how they should be treated. Our policy in this instance is clear and it is regarded as being a very strong policy, which is to be departed from only in the most exceptional cases. Our overriding duty is to prosecute cases in the public interest. That means that we must always take account of all the circumstances of the case; there can be a number of unforeseen factors in cases and we have to be open to considering them. In the example that you give, if the witness had particular anxieties, our first option would not be to delete the aggravation or to discontinue the proceedings but to give advice and support to the victim to help them through the prosecution, so we would have recourse to, for example, special measures and the range of other support mechanisms that are there to make the process better for victims. We feel strongly, particularly when vulnerable groups are targeted, that it is generally not in the public interest to allow the fear that the perpetrator has brought to bear on a witness to bring proceedings to an end, but a different approach sometimes has to be taken in very extreme cases.

Robert Brown: On a practical point, if you drop the aggravation, does that have to be indicated on the case papers, with some reason given for it and some justification for higher-up officials?

Andrew McIntyre: Absolutely. Would Linda Cockburn like to comment?

Linda Cockburn: Yes. That would be the advice to every prosecutor when they depart from a policy. In any type of case, the advice is to write on the case papers the reasons for departing from a policy. If the prosecutor is asked about the issue six months down the line, because they deal with so many cases, they might have forgotten reasons, so those would be marked on the papers.

Andrew McIntyre: Our system requires us to give the reasons for such decisions, which are approved by a senior member of the prosecution service.

Linda Cockburn: Yes—a legal manager ultimately takes that decision.

The Convener: What do you do in a case of assault or breach of the peace that includes in the libel sectarian or racist remarks if, in the course of the Crown case, your evidence does not sustain the sectarian or racist element? That inevitably happens from time to time. If the defence does not make a no-case-to-answer submission, do you seek to delete that element from the complaint?

Andrew McIntyre: There are several options. The prosecutor might feel that it is patently obvious that the evidence is not sufficient and that, as an officer of the court and an independent prosecutor, they cannot properly ask the court to consider that element. In that situation, they will delete it. Alternatively, the prosecutor might feel that an argument can be made. The comment that was made might be on the boundary, so it is not clear whether the remark was racist or motivated by hatred. The prosecutor might make an argument about that, which may or may not be successful. The prosecutor will either delete the element or argue the case, with the court then deciding whether that aspect should be removed. However, the substantive charge will not be lost as a result.

The Convener: There have been complaints, which are too frequent to be apocryphal, that in some cases the Crown, through no fault of its own, cannot sustain the effective aggravation but still seeks a conviction.

Andrew McIntyre: I cannot speak about individual cases or the decisions that people take. However, people prosecute such cases daily and make immediate decisions about the evidence and its significance. Sometimes, there is a subjective element in relation to what a particular remark means. For example, there might be a question as to whether a remark was really racist, as it might be interpreted in several ways. If an argument can be made, it is proper for the prosecutor to make that argument and to let the court decide. However, if it is patently obvious that there is no evidence to support that element, it will be perfectly appropriate to remove the aggravation—personally, that is what I would do.

Linda Cockburn: I agree. Obviously, we can still go for conviction on the substantive charge, but the aggravation should probably be removed. However, I cannot speak for every individual case in the country.

The Convener: Clearly not.

Paul Martin (Glasgow Springburn) (Lab): We have had evidence that the creation of a new statutory aggravation might impose additional burdens on the Crown. What is the panel's experience of that? Do you envisage any difficulties with implementing the bill?

Andrew McIntyre: There are two aspects to that. It will be clear to prosecutors that an additional element must be considered. The word "burden" sounds slightly negative—there will be duties on prosecutors to look for evidence of the new aggravations, to ensure that charges are libelled effectively, and to lead the evidence on

that explicitly in such cases. There will be additional duties on us to ensure that we do all that we can to secure and bring before the court the available evidence of any such aggravating factors. There will therefore be work for us in developing policy and guidance and work for individual prosecutors in individual cases.

Linda Cockburn might say something about the impact on our information technology systems.

Linda Cockburn: So that the committee understands the process, I point out that our reports are received electronically from the police. Every report has a charge, which we will adjust. Obviously, there is a huge number of possible charges. The police also send aggravation codes, which we can add to or take away from. With the aggravations that already exist, there are 2,500 combinations of the aggravation codes. The bill will introduce more, so that we will have 6,500 combinations. That is not the problem; our system can cope with that. The problem is that the charge can hold only six aggravations. It might seem unusual that one charge would have six aggravations, but there are not only textual aggravations but aggravations relating to domestics and whether someone is on bail. Our system can cope just now, but if we keep adding to the law by way of aggravations, our system will eventually become full up; six characters will not be enough and we will have to rewrite the whole system. That is a word of warning. We can cope just now, but if there were any more aggravations, we would begin to struggle.

The Convener: There would be computer overload.

Linda Cockburn: Yes.

The Convener: We will follow that up later.

Paul Martin: What are the implications for witnesses and victims who will be giving evidence in these cases?

Andrew McIntyre: That is an important issue for us to consider. If we choose to libel these aggravations, they will be part of the charge and victims and witnesses will be required to give evidence that speaks to them. We have to be careful that we are comfortable with that and that it is in the public interest in the individual case. In relation to homophobic crime—or indeed any area of crime—there is a clear prospect that someone might have to talk about sensitive and, sometimes, private matters relating to their personality or identity, which they might not wish to have aired in a public forum. We have to be careful that we have information about that. Where that is a real problem for the victim or witness, we have to consider what is in the public interest. In some cases, it will not be in the public interest to air that part of the crime in the public forum of the criminal trial.

The other option, which is always our first option, is that we do whatever we can to support the victim or witness through the process. I know that the Government is considering provisions on witness anonymity. We will follow closely what emerges from that. A sufficient degree of anonymity might be afforded to victims and witnesses in some categories of case to allay their fears about aspects of their private life being aired in public. We have done that in the past under the common law. There is a lot to think about, but the implication for witnesses and victims is one of the most sensitive areas and we would have to be clear about the impact on them and what was in the public interest.

Paul Martin: The evidence that we have received is that, in evidential terms, the common law is much more powerful than this statutory aggravation would be. Do you agree with that?

Andrew McIntyre: I do not think I can say that the current common law is more powerful. At present, if we were dealing with, for example, an assault that was motivated by homophobia, we would prosecute it and choose whether to lead evidence about the particular aggravation involved, such as remarks made at the time of the assault. We might choose not to lead evidence on that, for the reasons of sensitivity that I outlined. The same will apply with the new aggravation. We will have to decide whether it is in the public interest to bring out that aspect of the case. If we choose to do that, we will do it using the aggravation and there will be express reference to it.

Paul Martin: In response to a previous question, you said that these cases would be treated in a high-profile manner. You used the term “high profile”. Will you elaborate on what you said?

Andrew McIntyre: I do not think I said that these cases would be high profile, but their general profile would be raised by virtue of the aggravation. They will absolutely not all be high-profile cases. This is not to diminish any kind of crime, but some cases will be a breach of the peace or a minor assault that is made more serious because of the aggravation. Given the aggravation, the profile of these cases would be raised in the context of the court, because of the new duties that would be imposed on the judge. Some cases might be high profile, but they will not all be high profile.

Paul Martin: That is not to do with the resources that will be attached to the case.

Andrew McIntyre: No. I was talking about the way in which the crimes are regarded. We are raising the profile of crimes that are aggravated by

virtue of hatred against a particular group, because Parliament will have raised the profile of those crimes by recognising their particular seriousness. The profile of the crime—its seriousness—will necessarily be raised in the court because of the provisions that will be enacted if the bill is passed.

Linda Cockburn: It is important to emphasise that the bill is seeking to introduce not a new category of crime but aggravations to an existing common-law crime.

10:45

Bill Butler (Glasgow Anniesland) (Lab): Previous witnesses have suggested that a significant number of false or exaggerated claims of racial aggravation have been made in an attempt to ensure that prosecutions take place. Indeed, last week, a witness claimed that that was an element in 20 per cent of such cases. Have you found that to be a particular problem?

Andrew McIntyre: In the absence of any sound research showing the exact proportions, I would be loth to put a figure on that.

Bill Butler: Like, I am sure, the rest of the committee, I was surprised that the witness felt able to do so. In any case, I was simply referring to the evidence that we took last week. What is your view on the general point?

Andrew McIntyre: As I say, we certainly cannot put a figure on it. With any crime, we as prosecutors have to examine the evidence carefully and take into account any suggestion that the complaint is ill-motivated or not founded on credible and reliable evidence. However, it is safe to say that our anxiety over people making false allegations with regard to this type of crime is no greater than our anxiety over such allegations in relation to other types of crime.

Linda Cockburn: Absolutely. What Bill Butler suggested can happen with any crime. Anecdotal evidence is one thing, but sound research might need to be provided to back up such claims.

Bill Butler: That is very clear.

Are you content with the provision that evidence from a single source is sufficient to prove that an offence has been aggravated by one of the various types of prejudice that are set out in the bill?

Andrew McIntyre: It is a very important provision, because it does not give us any more of a burden than the common law already imposes on us. As Linda Cockburn has pointed out, we will still be prosecuting the same substantive crime. We will still require corroboration of the fact that the crime has been committed and of the perpetrator's identity, but, as with the common law, particular features of an account and particular aggravations will not require corroboration. It is important that a standard is set that will allow us to admit that evidence but which is not unreasonable or unachievable.

Bill Butler: In fact, the standard has already been applied hitherto.

Andrew McIntyre: Absolutely.

The Convener: Obviously, if there is sufficient evidence, you are perfectly entitled to proceed with a case. Sometimes, when you assess evidence in a crime, you might well have reservations about any racial or sectarian aggravation before the case is marked. In such cases, would you rely on the sufficiency of the evidence and go ahead with the prosecution or would you apply the same standard that you would apply to any run-of-the-mill case?

Andrew McIntyre: Prosecutors always face that dilemma. Our primary role is not to determine the facts of a case but to look independently at the evidence and bring it before the court for a judge or a jury—as the case may be—to make a decision. However, in certain situations, we might have to go further than that. For example, a piece of evidence might not only make us question the principal evidence in a case but substantially contradict the principal evidence. If, as a result, it is clear that the allegation cannot be true or is seriously in question, we have to pause and think about whether we can properly bring the case before the court. On the other hand, if it is a matter of the individual prosecutor believing the account, we are probably going too far. Deciding who is or who is not telling the truth is not a luxury that we as prosecutors have, particularly given that, in Scotland, corroboration is required and we can bring a case only if there is principal and supporting evidence.

Stuart McMillan (West of Scotland) (SNP): Will you elaborate on the difficulties that prosecutors face in differentiating between offences that are motivated by prejudice and those that are carried out due to a person's perceived vulnerability? What effect, if any, will the bill have on prosecution decision making in such cases?

Andrew McIntyre: We already have that dilemma, but it will be crystallised by the creation of particular aggravations. Our approach will be simple: the fact that a crime has been committed against someone in one of the protected groups will not be enough to prove to the court that the offence was motivated by a hatred of that group. It is important to be clear about that, because there could be an expectation that whenever a crime is committed against someone who is disabled, for

example, the aggravation will be triggered. It will not.

We will have to look into the mind of the perpetrator, in so far as we can do that. In general, we will look for any evidence that demonstrates that they were motivated not just because they are a bad person or because the other person was vulnerable but because they have a hatred of the protected group in question. We will need to find evidence of something that they said at the time of the offence, or before or after it, that shows us their motivation.

Linda Cockburn: Andrew McIntyre is right. The fact that someone perceives that something was the cause of what happened does not mean that we can prove it. We need objective evidence that we can provide to the court.

Stuart McMillan: Might cases be prolonged because you need to seek specific evidence?

Andrew McIntyre: I do not think so. Cases will not be dragged out beyond what is right and proper, given our investigation and inquiries. What might happen—although it should not happen if we give clear guidance to the police—is that we get a report of an assault against someone in a wheelchair, for example, and nothing is said about the motivation for the crime. An obvious question for us would be whether the crime was motivated by a hatred of people in wheelchairs or by the person's vulnerability. We would ask the police to consider that and report back to us, and we would then consider the evidence. There might be some work involved in that, but it would be quite proper for that to be undertaken.

However, cases should not be prolonged. Either there will be evidence or there will be none. If there is evidence, it will be brought out at the trial. I do not think that undue delay will be created in the investigation and prosecution of cases.

Bill Butler: As Ms Cockburn said earlier, the bill does not create any new offences, but it has been suggested that it might pose a threat to freedom of speech for those who hold mainstream Christian beliefs about sexuality, marriage and so on. For example, let us say that, outside a gay bar, a church organisation distributes pamphlets that contain material about sexuality that some people might perceive to be alarming or upsetting. Could that lead to a charge of aggravated breach of the peace?

Andrew McIntyre: I anticipated that question, because we have discussed how we will approach such cases. Such issues arise, and have arisen in the past in respect of the existing aggravations, so they are important to consider.

In the first instance, our primary function will be to decide whether a substantive crime has been committed. It is worth while to look at the definition of breach of the peace, which requires a standard of conduct that would be

"alarming or seriously disturbing to any reasonable person in the particular circumstances."

Taking account of that definition, it would be for us to consider the facts and circumstances and decide whether the conduct amounted to a breach of the peace. One view would be that distributing leaflets is simply a legitimate expression of freedom of speech. I think there would need to be something more—something in the nature of what was said in the leaflets or about the way in which the protest was undertaken or a view was expressed—for an incident to meet the definition of breach of the peace.

On the basis of a bald scenario, it is impossible to say whether a breach of the peace would be committed, but we are clear that the definition of breach of the peace sets a certain standard that goes beyond someone expressing their views freely and legitimately.

Where expression of views goes further and breaks the law, not only could it conceivably be a breach of the peace—as is the case at present—but it could be a breach of the peace that is aggravated by one of these specific aggravations.

If the bill is passed, there will be no significant change, and there should be no greater anxiety over such situations than exists at present. As prosecutors, we have to weigh up such dilemmas in taking decisions. However, we recognise the difference between the legitimate and lawful expression of views and a breach of the peace.

Bill Butler: So it would all hinge on the circumstances, the reasonableness of the material being distributed and/or the actions of those distributing said material.

Andrew McIntyre: Absolutely. We would have to consider all the circumstances: what was being said, how it was being said and who it was being said to, and the nature of any publications. Only when something breached the criminal law would an issue arise.

Linda Cockburn: Objectively, an issue would arise only if the action would alarm or seriously disturb any reasonable person. That is the objective test that the court would set.

Articles 9 and 10 of the European convention on human rights protect one's right to religious expression and freedom of speech. Any legislation has to be ECHR-compliant.

Bill Butler: You are content that the bill's definition of prejudice as "malice and ill-will" is sufficiently clear to allow prosecutors to decide in

examples such as the one I have attempted to outline.

Andrew McIntyre: I think so. The expression "malice and ill-will" is quite old fashioned, but it is used daily in the courts and we are familiar with it. It says what it sounds like it says, and it is something that we can recognise generally when we see it in the evidence. We are not uncomfortable with the test. It does not change the standard to any significant degree. Importantly, the root offences will continue to be the same, so our handling of them will be the same as it is now. However, if there is evidence of a particular motivation, that will be highlighted differently under the bill.

Bill Butler: So there will be no real change in the procedure and the approach.

Andrew McIntyre: That is correct. Although there will be a change in the court's recognition of breach of the peace—its profile in the court—we will still have to make the same decisions about what is a breach of the peace and what is not.

The Convener: Surely the issue here is the question of alarm, which was originally defined in the case of Logan v Jessop. The alarm has to be real. It should not be exaggerated, and it should not be the alarm that would be experienced by a particularly sensitive person. Has the law moved on from that definition of alarm?

Andrew McIntyre: The current definition is that in Smith v Donnelly, which states it slightly differently, although the way in which you expressed it is exactly the way in which we would apply it. The prospect that someone could potentially suffer minor annoyance or disagreement, or hold a different view, would absolutely not be a breach of the peace. There has to be something more, and it must always be judged, as with all such standards, against the standards of the reasonable person taken in the whole.

Robert Brown: Are there two exercises that have to be carried out by the prosecutor and the sheriff?

Andrew McIntyre: Yes.

Robert Brown: One exercise is to identify whether there is a breach of the peace in the first place. Does an aggravation influence or affect the definition of breach of the peace in any way?

Andrew McIntyre: No, it does not. The first test is whether there is a breach of the peace. If there is, the next test is whether the comments—comments that would be likely to cause alarm and distress to a reasonable person—were made because the person who made them had a hatred of, or was evincing malice or ill-will towards, a particular group. Those are the two tests, although they will be closely linked. With a breach of the peace in particular, the issue will probably hinge on the comments that were made, and we will have to consider whether those comments meet both parts of the test. There will be other factors, such as the way in which something is articulated and where it is articulated.

Those are difficult decisions when it comes to someone who is expressing their views, and we have to be very clear. We agonise over such cases when they come in to ensure that they meet the standard set in the criminal law rather than just accepting that they represent someone exercising their legitimate freedom of speech.

11:00

Robert Brown: The key point is that you do not anticipate that an aggravation per se will influence or change the definition of breach of the peace.

Linda Cockburn: No. There must always be an objective, reasonable test.

The Convener: There is a little concern about one of your earlier answers on IT, Miss Cockburn. Perhaps it is worthy of further explanation.

Stuart McMillan: Can you provide some further detail on the implications for IT if the bill is passed? Have you anticipated a timescale for making any necessary changes?

Linda Cockburn: As I explained, we have a finite number of characters that can be put into aggravation codes, with a maximum of six aggravations per charge. At present, we might see three aggravations. As I said, they do not all represent racist or religious aggravations but include aggravations related to bail and domestics, for example. The codes can be used to flag up in court a previous conviction for a domestic, for example. That is the reason for them.

When the question whether to introduce age and gender aggravations was raised by the Equal Opportunities Committee, our IT department started to think about the situation. We will run out of space for aggravations if they keep being added. The implication is that our whole system would have to be rewritten. I am told by the Information Services Division that that would cost £300,000 for us alone. The courts and the police would also have to realign their computer systems so that we could all work in unison, as we do now.

Stuart McMillan: You mentioned the cost implication, which is substantial. There is also the problem of the number of back-office hours needed to make the changes.

Linda Cockburn: A lot of hours would be needed. Someone from our policy division would need to sit and input the text for 4,000 extra

combinations. There is no doubt that the job would be time consuming, but it could be done. The timescale would be 12 weeks. We would have to meet the police and the Scottish Court Service to ensure that everyone was using the same aggravation codes. There would be a policy aspect to take into account, too, as well as the time that it would take someone to write the 4,000 extra combinations.

Stuart McMillan: Would that be done in-house, or would you bring in external expertise to assist you?

Linda Cockburn: The codes would be written by a member of staff from the policy division.

Andrew McIntyre: We are clear that the current proposal would pose no problem for the capacity of the IT system. Although there would be work to configure all the different possible charge codes that would need to be configured, the system has the capacity to deal with what has been proposed.

Linda Cockburn: And the cost is minimal.

Stuart McMillan: When legislation is being made in any Parliament, the focus should not be on the short-term view alone; a longer-term view should also be taken. You have flagged up an important issue.

Andrew McIntyre: We are not making any judgment or comment about what might or should happen in the future. The point is that the current system is capable, but it is reaching its capacity.

Linda Cockburn: We are merely flagging up that point to everyone.

The Convener: As there are no further questions, I thank Miss Cockburn and Mr McIntyre for attending. In your case, Mr McIntyre, it might have been an action replay of an earlier briefing, but you appreciate that we require to put your evidence on record. I thank you both for the quality of your evidence this morning.

Andrew McIntyre: Thank you very much.

11:04

Meeting suspended.

11:09

On resuming—

The Convener: I welcome our second panel: Patrick Harvie MSP introduced the bill; Sara Stewart is from the Scottish Government criminal law and licensing division's sentencing policy unit; and Jetinder Shergill and Marie-Claire McCartney are from the Scottish Government legal directorate. We will move straight to our first line of questioning, which is led by Angela Constance.

Angela Constance (Livingston) (SNP): Good morning. I ask Patrick Harvie to give an overview of the main purpose of the bill.

Patrick Harvie (Glasgow) (Green): Good morning, colleagues.

As members are aware, the proposal is a long-standing one. During the first session of the Scottish Parliament, moves were made to introduce a statutory aggravation of prejudice on the ground of religion. Questions started to be asked about which of the equalities strands such a mechanism would be appropriate for. The case for the bill has become very strong over the years since then. In Scotland, offences committed on the grounds mentioned in the bill are not being reported often enough, and the nature of the offences involved is not being sufficiently and explicitly recognised.

Such offences have a disproportionate impact on people's lives, not just because of their scale, but because of the emotional impact that they can have, given the nature of the targeting or malice or ill-will that is shown. It is also arguable that it is sometimes necessary to vary sentences, which does not happen often enough.

The arguments were debated at length in the discussions on the extension of statutory aggravation to the ground of religion in the first session of Parliament. At that point, Parliament took the view that statutory aggravation gave greater clarity and helped to address some of the problems with underreporting. Since then, it has been shown that the religious and racial aggravations have been effective—I hope that the committee agrees that some of the evidence that it has heard shows that—and a clear case has been made that extending statutory aggravation to the grounds that are mentioned in the bill would also be effective.

The Scottish Executive working group examined a range of options, including non-legislative options. It made several recommendations, many of which have been acted on, but the headline recommendation was to extend statutory aggravation to cover the grounds of sexual orientation, transgender identity and disability. My intention in introducing the bill was to allow the Parliament to decide whether to support that recommendation, and I hope that the case in favour of it has been made.

Angela Constance: You will have heard that previous witnesses have stated that the common law is already well-equipped to deal with the aggravations that are outlined in the bill. What is your view?

Patrick Harvie: A number of witnesses have argued that the common law is technically sufficient. However, there has also been a

substantial amount of evidence that the common law is not being effectively applied or is unable to perform some of the functions that we seek from legislation. In particular, common-law aggravations are not being used frequently enough in cases in which they might be appropriate, and there is no regular recording of those aggravations. There is no guidance to the police or to procurators fiscal on how to deal with such crimes.

There are also some things that the common law cannot do. Recent answers to written questions from Bill Butler gave, for example, the number of convictions for religious prejudice aggravations in each procurator fiscal area in 2006-07. I have asked similar questions. At the moment, it is completely impossible to get such data for the crimes that the bill covers.

We could introduce guidance for the police and PFs without legislation, but only through legislation can we impose the requirement that the court must make a decision about the aggravation and state whether the sentence has been varied as a result and, if so, how. This nice, short, simple little bill is the simplest, easiest and most effective way of putting together the package of measures that we need if we are to treat these hate crimes in a way that that is consistent with the way in which hate crimes that are already recognised are treated.

Another thing that the common law cannot do is allow us to draw comparisons across the different forms of aggravation, so we cannot tell whether we are having an impact. The Scottish Government has a large number of strands of work, involving a huge amount of activity, related to tackling prejudice in all its forms in our society. We need to be able to ascertain whether such work is effective. We need data on the operation of the justice system in relation to hate crimes, so that we know whether the way in which we treat them is effective.

11:15

Angela Constance: You said that although witnesses said that the common law is technically capable of dealing with aggravations, the reality is somewhat different and the law is underutilised. Can you cite evidence that supports your view?

Patrick Harvie: "There are known unknowns"—is that Rumsfeld's phrase? As witnesses on the previous panel said, it is about knowing that offences are not being reported to the police, that cases are not being brought and that hate crimes are not being explicitly recognised as such, which means that data on them do not exist. It will be possible to give the fullest answer to the question only after legislation has been in operation for a while and we know whether the Association of Chief Police Officers in Scotland was right to say that more hate crimes will be reported if the bill is passed. The statistics might go up for a while, simply because offences would be recognised as hate crimes. I hope and believe that sentences would be effective and that the evidence and intelligence information that are gathered by the police and by the courts will be used effectively.

Angela Constance: You hope that the bill will improve the situation and enable us to know what is currently unknown.

Patrick Harvie: Yes. The committee heard from equality organisations that there is not just anecdotal evidence but research evidence that people who experience such offences come to accept them as a given that they have to live with. We should not allow that to persist—we should not expect people to think that they must deal with hate crimes as a given. [*Interruption.*] That is not the kind of society that Parliament wants, nor is it the law of nature; it is something that we can tackle. Passing the bill is just one of the necessary actions that we must take if we are to tackle such offences more effectively.

The Convener: The gremlins are around this morning. Will everyone please ensure that their mobile phones are switched off?

Robert Brown: It seems that two issues are involved in what Patrick Harvie has been telling us about common-law aggravations: first, the extent to which aggravations in reported crimes are not being drawn out by procurators fiscal and sheriffs; and, secondly, the extent to which such crimes are underreported as a result of perceptions about what the law does about them. Do you accept that there is no clear evidence that common-law aggravations are not used in cases that come before the procurator fiscal? Is it fair to say that there is no evidence one way or the other on the matter?

Patrick Harvie: I am not sure that I agree. When witnesses from the Law Society of Scotland gave evidence to the committee they made a case for the common law's ability to achieve what I hope the bill will achieve, but their case was not entirely consistent. David Cabrelli said:

> "The issue might be inherent in the common-law system, but it is not so much at the forefront of it."—[*Official Report*, *Justice Committee*, 20 January 2009; c 1528.]

A number of witnesses have told the committee that the introduction of statutory aggravations on racial and religious grounds brought the issues to the fore much more effectively. The introduction of the aggravation drew attention to such crimes, increased the focus on them and has been a necessary part of tackling them.

A comparison can be made with the debates that took place a few years ago on domestic

violence, which was not then thought to be as important an issue as we now recognise it to be. It was not treated in the way it is currently—there is now a clear legislative, judicial and political focus on the issue. We regard that kind of violence as being completely unacceptable and we have put in place systems to ensure that we fulfil our objective of eradicating it. If the Law Society is right in saying that the issues that we are discussing are

"not so much at the forefront of"

the common-law system, legislation is needed to ensure that that situation is overturned.

The Law Society representative, after expressing some concerns, said:

"I do not think that the concerns are a bar to legislating in this area, but they are a consideration."—[*Official Report*, *Justice Committee*, 20 January 2009; c 1531.]

That is an entirely balanced and proportionate response. We should work through any issues that arise, rather than use them as a reason not to put in place legislation. We could continue to rely on the common law and perhaps introduce some additional guidance, but it is clear that that would be a less effective system for dealing with these crimes. It would also perpetuate a situation in which we deal with hate crimes in different ways. We might talk about the workload of various organisations such as the police or the Crown Office, but having different systems introduces additional complexity, and the system is not particularly easy to deal with anyway. That would also reinforce the view that some offences or forms of prejudice are less significant and worthy of attention than others.

Robert Brown: My question was related to the evidence that exists with regard to whether the common law is used to deal with aggravation. In your answer, however, there was quite a strong suggestion that the bill is intended to send out a message, as part of a number of other mechanisms to identify the importance and significance of those issues. I will ask you about two points in relation to that. First, is it an appropriate job for criminal law to send messages, as opposed to dispensing justice in individual cases? Secondly, will the bill alone be effective in conveying that message and increasing the profile of that type of offence?

Patrick Harvie: I am not sure that I agree that the core purpose of the legislation is to send a message. Most of us take the view that legislation is not a flag-waving exercise—it is not just about sending smoke signals.

I agree with the witnesses who have argued that we require legislative change to ensure that there is an appropriate response to offences that are committed, and that courts pass appropriate sentences and give reasons for them: that is the bill's core purpose. Several witnesses also argued that, in addition, a message will be sent or received, so it is perhaps a factor that we should take into consideration.

To leave the situation as it stands would be interpreted as meaning that crimes that are motivated by prejudice on the grounds of sexual orientation, transgender identity or disability are less significant or worthy of attention than those that are motivated by prejudice on the grounds of race or religion. That would be a very negative message for people to hear. The core purpose is not to send a message, but that can be a secondary factor. If we send a signal in addition to ensuring that the right sentences are passed and that useful data are generated under the legislation, that is not necessarily a bad thing.

Robert Brown: So your view is—if I understand it correctly—that a range of things are being done and should be done to tackle that particular difficulty.

Patrick Harvie: Yes indeed.

Robert Brown: Is one of the high points of the legislative change that it gives a direction of travel, in addition to other things?

Patrick Harvie: Yes. I have with me a copy of the report of the working group on hate crime, with which I am sure the committee is familiar. The working group produced a number of recommendations, most of which were not legislative in nature. There were only two proposed legislative changes, of which the provision under discussion was the clearest. In introducing the bill, I sought to give Parliament the opportunity to enact that provision.

The other proposed legislative change is somewhat more complicated and was made simply for consideration. It posed the question whether harassment should be considered—that question remains open. The working group made a host of other recommendations and we also took account of the Scottish Government's recent response to the "Challenging Prejudice" document.

Prejudice throughout society should be tackled in diverse ways. No one should give the impression that they can simply wave a magic wand and make everything perfect. I have always argued that the progress that has been made over recent decades did not happen by magic but because people came out—they became open, honest and willing to express the reality of their lives in an explicit and direct way. I expect no less from the legal system. If we continue not to explicitly recognise, label and name homophobic crime, it will become more difficult to continue to challenge and reduce it. Being explicit creates the

kind of progress that we have seen over recent decades.

Robert Brown: That links directly to my question on underreporting, which can be said to be the elephant in the room. Underreporting is a serious matter in this regard, as it is in the reporting of rape and sexual offences where, for all sorts of linked reasons, it is difficult to get people to come forward to make complaints and so forth. Will the bill help to counter underreporting? If so, to what extent should the provisions in the bill be matched by others that would encourage people to stand up for their rights in the way that you implied in your response to the previous question?

Patrick Harvie: The bill will certainly have an effect. That said, the bill is necessary but not sufficient in itself. A host of other things must be done. If someone's friend or partner has gone through a process of reporting such a crime and is treated with respect by the police and courts—in other words, their experience is recognised—that person will, if they are in such a situation, recount to the court how an aggravation was demonstrated and the sentence will be varied as a result. That sort of experience is likely to increase willingness to report.

The opposite could also be said to be true. If the evidence is not led on an aggravation because the prosecution does not, at the end of the day, expect it to make a difference to the sentence, if the sentence is not changed as a result of the aggravation, or if no information is given on whether a decision was made differently, people's confidence and trust in the system will take a bit of a knock.

We recognise the profound change and progress that has been made over recent decades, but it is important to remember that we live alongside people—offenders, victims and even police officers—who were adults when homosexuality was illegal. Police forces still have serving police officers who were trained at that time. If we are to eradicate or tackle more effectively these types of crime, a profound level of cultural change will need to take place. The situation is not yet "Job done." It remains the case that it is entirely necessary to build people's confidence. As I am sure ACPOS made clear, police forces in Scotland are already considering how to improve their work on sexual orientation as an aggravation. They have made a lot of progress in that regard and there is a genuine will to make further progress.

The bill also makes provision for disability, but we are not quite there yet in that regard. We still need to put in place additional systems, including for third-party reporting and additional forms of support.

I am not going to go through all the statistics—the committee has heard them and has had them in written evidence—but it is clear to us that, on all three grounds, there is a far greater experience of living with the criminal offences than is shown in the reported figures. If we are going to get there, we must build confidence among the public that, on all those grounds, their experiences will be taken seriously. Sometimes, bespoke systems are required to deal with those groups in society.

11:30

Paul Martin: The bill does not make provision for the imposition of mandatory sentences when an aggravation has been proven. What are the reasons for that?

Patrick Harvie: As has been made clear, the bill does not create new offences; it introduces a statutory basis for an aggravation for offences that could be either extremely serious or more low-level—offences that might attract a custodial sentence or a community sentence. It would be difficult effectively to specify in legislation what variation to a sentence should be required. It would be better to leave that in the hands of the court, which will know the facts of each case. The court may determine that a sentence should not be varied as a result of the aggravation, but it would have to explain why. If it chose to vary the sentence, information would have to be given on the nature of that variation.

A little while ago, we talked about whether the common law is sufficient. I do not think that anybody would argue that the flexibility in the common law does not have advantages. The idea of the aggravation retains the advantage of flexibility, as it allows the court to hear the evidence and to make a decision based on the facts of the case. It does not bind the court's hands in any way, but it requires that the decision-making process be clear and explicit. The reasons behind the decision will have to be made available not only so that the system can continue to improve, but so that the data can inform the system.

Paul Martin: Do you accept that sentencing is an important part of the process? We heard earlier from Mr McIntyre that some victims may find it difficult to give evidence in court. If the outcome was a sentence that was not as punitive as they had expected it to be—perhaps they expected a mandatory sentence, but that was not what the offender received—would not that be disappointing for victims who have gone to the trouble of giving evidence in court? They may have wanted to remain anonymous but decided not to do so because they thought that the offender would receive a mandatory sentence.

Patrick Harvie: The purpose of the court passing a sentence is to serve the best interests of the public—it is not necessarily to send every victim away not feeling disappointed. People go through difficult emotional experiences when they report an offence and when they go through court proceedings as witness or victim. We cannot pretend that we are going to make everybody happy. What we must have, as Tim Hopkins from the Equality Network has said, is the appropriate response. In some circumstances, that will be a severe sentence; in other cases, it might be a different sentence. It is for the court to determine the response that is appropriate for the offender. That is what we should be looking for.

The Scottish Government and I agree on the policy, which is why we are working together on it. However, speaking personally, I think that there is a powerful argument for developing a more sophisticated response by considering the ideas that Tim Hopkins has raised around more appropriate community sentences that actually get to grips with the reasons why somebody has committed an offence, rather than saying simply that offences must be treated more severely. If that were an area for sentencing guidelines, we would have a very strong system.

Paul Martin: Do you accept that the victim would have to feel comfortable giving evidence? Surely if they were convinced that a trial would result in not just a community sentence but a more effective community sentence, they might feel more confident about coming forward in the first place.

Patrick Harvie: I believe that making the reasons for varying a sentence very clear will have a knock-on effect for future victims of offences. If victims are aware that that happens in Scotland, it will help to build confidence in reporting. I stress the word "help", because it will not build confidence on its own.

I hope that that is clear. If I have not responded to some of your question, it might be because I have not fully understood it.

Paul Martin: I understand the response.

Jetinder Shergill (Scottish Government Legal Directorate): I might be able to shed some more light on the question of cases in which a sentence might be considered to be particularly low. The Crown would still be able to pursue the case under the appeal procedures in the Criminal Procedure (Scotland) Act 1995; indeed, under the bill's provisions, the court would have to explain how the sentence has been affected by the aggravation.

Patrick Harvie: As I said earlier, there is a need to be clear and explicit and to recognise these offences. I am sure that in some circumstances someone might be uncomfortable about the inference that might be drawn about their transgender identity or sexuality based on an aggravation, but we should remember that the aggravation is about the offender's motive, not the victim's status or identity. In such cases, there must be appropriate support through victim support agencies and organisations, but that is no reason for not recognising that, in many cases, victims are angry and assertive, or for not having the aggravation.

Paul Martin: Let us whether get back to the real world for examples. Some individuals will continue to carry out homophobic attacks unless a clear message is sent out by having a mandatory sentence. I am not necessarily saying that such a sentence should be introduced; however, a very clear message has to be sent to certain individuals, who will simply not respond to community sentences.

Patrick Harvie: I am still minded to leave such matters in the hands of the court, which will base its decision on the specifics of the case and the information that is available. Of course, some individuals will continue to hold such attitudes, to believe that they have the right to act on them and to commit further offences. If a court were convinced that an offender's motivation demonstrated a continued—and higher—threat to the public, it would take account of that and express those reasons in passing and varying a sentence. It would be very hard to specify that in legislation. What you suggest might be appropriate in some cases, but not in every case.

Stuart McMillan: You have already answered part of my question. However, as far as appropriate community sentences or appropriate responses from the court are concerned, would educating offenders on such matters have benefits? Would educating school pupils also have future benefits in that respect?

Patrick Harvie: Very much so. The Scottish and United Kingdom Governments have identified a large number of areas where work on this issue has to improve. I will probably not surprise anyone if I say that the way in which racism in schools has been dealt with much more seriously in recent years has not been paralleled by a change in how homophobia is dealt with. Some schools and teachers are better than others, but many teachers still feel uncomfortable about challenging homophobia. In many schools, homophobia is still just normal. We should not allow it to be just normal. The Government document that I mentioned identifies several ways in which it is working on that. I hope that the Justice Committee and others will continue to take an interest in the matter. I certainly will.

On the issue of offenders who commit aggravated offences under the bill, I believe that there will be many situations in which a real difference can be made. As Paul Martin hinted, that is more likely to happen at the lower end of the spectrum, with the less serious offences. I can give a second-hand report of an example of that—it was written about in *Gay Times* last year, so I cannot give an update on how the matter panned out. An offender who assaulted a gay man in Brighton was ordered to spend a short time working with a local gay magazine, with a probation officer present throughout. That was reported as having positive results.

That approach would not be appropriate in every case. The courts would have to decide whether such opportunities should be explored. However, in some situations, it would be appropriate for the court to pass a sentence that engages with the reasons why an offence was committed, rather than one that merely responds or reacts to the offence. That is an issue for the Scottish Government and, perhaps, for the proposed sentencing council to consider in the future. I am sure that the committee, too, would consider it as part of the parliamentary process. The approach is not explicit in the bill, but the opportunity will exist in the future.

Stuart McMillan: The written submission that we received from Leonard Cheshire Disability quotes *Disability Now* magazine. At the bottom of page 3, the submission states:

"Disability Now concluded that their investigation shows 'that police are not taking disability hate crime seriously enough and that disabled people are being attacked for the 'crime' of living independent lives'".

I was taken aback when I read that comment. Is it a legitimate comment and, if so, do you agree or disagree with it?

Patrick Harvie: As I mentioned in relation to sexual orientation and transgender identity, police forces in Scotland have made progress towards having in place specific systems to deal with offences related to those issues. However, we are less advanced when it comes to disability. I hope—in fact, it is more than a hope, it is a clear expectation that is confirmed by the comments of police representatives—that if the bill becomes legislation it will help to bring us up to speed on offences that are motivated by prejudice on the ground of disability.

We should not think of that as a scathing criticism because the simple fact is that progress takes time. We are where we are, and the next thing we must do is to put in place statutory aggravations, which will help to crystallise the issue and to focus minds. We are likely to have substantial progress from the police on the issue.

The Convener: We received evidence a few weeks ago on the Brighton case that you mentioned.

Patrick Harvie: Okay—thank you.

Bill Butler: As Patrick Harvie knows, under the bill, evidence from a single source will be sufficient to prove that an offence was aggravated by prejudice relating to disability or sexual orientation. How confident are you that that will not lead to false accusations being made about aggravation? Last week, we heard the assertion that in perhaps as many as one in five cases involving racially aggravated offences—20 per cent—an issue arises about the veracity of the accusation. What is your view on that?

11:45

Patrick Harvie: To be clear about what was said, I do not think that it was suggested that one in five cases involved false accusations; it was suggested that, in about one in five cases, there is an issue about veracity. That is very different from saying that a certain number of allegations have been found to be false.

Bill Butler: Sure.

Patrick Harvie: An issue might be raised about the veracity of evidence in substantially more cases than that, for any particular criminal offence that we might mention. We took the view that the statutory aggravations on the new grounds should be modelled on the existing ones. That is the nature of racial and religious aggravations, as well as others, as the committee heard earlier this morning. An additional feature of an offence does not necessarily need corroboration. We took that view in order to be consistent. I also think that it is the appropriate view. It will ultimately be for the court to decide whether sufficient evidence has been presented to justify a view on aggravation.

I refer again to the written answers that Bill Butler and I have received from ministers, which demonstrate that a clear majority of cases in which an aggravated charge is brought go to court proceedings, of which a clear majority result in the aggravation being proved. I question the idea that we should, in that respect, be worried about one in five cases. Even if we were worried about a large number of false accusations, that would not be a reason not to put the proposed legislation in place.

Let us imagine that we are thinking about a new offence to deal with a serious crime that we had become aware of. We might be worried about false accusations in the area of sexual offences, for example. I do not think that we would consider that a reason not to legislate. If false accusations are made, our systems would be perfectly adequate to deal with that. Courts will be perfectly

capable of making their minds up on the basis of the information that is before them, and I do not think that that would overload the system. When it comes to racial and religious grounds, I do not think that that is causing a problem.

Bill Butler: That was a clear answer. You will realise, of course, that I was acting as advocatus diaboli—and I will do so again, with the next question. It has been suggested that, although the bill does not create any new offences, it might pose a threat to freedom of speech, particularly for those who hold what could be described as traditional, mainstream Christian beliefs about marriage and sexuality. How would you, as the bill's proposer, respond to those concerns?

Patrick Harvie: We are working within the limits of the human rights legislation that is in place. I am sure that Bill Butler knows that I am not likely to wish to infringe on people's right to public protest, freedom of speech or even civil disobedience, if it came to that.

Bill Butler: And you would not be allowed to introduce the bill in the first place—you are absolutely right about that.

Patrick Harvie: I believe strongly in freedom of speech, and I do not believe that the bill infringes on it at all. The organisations that have submitted written evidence expressing that concern have done so on the basis of fear and apprehension, rather than on the basis of actual experiences. The Bishop of Chester might have had a phone call with the police that he did not enjoy, but no charges resulted. If aggravations could be misused in the way that has been suggested, examples would have occurred in England and Wales, but that is not the case.

Bill Butler: That was very clear. Thank you.

Jetinder Shergill: I would like to add something in relation to the convener's earlier question. My colleague from the Crown Office did not touch on this technical aspect to how the provisions would work. Because of section 1(1)(b), the provisions will bite only where the Crown has libelled the relevant offence with the aggravation. Paragraph (b) is an important technical provision: the Crown must prove

"that the offence is so aggravated."

Where sufficient evidence has not been adduced, and where the aggravation has not been proved, the provisions will fall away. As with all the rest of the evidence that it must prove at trial, the Crown is under an obligation to prove aggravation beyond reasonable doubt. If the evidence on that point is not corroborated, there is no difference from the current common-law situation.

Bill Butler: The reasonableness test will again apply.

Jetinder Shergill: The standard of proof will be no different—it will be the criminal standard. The provisions relating to corroboration reduce the amount of evidence that is required, but the Crown will be obliged to provide the tribunal of fact with the same sufficiency and level of proof.

Bill Butler: So, it is the status quo ante.

Jetinder Shergill: Indeed.

The Convener: Given the special circumstances of the bill, which is a member's bill promoted by Patrick Harvie, it is appropriate for me to revert briefly to you, Mr Harvie. The committee has attempted to deal with the matter as thoroughly as it can, but we may have missed issues that are to the fore in your mind. Is there anything you would like to raise with us?

Patrick Harvie: You will be aware of the Equal Opportunities Committee's report and recommendation that other forms of hate crime and bases for statutory aggravation be included in legislation by ministerial order at some future point. When I introduced the bill, my intention was to base it on the key recommendation of the working group on hate crime; I did not intend to express a view on whether it was appropriate to extend the legislation to age or gender. The Equal Opportunities Committee has taken the view not that that is necessarily appropriate but that the option should be left open to ministers. The Justice Committee may feel that the proposed power is very broad.

The committee should also consider whether that is the right approach in the light of the information that was provided on IT systems. A number of MSPs would expect legislation to be brought before them for consideration before ministers could add further categories.

The Convener: That is certainly my view, and many members may share that opinion. Would you like to raise any further issues?

Patrick Harvie: No. We have covered more or less everything that I expected to cover. Thank you for your time.

The Convener: Not at all. Thank you for giving evidence to the committee.

11:52

Meeting suspended.

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