

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Offences (Aggravation by Prejudice) (Scotland) Bill introduced in the Scottish Parliament on 19 May 2008. It has been prepared by Patrick Harvie MSP, with the assistance of the Scottish Government, to satisfy Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 9–EN.

2. The Bill will extend hate crime legislation to cover crimes motivated by malice or ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability. The Cabinet Secretary for Justice has indicated the Scottish Government's support for legislation in this area.

POLICY OBJECTIVES OF THE BILL

3. The policy objective of this Bill is 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.

4. No one in Scotland should be victimised because of their sexual orientation, transgender identity or disability. It is clear from the findings of the Working Group on Hate Crime¹ that certain groups of people within society are much more likely to have experienced harassment or violence than others, simply because of who they are. The aim of this Bill is to ensure that when the prejudicial context of a crime has been hatred towards a certain group then that context is taken into account when an offender is being sentenced. Crimes motivated by hatred are both individually and socially damaging and should not be tolerated.

¹ <http://www.scotland.gov.uk/Publications/2004/10/20027/44264>

Background

5. The Working Group on Hate Crime was set up by the previous administration in 2003 and defined hate crime in its September 2004 report as “crime motivated by malice or ill-will towards a social group”. The report went on to state that:

“Research consistently shows that some social groups are proportionately more often victims of harassment and crime and that much of this is motivated by prejudice against those groups;

Hate crimes can cause more psychological damage to a victim than crimes that are not motivated by hatred, because the victim's core identity is being attacked. This personalises the crime and can cause the victim a greater amount of distress; and

Hate crime is socially divisive. Such crimes need to be particularly condemned in order to avoid a situation in which the relevant group feels victimised as a group, with members in constant fear of attack. Prejudice against groups can lead to a number of consequences, ranging from fear of crime and inability to participate in normal social activities through to paranoia and vigilantism.”

6. The Working Group recommended that the Scottish Executive (as it then was) should introduce as soon as possible a statutory aggravation for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. The Cabinet Secretary for Justice indicated on 15 January 2008² that the Scottish Ministers are in agreement with this recommendation and support legislation which will give effect to it.

Effect of the Offences (Aggravation by Prejudice) (Scotland) Bill

7. The Bill ensures that, 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. This may lead to a longer custodial sentence or higher fine or a different type of disposal than might have been the case if the offence was not so aggravated. These aggravations also extend to situations where an offender in committing an offence demonstrates malice or ill-will towards a particular group as a whole without the need for an individual victim to be identified.

8. At 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. 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.

9. 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

² PQ S3W-08323

accurate picture of the extent of these particular hate crimes in Scotland and inform policy accordingly.

Existing legislative framework

10. In Scotland, section 96 of the Crime and Disorder Act 1998 made provision for offences that are racially aggravated ('racial hatred'), requiring courts to take such aggravations into account when determining sentence.

11. Section 74 of the Criminal Justice (Scotland) Act 2003 makes provision for offences motivated by religious prejudice ('religious hatred'), requiring the courts to take such aggravations into account when determining sentence and also to state the extent of and reasons for any consequent difference in sentence.

12. Similar provisions to those contained in the Bill already exist in England, Wales and Northern Ireland. Section 146 of the Criminal Justice Act 2003 created statutory aggravations related to sexual orientation and disability in England and Wales.

13. Section 2 of the Criminal Justice (No. 2) (Northern Ireland) Order 2004 brought in similar provisions for Northern Ireland to those introduced for England and Wales.

ALTERNATIVE APPROACHES

14. The Working Group on Hate Crime also considered the creation of new offences of aggravated harassment and incitement to hatred. An aggravated harassment offence would be aimed at behaviour which could be construed as harassment of an individual or acting in a manner aggravated by prejudice which causes or is intended to cause alarm or distress. The risk with such an offence is that it may be difficult to prosecute, relying as it does on proving both the act of harassment itself and the motivation. With a statutory aggravation, even if the motive cannot be proven, the accused can still be convicted of the non-aggravated offence. Behaviour which constitutes harassment or acting in a manner intended to cause alarm or distress could be dealt with using the existing common law offence of breach of the peace, with or without the addition of a statutory aggravation.

15. 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.

16. Statutory aggravations in relation to gender and age were also considered by the Working Group on Hate Crime. The Working Group concluded that age is a very complex issue in relation to crime. 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 statutory aggravation.

17. Like age, gender is also a much broader issue in relation to crime. Domestic abuse and other forms of violence against women are serious issues within society. However, the Working Group's consultation revealed a lack of consensus over whether domestic violence should be considered a hate crime in the same way as crimes motivated by prejudice based on sexual orientation, transgender status, disability, race or religion. As a result, the arguments in favour of a statutory aggravation aimed at tackling violence against women and gender based violence remain unconvincing.

CONSULTATION

18. The Equal Opportunities Committee agreed on 6 November 2007 that there was no need for further consultation on the proposed Bill, accepting the argument that extensive consultation had already been carried out by the Working Group on Hate Crime.³

19. The Working Group's consultation received a total of 175 responses. 102 of these were responses to the main consultation and 73 were responses to the EasyRead version (aimed at those with learning difficulties). 101 responses were submitted by individuals, 13 by disability organisations and 9 by LGBT organisations (representing the lesbian, gay, bisexual and transgender communities). The rest of the responses came from a mix of local authorities, trade unions, gender equality organisations, religious organisations and criminal justice organisations. Respondents were asked first whether specific legislation was appropriate to tackle hate crime, then what form that legislation should take and then which groups should receive special protection through legislation. 70% of responses to the consultation felt that legislation should be introduced to address hate crimes and, of those, the majority agreed that this legislation should take the form of statutory aggravations. The LGBT community and disabled people were the two most mentioned groups, which respondents felt would benefit from special protection through legislation.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Effects on equal opportunities

20. The provisions of the Bill are not discriminatory on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

21. An Equality Impact Assessment (EQIA) has been carried out on the policies in the Bill. As a result of this impact assessment it has been concluded that the Bill will have no detrimental impact on equal opportunities but will help promote equality of opportunity and good relations for lesbian, gay, bisexual, transgendered and disabled people.

Effect on human rights

22. The Bill does not give rise to any issues under the European Convention on Human Rights (ECHR). There may be circumstances where Articles 9 (freedom of thought, conscience

³ <http://openscotland.gov.uk/Publications/2004/01/18642/30070>

and religion) and Article 10 (freedom of expression) are engaged but it is considered that 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.

Effects on island communities

23. This Bill has no disproportionate effect on island communities.

Effects on local government

24. No significant burden to local authorities is anticipated as a result of the Bill.

Effects on sustainable development

25. The Bill is expected to provide social benefits by helping to tackle crimes based on prejudice and hatred and extending additional protection to some of society's most vulnerable groups. It is expected to have a positive social impact by contributing to ongoing efforts to reduce levels of crime. Increased cohesion and solidarity will have positive economic benefits. No significant environmental effects are expected.

Regulatory impact

26. The proposed Bill will not increase the costs on businesses, charities or voluntary bodies and therefore does not require a Regulatory Impact Assessment.

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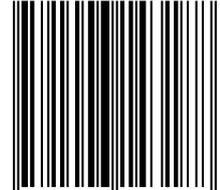
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