Briefing for the Public Petitions Committee

Petition Number: PE1647
Main Petitioner: Angus O’Henley
Subject: Protection for all employees in NHS Scotland

Calls on the Parliament to urge the Scottish Government to make it a specific offence to assault any employee within NHS Scotland whilst that employee is carrying out any patient service in the Scottish NHS

Proposed Reform

The petition seeks the creation of a specific statutory offence covering the assault of any employee within NHS Scotland whilst that employee is carrying out any patient service in the Scottish NHS.

Any such assault can already be prosecuted under existing criminal offences – in particular, the common law offence of assault. However, the petition makes the point that additional offences currently set out in the Emergency Workers (Scotland) Act 2005 (the ‘2005 Act’) do not apply in the same way to all health sector workers.

Emergency Workers (Scotland) Act 2005

The 2005 Act provides that it is an offence to assault, obstruct or hinder various people involved in the provision of emergency services. Given that it covers obstruction and hindering, it can be used to prosecute behaviour which would not be caught by the common law offence of assault (although at least some such behaviour might be covered by other offences such as breach of the peace). The proposals in the petition (as lodged) do not refer to obstruction or hindering.

The following sections set out a series offences dealing with people who assault, obstruct or hinder another person acting in the capacity mentioned:

- section 1 – protects police officers, firefighters, doctors, nurses, midwives and ambulance staff. The offence applies whether or not the worker is responding to emergency circumstances
- section 2 – protects additional categories or worker (eg prison officers), but only where they are responding to emergency circumstances

As amended by subsequent legislation (eg the Emergency Workers (Scotland) Act 2005 (Modification) Order 2008).
section 3 – protects a person assisting someone falling within any of the above categories of worker, but again only where the worker is responding to emergency circumstances

section 5 – protects (a) doctors, nurses, midwives and ambulance staff; and (b) any person assisting one of those health sector workers. There is no need to show that the relevant worker is responding to emergency circumstances. However, the offence only applies on hospital premises

Thus, in the context of health care:

- doctors, nurses, midwives and ambulance staff are protected
- other people (including other health sector workers) are protected if assisting one of the above categories of worker, either in responding to emergency circumstances or whilst on hospital premises

The justification given for providing some workers with additional protection under the 2005 Act is based on their role in responding to emergencies. Thus, for example, the policy memorandum published along with the Emergency Workers (Scotland) Bill said that the additional protection for relevant workers:

“...is in recognition of the fact that these workers perform a vital service to society in difficult and often dangerous circumstances. They need to respond quickly and if they are assaulted or obstructed the consequences may be very grave, not only for the emergency workers but for those they are trying to help.” (para 5)

In relation to incidents in hospitals, where there is no need to show that relevant workers are responding to emergency circumstances, the policy memorandum noted that the Bill:

“...makes special provision for health workers in hospital accident and emergency premises, indicating that a state of emergency is to be considered to exist at all times in such departments. This is in view of the nature of these departments, whose purpose is to be always ready to receive and treat casualties, and the significant number of attacks on medical personnel that occur there.” (para 10)

During the passage of the Bill through Parliament, the situations in which a person could be prosecuted for an offence, without the need to show that a relevant worker was responding to emergency circumstances, were substantially expanded. This included the creation of the offence now set out in section 1 of the 2005 Act and the expansion of the offence, initially applying to hospital accident and emergency premises only, to all parts of a hospital. A Scottish Executive news release (18 November 2004) stated that:

“...we are extending the protection offered by the Bill to ensure that the police, fire and ambulance workers as well as medical staff in hospitals are covered whenever they are on duty, as well as when they are actually dealing with emergencies. These workers often face attack and are those who most often deal with emergencies – and they should be given the most protection. An attack on any one of these workers, even when they are just
on duty, can mean less capability to deal with emergencies – putting lives at risk. That is why we have amended the Bill.”

Protection of Workers (Scotland) Bill

Although clearly different from the proposals in the petition, comparisons may be drawn with the reforms put forward in the Protection of Workers (Scotland) Bill.

The Bill, introduced by Hugh Henry MSP in June 2010, sought to create a specific statutory offence relating to assaults on people whose work brings them into face-to-face contact with members of the public. It was not passed by the Parliament (falling after its general principles were not agreed).

The Bill would not have extended the scope of the criminal law. Any behaviour which could have been prosecuted under the proposed offence could also be prosecuted under existing criminal offences (eg the common law offence of assault). However, by creating a specific offence, the Bill sought to highlight the problem of assaults on a particular group of people. Further information is set out in a SPICe briefing on the Bill.

A key argument advanced by those supporting the Bill was that the Parliament would, by passing it, send out a strong public policy message that it views assaults on relevant workers as a particular problem which should be treated as such by all those involved. Supporters of the Bill also sought to draw parallels between its provisions and the protections provided by the 2005 Act. The Bill was similar to the 2005 Act in providing for a specific statutory offence of assaulting particular types of worker. There were, however, also differences, including the fact that the 2005 Act also makes it an offence to obstruct or hinder a relevant worker.

In outlining, during the stage 1 debate, why the Scottish Government did not support the Bill, the Justice Secretary stated that:

“No one disagrees that workers who serve the public deserve protection. What the stage 1 scrutiny has revealed, however, is that there is disagreement on how best that can be achieved. It is important to be clear about the effect that the Bill would have if it were passed. It would take a bit of the existing common law of assault and replicate it as a new statutory offence. It would not extend the criminal law in any way and it would not, therefore, extend new protections at all.” (col 31859)

A SPICe bill summary outlines the arguments advanced during parliamentary consideration of the Bill.

Sentencing

As indicated above, the fact that proposed legislation would not extend the scope of the criminal law has been highlighted by critics of such legislation. However, supporters may still argue that it could assist in highlighting a particular problem and, in practice, lead to tougher sentences.
The maximum sentence which would have been available on conviction for the offence provided for in the Protection of Workers (Scotland) Bill did not exceed that available for a common law assault. Nevertheless, the policy memorandum published along with the Bill said that:

“The core rationale of this Bill is that the roles of workers who provide services to the public are nonetheless socially important and that the increasing number of assaults committed against such workers makes it imperative that they receive tougher criminal protections from assault.” (para 12)

It may be argued that this outcome is achievable (and may at least in some cases already be achieved) under existing laws. Certainly, it is the case that the criminal courts can take a wide range of factors relating to the victim (eg vulnerability), the offender (eg previous convictions) and the offence (eg impact on the victim and others) into account when determining the appropriate sentence for a common law assault conviction.

However, the general ability of the courts to treat relevant circumstances as aggravating factors when sentencing has not prevented the Parliament from passing legislation creating specific statutory aggravating factors (eg in relation to hate crime). The Abusive Behaviour and Sexual Harm (Scotland) Bill included provision for a domestic abuse aggravator. The policy memorandum published with the Bill stated that:

“Statutory aggravations exist to assist in the identification and prosecution of a number of different types of crime. For example, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for statutory aggravations for any crimes where the perpetrator is motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. This could, for example, be an assault motivated by ill-will towards a person because of their sexual orientation. Where offences are proven to have been motivated by such malice or ill-will, the court must take that into account when determining sentence. Evidence from a single source is sufficient to establish the aggravation.

Section 74 of the Criminal Justice (Scotland) Act 2003 makes similar provision for offences aggravated by religious prejudice, and section 96 of the Crime and Disorder Act 1998 provides for a statutory aggravation that an offence was motivated by malice or ill-will towards the victim based on their membership (or presumed membership) of a racial group.

The Human Trafficking and Exploitation (Scotland) Bill recently passed by the Parliament, establishes a statutory aggravation that an offence was committed against a background of human trafficking. This recognises that many cases involving other offences, for example, producing false documents, immigration offences, brothel-keeping and drugs offences, are.

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2 In fact, a conviction for common law assault may result in a greater fine and/or longer custodial sentence if prosecuted under solemn procedure (used in relation to more serious offences).
3 Factors that are likely to increase a sentence are called ‘aggravating’ whilst those likely to decrease a sentence are called ‘mitigating’.
4 Now set out in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.
committed in the context of human trafficking, even though there may be insufficient evidence to raise proceedings for a specific human trafficking offence.

A statutory aggravation that an offence or offences involved abuse of a person’s partner or ex-partner provides a means of ensuring that the courts formally recognise a victim’s experience. By placing a statutory duty on the courts to take this fact into account when sentencing the offender, as they are required to do by existing legislation concerning eg offences aggravated by prejudice, victims can have greater confidence that the sentencing decisions of the courts reflect the fact that the offence occurred in the context of an abusive relationship.” (paras 13-16)

Further relevant information is set out on the Scottish Sentencing Council’s website under the heading of Sentencing Factors.

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