Passage of the

Offences (Aggravation by Prejudice) (Scotland) Bill 2008

SPPB 133
Passage of the

Offences (Aggravation by Prejudice) (Scotland) Bill 2008

SP Bill 9 (Session 3), subsequently 2009 asp 8

SPPB 133

EDINBURGH: APS GROUP SCOTLAND
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Bill was a Member’s Bill. The Parliament’s Standing Orders at the time of the Member’s proposal for this Bill, provided, among other things, for members to consult on a draft proposal for a Bill (or to provide reasons why such consultation was not necessary) prior to submitting a final proposal. The final proposal also required to obtain the support of at least 18 members, drawn from at least half of the parties or groups represented on the Parliamentary Bureau. In addition to the requirement for significant cross-party support, a Bill could not be introduced if the Scottish Executive indicated that either it or the UK Government intended to initiate legislation to give effect to the final proposal within a defined time period.

The Equal Opportunities Committee agreed on 6 November 2007 that no further consultation was required on the proposed Bill, on the basis that sufficient consultation had been carried out on the issue by the Working Group on Hate Crime established by the then Scottish Executive in 2003. Patrick Harvie’s final proposal received support from 45 members (including the required degree of cross-party representation). Patrick Harvie, therefore, obtained the right to introduce the Bill which is the subject of this volume.
On 15 January 2008, the Scottish Government announced that it would be giving its support to Patrick Harvie’s proposal and that the Bill would be taken forward with Scottish Government assistance.

The Justice Committee was designated lead committee, and the Equal Opportunities Committee as secondary committee, for consideration of the Bill at Stage 1. The two committees issued a joint call for evidence on the Bill at Stage 1. The written evidence received was originally published on the web only. This material is included in this volume after the Justice Committee’s Stage 1 Report. The Official Reports of oral evidence taken by the Equal Opportunities Committee were not published as part of the Stage 1 Report and are, therefore, also included in this volume after the Report.

No amendments were lodged at either Stage 2 or Stage 3, and so there were no ‘As Amended at Stage 2’ or ‘As Passed’ versions of the Bill produced. The Bill was passed in its ‘As Introduced’ form.
Offences (Aggravation by Prejudice) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the aggravation of offences by prejudice relating to disability or to sexual orientation or transgender identity.

1 Prejudice relating to disability

(1) This subsection applies where it is—

(a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to disability, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to disability if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to a disability (or presumed disability) of the victim, or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or a particular disability.

(3) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by prejudice relating to disability,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or
(ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), “presumed” means presumed by the offender.

(7) In this section, reference to disability is reference to physical or mental impairment of any kind.

(8) For the purpose of subsection (7) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.

2 Prejudice relating to sexual orientation or transgender identity

(1) This subsection applies where it is—

(a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) the transgender identity (or presumed transgender identity) of the victim, or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—

(i) a particular sexual orientation, or

(ii) a transgender identity or a particular transgender identity.

(3) It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to sexual orientation or transgender identity.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state—

(i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or

(ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), “presumed” means presumed by the offender.
(7) In this section, reference to sexual orientation is reference to sexual orientation towards persons of the same sex or of the opposite sex or towards both.

(8) In this section, reference to transgender identity is reference to—

(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or

(b) any other gender identity that is not standard male or female gender identity.

3 Commencement and short title

(1) This Act (except this section) comes into force on the day that the Scottish Ministers by order made by statutory instrument appoint.

(2) An order under subsection (1) may include transitional or saving provision.

(3) The short title of this Act is the Offences (Aggravation by Prejudice) (Scotland) Act 2008.
Offences (Aggravation by Prejudice) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the aggravation of offences by prejudice relating to disability or to sexual orientation or transgender identity.

Introduced by: Patrick Harvie
On: 19 May 2008
Bill type: Member’s Bill
These documents relate to the Offences (Aggravation by Prejudice) (Scotland) Bill (SP Bill 9) as introduced in the Scottish Parliament on 19 May 2008

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Offences (Aggravation by Prejudice) (Scotland) Bill introduced in the Scottish Parliament on 19 May 2008:

- Explanatory Notes;
- a Financial Memorandum; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 9–PM.
INTRODUCTION

2. These Explanatory Notes have been prepared by Patrick Harvie MSP, with the assistance of the Scottish Government, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. This Bill makes provision for the prejudicial context (i.e. either the motivation or the demonstration of malice or ill will) of an offence to be taken into consideration when an offender is sentenced when that prejudicial context has been one of hatred towards persons within certain groups.

5. The Bill provides for new statutory aggravations which may be applied in cases where there is evidence that a crime has been motivated by malice and ill-will based on the victim’s actual or presumed sexual orientation, transgender identity or disability. The aggravations also cover situations where an offender demonstrates malice or ill-will towards a relevant societal group as a whole, without the need for an individual victim to be identified. Further explanation on the two types of situation where the aggravations apply is contained in the commentary on sections below.

6. Where aggravations are proven, the court must take that motivation into account when determining sentence. However, the ultimate discretion of the court to impose a sentence is not affected. In some cases this may well lead to a different sentence (e.g. a longer period of custody, a higher fine or an appropriate community disposal) than might have been the case if the offence was not so aggravated. In other cases, an aggravating factor may not have any bearing on sentence. Similar statutory aggravations already exist to protect individuals targeted on racial or religious grounds. Statutory aggravations relating to crimes motivated by prejudice based on disability and sexual orientation are already in place in England and Wales and Northern Ireland.

COMMENTARY ON SECTIONS

Overview

7. The aggravation for prejudice relating to disability is contained in section 1 and the aggravation for prejudice relating to sexual orientation or transgender identity is contained in section 2. Both sections contain the same procedural elements in subsections (1) and (3) to (5) and the commentary which follows on these subsections is substantially the same in relation to either aggravation.
Section 1: Prejudice relating to disability

8. This section applies where it has been specified that an offence was motivated by prejudice relating to disability and it has been proven that the offence was motivated by that prejudice.

9. Subsection (2) sets out when an offence is aggravated by prejudice relating to disability. There are two types of situation where it can arise. First, where the offender has demonstrated prejudice towards the victim based on their actual or presumed disability and secondly, where the offence was motivated by general malice and ill-will towards people who have a disability or particular disability. This means that the aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without the need for a specific or individual victim to have been identified – for example, where a building used by disability organisations is vandalised or daubed with graffiti that suggests prejudice against those with a disability. The prejudice may have been demonstrated before, during or after the offence was committed.

10. Subsections (3) and (4) are evidential provisions. Subsection (3) confirms that the aggravation can apply even if prejudice relating to disability is not the sole motivation for the crime and subsection (4) provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to disability.

11. Subsection (5) requires that, where an aggravation relating to prejudice is proved, the Court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to disability.

12. Subsections (7) and (8) define what is meant by disability in the Bill. Disability is defined widely by reference to physical and mental impairments (which is a recognised way of defining disability). It includes learning difficulties, mental illness, physical disabilities and sensory impairments. Subsection (8) ensures that the definition also expressly includes any medical condition which has or may have in the future a substantial or long term effect or is progressive – examples of such conditions include HIV/AIDS, Hepatitis C, cancer and multiple sclerosis.

Section 2: Prejudice relating to sexual orientation or transgender identity

13. This section applies where it has been specified that any offence was motivated by prejudice relating to sexual orientation or transgender identity and it has been proved that the offence was motivated by that prejudice.

14. Subsection (2) sets out when an offence is aggravated by prejudice relating to sexual orientation or transgender identity. First, where the offender has demonstrated prejudice towards the victim based on their actual or presumed sexual orientation or transgender identity and, secondly, where the offence was motivated by general malice and ill-will towards people of a certain sexual orientation or transgender identity. This means that the aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without
the need for a specific or individual victim to have been identified – for example, where a premises frequented by individuals of a particular sexual orientation is vandalised or daubed with graffiti that suggests prejudice against those of a certain sexual orientation or transgender identity. The prejudice may have been demonstrated before, during or after the offence was committed.

15. Subsections (3) and (4) are evidential provisions. Subsection (3) confirms that the aggravation can apply even if prejudice relating to sexual orientation or transgender identity is not the sole motivation for the crime and subsection (4) provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to sexual orientation or transgender identity.

16. Subsection (5) requires that, where an aggravation relating to prejudice is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to sexual orientation or transgender identity.

17. Subsection (7) defines what is meant by sexual orientation in the Bill. This is heterosexuality, homosexuality or bisexuality.

18. Subsection (8) provides the definition of transgender identity for the Bill. The definition gives four specific examples: transvestism (often referred to as ‘cross-dressing’); transexualism; intersexuality; and where a person has changed gender in terms of the Gender Recognition Act 2004. However, the definition also extends expressly to cover other persons under the generality of broad reference to non-standard gender identity. For example, those who are androgynous, of a non-binary gender or who otherwise exhibit a characteristic, behaviour or appearance which does not conform with conventional understandings of gender identity.

Section 3: Commencement and short title

19. Sections 1 and 2 will commence by order while section 3 will commence on Royal Assent. The order may include transitional or saving provisions.

FINANCIAL MEMORANDUM

INTRODUCTION

20. 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 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.
21. There is no robust statistical information available on the extent of hate crime in Scotland motivated by sexuality, transgender status and disability. Figures from the US and London Metropolitan Police (where similar aggravations already exist) suggest that race hate crimes substantially outnumber crimes motivated by sexuality and disability. It is not clear whether the same would be true in Scotland as there are demographical differences which might be significant. But in the absence of specific Scottish data, the race/religion figures appear the best basis available for an estimate of the possible number of hate crimes motivated by sexuality, transgender status and disability for the purposes of estimating the financial implications.

COSTS ON THE SCOTTISH ADMINISTRATION

Police

22. The Bill does not create any new offences and should not place any significant additional burden on the police in terms of caseload. The cost of the police investigation into any crime will vary depending on the circumstances and requirements of the particular case. Any additional cost incurred as a result of investigating whether or not an offence may have been motivated by prejudice of the kind outlined in the Bill would be extremely difficult to quantify precisely and, in any case, is likely to be minimal, given that the investigation of a crime already includes the consideration of motive.

23. There are likely to be some logistical and practical implications for the police – principally around limited IT modifications and training/guidance for officers. The aggravations will need to be added to the ISCJIS (Integration of Scottish Criminal Justice Information Systems) Data Standards Manual and implemented onto their computer systems by all ISCJIS partners (including the police and the Criminal History System). This will require a change in software programming but any cost will be absorbed by the respective agencies. The Scottish Police Services Authority has estimated that the costs for the time involved will be in the region of £10,000 (and will be a one-off cost).

24. These costs will be met from within existing police force and Scottish Police Services Authority budgets and will not require the allocation of additional funding from the Scottish Government.

COPFS and the Scottish Court Service

25. Similarly, the fact that the Bill does not create any new offences should not place any significant additional caseload burden on prosecutors in the Crown Office and Procurator Fiscal Service. There will, however, be similar logistical and practical implications to those faced by the police. COPFS has indicated that the IT changes to enable it to produce aggravated charges on a complaint or indictment will cost in the region of £20,000 (as a one-off cost). This cost will be met from within existing COPFS budgets and will not require the allocation of additional funding.

26. The Bill will also have cost implications for the Scottish Court Service, with the added administrative arrangements involved in taking account of the recording (and other) requirements at sections 1(5) and 2(5). SCS estimates a one-off cost of £5,000 for IT development and modifications. Based on the most up-to-date figures (2005-2006) for the
number of individuals in Scotland proceeded against in which a racial or religious aggravation was applied, it is estimated that ongoing annual administrative costs for the SCS will be in the region of £23,000. These costs will be met from within existing SCS budgets and will not require the allocation of additional funding.

Scottish Prison Service

27. Offenders convicted of an aggravated offence under the provisions of the Bill may spend longer in custody than if the offence had not been aggravated. However, the overall impact on the prison population is likely to be very slight. The Scottish Prison Service estimates, based on a comparison with existing racial and religious aggravations, that the maximum level of impact would be fewer than 25 additional prisoner places each day and, in practice, is likely to be fewer than 10 additional prisoner places. The effect may be a slight upward pressure on the prison population. For planning purposes (and in line with advice on other legislation) 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.

28. However, for small increases in population, like that predicted in this case, it is expected that any extra prisoners may be accommodated within normal fluctuations in prison population at marginal cost only. This means that the recurring annual cost mentioned above is unlikely to arise in practice (and the information given in that respect is for background interest only). In such circumstances, the marginal cost will be met from within existing SPS budgets and will not require the allocation of additional funding.

Margins of uncertainty

29. Given that no new offences are being created and based on an understanding of the level of existing aggravated convictions, it is considered that there is a low risk of costs substantially exceeding the estimates included in this memorandum.

POTENTIAL SAVINGS GENERATED

30. No cost savings will be generated as a result of this legislation.

COSTS ON LOCAL AUTHORITIES

31. No additional costs to local authorities are anticipated.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

32. There are no costs for other bodies or businesses.
PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE COMPETENCE

33. On 15 April 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Offences (Aggravation by Prejudice) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
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 2008 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

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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.


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 received 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
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.
OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by Patrick Harvie MSP with the assistance of the Scottish Government. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of a provision in the Offences (Aggravation by Prejudice) (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of the provision and outlines the reasons for seeking the proposed powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are the responsibility of Patrick Harvie MSP and have not been endorsed by the Scottish Parliament.

OUTLINE OF THE BILL

3. The Bill provides for the creation of new statutory aggravations to protect victims of crime who are targeted on the basis of hatred of their actual or presumed sexual orientation, transgender identity or disability. Such statutory aggravations already exist to protect individuals targeted on racial or religious grounds.

4. The new provisions will provide that evidence from a single source is sufficient to prove the aggravation and that the court must take the aggravation into account in determining sentence. Where the eventual 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.

APPROACH TO USE OF DELEGATED POWERS

5. The Bill contains only one delegated power provision, which is explained in more detail below. Patrick Harvie (with the assistance of the Scottish Government) has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill to—
the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;

the need to make proper use of valuable Parliamentary time; and

the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

6. The delegated power in this Bill is restricted to the commencement of the resulting Act, which does not normally attract procedure (and the power is discussed further below).

DELEGATED POWERS

7. Section 3(1) provides for the provisions of the Bill to come into force on the day appointed by the Scottish Ministers. Section 3(2) allows the commencement order to make transitional or saving provision. This is to ensure that commencement takes place in an orderly fashion.

8. It is not intended that the Bill will apply to offences committed before the Bill (once enacted) comes into force, and some transitional and saving provision may be necessary to ensure the appropriate application of the Bill by reference to commencement.

9. In addition, appropriate arrangements and procedures (including the updating of relevant IT systems) need to be in place to fulfil the requirements of the Bill. The Scottish Government is continuing to consider these practical arrangements in conjunction with Crown Office and the Scottish Court Service and with this in mind it is appropriate to have some flexibility of approach with reference to those arrangements being in place.

Section 3 - Short title and commencement

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10. As is the usual practice, commencement orders under this provision will not be subject to parliamentary procedure.
Dear Bill

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

Please find enclosed the Executive Memorandum on the Offences (Aggravation by Prejudice) (Scotland) Bill, introduced in the Parliament by Patrick Harvie MSP on 19 May 2008.

This letter has been copied to Margaret Mitchell MSP, Convener of the Equal Opportunities Committee.

Regards,

KENNY MACASKILL
MEMORANDUM FROM THE SCOTTISH GOVERNMENT ON THE OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL (SP BILL 9)

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Justice Committee (as lead committee) and the Equal Opportunities Committee (as secondary committee) of the Offences (Aggravation by Prejudice) (Scotland) Bill 2008 (referred to throughout as "the Bill"), which was introduced by Patrick Harvie MSP on Monday 19 May 2008.

2. Mr Harvie lodged the proposal for a Member’s Bill on Hate Crime in October 2007.

POSITION OF THE SCOTTISH GOVERNMENT

3. The Scottish Government agrees that statutory aggravations for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability should be created. 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. No one in Scotland should be victimised because of their sexual orientation, transgender identity or disability. Crimes motivated by hatred are both individually and socially damaging and should not be tolerated.

4. On 15 January 2008, the Cabinet Secretary for Justice announced Scottish Government support for the proposed Bill. That position is unchanged.

BILL AND ACCOMPANYING DOCUMENTS

5. The Scottish Government has assisted Mr Harvie with the drafting of the Bill and the Accompanying Documents. This work included supplying information for the financial memorandum. As such, the Government endorses both the Bill as introduced and the information contained in the Accompanying Documents.

Scottish Government
June 2008

¹ The Working Group on Hate Crime was set up under the previous administration and reported in 2004. Its report may be found at http://www.scotland.gov.uk/Publications/2004/10/20027/44264
Justice Committee

6th Report, 2009 (Session 3)

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

Published by the Scottish Parliament on 5 March 2009
# Justice Committee

## 6th Report, 2009 (Session 3)

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ANNEXE D: ORAL EVIDENCE

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

Oral evidence

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

Oral evidence


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

Oral evidence

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.
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
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.”

2. The Scottish Government had previously confirmed on 15 January 2008, in a response to a parliamentary question lodged by Patrick Harvie MSP, 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.”

Committee scrutiny

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

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—

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“... 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.”

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.”

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.”

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

“Crime motivated by malice or ill-will towards a social group.”

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?”

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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.”

15. The Sentencing Commission’s report,\textsuperscript{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:

\begin{verbatim}
\end{verbatim}

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


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 (e.g., 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.\footnote{Scottish Government. (2004) \textit{Working Group on Hate Crime Consultation Paper}. Page 5. Edinburgh: Scottish Government. Available at: \url{http://www.scotland.gov.uk/publications/2004/01/18642/30070}}

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.”\footnote{Scottish Government. (2004) \textit{Working Group on Hate Crime Consultation Paper}. Page 7. Edinburgh: Scottish Government. Available at: \url{http://www.scotland.gov.uk/publications/2004/01/18642/30070}}

\textit{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.”\footnote{Policy Memorandum, paragraphs 8 and 9.}

\textbf{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
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.”

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.”

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.”

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.”

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

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16 Stonewall Scotland. Written submission to the Justice Committee.
18 Equality Network. Written submission to the Justice Committee.
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.”

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.”

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.”

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.”

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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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.”

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.”

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.

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

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."

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.”

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.”

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 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.”\(^{35}\)

\(^{31}\) The Scottish Police Federation. Written submission to the Justice Committee.

\(^{32}\) The Law Society of Scotland. Written submission to the Justice Committee.


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.”

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

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.”

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.”

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.”

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.”

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.
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.”

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

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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.”

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.”

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.”

70. Stonewall Scotland’s submission meanwhile stated—

“The bill will introduce no new offence or sentencing arrangements, but will simply bring consistency to the handling and sentencing of hate crimes, bringing them into line with other crimes motivated by prejudice and hate.”

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.”

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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45 SAMH. Written submission to the Justice Committee.

46 Stonewall Scotland. Written submission to the Justice Committee.

achieve that. I would like to leave sheriffs that flexibility—they are the experts, after all.”

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.”

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.”

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.”

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,

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49 Scottish Transgender Alliance. Written submission to the Justice Committee.
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.”

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.”

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.”

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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“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?”

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 McIntyre 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.”

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.”

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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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.”

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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.”

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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.”

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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.”

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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
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.”

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.”

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.”

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.”

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

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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.
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.”

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.”

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.”

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

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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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{70} The Royal National Institute for Deaf People Scotland. Written submission to the Justice Committee.
\textsuperscript{71} Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
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.”

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.”

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.”

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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74 Crown Office and Procurator Fiscal Service. Written submission to the Justice Committee.
“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—

“… 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.
“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.”

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.”

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.”

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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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.”

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.”

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.”

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.”

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.
“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

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.”

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.”

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.”

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90 Association of Chief Police Officers in Scotland. Written submission to the Justice Committee.
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.”

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.”

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

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by statutory instrument if evidence emerged that such groups would benefit from the measures being proposed in the Bill.”

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.”

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.”

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

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95 Scottish Parliament Equal Opportunities Committee. 3rd Report, 2008 (Session 3). Report on Offences (Aggravation by Prejudice) (Scotland) Bill (SPP 187)
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.


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.”

153. However, the Financial Memorandum concludes that any such increase will be “accommodated within normal fluctuations in prison population at marginal cost only” 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.”

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
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.

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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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17. In written evidence, Patrick Harvie MSP indicated that he would be “remaining neutral on the inclusion of other categories” 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”.  

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”.

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” and Victim Support Scotland thought that the Bill should include protection for all social groups. 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”.

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”.

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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

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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”.  

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. 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.  

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.  

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”.  

33. In written evidence, the Scottish Trades Union Congress (STUC) and Unison Scotland 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.  

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22 Scottish Parliament Equal Opportunities Committee, Official Report, 4 November 2008, Col 697  
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.

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.  

*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”.  

*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”.

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”.

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.”

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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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".  

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”. However, during oral evidence, Alistair Stevenson from the EAS appeared less convinced: “we have the opportunity now to add the other two equality strands to the bill, but I suppose it is a question of weighing up whether this is the best opportunity to do that”.

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”. 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”.

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”. 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

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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. 

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.”

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”. 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”.

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” 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.

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."
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
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

49 Barnardo’s Scotland, Written submission to the Equal Opportunities Committee
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". 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”.

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”. 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”.

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. 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”.

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.

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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”.

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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.
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.

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.
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 McCreddie, 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.
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, I think 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 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
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 other 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 crimes 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?


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 in 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 McCreddie, 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—not to desert cases or to 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, officers who had been processing him at the police station had an English accent and, at one stage, 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.
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 it 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 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. [Interuption.] 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 labelled 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 crimes; 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 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.
Written submissions to the Justice Committee

Scottish Association for Mental Health
The Law Society of Scotland
Learning Disability Alliance Scotland
ENABLE Scotland
Scottish Police Federation
Victim Support Scotland
Association of Chief Police Officers in Scotland
Inclusion Scotland
Sandyford, NHS Greater Glasgow and Clyde
Fife Men Project
Humanist Society of Scotland
Stonewall Scotland
Leonard Cheshire Disability
Equality and Human Rights Commission
Jane McLaren
National Aids Trust
Evangelical Alliance Scotland
The Christian Institute
Capability Scotland
Royal National Institute for Deaf People Scotland
CARE for Scotland
Scottish Transgender Alliance
Lesbian, Gay, Bisexual and Transgender Youth Scotland
Crown Office and Procurator Fiscal Service
Equality Network

Supplementary written submissions to the Justice Committee

Scottish Government
Equality and Human Rights Commission for Scotland
Capability Scotland
Stonewall Scotland
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from the Scottish Association for Mental Health

SAMH, Scotland’s leading mental health charity, works to support people who experience mental health problems, homelessness, addictions and other forms of social exclusion. We provide direct services, including accommodation, support, employment and rehabilitation, and actively campaign to influence policy and improve care services in Scotland.

In response to your call for evidence, SAMH would like to outline the key reasons why we fully support the Offences (Aggravation by Prejudice) (Scotland) Bill.

The proposed change to the law was recommended by the previous Scottish Executive’s Hate Crime Working Group, which included Crown Office, police and community representatives. The move will introduce ‘statutory aggravation’ power to ensure that abuse and violence towards disabled people is treated in the same way as abuse and violence that is motivated by religious bigotry and racism. Similar provision already exists elsewhere in the UK.

The hate crime laws which protect religious groups and minority ethnic communities are useful not only in individual cases, but also in focusing police attention on the problem. People with mental health problems deserve no less protection.

A survey in 2004 found that 47% of disabled people had experienced hate crime because of their disability, with 31% of those reporting that they suffered verbal abuse, intimidation or physical attacks at least once a month.

People with mental health problems may face hate crime of a prolonged and insidious nature, finding themselves targeted as a result of fear and ignorance. This would be detrimental to anyone’s confidence, but someone who already has an underlying mental health problem may be left further ostracised, alienated and stigmatised. It can also be more difficult for people in this situation to come forward and report crime as they lose confidence in the systems that are there to ensure their protection.

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.

It would also allow these hate crimes to be recorded as such through the system, meaning 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.

Finally, it would send strong messages: to victims, that the crime will be taken seriously and should be reported to police, to potential perpetrators, and to society as a whole that we are all seeking a Scotland where prejudice, and crime arising from it, are not acceptable.

SAMH was part of the Working Group on Hate Crime which recommended in 2004 that the then 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.“

Four years on, SAMH stands by this recommendation, regrets the length of time it has taken to get to this stage, and hopes that this Bill will be passed without further delays.
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from the Law Society of Scotland

The Law Society of Scotland commends the Scottish Parliament for its concern that Courts should look more seriously on crime against people based on their sexual orientation, transsexual status and disability.

With that goal in mind, the Law Society has some concerns about the effectiveness of the Bill in achieving this goal. The common law system at present provides flexibility to prosecute a wide variety of criminal conduct and also allows for aggravating circumstances to be taken into account, both in determining the forum for prosecution and the level of sentencing on conviction. 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. The Law Society has expressed similar concerns in the past when addressing other legislation that would introduce statutory aggravations.

However, if the Bill does proceed, the Law Society wishes to make two suggestions on how to improve the legislation’s effectiveness. The first concern is ensuring the outcome of the legislation is monitored. After it is enacted, it would be useful to know how often the legislation is used when prosecuting crime, how often such prosecutions are successful, and whether the legislation is effective at reducing hate crime. One way to improve monitoring would be to assign crime codes to aggravations. Currently, only offences themselves are given crime codes. If aggravations were also assigned codes, it would be easier to monitor their use and the rate of successful prosecutions.

The second concern is ensuring diversity training offered to police officers and police staff is up to date and effective. Existing diversity training programs should be updated to reflect the new legislation. Furthermore, the Committee suggests refresher training should be a mandatory requirement for all officers and staff to emphasize the importance of the legislation and to ensure all staff will be kept up to date on these new developments.

Samuel Condry
Law Reform Officer
The Learning Disability Alliance Scotland organised a meeting for service users from Enable Scotland, Quarriers, Key Housing Association and Cornerstone Community Care to come together to talk about their experiences of bullying and harassment. The meeting took place in Glasgow on the Monday, 06 October 2008 in Glasgow and we were fortunate to have Patrick Harvie MSP join us for part of the meeting.

We heard a range of stories about daily experiences of bullying and harassment. From these accounts, the more that people went out into the community the more they experienced name calling and bullying. A few suffered repeated and sustained harassment in the community. Mostly people had adjusted to this experience and expected no help from others in the community or from the police when they became involved. There were times when other people had stepped in to stop name calling and so on and people were grateful when this took place and remembered these incidents clearly.

Mostly people did not involve the police. They only did so in the most serious cases such as injury and rarely were any charges or criminal proceedings launched.

Most people felt that the new legislation was an important step in raising awareness of the bullying and harassment that people regularly experienced. There were a number of suggestions as to how to reinforce the new legislation.

As a result, the effects of the new legislation may be more indirect in giving people confidence that their concerns may be addressed and that important statutory bodies such as the courts and the police recognise and understand the discrimination that people with learning disabilities experience.

TESTIMONY

The following are the description of personal experiences transcribed in the speaker’s own words:

*Douglas White is a part time commissioner with the Mental Welfare Commission for Scotland. He also advises the University of Edinburgh and Stirling University on issues to do with learning disability.*

“it was on a nice hot day in Edinburgh, there haven’t been many this year. I was at the Tesco store near where I stay. I heard people shouting and swearing but I didn’t pay them any attention as they are always doing this. Then somebody threw a half size brick and hit me on the back. I saw it was three young people who had hit me but I didn’t know who they were. Fortunately the man who phoned for the police thought he knew who they were. Someone also phoned for an ambulance for me because I was lying on the ground. I had to go back to the hospital for the second time this year. I had to stay for 6 days because my disc was damaged from the brick. That’s a long time. I told the police but they said there was nothing they could
do as the young people were under 16. I know this is wrong because I am a part-time commissioner. They can charge children over the age of 10.

“I am often picked on. Young people throw eggs and stones at my windows if they think that I am in. The only way that I can stop it is if I pull the blinds down and keep them shut all day.

About a year ago I went over to my mother’s grave to take a picture so I could remember it. When I came home there were two police cars outside my house. They accused me of taking pictures of children playing in the street. I wasn’t even there. I was on the other side of town. The police wouldn’t listen to me and phone the people that I asked them to to prove it. I think its wrong to make a malicious complaint about people just because they have a learning disability.”

A young man from the west of Scotland who goes to a local ACE group, one of Enable Scotland advisory groups.

“I had my mobile phone stolen this year. A young guy stopped me in the street and asked me what the time was. When I took out my phone to look, he grabbed it and ran off with it. I ran off after him but I couldn’t catch him. My mum says I shouldn’t chase after people like that in case it gets worse.”

James Rankin, who is a co-trainer with Key and lives in the east end of Glasgow.

“I have been bullied all my life. Once when I was working on the bins, three of the guys started calling me names and giving me a hard time. The driver said they had to stop or he would take them outside. They stopped.

“I used to go down to the shops at night to buy a can of juice and the yobs, young people hanging about would call me spastic and try and push me. I just ignored them because they wanted to provoke me but I didn’t like it. It has stopped now. The police have moved them on but I don’t know where they have gone.

“When I go into the Crammond, one of the pubs near where I stay, people call me and my friends “weans” and say “here come the weans”. I don’t like this. It makes me feel very bad but I tell my friends to ignore it. We’re not children, we are all adults.
 “One of my friends, a woman is still bullied when she goes out. People call her names and try to get money off her. She sometimes gives it to them to get rid of them but they keep coming back.

Another man who goes to Glasgow ACE group, one of Enable Scotland’s advisory groups.

“I was bullied at school. At first I went to mainstream school and it was fine. When I went to a special school it was really bad. I didn’t know what to do about it and was very scared. Eventually my mum was able to help me. Its not so bad now.”

Lorraine Kennedy who goes to Glasgow ACE group, one of Enable Scotland advisory groups.
“I have a brain injury. I am hard of hearing and can’t see very well. People are often calling me names and there is not much I can do about it.

“I used to have a job and people who worked beside me were being nasty to me. They always told me I was useless and that upset me. There was nothing much that I could do about it.

“I have known people who live down the street from me who cannot get into their own house because kids hang about outside and call them names because they have a learning disability.”

A young woman who goes to Stirling ACE group, one of Enable Scotland’s advisory groups.

“I used to have problems with my neighbours. They used to play loud music to annoy me and wouldn’t listen to me. I tried to tell the police about it but they didn’t do anything to help.”

Caroline Grey is from Ayrshire and is an advisor to the Scottish Consortium for Learning Disabilities and a co-trainer with Quarriers.

“I was bullied at home and it was difficult for me to handle. I would do what I was told but I still always seem to be in the wrong. I don’t want to say any more about this as it still makes me upset.

“I don’t live at home any more so it doesn’t happen any more.

“I meet a lot of people with learning disabilities and I hear a lot of stories about people with learning disabilities getting bullied. I met the Local Area Coordinator in Girvan recently and he told about a lot of people being bullied just for having epilepsy or a disability.

“I think that sometimes people with learning disabilities are bullied by organisations. I wonder if when people get their services changed through tendering without permission whether they are being bullied into accepting this.”

Another woman who is from Ardrossan and uses support services from Quarriers.

“I am quite confident and good at standing up for myself, so I can say that I have never been bullied. I know lots of people that have.

“I had to go and help [I’ll not say his name as he is not here. Lets call him Joe] … help Joe when a young kid was calling him names. Joe has got a brain injury and he was getting called spastic and things. I told the staff and they spoke to his father and the young boy has been as good as gold ever since.

“It’s not right when people get bullied at home. This often happens and people can’t speak out because they love their parents even though they are being cruel to them. I don’t know what you can do about that.
FREE DISCUSSION

A number of points were made in a period of discussion that individuals asked to be submitted to the committee.

- Much of the harassment that people faced was related to the consumption of alcohol.
- Many people didn’t understand why they were the target of such dislike and hate.
- There were people who would stand up to bullying of others but that they needed to be supported in saying that it wasn’t alright to discriminate.
- The successful passing of this legislation should be accompanied by a public information campaign.
- Education in colleges and schools would support the ideas behind the legislation.

CONCLUSION

Overall we look forward to the successful implementation of this legislation and hoped that it will be a step forward in making the lives of many people with learning disabilities more bearable.

The Learning Disability Alliance Scotland having considered the above testimony would like the Justice Committee to consider the following points.

1. Consideration should be given to making discrimination against people with disabilities a primary offence not just a secondary offence.
2. The definition of “hate crime” should give a strong emphasis to disability.
3. The enactment of the legislation should be supported by a publicity drive to increase awareness of heavier sentences that may be imposed for “hate crimes”.
4. There should be a national training scheme for police, court officials, etc. on the implications of the legislation.
5. The bar at which the “hate crime” legislation is brought to bear should be set low, applying the principles of “zero tolerance”.
6. Provision of a national initiative to raise awareness of learning disabilities and bullying within the school system. This has already been piloted in some areas with good results.
7. Provision of community youth involvement services in work with people with learning disabilities and other support needs. This may help break down the barriers that exist between many young people and people with disabilities.
8. More advice and support for people in work who face bullying and harassment. Many people face continual bullying in work situations with no clear place to go to resolve it.

Ian Hood
Coordinator
Thank you for your letter inviting us to submit comments on the above Bill. ENABLE Scotland was involved in the working group that initially looked at these offences and our members have a strong interest in criminal justice. We are pleased that this legislation has been introduced and that the Scottish Government has indicated their support. We have no difficulty in fully endorsing the general principles of the Bill.

We know that people with learning disabilities are often the victims of crime. The limited research we have conducted confirms that in many cases they are targeted and bullied because of their disability. We also have anecdotal evidence to this effect.

When people are the victims of crime aggravated by prejudice this has a particularly serious effect on their life. It personalises the crime and often leads to a reduction in confidence and fear of further attacks. Prejudice can also affect families and friends who are targeted for abuse and causes distress to all those involved.

We believe that this Bill sends out a strong message that it is wrong to target people with disabilities or to use abusive language towards them. We think it will raise the profile of these crimes and show that as a society we do not think this behaviour is acceptable.

In addition, the Bill will mean that aggravated crimes are identified and tracked. This will give us the real statistics and the evidence we need to establish the scale of the problem. It is essential that there is ongoing monitoring of reports, charges, convictions and outcomes so that we can make sure any changes are effective. There should also be the opportunity to consider the best ways to rehabilitate and educate offenders who demonstrate hatred towards a specific group.

In general, we know that people with learning disabilities face specific barriers when they are the victims of crime. Although legislation such as the Vulnerable Witnesses (Scotland) Act has improved the position more needs to be done. People with learning disabilities need good and consistent support from the moment they report a crime and a lot can be done to build capacity to give evidence. In addition, we need to continue to tackle assumptions by those involved in the criminal justice process about the credibility of people with learning disabilities and their ability to give evidence.

Norman Dunning
Chief Executive
I refer to the above and thank you for your invitation dated 11th September 2008 to respond to this consultation. The Scottish Police Federation (SPF) has itself consulted widely on this matter and this response is drawn from replies received from Federation representatives across Scotland.

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.

Notwithstanding our position on this subject, we recognise a number of statutory aggravations now exist (racial, religious etc) and our experience has shown the police time and resources 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. We believe, should this legislation be forthcoming, that experience will be realised once more.

The SPF would be surprised if the courts were to concede the observation made at paragraph 8 of the policy memorandum and believe this perceptual issue to be instrumental in driving this consultation. This perception is not unique and indeed one of our responses stated: … 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.

I trust you find the foregoing useful and should you require any further information please do not hesitate to get in touch.

Calum Steele
General Secretary
Introduction
Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. Established in 1985 the organisation currently employs around 140 staff and 900 volunteers. In 2007-2008 our community based victim services and court based witness services supported around 175,000 people affected by crime. With the interest of victims and witness at heart, we are pleased to provide a response to this important consultation.

Extent of the new proposal
The Offences (Aggravation by Prejudice) (Scotland) Bill looks to extend current ‘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 aggravations introduced by the Bill also include situations where an offender demonstrates malice or ill-will toward members of the societal group as a whole, without the need for an individual victim to be identified. Where aggravations can be proven, the court must take that motivation into account when determining sentence. The ultimate discretion of the court to impose a sentence is however not affected.

Statutory aggravations already exist to protect victims of crime who are targeted as a result of hatred of their racial or religious group. The Bill does not create any new criminal offences; instead it extends current statutory aggravations.

Impact of crimes motivated by malice and ill-will
There is an unequal risk of being a victim of crime. It is recognised that people of a certain age, sex or socio-economic group are at greater or lesser risk of being victimised than other groups.1 The consultation refers to the Working Group on Hate Crime who stated in its report:2

- “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.”3

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3 See:
  - “The Experience of Violence and Harassment of Gay Men in the City of Edinburgh” (Scotland Office Central Research Unit, 1998)
  - “First Out...Findings of the Beyond Barriers survey of lesbian, gay, bisexual and transgender people in Scotland” (Beyond Barriers, 2003)
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 personalizes the crime and can cause the victim a greater amount of distress.\(^4\)

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 to paranoia and vigilantism.\(^5\)

Through our work with victims of crimes motivated by malice or ill-will, Victim Support Scotland has gained practical confirmation of the above mentioned statements. There is general agreement that crime causes more distress than similar injury or loss resulting from other causes; physical injury caused by intent is more difficult to deal with than injury caused by accident.\(^6\) If the motivation for the crime is connected with personal characteristics and/or abilities, the victim will feel more targeted than if is was an opportunist crime where the person just happened to be ‘at the wrong place at the wrong time’. Although all crimes can bring serious consequences for victims, ‘hate crimes’ may be particularly distressing for various reasons:

- The personal nature of the crime increases the level of distress that may be experienced by the victims. Subsequently, a crime that may be seen as ‘minor’ may have profound effects on victims, their families and their whole community.
- Victims, or communities against which hate crimes are directed, may feel threatened at all times. As the crime is not motivated by the victim’s actions but by personal characteristics and abilities, feelings of vulnerability may exist continually leading to lack of sleep, family or work difficulties, depression etc.

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\(^4\) See:
- “The Hate Debate: Should Hate be punished as a Crime” (edited by Paul Iganski, 2002)
- “Racist Crime and Victimisation” (Ian Clark and Sue Moody, 2002)
- “Consequences for Victims – a comparison of bias- and non-bias motivated assaults” (J McDevitt, J Balboni, L Garcia and J Gu, 2001)

\(^5\) See:
- “The Hate Debate: Should Hate be punished as a Crime” (edited by Paul Iganski, 2002)
- “Dealing with Racist Victimisation: Racially Aggravated Offences in Scotland” (Sue Moody and Ian Clark, 2004)

• Victims of crimes motivated by malice or ill-will are at high risk of repeat victimisation. For example, in regard to racial attacks, 67% of the families are multi-victims.\(^7\) The impact of repeat victimisation is substantial; victims do not get ‘used’ to crime. Repeat victims suffer many increasing emotional and practical effects, even when the individual incident appears trivial. The incidents can also have a substantial social impact. Many repeat victims become socially excluded and withdraw, either partially or completely, from any social contact during the worst periods of victimisation.\(^8\)

• Hate crime can lead to feelings of group victimisation, resulting in tension between communities.

• In communities targeted due to their social grouping, feelings of fear and distrust may grow. In some instances, children may not play outside, or family and friends may be reluctant to visit, resulting in increased social exclusion.

• Being a victim of a crime motivated by malice or ill-will can increase the victim’s fear of future victimisation. 50% of black and Asian people living in Scotland are worried about being attacked due to skin colour, ethnic origin or religion.\(^9\)

• Other reactions for people affected by ‘hate crimes’ are dissatisfaction and mistrust aimed at the criminal justice system who fails to protect them. Europe-wide trends show that people from minority groups show less confidence than other groups in the criminal justice system. The gap is generally biggest in relation to the police.\(^10\)

4. View of Victim Support Scotland

Based on the information provided above, Victim Support Scotland agrees with the introduction of the extended aggravations to protect victims of crime who are targeted as a result of their actual or presumed sexual orientation, transgender identity or disability. There is no place in Scotland for criminal expressions or behaviours towards people because of who they are. We recognise that ‘hate crime’ legislation can be seen to punish individual’s opinions with the result that the same act can lead to different sentences due to the subjective opinions of the offender. This may be seen as political correctness; however we believe that the regulations are legitimate due to the increased reactions and repercussions hate crimes develop amongst victims. Primary needs in the aftermath of crime include safety and security. Being singled out due to personal characteristics emphasises the victims’ fear of repeat victimisation and feelings of humiliation and distress. To ensure that the punishment fits the crime, this increased reaction should be taken into account when deciding on suitable sentences. We

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\(^10\) Findings 243 - *Confidence in justice: an international review*, Home Office, 2004
therefore support the introduction of, and regulations contained in, the Offences (Aggravation by Prejudice) (Scotland) Bill.
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from the Association of Chief Police Officers in Scotland

I refer to your correspondence dated 11 September 2008 in connection with the above matter which has been considered by the ACPOS Diversity Business Area and can advise as follows.

ACPOS welcomes the proposal of statutory aggravations to protect victims of crime targeted due to perceived sexual orientation, transgender status or disability.

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.

If introduced, the bill will impact on the Scottish Police Service as far as the correct recording, reporting and monitoring mechanisms are concerned; however, this in turn will allow for the consistent and appropriate processes to be identified in conjunction with those processes already in place for race and religiously motivated crimes.

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. ACPOS understands the bill will not introduce any new offence; however, it will go some way to promote the fight against prejudice and target hatred in our communities.

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.

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.

Issues relating to Hate Crime

During the consultation and involvement process to publish Force Disability Equality Schemes in 2006, anecdotal evidence was received on a number of occasions that people did not report offences or incidents motivated by malice towards a person’s disability due to a variety of reasons. Much of this lack of
reporting was due to the perception that the incident would not be treated by the legal system with due gravitas, and that “nothing would be done about it”. This has also been the perception on many occasions in the LGBT community regarding reporting of homophobic and transphobic incidents.

A significant difficulty for the police service in tackling incidents and offences motivated by malice towards a person’s disability is that current Force recording systems do not have a mechanism for recording such incidents. Introduction of a statutory aggravation for such incidents, along with the same aggravation for homophobic and transphobic conduct will enable Forces to properly record and examine patterns and levels of incidents and offences. It will also have the effect of reassuring the communities that such incidents are taken seriously by the legal system. Under reporting of hate related incidents could be improved through the perception that incidents will be treated seriously and sentencing will be applied accordingly. Whilst the use of third party reporting as a means to encourage recording of hate related incidents continues to be developed, the inclusion of a statutory aggravation will enable promotion of the scheme to be further enhanced.

Some areas of the Bill are specifically helpful in police terms: -

- Section 1(4) and Section 2(4) provide that evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability/sexual orientation or transgender identity respectively. This will be of positive benefit, as it removes the need for a victim to have independent witnesses. Whilst the common law statutory offence attached to the aggravation will still require corroboration, an individual person’s perception of motivation for an 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.

- With regards to sentencing, the Bill also contains the provision that where any sentence in respect of the offence is different from that which the court would have imposed if the offence was not so aggravated, the extent of reasons for the difference or otherwise the reasons for there being no such difference must be stated. Whilst this issue is relevant for the Crown Office in terms of sentencing, it will also have relevance and benefit to the Police Service where increased sentences are imposed and differentials between aggravated and non aggravated offences are made public, as this will provide a reassuring message to communities who may otherwise be reluctant to report hate crime offences. It is also noted that the Crime and Disorder Act 1998, Section 96 does not contain such a provision, and it would be helpful if the same provision was to be extended across all diversity related areas.
Comparison with existing Hate Crime Legislation

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 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. Statutory aggravations based on religions are contained within Section 74 of the Criminal Justice (Scotland) Act 2003.

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. If this were the case, any offence which had a motivation based on hate of a minority group could be progressed by the use of a common law crime/offence with a suitable aggravation attached. There may then be no requirement for a separate statutory offence, such as the Section 50A Criminal Law (Consolidation) (Scotland) Act 1995. If the separate statutory offence requires to be retained to encompass behaviour not competently charged under existing common law/statutory offences, then consideration should be given to creating either a single statutory offence encompassing all areas of diversity, or additional legislation to provide a stand alone offence for each of the other diversity areas. This would negate any suggestion that race related offences are deserving of separate stand-alone offences, whilst other diversity areas do not.

In practical terms there will be a requirement for some changes in guidance and IT provision within forces with some of these being outlined below:

- The Lord Advocate previously provided Guidelines to Chief Constables in relation to how racial crime should be dealt with, in support of the legislation recognising the aggravation. If this bill is passed, the Scottish Police Service should seek similar guidance from the Lord Advocate to provide the support in the implementation of this legislation.
- 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.
- There will need to be software amendments to current IT systems to allow for data capture and reporting.
• Consideration should be given to assigning charge codes to the proposed aggravations as this would make it easier to record and monitor hate crimes.

In conclusion, the Bill creates statutory aggravation for areas where no such existing legislation operates and will have benefits to the Scottish Police Service of allowing accurate reporting and analysis of crimes, patterns, victims, etc. It will also provide reassurance to the general public, and in particular minority groups, that offences aggravated by hate will be treated with a suitable level of seriousness by both the Police Service and the Criminal Justice System in terms of sentencing, etc. It may also have the added benefit of encouraging reporting of crime. As previously mentioned, it does however have the potential to add an element of confusion to existing provision. Given that three pieces of legislation already exist in the area of hate crime aggravations, and clarity as to different applications of stand alone racially aggravated conduct offences as opposed to racial aggravations of separate offences and crimes is not always apparent, the addition of further legislation may have a detrimental effect on the desired outcomes.

John Pow
Interim General Secretary
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Inclusion Scotland

1 Background

1.1 Inclusion Scotland (IS) is a consortium of organisations of disabled people and disabled individuals. We aim to draw attention to the physical, social, economic, cultural and attitudinal barriers that affect the everyday lives of disabled people in Scotland. We also aim to reverse the social exclusion currently experienced by disabled people through encouraging civil dialogue, partnerships, capacity building, education, persuasion, training and advocacy.

2 Disablism and Hate Crime

2.1 Disablism is the abuse of or discrimination against disabled people arising from a belief that they are inferior to others, in some cases less than human, or of no value to society. These views are still widespread and often tolerated in our society. Discrimination against disabled people was not recognised until the passage of the Disability Discrimination Act in 1995, some twenty years after major legislation outlawing racial and gender based discrimination.

2.2 Disablism is so prevalent in our society that, tragically, even the parents of disabled children can be affected by it. Joanne Hill recently convicted of murder said that she had drowned her 4 year old daughter Naomi because she was ashamed of her mild cerebral palsy and use of calipers (i).

3 Extent of problem

3.1 No government research has ever been carried out on the prevalence or nature of hate crimes against disabled people. However in 2004 the DRC and Capability Scotland carried out research (ii) to measure the extent of hate crime against disabled people in Scotland.

3.2 This research found that –

- Almost half (47%) of all respondents had experienced hate crime because of their disability.

- Hate crime had a major impact on the lives of victims. One third had to avoid certain places or situations and one quarter had moved house as a result of an attack.
3.3 A more recent UK-wide report (iii) by the cerebral palsy charity Scope in collaboration with “Disability Now” magazine and the UK Disabled People’s Council found that 47% of disabled people had either experienced physical abuse or witnessed the physical abuse of a disabled friend.

3.4 The research also found that -

- Disabled people are four times more likely to be violently assaulted than non-disabled people and almost twice as likely to be burgled.

- Visually impaired people are four times more likely to be verbally and physically abused than sighted people.

- People with mental health issues are 11 times more likely to be victimised.

- 90% of adults with a learning difficulty report being ‘bullied’.

4 Nature of crimes and their impact on Disabled People

4.1 Disablist crimes vary in motive from taking advantage of a victim's perceived or actual vulnerability, to the impairment being the reason or motive for the crime. They happen more frequently than we might imagine as they currently go unrecorded (e.g. as recently as this September a blind man in Edinburgh was lured into a violent gang attack by a woman feigning friendship the motive may have been robbery or hatred or both (iv)).

4.2 All such crimes are symptomatic of the disregard for disabled people's dignity and human rights which is general within our society. Inclusion Scotland believes that there is a lack of awareness about disablist crime which is similar in nature and extent to the public's ignorance of racist hate crimes prior to the Stephen Lawrence case.

4.3 The modest advances that have been made towards the participation of disabled people in everyday life are fragile and under threat when such criminal behaviour goes unrecognised, unstigmatised and unpunished. Disabled people must not be placed in fear of physical or verbal abuse when they leave their homes and venture out on Scotland’s streets.

4.4 “Disability Now” magazine investigated 50 crimes against disabled people in 2006 and 2007 (v).

4.5 To name but a few of the victims - Steven Hoskin, Brent Martin, Raymond Atherton, Kevin Davies, Rikki Judkins and Barrie-John Horrell all suffered horrific abuse (including being burnt with cigarettes, beatings, being stripped, urinated on, being put on dog leads and otherwise humiliated, having their homes taken
over and savings and income stolen) before they were killed by people purporting to be their friends.

4.6 In total 14 of the 50 cases listed by “Disability Now” resulted in the death of a disabled person and many others in serious injury. A substantial number involved attacks on people in wheelchairs or using mobility scooters. Only two of the cases were treated as hate crimes by the prosecuting authorities. This demonstrates that a change in the law extending hate crimes protection to disabled people is a necessary first step but insufficient in itself to result in prosecutions.

4.7 Inclusion Scotland would urge that if this Bill becomes law there should be mandatory training of the Procurator Fiscal and Police services to equip them to recognise hate crimes against disabled people for what they are.

5 Conclusion

5.1 When such a disproportionate level of abuse and crime is being perpetrated against disabled people then Scotland’s lawmakers are under a moral duty to send a powerful message that such barbaric behaviour will not be tolerated in our society.

5.2 Inclusion Scotland calls on the Justice Committee and all MSPs to ensure that Disabled People are given the same protection as other minority groups and are enabled to go about their daily lives without fear of harassment and assault.

Bill Scott
Policy Officer

References:

(i). See here – http://news.bbc.co.uk/1/hi/wales/7631734.stm


(v) See here for the full report – http://www.disabilitynow.org.uk/the-hate-crime-dossier [Link no longer operates]
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Sandyford, NHS Greater Glasgow and Clyde

Sandyford is the specialist sexual health service for NHS Greater Glasgow and Clyde. In the last year, there were 130,000 individual visits to Sandyford’s mainstream and specialist services that include services for men who have sex with men, lesbian and bisexual women, and transgender clients within a non-judgemental environment.

A number of Sandyford clients have experienced discrimination or been subject to verbal or violent attack because of their perceived or actual sexual orientation or disability, and on those grounds we support the Bill’s aim is to strengthen the law regarding statutory aggravation in relation to offences based on prejudice.

However, we are concerned in how potential tensions around this Bill regarding equality issues and the views of some faith and belief organisations particularly in relation to sexual orientation, are managed during its passage through Parliament. From a sexual health service perspective, there are challenges in managing these tensions, and we would hope that the Bill is protected from amendments that could enable homophobic remarks to be made in religious contexts including educational settings.
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Fife Men Project

1. About Fife Men Project

Fife Men Project is a community based project which supports the LGBT community in Fife by working in Partnership with NHS Fife, Fife Council and Fife Constabulary. The services we offer include Men's Health, local access to NHS and Council services, remote reporting of Hate Crime, social inclusion, counselling, referrals and support. We have been running for the last 10 years.

2. Introduction

It is generally accepted that heterosexual couples can walk down their high street hand in hand and not have people stare at or shout abuse at them. Unfortunately this is not the case for the LGBT community. Also if a tenant is being harassed because of their sexual orientation or sexual identity, often it is the victim who will be offered a move to provide a more convenient solution to the problem. There are a number of aspects which need consideration if the LGBT community are to have equality of outcome within the law and equality under the European Anti-discrimination Framework.

The Fife Men Project believes that the equality strands are a core part of our business and that we need to work in partnership to challenge inequality and to secure change on behalf of the Fife LGBT Community.

A partnership approach is necessary in changing attitudes, improving practice of how Hate Crime situations are dealt with and also how Hate Crimes are recorded so that robust evidence is available both to prosecute such cases, to monitor trends of incidents and changes in attitude in order to support targeted interventions. Many people in the LGBT Community feel that there is little to be done to help, that the authorities do not care and that we should either accept or deal with such prejudices ourselves. We feel that there needs to be a multilateral campaign to challenge prejudice, which is based on respect in the work place and respect in our communities.

The Working Group on Hate Crime report (Scottish Executive 2004) defines hate crime as “Crime motivated by malice or ill-will towards a social group”. Currently Scotland is out of step with England, Wales and Northern Ireland in how it approaches Hate Crime. Many attitudes towards the LGBT community, especially in rural areas do not recognise the gains which have been made through existing equalities legislation.
LGBT research is very difficult to carry out and is usually done through anonymous surveys or interview in known gay venues, which are attended by a particular section of the LGBT community. The pattern of behaviour is that many LGBT people will only attend these places at specific points in their life which are related to age, relationships and being out to friends, colleagues and perceived authorities. It is not necessary to have a flamboyant lifestyle to be targeted for hate crime, it is motivated by the perception of the perpetrator rather than the actions of the victim.

3. The Bill

The Fife Men Project welcomes the opportunity to comment on the forthcoming legislation. We have supported recommendations 1 and 3 from the Working group on Hate Crime Report published in 2004. In particular recommendation 1 which states that

“The legislation should be framed in such a way as to allow this approach to be extended to other groups by statutory instrument over time if appropriate evidence that such other groups are subject to a significant level of hate crime.”

We view the Offences (Aggravation by Prejudice) (Scotland) Bill as progressing the recommendations in this report.

Our Project welcomes the Bill which, for the first time provides that either the motivation or demonstration of Malice or ill-will can be taken into account when sentencing for an offence aggravated by prejudice. We believe that it is the motivation of the offender which is important in sentencing. We acknowledge that there is current provision for aggravation to be taken into account on sentencing. There are however short-falls in current sentencing. These include inconsistency in application, how the aggravation is evidenced and lack of monitoring.

The project welcomes provisions for a single source of evidence and the exclusion of the need for a specific or individual victim to be identified e.g. as with vandalism or graffiti at locations identified or frequented by the LGBT Community.

There is anecdotal evidence from our service users and clients of under reporting of offences motivated by presumed LGBT status. This is despite feedback from the Gay Police Association of improved reporting of Hate crime through remote reporting schemes. The Fife Men Project runs a helpline which is currently funded by Fife Constabulary. We welcome the remote reporting schemes and support the continued funding of these schemes by all Police Forces in Scotland.
The provision of this new legislation, will not in itself change attitudes towards prejudice. This requires an information campaign and a support service be made available to victims of prejudice. This should be supplemented by training for staff working with the Procurator Fiscal and Scottish Court services.

We also welcome the publication of the report by the *Hearts and Minds Agenda Working Group*, which was published in February 2008. However, there is a need to build the confidence of the LGBT community to address under reporting. Sentencing of Aggravation by Prejudice cannot be taken in a vacuum. In addressing the wider context of equality, we hope that the message which is sent out to the people of Scotland from this legislation is one step towards achieving the vision set out in the *Hearts and Minds Agenda report*.

We recognise that the legislation also has the potential to support the Public Sector Equality Duties and increase the range of remedies and monitoring available for LGBT victims of anti-social behaviour from tenants and owner occupiers alike.

Our Project notes that that the Sentencing Commission report on *The Scope to Improve Consistency in Sentencing*, had the remit of improving consistency of sentencing but failed to make any mention of the *Working Group on Hate Crime Report recommendations*. We welcome that sentencing will still be addressed by the judge rather than assigning a prescribed response to these issues. We feel this is the best way to address consistency issues. We recognise that this may not add to the sentence but that the nature of the aggravation and how it has influenced sentencing will be recorded.

We also welcome the costed improvements which have been identified for the implementation of the monitoring of the Bill and that both the Crown Office and Procurator Fiscal Service and the Scottish Court Services have agreed to pay for this from existing funding.

4. Conclusions

Hate crime is motivated by the perception of the perpetrator rather than the actions of the victim. The Fife Men Project welcomes provisions for a single source of evidence and the exclusion of the need for a specific or individual victim to be identified. There is anecdotal evidence from our service users and clients of under reporting of offences motivated by presumed LGBT status. LGBT research is very difficult to carry out due to the need to self identify, reluctance to be “out” to authority figures or researchers and only a limited proportion of the LGBT community regularly attend LGBT venues. We welcome the remote reporting schemes and support the continued funding of these schemes by all Police Forces in Scotland. However, there is a need to build the confidence of the LGBT community to address under reporting.
The provisions of this new legislation, will not in itself change attitudes towards prejudice. This requires an information campaign and a support service to be made available to victims of prejudice. We feel that there needs to be a multilateral campaign to challenge prejudice, which is based on respect in the work place and respect in our communities.

SOURCES
Having consulted with my colleagues in the Humanist Society of Scotland (HSS), we have concluded that the Bill covers its objectives very well. We had originally made a contribution (by our Mr. Charles Douglas) to the Hate Crime debate since it was first raised in the Sectarian and Religious Bill in 2001. Please see some details in Attachment I. Attachment II introduces the HSS and its fundamentals.

We have one small reservation in the wording of Section 3 (2) of the current Bill. It is not clear what is meant by “saving provision”? We are concerned that this might be used to make exemptions for some religions or beliefs. We therefore propose adding the words “such as personal beliefs” to sections 1 (3) and 2 (3), to make them read as follows:

1 (3) & 2 (3): It is immaterial whether or not the offender’s malice and ill-will is also based (to any extent) on any other factor, such as personal beliefs.

We would be pleased to provide the Committee with oral evidence, if required.

A D H Tehrani
Public Affairs
Response – Offences (Aggravation by Prejudice)(Scotland) Bill

The Humanist Society of Scotland has made a contribution to the Hate Crime debate since it was first raised in the Sectarian and Religious Bill in 2001. The view of the Society at the time was that it would not achieve anything significant in the way of a reduction in sectarian crime and might be misused by bigoted public officials or Ministers and that aggravation should only apply to race hatred.

We still believe that it would be better if section 74 of The Criminal Justice (Scotland) Act 2003 was repealed. But given that this is unlikely at the present time, we would support the position that we took when we responded to the Hate Crime Consultation in 2004. This is that as aggravation has been extended to Religion there is no logical reason for not extending it to other groups covered by Article 13 of the Treaty of Amsterdam. Particularly to groups who might be the victims of crimes motivated by religious bigotry.

As the Hate Crime Report of 2004 shows the areas of most concern are the ones covered by the present Bill. While we support both sections our greatest concern is with those covered by Section 2 as it is in this area that most of the abuse is driven by religious bigotry. It is clear that religious extremists want to go on fermenting hatred against those whose sexual orientation/transgender identity does not fit with their own narrow views. This is clearly demonstrated by a quotation in the HCR from the submission of the Christian Institute, which reads:

“*It is important to stress that Christians completely oppose criminal acts against anyone regardless of “sexual orientation”. Nevertheless, we are concerned an aggravated offence will be used to threaten and intimidate those who hold traditional views on sexuality.*”

The first part is very hollow when we see how Christian Voice picketed sick people because they didn’t like a TV show.

This attitude is based on some very unpleasant passages in the Old Testament. For homosexuality Leviticus Ch XX v 13 “*If a man also be with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.*” And on Cross dressing Deuteronomy Ch XX11 v 5 “A woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman’s garment. *For whosoever doeth these things is an abomination unto the lord thy god.*” In the light of these sentiments we believe the Bill must be passed and that there must be no exemptions for religious beliefs.

The current bill covers all three aspects, disability, homosexuality and gender dysphoria/transgender identity very well. But we have one small reservation in the wording of Section 3 (2). What is meant by “saving provisions”? We therefore suggest adding the words “such as personal beliefs” to sections 1 (3) and 2 (3).

The Humanist Society of Scotland (HSS) represents the interests of the growing number of ethically concerned but non-religious people in Scotland. Membership is open to all those who share our life stance and support our aims, while Humanist groups affiliated to us include the UK Armed Forces Humanist Association and the Edinburgh University Humanist Society. The HSS is a member of the European Humanist Federation and the International Humanist and Ethical Union (IHEU).

The fundamentals of Humanism, followed by the Humanist Society of Scotland, and the International Humanist and Ethical Union, are as follows:

1. Humanism is ethical. It affirms the worth, dignity and autonomy of the individual and the right of every human being to the greatest possible freedom compatible with the rights of others. Humanists have a duty of care to all of humanity including future generations. Humanists believe that morality is an intrinsic part of human nature based on understanding and a concern for others, needing no external sanction.

2. Humanism is rational. It seeks to use science creatively, not destructively. Humanists believe that the solutions to the world's problems lie in human thought and action rather than divine intervention. Humanism advocates the application of the methods of science and free inquiry to the problems of human welfare. But Humanists also believe that the application of science and technology must be tempered by human values. Science gives us the means but human values must propose the ends.

3. Humanism supports democracy and human rights. Humanism aims at the fullest possible development of every human being. It holds that democracy and human development are matters of right. The principles of democracy and human rights can be applied to many human relationships and are not restricted to methods of government.

4. Humanism insists that personal liberty must be combined with social responsibility. Humanism ventures to build a world on the idea of the free person responsible to society, and recognises our dependence on and responsibility for the natural world. Humanism is undogmatic, imposing no creed upon its adherents. It is thus committed to education free from indoctrination.

5. Humanism is a response to the widespread demand for an alternative to dogmatic religion. The world's major religions claim to be based on revelations fixed for all time, and many seek to impose their world-views on all of humanity. Humanism recognises that reliable knowledge of the world and ourselves arises through a continuing process of observation, evaluation and revision.
6. Humanism values artistic creativity and imagination and recognises the transforming power of art. Humanism affirms the importance of literature, music, and the visual and performing arts for personal development and fulfilment.

7. Humanism is a life stance aiming at the maximum possible fulfilment through the cultivation of ethical and creative living and offers an ethical and rational means of addressing the challenges of our times. Humanism can be a way of life for everyone everywhere.

Our primary task is to make human beings aware in the simplest terms of what Humanism can mean to them and what it commits them to. By utilising free inquiry, the power of science and creative imagination for the furtherance of peace and in the service of compassion, we have confidence that we have the means to solve the problems that confront us all. We call upon all who share this conviction to associate themselves with us in this endeavour.
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Stonewall Scotland

1 Introduction

1.1 Stonewall Scotland welcomes the introduction of The Offences (Aggravation by Prejudice) (Scotland) Bill. This simple bill will implement the central recommendation of the previous Scottish Executive’s Hate Crime Working Group¹, which reported its recommendations in October 2004.

1.2 Stonewall Scotland was established in 2000. Since then we have been campaigning for equality and justice for gay, lesbian, bisexual and transgender (LGBT) people living in Scotland. We work with businesses, the public sector, the Scottish Executive, the Scottish Parliament and a range of partners to improve the ‘lived experience’ of LGBT people in Scotland.

1.3 The work we do involves campaigning on, and raising the profile of, LGBT issues; helping to explain new policies and legislation practically to stakeholders; developing public services to involve LGBT people in Scotland; and working with employers in the private, public and voluntary sector to tackle homophobic discrimination in the workplace.

2 What is a hate crime?

2.1 A hate crime is a crime motivated by malice or ill will against a person because of who they are – their sexual orientation, transgender identity, disability, race or religion.

2.2 Hate crimes can take many forms and range in severity, but what they all have in common is the malice behind them. At Stonewall Scotland we have heard the stories of many hate crime victims. Here are just three of them.

2.2.1 Michael was standing outside a club in Dumfries when a complete stranger walked up to him and, without saying anything, punched him. When asked why, he said “I’m homophobic.” On another occasion, Michael was walking along the street hand in hand with another man when two strangers approached them and hit them. Michael said: “I was shocked. You worry about going out for a while. I didn’t know the guys, I’d never seen them in my life before.”

2.2.2 Johanna was walking to her home in Edinburgh when a 16-year-old girl screamed and shouted at her, tried to take a photograph

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¹ http://www.scotland.gov.uk/Publications/2004/10/20027/44264
of her on her mobile and spat in her face – all because she is transsexual.

2.2.3 Norman was walking home from a friend’s house in Paisley when he was stabbed in the back because he “looked” gay. The knife hit his spine and narrowly avoided paralysing him or hitting his vital organs. He was one of five gay men attacked on the same night. He said: “For the next six months I couldn’t leave the house without someone with me. I moved to London because I didn’t feel safe in the West of Scotland.”

3 What will the bill do?
3.1 The bill addresses the problem of hate crime motivated by malice or ill will towards people because of their sexual orientation, transgender identity, or disability.

3.2 Statutory aggravations already exist in Scots law to protect individuals targeted on racial or religious grounds, and statutory aggravations relating to crimes motivated by prejudice based on disability and sexual orientation are already in place in England and Wales and Northern Ireland.

3.3 Introducing a statutory aggravation makes it possible to identify a specific offence as a hate crime. If the motive of malice or ill will is proved in court, the judge or sheriff will take this motivation into account as an aggravating factor in setting the sentence – meaning an appropriate sentence can be given, whether it is a specific form of community sentence to suit the nature of the offence or a longer custodial sentence.

3.4 The statutory aggravation system also allows proper recording of hate crime and enables statistical monitoring of how much hate crime is reported and how it is dealt with in the criminal justice system. Currently there is no official figure for the level of homophobic or transphobic hate crime in Scotland – a statutory aggravation would allow figures to be collated and trends monitored.

3.5 A statutory aggravation system encourages more people to report hate crimes to the police and sends a vital message about the unacceptability of prejudice and hate in a modern Scotland.

4 Why is the bill needed?
Stonewall Scotland believes this bill is essential for the following reasons:
4.1 There is a very significant level of crime targeted at people because of their race, religion, disability, sexual orientation, gender identity or disability. A 2002 study of lesbian, gay, bisexual and transgender (LGBT) people in Scotland found one in four had been physically assaulted because they are LGB or T. In 2007 in the Lothian and Borders Police area, there were 91 crimes reported as motivated by anti-gay hate, compared to 49 motivated by religious hatred – and yet
there is a statutory aggravation for religious hate crime, but not for homophobic hate crime. Over the year 2007/8 there were 190 homophobic incidents reported in the Strathclyde Police area. There is a problem of under reporting of hate crime as many victims believe they will not be taken seriously, or that hate crime is simply a part of being LGB or T.

4.2 Anyone can be a victim of a hate crime, whether or not they are LGB or T. An assailant may assume someone is gay because they are walking past a gay bar, or because they have LGBT people as friends. For this reason the statutory aggravation in the bill is based on the motivation of the offender and not on the identity of the victim, and would apply to any offence motivated by disability-related, homophobic or transphobic malice, regardless of whether the victim is actually disabled or LGB or T.

4.3 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 have 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.

4.4 The bill will enable proper recording of disability, sexual orientation and transgender identity related hate crimes. 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.

4.5 The legislation will send three vital messages. It will show victims they can and should report the crime and it will be dealt with appropriately. It will show offenders that crimes motivated by hate will be recognised as such and sentenced appropriately. And to society as a whole, it will demonstrate that hate is not acceptable in a modern Scotland.

4.6 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.

4.7 The race and religion statutory aggravations have been proved to be effective. There are more than 4000 reports of racially aggravated offences and 700 or religious prejudice aggravated offences a year. Conviction rates are high. Similar legislation was passed for England and Wales in 2003 and came into effect in 2005. Below, we have examples of how it has worked in practice and enabled judges to take the motivation for a crime into account in their sentences.
5 How have statutory aggravations worked in practice?
Since similar legislation came into effect in England and Wales in 2005 there have been several successful prosecutions for crimes motivated by homophobia. Here are three examples.

5.1 In April 2008 Karen Reeves and her daughter Christie Miles were jailed and given a community service order respectively after waging a campaign of terror against two gay men. The pair subjected Michael Harries and Shires Crichton to vile abuse and Reeves drove her car at Shires. Reeves and Myles shouted phrases like “poof” and “you're a grass, stick it up the “ss” and stuck two-fingers up at Michael. During the sentencing, the chairman of the magistrates told Reeves: “Although there was no evidence of violence, the psychological effect on the victims has been far reaching. In your case there are strong aggravating factors. Those factors are that you made homophobic gestures and remarks over an extended period and you showed no remorse.”

5.2 Gary Lee Walls was sentenced to two years in prison in February 2008 after he and two others attacked Charles Sanday because they mistakenly thought he was gay. The men punched Charles and one jumped on his leg, leaving it so badly broken that it took six months to heal and a titanium rod was inserted into his leg. Sentencing, Judge Ashurst said: “Three of you determined to attack someone for no reason other than you thought he was homosexual. It was a disgraceful assault by three younger men. He was put to the ground, kicked and stamped on. He has serious injuries, and there are long-term consequences for this man.”

5.3 Scott Walker and Thomas Pickford were sentenced to a minimum of 28 years in prison in June 2006 for the homophobic murder of 24-year-old Jody Dobrowski. The court heard that the pair set out to attack a gay man. They jumped on Jody, stamped on his head and inflicted 33 visible injuries to his body whilst shouting homophobic abuse. Sentencing, the Common Serjeant of London, Judge Brian Barker, increased the minimum term to reflect the homophobic aggravation for the crime. He told them: "I am quite satisfied from what I have heard that aggression was uppermost in your mind. Your target was those that were gay and vulnerable. You can only have had one intention when you went to the wood in Clapham Common and that was to engage in homophobic thuggery."

Christina Stokes
Communications Officer
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Leonard Cheshire Disability

Leonard Cheshire Disability, while focusing on how the Bill will affect disabled people, warmly welcomes the principles behind Patrick Harvie’s Bill for all those people that it aims to protect. In fact Leonard Cheshire Disability renewed our call for such a Bill soon after the 2007 Scottish Parliamentary Election when we wrote to the Cabinet Secretary for Justice.

In our letter we stated that the SNP and other political parties either mentioned in their manifestos or in hustings that attacks on disabled people should be treated as ‘hate crimes’. And as such the Cabinet Secretary should create legislation which would ensure that Scotland’s disabled people were afforded the same rights as their UK peers. After all the Criminal Justice Bill of 2003 saw England, Wales and Northern Ireland courts treat attacks on disabled people as ‘hate crimes’. Leonard Cheshire Disability believed that bringing this legislation to Parliament and passing it would show the much talked about ‘new politics of consensus’ was working in practice.

This Bill is needed as it aims to tackle a real and serious issue that still prevails in our society, namely that disabled people are ‘attacked/offended against’ simply because of their impairment.

One of the arguments which we hear against this Bill is that people do not believe that ‘attacks/offences’ on disabled people are prevalent and if ‘attacks/offences’ do happen to disabled people then it is not because of their impairment. The question that these people usually pose is ‘why do disabled people need new laws?’

Well first of all Leonard Cheshire Disability are not advocating that crime should be taken more seriously just because a victim is a member of a minority group, that would be discriminatory in itself, but we do state that when a crime is committed because the victim is a member of a minority group then by its very nature this is an aggravated crime that deserves to be treated as such. The crime is an assault not only on the person but also on the person’s identity.

We are aware that some people may believe that the Bill would introduce a law that would be showing favouritism to a “select few” minorities. But Leonard Cheshire Disability believes that the new law would uphold the principle that an attack motivated by hatred of one’s person is a reprehensible denial of one’s right to exist.
What the Bill seeks to address is that if someone chooses to prey on the ‘vulnerable’ or gang up on specific groups of people or individuals simply because of prejudice and hate, the law will rightly exert an extra/fitting penalty to reflect this additional malicious aspect of the crime specifically to dissuade this type of behaviour in the future.

Leonard Cheshire Disability acknowledges that under Scots Law the courts can take any aggravating factor into account when sentencing someone found guilty of an offence.

However we feel that the courts do not utilise this power when it comes to cases involving offences against disabled people. What the Bill will do is to ensure courts must consider the offender’s hatred towards disabled people and sentence them accordingly.

Under section 1 subsection 5 the court must—
(a) state on conviction that the offence is aggravated by prejudice relating to disability,
state—
(d) (i) where the sentence in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference

Leonard Cheshire Disability believes that the above provisions of the Bill will make sure that the courts openly announce when a sentence has been increased because it was a disability hate crime. This should have a ‘declaratory effect’ – it tells society that such crimes are wrong by naming them for what they are.

The Bill will also assist record keeping of the number of ‘hate crimes’ that exist as currently we are operating in a ‘knowledge vacuum’. If we are to seriously address the problem we need to know the facts to find a solution. Police forces need a uniform reporting procedure so that we can examine the results. Hate crime is under reported as a crime. If more victims and witnesses report incidents it can prevent other people becoming victims of ‘hate crime’.

Now to tackle the issue that people argue that ‘attacks/offences’ on disabled people are not prevalent, as we have noted above ‘hate crimes’ are under reported but that does not mean they don’t exist.

Since 9/11 and 7/7 political movements have been trying to make political capital out of the ‘climate of fear’ and xenophobia has risen to the top of the political agenda. As a result there has been heightened anxiety and rising violence against racial, ethnic, and religious minorities. The media, and to a certain degree governments, have been preoccupied with this situation. However this has meant that violence toward those who are deemed ‘outsiders’ because of
their impairment may be less visible, but it does not mean that attacks are any less serious or prevalent.

They have been various studies and reports which have examined the issue of disability hate crime, to highlight just a few:

One report which I’m sure will be mentioned by many people is the 2004 survey by the Disability Rights Commission (DRC) and Capability Scotland which found that 47% of respondents had been attacked or frightened (by someone) because of their impairment.

Also a survey by the Royal National Institute for Deaf People, found that only 23% of respondents felt safe walking around their neighbourhood at night.

Back in 2000 Mencap found that nearly nine out of ten respondents said that they had been ‘bullied’ in the past year.

Mental health charity, Mind, published a report in 2007. Their results showed that people with mental health issues were 11 times more likely to be victimised than the rest of society. The report found that 71% of survey respondents with mental distress had been victimised in the last two years.

More recently at the beginning of this year Disability Now magazine presented its ‘hate crime dossier’ which examined 50 crimes. These cases represent just the tip of the iceberg of the violence experienced by disabled people. The cases involved disabled people with a wide range of impairments and included 12 vicious attacks on people with learning difficulties, nine of which resulted in death. There were a further 26 attacks on wheelchair or mobility scooter users, seven attacks on people with sensory impairments and four attacks on other disabled people.

The magazine highlighted cases like the murders of Steven Hoskin, Barrie-John Horrell and Rikki Judkins, the manslaughter of Raymond Atherton and the torture and death of Kevin Davies......... however none of these five crimes were identified as potential disability hate crimes.

Fiona Pilkington, killed herself and her disabled daughter, Frankie, after months of abuse by young people. Police confirm that Ms Pilkington had complained about harassment, which they logged as anti-social behaviour, not as on-going hate crime.

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... Just three of the cases that we reviewed were treated as disability hate crimes.’
‘There have been many, many studies on criminal victimization of disabled people. Almost every single one of these will tell you that a disabled person is somewhere between five and ten times more likely than a non-disabled person to be the victim of a hate crime’.

Mark Sherry

Mark Sherry, Endowed Chair of Disability Studies and Assistant Professor of Sociology at the University of Toledo. He has extensively researched violence against disabled people.

‘Disability hate crime is very widespread. At the lower end of the scale there is a vast amount not being picked up. The more serious offences are not always being prosecuted as they should be…. This is a scar on the conscience of criminal justice. All institutions involved in criminal justice, including my own, share the responsibility’.

Sir Ken Macdonald QC

Sir Ken is Director of Public Prosecutions (England)

So I think we can clearly see that ‘disability hate crime’ does exist. In fact unfortunately too many disabled people see aggression, harassment and violence as an inevitable part of life as a disabled person.

Hate crimes not only affect the actual victim, it can affect the whole family, friends and the wider community. It can do serious long-term harm as many victims do not report incidents but endure harassment for a long time – sometimes for years.

Hate crime legislation signals a society’s commitment to combat violent discrimination, it allows courts to punish them accordingly by imposing greater sentences for the perpetrators or to utilise restorative justice sentences. For example one of our residential gardens were vandalised, the people who committed this offence could have been made to help clear it up and hopefully by spending supervised time beside disabled people it will change their attitude and show them the upset and pain that they caused.

Disabled people need to feel safe in coming forward to report a crime they want to know that the police will treat the offence seriously. We hope the Bill will also spur better disability awareness training for police officers to ensure that they change their perceptions about the credibility of disabled victims.

We have seen that these new powers must be backed up by police action. Scotland should pay heed to the lessons that are being learnt in England. Disappointingly, even though in England they have ‘hate crime’ powers, the police and courts do not seem to be making use of them as first envisaged (as Disability Now highlight). Leonard Cheshire Disability would hope that if Scotland
passed this Bill that Scottish judiciary and police would fully embrace the law and be a shining example to the rest of the UK, in the implementation of the ethos of hate crime legislation.

Leonard Cheshire Disability hopes by creating this piece of necessary legislation the Parliament can send out a clear message that intolerance and discrimination has no place in a forward-looking Scotland. It would also help to shine a light into a dark corner of society as many attacks go unreported. New legislation could garner greater confidence for people to report incidents. This would mean hate crimes would not be shielded from public view. Leonard Cheshire Disability therefore fully support's Patrick Harvie's Bill.

Ryan McQuigg
Policy & Parliamentary Officer- Scotland
Introduction

1 The Equality and Human Rights Commission was established by the Equality Act 2006 and came into being on 1 October 2007. We are the independent advocate for equality and human rights across the three nations of Great Britain, and we work to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We enforce equality legislation on age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation and encourage compliance with the Human Rights Act. In Scotland, we co-locate and work in partnership with the Scottish Commission for Human Rights.

2 The Commission welcomes the opportunity to give evidence to the Justice Committee on the Offences (Aggravation by Prejudice) (Scotland) Bill. The Commission, and its legacy organisations, the Commission for Racial Equality (CRE), Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC), have been closely involved in the debate on criminal justice responses to hate crime in Scotland, with the CRE represented on the Cross-Party Working Group on Religious Hatred, and both the DRC and the EOC members of the Working Group on Hate Crime.

3 The Commission has sought to build on this work from its legacy commissions, and is currently taking forward a number of pieces of work looking at legislative and policy responses to crime targeting different social groups and at how different types of offence disproportionately affect different sections of society. At the GB level, work is underway on identifying the priorities for promoting personal safety and security for disabled people, looking at criminal justice responses, but also those from the health and social care sectors. In Scotland, the Commission aims to reflect and lead debate on the criminal justice responses to gender-based violence, and will produce a report in spring next year.

4 The Commission supports the introduction of statutory aggravations to identify and tackle crimes motivated by malice and ill will towards gay, lesbian, bisexual, transgender or disabled people, in line with the recommendations of the 2004 report of the Working Group on Hate Crime. Evidence strongly suggests that LGBT and disabled people are disproportionately more likely to be victims of certain types of offence, and that statutory aggravations have the potential to be one effective method of addressing these crimes, providing greater confidence and security for victims and assisting in identifying and addressing offending behaviour.
This submission will concentrate on defining the nature of the problem, and will attempt to clarify some of the confusion that sometimes surrounds the term “hate crime”. It will touch on some of the issues relating to crime targeting disabled people, in particular the persistent “vulnerability” model which has at times skewed debate in this area. It will also consider the valuable learning – both positive and negative – from the introduction of statutory aggravations for disability and homophobic hate crime in England and Wales. Finally it will seek to locate statutory aggravations within a wider set of interlinked policy and legislative responses to targeted crime.

The Nature of the Problem

It is probably difficult for heterosexual people to realise just how often one is insulted simply for being or looking gay. Whilst straight-looking myself, when my partner and I are together, we are obviously a gay couple. We receive completely unwarranted abuse quite often and have just got used to ignoring it. As we got off our local bus a few months ago, a young woman with whom we had had no contact or conversation whatsoever, called out: ‘F***ing poofs! What can one do? – 59 year old respondent to Stonewall survey

There is a growing body of evidence that LGBT and disabled people are significantly more likely to be targets of various types of crime, including harassment, abuse and assaults, because of who they are, or are perceived to be. These crimes are not simply unacceptable in themselves but, given their targeted nature, strike at the heart of the values and norms of a fair, tolerant society. As one commentator puts it,

Hate crimes offend societal norms, or the collective moral code ... ... Hate crime offenders are entitled to their reservations and opinions about living with diversity. However, when they act on those opinions and commit crimes motivated by bigotry, they offend values that are fundamental to civil society.

This type of targeted crime would also appear to have a more profound and lasting impact on the victim than other types of crime. There is therefore a compelling argument, both in terms of the prevalence of this type of crime, and the impact it has on individuals’ lives, to identify more effective criminal justice responses.

Defining Hate Crime

One of the issues which have hampered the debate on criminal justice responses to hate crime is the term itself. While a useful shorthand, it can also be emotive and misleading. The central issue is not ‘hate’ as such, but prejudice or ill-will towards a social group which manifests itself in a criminal act.
9 The need for clarity is particularly important when considering crimes motivated by prejudice or ill-will towards disabled people. As one learning disability organisation puts it,

The phrase ‘hate crime’ is important in terms of recognition, but the label is sometimes confusing or unwelcome. Disabled people are in effect given a Hobson’s choice of being labelled ‘vulnerable’ or seen as being ‘hated’. Neither option is empowering or positive for disabled people.

10 It is important therefore to ground debate on statutory aggravations in a clear definition of hate crime, which focuses on the motivations and values of the perpetrator, not the identity of the victim. The definition used by the Scottish Executive working group on hate crime in its 2004 report – ‘crime motivated by malice or ill-will towards a social group’ – is useful in this regard.

Successful implementation of statutory aggravations

In other cases victims were deliberately targeted, many of them had been attacked or harassed before, in almost all cases more than one attacker was involved, and the perpetrators used explicit derogatory language like ‘spastic’, ‘schizo’, ‘cripple’ and ‘muppet’ to describe their victims. The motivating factor stares us in the face: a hostility and contempt for disabled people based on the view that disabled people are inferior, and do not matter. –Scope report on disability hate crime.

11 The dangers of proceeding on the false premise that all disabled victims of crime are inherently vulnerable can be seen from the mixed lessons which have come from the introduction of statutory aggravations for homophobic and disability-related hate crime in the Criminal Justice Act 2003. The murder of Jody Dobrowski on Clapham Common in October 2005 and the subsequent conviction of his killers was an important milestone because of the clear statement from Judge Brian Parker as to the homophobic nature of the crime and the increased sentence given to the two men as a result.

12 There has yet to be a similarly high profile use of the disability aggravation, with suggestions that police and prosecutors in England are only now beginning to recognise the scale of the problem. Under-reporting also remains an issue, with widespread agreement that official figures do not reflect the true scale of the problem. The outgoing Director of Public Prosecutions in England and Wales, Sir Ken Macdonald, has been very vocal on the current shortcomings in identifying and prosecuting disability hate crime in a speech in October this year, and is clear that part of the problem relates to the misapprehension that disabled people are inherently vulnerable:

...where people are deliberately targeted because of their vulnerable situation, it is our duty to bring the sentencing court's attention to this
fact. However each of us needs to be careful about the language that we use. There is a world of difference between calling a person ‘vulnerable’ and labelling their situation at the time of the offence as vulnerable...

...calling a person vulnerable conflates their situation with their identity. The effect of this is that ‘vulnerability’ becomes an innate, unchanging and unchangeable characteristic of disabled people. We are one step away from making the assumption that disabled people should expect to be attacked because of who they arexii.

13 The effective implementation of statutory aggravations for disability hate crime will depend on the kind of leadership shown by Sir Ken Macdonald, and on police and prosecutors ensuring that policy and practice is not shaped buy often unconscious assumptions about disability and vulnerability.

14 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.

15 Statutory aggravations should not however be seen in isolation as the only policy response to targeted crime. The Committee may want to consider the Commission’s parallel evidence to the Equal Opportunities Committee, where we suggest that responses to gender and age-related crime may need to be differentxiii. Aggravations covering homophobic, transphobic and disability related crime will themselves have to be seen against the backdrop on a range of other legislative and policy interventions, from antisocial behaviour measures to the implementations of the Adult Support and Protection (Scotland) Act 2007. A useful point of reference in considering how a range of policy interventions might be brought to bear on targeted crime and harassment is Positive Action in Housing’s challenge Racism Toolkitxiv, which provides practical policy advice for a range of actors in dealing with racist incidents.

Conclusion
The Equality and Human Rights Commission supports the policy aims and approach of the Offences (Aggravation by Prejudice) (Scotland) Bill, and believes that it has the potential, if implemented effectively, to be one useful response to crime targeting LGBT and disabled people, Giving reassurance to victims and helping address offending behaviour.

Euan Page
Parliamentary and Government Affairs Manager
Endnotes/References


ii Scottish Executive, Working Group on Hate Crime Report, October 2004

iii Quoted in Stonewall survey on homophobic hate crime (link below).


vi See, for example, Gregory M. Herek/ American Psychological Association, Summary of Preliminary Findings from a Study of the Psychological Impact of Hate Crimes based on Sexual Orientation [Link no longer operates], 2008; Crown Prosecution Service, Policy for prosecuting cases of disability hate crime, February 2007


viii Scope, Getting Away with Murder: disabled people’s experience of hate crime in the UK, 2008

ix The Times, Two face thirty years in jail for homophobic murder [Link no longer operates], 13 May 2006

x BBC News, Fears over Disability Hate Crime, December 2007; Respond/ACT/UK Voice, Submission to the Joint Committee on Human Rights Inquiry into the Human Rights of Adults with Learning Disabilities, July 2007 [Available at: http://www.publications.parliament.uk/pa/lt200708/ltselect/ltrights/40/40we78.htm]

xi Alison Holt, BBC Social Affairs Correspondent, January 2008

xii Sir Ken Macdonald QC, Director of Public Prosecutions, Speech on prosecuting disability hate crime, 6 October 2008


xiv Available at: http://www.challengeracism.com/
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Jane McLaren

I am interested in the progress of this Bill. My interest was prompted by hearing recently of a cruel repeated incident of local victimisation concerning the home of a man with a disability. I discovered today that I could contribute in a small way to the discussion.

I have after advice and on reflection not given examples as I do not have the permission of those who were victimised.

I have lived happily in the same pleasant residential area for many years. Over the years I have witnessed at first hand a few incidents demonstrating the powerlessness of disabled individuals and their carers faced with targeting and threats and assaults on them or their home. Through happening to intervene myself by calling the police I have also seen the difficulty the police have in tackling these repeated incidents. Perpetrators tended to be young males aged 14 to 18 yrs who scattered on police arrival. The victims were really only protected by the chance intervention of others or by waiting alone and afraid for the attackers to grow bored. This occasional, but at times insistent and repeated, harassment caused great distress to the victim who no longer felt secure in their home. I do not think my observations are untypical of many areas in Scotland both rural and urban.

I have also seen victimisation escalate and have felt fears that levels of violence were capable of increasing to dangerous levels as hatred was whipped up. Surely a person suffering from disability requires more support from us all when faced with this bullying. I think this Bill may help cases where ongoing prejudice and victimisation go unpunished against minority groups.

It might deter the easily led mob and motivate their parents to ensure they do not participate. Ringleaders and agitators of such hatred would be deterred by a risk of facing a serious offence. Police and the local authority might be enabled to respond with greater priority than at present. Perhaps even more significantly, local citizens might feel encouraged to intervene and offer support through the Parliament’s clear signal that prejudice is unacceptable in a modern Scotland.

All assaults should be taken seriously and there is a difficulty in identifying where such prejudice is the underlying factor. However, I think a sort of fashionable derision of the weak or different is in our wider entertainment culture at present. I feel sorry that we are, through our collective powerlessness as adults allowing children to grow up believing identified groups as fair game to hate. We seem unable to tackle the very few individual young ringleaders who get away with such intimidation.
I would also like to draw the Committee's attention to reports of the murder of Laura Milne who I believe had a learning disability. [Link no longer operates]

This highlights the way in which the wider entertainment culture of ridicule and derision can inadvertently lend authority to those who act out their hatred. Perhaps this Bill may restore some balance in our culture.

While qualifying assault in this way we must also surely remember that young able bodied, straight males with no criminal record are probably by far the largest statistical group of victims and need our protection with equal zeal.

I hope my small rather anecdotal contribution has been of help to your discussion and hope that this Bill progresses into law.
Introduction

1. NAT (National AIDS Trust) is the UK’s leading independent policy and campaigning charity on HIV. NAT develops policies and campaigns to halt the spread of HIV and improve the quality of life of people affected by HIV, both in the UK and internationally.

2. NAT welcomes the chance to contribute to the Justice Committee’s consideration of the Offences (Aggravation by Prejudice) (Scotland) Bill.

3. NAT particularly welcomes section 1 subsections (7) and (8) and Explanatory Note12 to the Bill which states that:

   Subsections (7) and (8) define what is meant by disability in the Bill. Disability is defined widely by reference to physical and mental impairments (which is a recognised way of defining disability). It includes learning difficulties, mental illness, physical disabilities and sensory impairments. Subsection (8) ensures that the definition also expressly includes any medical condition which has or may have in the future a substantial or long-term effect or is progressive – examples of such conditions include HIV/AIDS, Hepatitis C, cancer and multiple sclerosis.

4. NAT commends the Bill for the inclusion of a definition of disability which ensures that people living with HIV are given the same protection from hate crime as other disabled people.

5. NAT’s submission focuses on the need to ensure that HIV remains within the scope of the Bill as it goes through the Parliamentary process.

The need for protection for people living with HIV

6. Ensuring that HIV is recognised within the definition of disability in the Offences (Aggravation by Prejudice) (Scotland) Bill is vital. Stigma and discrimination remain a distressing and sometimes dangerous reality for many people living with HIV in the UK. Research suggests that one in three people with HIV have experienced discrimination linked to their HIV positive status. It would almost certainly be a much higher percentage were it not for the fact that most do not disclose their HIV status to many other people.

7. When an individual’s HIV status does become known to others in the community it can often lead to various forms of abuse and harassment. Below are just three examples that have come to the attention of NAT.
John’s story

John is 36 years-old. He’s been diagnosed HIV positive for four years. After a fall-out with his long term partner, John’s status and home address were exposed when a card appeared in his local shop window, warning parents that he was an “AIDS carrier” and that they should keep their children away from him. A few days later, John came home from work to find two guys in his flat. They beat him with chair legs, putting him in hospital for six days.

Fay’s story

Fay was originally from the Democratic Republic of Congo (DRC). She arrived in the UK in 2006 and has requested right to residency based on an Article 3 application. Fay speaks very little English and has two children under 4.

A local authority social worker worked with medical teams and children and families teams to find a couple of rooms for her in a house whilst her application was investigated. The worker felt she needed to break an isolation based depression that was becoming apparent and arranged for her to attend a group at a local centre that was for women from DRC.

Fay attended for three weeks, twice a week and started to make friends. She told the social worker that she recognised another women in the group from the hospital she was attending for her HIV so was happy she was not alone. A couple of weeks later she made a comment about her status. The group became very hostile to her and one of the women there grabbed Fay’s youngest child physically and threw her out of the room, telling Fay to leave as she would give everyone in the room AIDS. Fay became very distressed and left the group. A week or so later she saw the woman she had recognised from the hospital in the street. The woman asked Fay to go with her to talk and took her to a quiet part of the shopping street. The woman then held her against a wall and told her if she went back to the group she would hurt her, she did not want anyone knowing her status and she “had friends” who would hurt Fay’s children if she did not comply.

Fay asked the worker to move her because she was scared. On the night before they moved her, two people pushed her door in and threw pieces of wood and dirt at her in front of her children saying she was dirty and should go back home to Africa to die of AIDS. Fay has now been moved to a new city and is apparently doing well, however will not under any circumstances discuss with anyone her HIV status so as to protect her children.

James’s story

James is 53. In 2007 James’s long term partner passed away and over the next two moths James became increasingly unwell and was hospitalised. When James left hospital he got home to find he had been burgled and offensive graffiti about his sexuality and AIDS was all over the flat. To make matters worse his partner had not organised the home insurance correctly meaning he had no support to either replace the lost items or re-decorate.
Conclusion

8. The case studies in this submission illustrate the importance of ensuring that the Offence (Aggravation by Prejudice) (Scotland) Bill has a definition of disability that includes people living with HIV. NAT welcomes the inclusion of section 1 subsection (8) and Explanatory Note 12 and commends Patrick Harvie MSP for their inclusion.

9. Explanatory Note 12 is extremely helpful, making it clear from the outset that HIV is a disability and people living with HIV are included in the scope of the Bill. This is in contrast to the situation in England and Wales where NAT is in discussions with the Crown Prosecution Service (CPS) about whether HIV is included in the definition of disability in the Criminal Justice Act 2003. NAT hopes that when Offence (Aggravation by Prejudice) (Scotland) Bill becomes law, the CPS will follow Scotland’s example.

10. It will now be important to ensure that section 1 subsection (8) as explained by Explanatory Note 12 remains in the Bill and becomes part of the Act, ensuring people living with HIV are given the protection they need.

Eleanor Briggs
Senior Policy Officer
Introduction
1.0 The Evangelical Alliance Scotland is the largest body serving evangelical Christians in Scotland and has a membership including denominations, churches, organisations and individuals. Across the UK, Evangelical Alliance membership includes over 700 organisations and over 3000 churches. The mission of the Evangelical Alliance Scotland is to unite evangelicals to present Christ credibly as good news for spiritual and social transformation. We firmly believe in a pro-community agenda with tolerance and respect at the forefront of a transforming culture. As a membership organisation we would seek to draw attention to responses from our member organisations such as CARE for Scotland and encourage the committee to recognise the depth and breadth of opinion from the evangelical community on this issue.

1.1 The Evangelical Alliance Scotland welcomes the invitation to submit our views on the Offences (Aggravation by Prejudice) (Scotland) Bill; initially to the Equal Opportunities Committee through written and subsequent oral evidence and now through a written submission to the Justice Committee. We were grateful that our comments were also taken into consideration during the last significant consultation on this subject when the Working Group on Hate Crime was set up in June 2003. We are encouraged to see that this Bill almost entirely represents the recommendations put forward by the Working Group. We therefore agree that no further official consultation was required on the Bill by the Scottish Government before it was introduced to the Scottish Parliament.

2. General Comments
2.1 As a membership organisation the Evangelical Alliance Scotland represents hundreds of organisations, churches and individuals working to present the love of Christ credibly to our society and wholeheartedly promote equality amongst all individuals. The Evangelical Alliance believes in the basic biblical and Christian principle of a God who wants and longs for justice and equality for all people regardless of their faith, sex or sexuality, ethnicity, position in society, wealth etc. Therefore, 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.

2.2 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. We believe that no individual right should have pre-eminence, even if this means some motivations may be more difficult to judge. If we are choosing to govern ourselves by human rights
legislation, we must accept that fairness in their scope be applied across the board, however hard that might be in practice.

2.3 We recognise that unfortunately particular groups within society are more vulnerable or targeted as a result of hatred of their actual or presumed sexual orientation, faith or any other equality strand and therefore understand the need for specific legislation to protect these individuals. Such legislation protects against the particular consequences of a hate crime. For example the increased psychological damage to the victim due to the personalisation of the crime or the socially divisive nature of hate crimes. We would be particularly concerned if a particular group could not participate in normal social activities due to fear that the law did not adequately protect them against specific victimisation from others. For this reason we supported section 74 of the Criminal Justice (Scotland) Act 2003 which recognised specifically the widespread problem of sectarianism.

2.3 The Evangelical Alliance also recognise that statutory aggravations are necessary because they ensure that the courts must consider evidence of motivation towards certain groups and therefore sentence offenders accordingly. Statutory aggravations also overcome the shortfalls under common law which do not develop effective monitoring of instances where malice or ill-will towards a certain group might be evident over the short or long-term.

2.4 The Evangelical Alliance are adamant that, although there may be a need for new criminal justice and public policy responses to crime against individuals because of their sexuality or disability, clearly more needs to be done on a holistic level to change general public attitude towards these two groups and to tackle wider issues of deeply ingrained inequality that is sometimes experienced by the groups. Legislation can only do so much to tackle these issues.

2.5 We agree with the conclusions of the Hate Crimes Working Group of the danger and precedent that legislation such as this might set for the creation of an incitement to hatred offence beyond racial hatred. Such an offence would risk penalising freedom of speech too much for it to be extended to the other equality strands. (Working Group on Hate Crime Report, Scottish Executive 2004b para 5.28)

2.6 The Evangelical Alliance are concerned with section 1 (4) and section 2 (4) of the bill that states that “evidence from a single source is sufficient to prove that an offence is aggravated by prejudice”. If evidence is to be sufficient from a single source this must always be objective rather than purely subjective, alternatively we would hope that evidence is drawn from a third-party.

Sexual orientation or transgender identity
3.1 The Evangelical Alliance recognise the evidence that suggests that 36% of the LGBT community had been exposed to abuse or violence in a one year period compared to just 2.5% of the general population. We therefore support
the need for the legislation that requires motivation of an offence flowing from prejudice on grounds of sexual orientation or transgender identity be taken into account in sentencing.

3.2 The Evangelical Alliance also appreciate the need for such legislation for the simple argument that it provides holistic clarity and continuity of hate crime legislation across the United Kingdom as statutory aggravations relating to sexual orientation already exist in England, Wales and Northern Ireland.

**Disability**

4.1 The Evangelical Alliance Scotland recognises the difficulties and complications in legislating for statutory aggravations in relation to gender and age. This is significantly due to the difficulty in distinguishing between prejudice and a particular physical or mental vulnerability. We would suggest that very similar difficulties would be relevant for the protection of those targeted because of a perceived disability. Disability and age are very closely linked. An individual may be disabled because of their age, and therefore more vulnerable. In general, the six equality strands at times relate to subtle social relationships and complex questions of identity.

4.2 While open-minded to the possibility, the Evangelical Alliance Scotland are not yet convince by the evidence that grounds of disability should be included within this piece of legislation. Evidence suggests that this provision within English and Welsh Law (section 146 of the Criminal Justice Act 2003) has not been greatly used. This could lead to the disabled community feeling indignation because, although the provision is in place, it is not been adequately used by the judicial system and therefore not providing adequate protection. We look forward to reading evidence from organisations who work directly with the disabled community.

**Alistair Stevenson**

*Public Policy Officer*
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from the Christian Institute

Introduction
The Christian Institute is a non-denominational charity established for the promotion of the Christian faith. We have almost 3,000 supporters throughout Scotland, including 532 churches and church leaders from almost all the Christian denominations.

We hold traditional, mainstream Christian beliefs about marriage and sexual ethics. In our efforts to promote these beliefs, we have previously contributed to public debates on issues such as divorce law reform, religious observance in schools, religious liberty and sex education.

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

It is not a crime to believe that homosexual behaviour is morally wrong. Many people, whether of religious faith or not, hold this view.¹ It is not a crime to own a Bible or read it in a public place, and the Bible teaches that homosexual practice is wrong.²

In 2006 the Roman Catholic Archbishop of Glasgow, Mario Conti, said in a sermon that the moral teaching of the church was being undermined. The Archbishop said that he and other "bishops are very concerned at the way in which the institution of marriage is undermined, and the family, which should be at the very centre of the state's concern, marginalised". He went on to say that: "Recent legislation to introduce civil partnerships dangerously weakens the uniqueness of marriage as a time honoured, legally recognised and protected social reality and a fiscally privileged entity. It also implicitly places homosexual acts on a plane of moral equivalence to marital love."³

One of the reasons we are so concerned about this Bill is that the main sponsor of it, Patrick Harvie MSP, wrote to the Chief Constable of Strathclyde Police asking him to investigate the Archbishop's remarks, believing they should be

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¹ The largest and most reliable study of sexual attitudes to date was published in 1994. It covered 18,000 people aged 16-59. It found that 70% of men believe that homosexual acts are always or mostly wrong - Wellings K, Field J, Johnson A M et al, *Sexual Behaviour in Britain*, Penguin, 1994, pages 10, 12, 246 and 271
² 1 Corinthians 6:9-10
³ *The Times*, 14 January 2006 and *Sunday Herald*, 15 January 2006
prosecuted. Mr Harvie said: "What he [Conti] said was clearly homophobic. This is a matter for the police."4

Ronnie Convery, Director of Communications for the Archdiocese of Glasgow, said that it was the duty of bishops to preach the truth and "Attempts to bully them, and ultimately gag them... are a disgraceful attack on our traditions of free speech and religious freedom."5

It seems that the main sponsor of this Bill doesn't believe that the Archbishop of Glasgow should be able to express his views in a sermon. We believe that he should, and are concerned that this Bill would provide a firmer platform for similar attempts to restrict free speech in the future.

There have been several other instances in which an attempt has been made to use the law against Christians and others who have spoken about their beliefs:

- Before aggravated offences relating to sexual orientation were introduced in England and Wales, the Bishop of Chester gave an interview to his local newspaper in which he said that, with medical help, some homosexual people could turn away from homosexual activity.6 A complaint by a gay rights activist led Cheshire police to announce they were considering prosecuting the Bishop.7

  The Chief Constable of Cheshire Police, Peter Fahy, publicly rebuked the Bishop.8 He attempted to link the Bishop's remarks with crimes against homosexuals "generated by hate and prejudice".9

  Yet Cheshire Police admitted that the Bishop had not broken any law. They issued a statement saying, “current public order legislation does not provide specific offences based on sexuality” [emphasis added].10

  If the Bishop made this statement in Scotland after the passing of this Bill in its current form, would he be committing an offence? Even if not, what protection would there be for his free speech if he was accused of an offence?

- In 2005 a retired Christian couple were subjected to an 80-minute interrogation by police after the couple made a polite complaint to their local council about its 'gay rights' policies, which included making pro-homosexual

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4 Sunday Herald, 15 January 2006
5 Scottish Catholic Observer, 20 January 2006
6 Chester Chronicle, 7 November 2003
7 The Daily Telegraph, 10 November 2003. The Independent, 10 November 2003
8 The Times, 11 November 2003
9 BBC News, 10 November 2003, see http://news.bbc.co.uk/1/hi/england/merseyside/3257623.stm as at 14 November 2008
10 BBC News, 9 November 2003, see http://news.bbc.co.uk/1/hi/uk/3255461.stm as at 14 November 2008
literature available in public buildings. Joe and Helen Roberts asked if Christian literature could be provided next to gay rights brochures, but were told no, because it may offend homosexuals. Some days later, Mr Roberts was visited by two police officers from Lancashire Constabulary who quizzed him and his wife for over an hour about their beliefs on homosexuality. The police told the Roberts they were responding to a reported 'homophobic incident'. The police said the couple were close to committing a 'hate crime' and were 'walking on eggshells'. A spokesman for Wyre Borough Council said they reported the couple to the police with the intention of challenging their attitudes and educating them.

In December 2006 Lancashire Constabulary and the Council both admitted they were wrong in how they responded to the Roberts' complaint. The police and the Council agreed to pay legal costs and also made a compensation payment to the Roberts.

- In December 2005 Lynette Burrows, an author and family-values campaigner, took part in a BBC Radio 5 Live talk show looking at the issue of civil partnerships.

During the course of the discussion Mrs Burrows said she did not believe that adoption by a gay couple was the best approach when raising a child.

The following day, Mrs Burrows received a telephone call from the police who said a member of the public had made a complaint about her 'homophobic' comments. Mrs Burrows says the police officer proceeded to read her a 'lecture about homophobia'. Despite no crime having been committed, Mrs Burrows feels that the policewoman was pressurising her.

- In 2006 Sir Iqbal Sacranie, then head of the Muslim Council of Britain, was investigated by police after he said on BBC Radio 4's PM Programme that the practice of homosexuality is not acceptable.

- The Christian Institute is aware of several cases in which transsexuals have sought to use the law against churches. The most high profile of these was in 2002, when William Parry, a man who had a sex change operation, sued a church which refused to allow him to attend the ladies' prayer meeting and to use the ladies' toilets. The father of three wanted a court to order Maesteg Christian Centre in Bridgend, South Wales, to recognise him as a woman.

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11 Daily Mail, 23 December 2005
12 Daily Mail, 23 December 2005
13 The Daily Telegraph, 10 December 2005
14 Daily Mail, 12 December 2005
15 BBC News Online, 11 January 2006, see http://news.bbc.co.uk/1/hi/uk/4603474.stm as at 18 November 2008
Mr Parry had been attending the church for two years and had asked to be allowed to attend the ladies’ prayer meeting and use the ladies' toilets. The church and its pastor, Alex Ashton, had firm religious beliefs on transsexualism and so refused his request for the simple reason that Mr Parry was a man. Mr Parry attempted to sue the church under his assumed name, Dian Parry. The church applied to the court to strike out the legal action. The judge, whilst expressing sympathy for Mr Parry, agreed there was no law to support his case and it was thrown out. 16

Mr Parry was no stranger to using litigation against people as a means to get them to accept him as a woman. Two years previously he had won a £6,000 out of court settlement against a beauty therapy course. Three months after that Mr Parry forced the Welsh equivalent of the Women's Institute to accept him. 17

Creating a new offence
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.

The law already protects homosexual people and transsexuals just as it protects other members of the public. The Consultation on Hate Crime in 2003 stated:

“A range of crimes and offences already exist which make it illegal to assault someone physically…or to pester them or scare them through insults and so on…The aggravation involved in offences motivated by prejudice or hate is therefore already covered in common law.” 18

Introducing sexual orientation and transgender identity as aggravating factors when offences are committed could, therefore, widen the scope of the law. Rather than just toughening the sentences for existing crimes, this change could criminalise activities which are currently lawful. Lord Waddington QC, a former Home Secretary, raised this issue in the context of the law for England and Wales during the passage of the Criminal Justice Bill in 2003. 19

In response, the Government admitted that individuals might try to use the law to silence Christians. The minister argued that the “…good sense of the judiciary and the way in which the legislation has been framed” would filter out such attempts. 20 However, this is hardly reassuring in the light of the above recent

16 The Western Mail, 16 February 2002; and South Wales Echo, 16 February 2002
17 The Western Mail, 17 April 2002
19 House of Lords, Hansard, 5 November 2003, cols. 808-809
20 House of Lords, Hansard, 5 November 2003, col. 818
examples., Even if cases do not result in convictions, Christians are likely to face increased hostile litigation and legal costs for speaking publicly about their beliefs.

Introducing this type of legislation means that existing crimes such as breach of the peace can have an aggravating factor attached to them. Under this Bill, “prejudice relating to sexual orientation” would be one of these potential aggravating factors. Of course we would never agree with any act of violence towards homosexuals, but some homosexuals consider simply expressing disagreement with homosexual practice to be an act of ‘homophobia’. Because of this, if this Bill is passed gay rights groups may claim that Christians have committed an aggravated offence for teaching what the Bible says about homosexuality. This would have a chilling effect on society. Christians would feel under pressure to self-censor what they say in public. It would create a culture in which Christians were afraid to express orthodox beliefs.

After aggravating factors based on sexual orientation were introduced in England and Wales, ACPO released guidelines relating to hate crimes. The guidelines advise that all accusations of hate incidents should be recorded. The description of a hate incident is very loose, it is expressed as: “Any incident, which may or may not constitute a criminal offence, which is perceived by the victim or any other person, as being motivated by prejudice or hate.”21 A distinguished constitutional lawyer, Francis Bennion, has criticised these guidelines. He says that the police have gone beyond the law. In an article for legal magazine Justice of the Peace he says:

“When is a law not a law? When it’s made by the police. It looks like a law. It’s enforced like a law. But it’s not a law...The duty of chief police officers is to enforce the law, not go beyond the law. That’s called police harassment.”22

As a result of these guidelines we have seen a series of Christians investigated for stating orthodox beliefs about homosexuality (see examples above). Although we are pleased that no such guidelines exist in Scotland, we are concerned that aggravated offences relating to sexual orientation or transgender identity may be a catalyst for such guidelines to be published. This would be cause for grave concern regarding the freedom of speech for Christians in Scotland.

Equality under the law
We oppose the introduction of prejudice relating to sexual orientation and transgender identity as a statutory aggravating factor in the criminal law. We believe that everyone should be equal under the law. Although there is a serious

problem of violence against religious people, we did not campaign for prejudice based on religion to be an aggravating factor (introduced in 2003). It should not matter to the law whether an assault was motivated by hatred of someone’s religion, wealth, social position, sexual orientation or age. Victims all deserve the same protection. Aggravated offences focus on certain groups – but there will inevitably be other groups who are left out because they cannot muster the political momentum to get the law changed in their favour.

Introducing uncertainty to the law
Section 2(8) defines transgender identity to include “(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender, or (b) any other gender identity that is not standard male or female gender identity”. This appears to be an extraordinarily wide definition that is not present in any other area of law and will therefore introduce significant uncertainty. Many would also question the legitimacy of including biological intersex conditions in the same category as transsexuals (who are biologically normal but believe themselves to be members of the opposite sex).

Conclusion
There is no law against expressing the view that homosexual or transsexual practice is morally wrong. It is essential for free speech and religious liberty that this remains the case. However, if prejudice relating to sexual orientation and transgender identity are introduced as aggravating factors where offences are committed, gay activists may use the law against religious believers and assert that disagreement with homosexual behaviour or gender reassignment is itself a crime. Passing this Bill therefore risks causing confusion. This must not be allowed to happen. Every citizen of Scotland should have equal protection under the law. Allowing this legislation to pass threatens to deny Christians the freedom to speak out about their religious convictions without the fear of prosecution.

David Greatorex
Head of Research
Capability will be a major ally in supporting disabled people to achieve full
equality and to have choice and control of their lives by 2020. We aim to
exert effective influence which ensures that laws are passed which give
disabled people equal human and civil rights and that attitudes are changed
through campaigning, education and information.

We have long been involved in the call for measures to tackle hate crime
against disabled people; as partners with the Disability Rights Commission in
the publication of the 2004 report ‘Hate Crime Against Disabled People in
Scotland’, as members of the Working Group on Hate Crime, and as one of a
number of disability and LGBT organisations supporting this Bill.

1. The need for this legislation

The fact that an alarming number of disabled people experience crime
motivated by prejudice or malice towards them has been established. Our
research in 2004 showed that:

- 73% of respondents who reported being frightened or attacked had
  experienced verbal abuse and intimidation. Just over a third of
  incidents reported (35%) were physical attacks.
- Approximately half the disabled people (47%) who responded to the
  survey had experienced hate crime because of their disability.
- In urban areas hate crimes were most likely to occur in public
  places, such as in the street or park, in shops or on public transport.

That same year, the (then) Scottish Executive published a consultation paper
which looked at ways to effectively tackle hate crime. It focused on whether
legislation was needed, what form such legislation should take, and what
other areas of the criminal justice system could be developed in order to
address this issue. 70% of respondents thought that legislation should be
introduced, the overwhelming majority of whom advocated a statutory
aggravation.

The potential for statutory aggravations to be used to combat hate crime was
further supported when the Criminal Justice (Scotland) Act 2003 introduced a
statutory religious aggravation. The Working Group on Hate Crime was
established to consider this further, working under 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”

The group consisted of officials from the (then) Scottish Executive, Crown
Office and Procurator Fiscal Service, the Police Service, and a range of
voluntary organisations representing issues around disability, gender, sexuality and transgender status and age. Although they recognised that legislation could be beneficial for other social groups, the first of the group’s 14 main recommendations focused on disabled and LGBT people. “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”.

Capability’s 2004 research showed overwhelming support for legislation that would protect disabled people against these crimes by raising awareness, sending a strong message to society that such crimes will not be tolerated, and establishing a consistent approach to monitoring and policing this type of attack.

The principles of this Bill have received support from disabled people, the panel of experts gathered to investigate ways in which to deal with the problem of hate crime, and the majority of respondents to the 2004 consultation. Capability continues to support these principles.

2. A question of equality

In our discussions around this Bill we have heard doubts around the effectiveness of statutory aggravation as a tool for tackling hate crime. Capability does not agree that such questions should prevent this long-awaited Bill from being passed - the value of statutory aggravations has been established in legislation for crimes motivated by racial or religious prejudice, and the need for this tool to be extended to other social groups has also been established. The lack of equivalent sanctions for such crimes against disabled and LGBT people implicitly suggests that such crimes are not considered as important as those motivated by racial or religious prejudice.

We welcome the consideration by the Equal Opportunities Committee of the need for statutory aggravations for crimes motivated by prejudice towards social groups not listed in this Bill, but the need for statutory aggravation for crimes motivated by prejudice towards disabled and LGBT people has already been established – by the Working Group, by the responses to the consultation, and by disabled people themselves. Capability fully supports statutory aggravation as a tool to tackle crime motivated by prejudice towards disabled and LGBT people.

3. The first step

Capability does not expect this Bill to singlehandedly tackle hate crime against disabled people. In our 2004 report we recognised that legislation can play a role in preventing hate crimes, but that there are a number of other steps that must also be taken.

The Working Group on Hate Crime identified the absence of official data on the particular hate crimes they were examining. At that point there was no consistent mechanism used by the Police and the Crown Office for counting
hate crimes against groups not covered by existing legislation. The provisions of this Bill 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.

The criminal justice system as a whole will need to consider innovative approaches to dealing with hate crime, in particular how evidence is collected and used to prosecute a hate crime, given that some disabled people may require additional support.

There is also a need for a resourced and sustained long-term campaign – along the lines of the One Scotland campaign – to tackle the prejudice which some people in society have towards disabled people.

This Bill is the first in a series of steps that must be taken towards. The need for these provisions has been clearly established, and it will send a clear message that prejudice towards disabled and LGBT people will not be tolerated.

Capability fully supports the general principles of this Bill.

Faye Gatenby  
Campaigns, Parliamentary & Policy Manager
About us

1. RNID Scotland welcomes the opportunity to respond to the Justice Committee’s call for evidence Stage 1 consideration of the Offences (Aggravation by Prejudice) (Scotland) Bill.

2. RNID Scotland is the largest charity working to change the world for the 758,000 deaf and hard of hearing people in Scotland. RNID Scotland’s vision is a world where deafness and hearing loss do not limit or determine opportunity and where people value their hearing. We aim to achieve this vision by campaigning and lobbying, with the help of our members, raising awareness of deafness and hearing loss, providing services and through social, medical and technical research.

3. Our submission focuses on issues of particular relevance to deaf and hard of hearing adults and children.

Deafness and hearing loss

4. It is estimated that 1 in 7 of the general population has some degree of hearing loss. There are many reasons why some people are deaf or hard of hearing. The most common is age-related deafness with more than 50% of people over the age of 60 having some hearing loss. Other people may lose their hearing because of exposure to noise at work or because of prolonged and repeated exposure to loud music. Deafness can be congenital with 2.6 in every 1,000 born with a significant hearing loss, and many more born with mild to moderate hearing loss. There are also some conditions such as damage to the eardrum or inflammation in the middle that cause deafness. There is also a broad spectrum of levels of hearing loss ranging from people with mild deafness to people who are profoundly deaf.

5. Depending on their level of deafness and on when they became deaf or hard of hearing, deaf and hard of hearing people use a range of methods to communicate. Between 5-6,000 deaf people in Scotland use British Sign Language (BSL) as their preferred or first language; around 25% deaf and hard of hearing people rely on lip reading, others use note takers or rely on equipment such as hearing aids; and some use a combination of these. For those who use BSL as a first language, often English is a second language and access to written English can be challenging.
Hate crime

6. Hate crime against disabled people happens when the perpetrator of the offence is motivated by their prejudice towards disabled people.

7. RNID Scotland welcome Patrick Harvie MSP’s Private Members Bill on Offences (Aggravation by Prejudice) (Scotland). The Bill was preceded by the 2003 Working Group on Hate Crime and RNID Scotland responded to the Working Group consultation. We welcome the inclusion of legislation on hate crimes in the SNP Government’s manifesto. We are also pleased that the Scottish Ministers agree with the Working Group recommendations and support legislation which will give effect to it. We support the principles in the Bill to create new statutory aggravations to protect victims of crime who are targeted as a result of hatred of their actual or presumed disability and this may lead to a longer custodial sentence or higher fine or a different type of disposal than otherwise would be the case.

8. We further welcome the Bill because it brings it in line with existing legislation – in particular with Section 96 of the Crime and Disorder Act (Scotland) 1998 which makes provision for offences that are racially aggravated ("racial hatred"): and section 74 of the Criminal Justice (Scotland) Act 2003 which makes provision for the statutory aggravation of an offence by religious prejudice ("religious hatred"). It also brings it in line with existing legislation in England, namely with section 146 of the Criminal Justice Act 2003.

9. The law in England protects disabled people from hate crime by ensuring that it is recorded as an additional, ‘aggravating’ factor by police and by requiring courts to give criminals tougher sentences where there is an element of disability hate crime in their offence. In England, the Crown Prosecution Service (CPS) has made the fight against disability hate crime a priority. They have issued a policy statement and guidelines which state that “the police, the criminal courts, magistrates and judges all have roles to play in promoting greater confidence of disabled people in the criminal justice system. We work with the police and other colleagues in the criminal justice system, both locally and nationally, to help us improve our understanding of disability hate crime to ensure that the whole criminal justice process brings perpetrators of disability hate crime to justice.”

10. RNID Scotland hope that the Committee and the Scottish Parliament pass this Bill which will send out a strong message that hate crimes against people because of their disability is unacceptable in 21st century Scotland.

1 SNP Manifesto (2007) Promoting Equality in Scotland “Expand hate crime legislation to protect disabled people, and people from the lesbian, gay, bisexual and transgndered community, as recommended by the Working Group on Hate Crimes set up by the Scottish Executive” (p.66).
2 PQ S3W-08323.
3 Section 146 of the Criminal Justice Act 2003.
We would also like to see a code of practice or guidance published to support implementation of the Bill. Central to the code of practice or guidance should be actions to ensure that deaf and hard of hearing people can report crime and access the judicial system on an equal footing with the non-disabled population. The following evidence gives examples of some of the barriers that deaf and hard of hearing people experience and examples of good practice. We would like these to be taken into account when writing the code of practice or guidance.

**Deaf and hard of hearing people and hate crime**

11. Disabled people are more likely to be victims of hate crime. A 2004 survey by the Disability Rights Commission and Capability Scotland\(^5\) found that 47% of respondents had been attacked or frightened by someone because of their impairment. One in five had suffered an attack at least once a week. Of those who were attacked, 35% were physically assaulted, 15% were spat at and 18% had something stolen. Hate crime had a particular impact on the victims. One third avoided certain places and one quarter had moved house as a result of an attack.

12. Deaf and hard of hearing people are also more likely to be victims of hate crime. An RNID survey of our members found that 14% of respondents in Scotland said that they had been a victim of physical or verbal assault because of their deafness or hearing loss\(^6\). Deaf and hard of hearing people are victims of a wide range of crimes, from name calling through having tyres slashed to grievous bodily harm.

13. In this context, disability-related crime creates an environment where deaf and hard of hearing people and their relatives and friends feel unsafe and unable to enjoy life to the full. Living in a climate where abusive behaviour occurs instils a fear in disabled people which may prevent them from leaving their home, particularly in the evening. Only 34% of the respondents to the RNID’s Annual Membership Survey who live in Scotland said that they felt safe when walking around their neighbourhood during the night\(^7\). The case studies below illustrate that deaf and hard of hearing people are the target of hate crime.

**Case study 1:** A deaf young man became homeless and was housed in a hostel. He was placed in a ground floor room in a hostel (which made it easier to break into) where he shared facilities with other people. Because people knew that he could not hear them, the man experienced a string of robberies when he was asleep.

**Case study 2:** A deafblind woman who uses a mobility cane to get around has had to stop her daily walks in the park after a group of young people repeatedly attacked her, taking away her mobility cane. Without her

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\(^6\) RNID (2006) *Annual Membership Survey*

\(^7\) RNID (2006) Op Cit.
mobility cane the woman cannot move around safely and her impairment makes it very difficult for her to ask for help.

14. Victims of hate crime can include people associated with deaf and hard of hearing people. Hearing people such as carers, friends and family who are associated with the deaf person, for example because they use sign language, can become victims too. In 2006, the BBC’s See Hear programme\(^8\) showed a deaf family in Bristol who were victims of a series of crimes related to their deafness. There is anecdotal evidence that hearing members of families with a deaf person may fall victim to crimes because their relative is deaf. These people, especially where it concerns children, need protection too.

15. We welcome the inclusion in the Exploratory Notes to the Bill that “aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without the need for a specific or individual victim to have been identified – for example, where a building used by disability organisations is vandalised or daubed with graffiti that suggests prejudice against those with a disability\(^9\).” This ensures that people associated with people with disabilities are protected too.

Reporting hate crime

16. It is generally agreed that around 60% of all crimes affecting the general population are unreported\(^10\). However, 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\(^11\).” Also, police officers may not be trained in deaf awareness and therefore may not be aware of how to communicate with deaf and hard of hearing people. Good practice would include police officers facing someone reporting a crime who relies on lip reading, speaking clearly but not too loudly or slowly, and using plain English.

17. There are initiatives such as Police Link Officers for Deaf People (PLOD) in Hampshire\(^12\), Westminster and Barnet, whereby police actively reach out to deaf community and can communicate using sign language. Similarly, deaf or hard of hearing people who live in Tayside can now alert

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\(^8\) BBC See Hear programme, 10/06/06
\(^9\) Exploratory notes to the Offences (Aggravation by Prejudice) (Scotland) Bill, note on Subsection (2)
\(^11\) Deaf young man speaking at a peer support event organised at Donaldson’s school for the deaf on 24/6/08.
\(^12\) Further information on the Hampshire PLOD is available at [http://www.hampshire.police.uk/Internet/advice/plod.htm](http://www.hampshire.police.uk/Internet/advice/plod.htm)
the police to emergencies using a text message\textsuperscript{13}. RNID Scotland would welcome the expansion of such schemes throughout Scotland.

18. It is very important that deaf and hard of hearing people are made aware of the new provisions in law if this Bill is passed and that they are encouraged to report crimes. RNID Scotland recommends that all awareness-raising publications used by the criminal justice system are published in a BSL version on DVD as well as online. Publications should also be written in plain English for deaf people whose first language is BSL and for whom access to written English may be challenging.

\textbf{Deaf and hard of hearing people and justice}

19. Deaf and hard of hearing people experience a number of barriers to accessing legal advice and justice. An RNID / Citizens Advice Bureau report on “Equality of Access to Advice and Information for Deaf and Hard of Hearing People”\textsuperscript{14} revealed that ‘deaf cases’ take an average of four times longer than other cases to resolve because of their complexity. Although BSL interpreters are usually made available to deaf and hard of hearing victims as well as defendants, \textit{Equality before the Law}\textsuperscript{15}, a research report into the use of interpreters in the (predominantly criminal) justice system highlighted the need to equip interpreters with skills to work in a legal setting and to raise awareness in the legal sector of the role of interpreters.

20. Deaf people must be able to use the courts whether they are victims, defendants or witnesses. RNID Scotland welcomes the Scottish Court Service’s \textit{Disability Equality Scheme and Action Plan 2006-2009}\textsuperscript{16} that illustrates how the Scottish Court Service intends to promote equality for disabled court users and members of staff. Good practice would include extending the availability of loop induction systems in courtrooms; promoting the availability of RNID Typetalk facility; training for criminal court sign language interpreters and users to assist them in understanding the criminal court process; monitoring the use of BSL interpreters; and training all legal professionals in deaf awareness.

21. Once communication support is in place, ongoing checks and reviews are necessary. For example, loop induction systems must be tested regularly to make sure they still work. As part of RNID’s research in England\textsuperscript{17}, we randomly called courts and found that of the 70 courts called, 61 said they had an induction loop however it was difficult to establish whether this was in the reception area only or also in the court room. When we asked whether they were working, only half of the 44 courts could say yes.

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\textsuperscript{13} BBC News, Police set up text message scheme, 11/08/08 available at http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/7554363.stm
\textsuperscript{14} Williamson Consulting (2007) \textit{RNID / CAB Advice Project: Evaluation Report}.
\textsuperscript{15} M. Brennan and R. Brown (2004) \textit{Equality before the law: Deaf People’s Access to Justice}.
\textsuperscript{17} RNID’s survey was carried out in England in April 2007.
\end{flushleft}
22. Disability related crimes may never reach trial in the first place. The report *Getting Away with Murder: Disabled People’s experiences of the Hate Crime in the UK*\(^{18}\) highlights that in 2007/8, 42 disability-related cases in England never even reached trial. One of the reasons for this was the view that the victim was considered to be an unreliable witness. The report also points to sentencing inequalities and shows that comparisons with sentencing for crimes against minority groups reveal that those motivated by religious, racial and homophobic hatred are more likely to be recognised as such and are therefore punished more harshly than crimes against disabled people.

23. Clearly there are issues in the criminal justice system that appear to create barriers for people with disabilities to get justice. However, RNID Scotland believes that this Private Members Bill sends out a strong message to people with disabilities that hate crime against them is unacceptable and is taken seriously in Scotland. We hope that if the Bill is passed, the criminal justice system should look again at access for people with disabilities to ensure that people are properly supported in reporting hate crimes throughout the whole legal process. RNID Scotland will be happy to work with the criminal justice system to make this happen.

Conclusion

6. RNID Scotland welcomes the Offences (Aggravation by Prejudice) (Scotland) Bill. We recommend that a code of practice or guidance should be published taking into account the issues facing deaf and hard of hearing people and hate crime. Deaf and hard of hearing people are more likely to be victims of hate crime and they are victims of a wide range of crimes which creates an environment where they and their relatives and friends feel unsafe and unable to enjoy life to the full. RNID’s vision is of a fully inclusive society and in this context, hate crime against deaf and hard of hearing people is unacceptable. We hope that the criminal justice system will look again at access for deaf and hard of hearing people and support them adequately through the whole legal process.

7. Our response has been endorsed by the National Deaf Children’s Society (NDCS).

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\(^{18}\) Scope (2008) *Getting Away with Murder: Disabled people’s experiences of hate crime in the UK.*
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from CARE for Scotland

Introduction to CARE
CARE is a charity and has over 30,000 registered supporters from all Christian denominations throughout the UK. CARE’s Public Affairs Department acts as a think tank on ethical issues in biology and medicine, as well as in education and social issues. CARE also briefs supporters and Parliamentarians as relevant issues are considered in Westminster, Brussels and the devolved Parliaments and Assemblies.

CARE for Scotland has an office in Glasgow. CARE for Scotland has approximately 3,000 registered supporters drawn from across the main denominations in Scotland. Since 1999 CARE for Scotland has maintained a significant public policy presence with a parliamentary officer liaising with the Scottish Executive/Government and the Scottish Parliament. We have responded to many consultations and given evidence to parliamentary committees.

General Approach of the Bill
CARE is conscious of the precedent set by the Scottish Parliament in introducing Section 74 of the Criminal Justice (Scotland) Act 2003, which made a motivation (where malice or ill-will was present) arising from religious prejudice an aggravating factor to be considered in sentencing in relation to conviction for a criminal offence. At that time we accepted the proposal as long as a new offence was not created. We argued that the creation of a new offence posed significant risks to freedom of speech and religious liberty. However, whilst we condemn violence directed against a person because of his/her religious faith, sexuality or other characteristics, we remain concerned that selecting specific groups for more favourable treatment potentially undermines the basic Christian and legal principle of equality before the law.

Biblical teaching in relation to these matters is designed to protect the poor and the vulnerable from exploitation by, and injustice at the hands of, the rich and powerful. As such, the basic principle which should be applied is one of equality before the law regardless of position in society, wealth, status etc. An argument may be made that where a group is particularly vulnerable or subject to sustained and organised abuse, that special protection in law can be justified. Previously this has been applied in relation to racial equality and more recently to offences committed owing to prejudice by the perpetrator against the victim’s perceived religion. These measures have been deemed necessary because of previous persecution of specific racial minorities and the widespread problem of sectarianism in Scottish society.

CARE is concerned about the perception of the creation of a hierarchy of rights. On that basis our general position is that all equality strands should be treated equally. However, we recognise that the application of a statutory
aggravation is designed to tackle the problem of violence and other criminal behaviour targeted against specific groups on the basis of their identity. In order to justify such exceptional treatment it would need to be shown that there was a specific and significant problem of particular groups being targeted. We are not convinced that there is evidence of such activity in relation to the gender, disability and age equality strands. Rather people are often targeted owing to them being in a vulnerable position. Crimes which target people because of vulnerability are particularly despicable. Arguably courts should take the fact that someone was targeted because of their vulnerability into account as an aggravating factor under the current common law provisions.

We remain concerned about the perception of the development of a hierarchy of rights in terms of the implementation of the proposed legislation. Arguably there is a case for the extension of the statutory aggravation to apply in cases of crimes committed where there is malice or ill-will related to someone’s sexual orientation. Evidence does show the perception on the part of victims of a significant level of crimes targeted people because of their sexual orientation. For example, Strathclyde Police detail 190 homophobic incidents in 2007/8. However, it should be noted that this figure is not an objective measure of convictions.

In seeking to extend the statutory aggravation it is important to understand that many faiths make a distinction between sexual orientation and sexual behaviour. This is not always understood or acknowledged by those advocating from an LGBT rights perspective. Moreover, there is a tendency on the part of those coming from a LGBT rights perspective to assume that those who disagree with homosexual behaviour are ‘homophobic’. In part this arises from the fact that the term ‘homophobia’ is open to interpretation and often assumed to be the motivation for disagreement with certain behaviour. There is a failure to understand that the motivation is owing to the Christian understanding of the role of marriage as the God-ordained context for sexual relationships. If applied within a heterosexual context, the fact that Christians hold to the sacredness of marriage as a context for sexual relationships is not equated with a hatred of people who commit adultery or who have sex before marriage. In seeking to implement this Bill, therefore, it is important that the courts, the Crown Office and the police have a clear understanding that the victim’s perception that a crime has been motivated because of his/her sexual orientation and the fact that the perpetrator has a faith-inspired disagreement with homosexual practice are not of themselves conclusive evidence that a hate crime has occurred.

This point is of particular importance in assessing if a Breach of the Peace has been motivated by prejudice relating to sexual orientation. In cases relating to Section 74 of the Criminal Justice (Scotland) Act, often it is the use of derogatory language during, immediately before or immediately after the incident which provides evidence that a hate crime has occurred. However, in applying this test in the case of an alleged Breach of the Peace (and other crimes) it is important to have regard to the need to protect religious liberty and freedom of speech. The concern relates to the potential for hate crimes
legislation to be applied in a way which unduly restricts religious liberty (e.g. reading certain passages from Scripture or preaching sermons), particularly if the perception of the complainant and the existence of a disagreement with certain types of sexual behaviour are used as the criteria for assessing if a hate crime has occurred. Clearly a balance must be struck which ensures that on the one hand religious believers are free to articulate their faith’s perspective on sexual behaviour whilst on the other hand people are protected from grossly abusive and alarming behaviour which constitutes a Breach of the Peace.

These considerations need to apply also in the implementation of Section 74 of the Criminal Justice (Scotland) Act in relation to those who might have a strong dislike of religious faith in general or of a particular faith. The fact that someone does not agree with a particular faith perspective is not in itself evidence of prejudice against a person because of his/her religion and belief. However, where a boundary is crossed and disagreement with a faith perspective develops into hatred of the adherents of that faith perspective and that in turn motivates a crime, Section 74 would apply. It is for the above reasons that CARE opposed the UK Government’s proposal to outlaw the incitement of religious hatred as we felt that there was a significant danger that the introduction of this new offence would unduly restrict religious liberty and freedom of speech.

**Conclusion**

CARE is of the view that the application of a statutory aggravation may be justified in cases where malice or ill-will is expressed towards someone owing to their sexual orientation. However, we are of the view that if the Scottish Parliament is minded to pass the Offences (Aggravated by Prejudice) (Scotland) Bill, that clear guidelines should be issued to police, prosecutors and courts in order to prevent the legislation being implemented in a way which might unduly restrict religious liberty and freedom of speech. In addition, a statement by the Committee clarifying the intention of the legislation along these lines would be of benefit.

**Dr Gordon Macdonald**

*Parliamentary Officer*
Introduction

1. The Scottish Transgender Alliance welcomes the opportunity to provide evidence to the Justice Committee on the Offences (Aggravation by Prejudice) (Scotland) Bill.

2. The Scottish Transgender Alliance was formed to address issues of transphobic prejudice and the lack of information and support for transgender people in Scotland. The Equality Network employs a Project Coordinator to organise the work of the Scottish Transgender Alliance and promote transgender rights, equality and inclusion across Scotland. The employment of the Scottish Transgender Alliance Project Coordinator is funded by the Scottish Government Equality Unit.

3. The Scottish Transgender Alliance membership is drawn from transgender community groups and individuals throughout Scotland. During 2007, the Scottish Transgender Alliance carried out a comprehensive survey of its transgender members to identify their key concerns around experiences of transphobia in Scotland. The survey responses received from 71 transgender individuals, together with focus group consultations which were carried out by the Scottish Transgender Alliance Project Coordinator with five transgender community groups form the basis of the Scottish Transgender Alliance’s policy work in relation to hate crime legislation.

Examples of Scottish Experiences of Transphobic Hate Crime

4. Of the 71 transgender respondents to the Scottish Transgender Alliance’s survey on ‘Transgender Experiences in Scotland’, 62% of respondents stated that they had experienced transphobic harassment from strangers in public places who perceived them to be transgender. Mostly this took the form of verbal abuse but 31% of respondents experienced transphobic threatening behaviour (such as being threatened with knives or broken bottles), 17% experienced transphobic physical assault and 4% experienced transphobic sexual assault. The following quotes (each from different respondents to the survey) highlight the intense negative impact which the transphobic element of these hate crimes have had on their self-esteem, mental health, confidence to leave their homes and integration in their local communities:

5. “I am transsexual but as a result of these two incidents my confidence was shattered and I decided that I would be unable to transition where I am
currently living and put off any hopes of doing this until such time as I am able to move away. As a result of continuing to live under the strain of the unresolved gender dysphoria I am currently off-work through depression."

6. “My confidence and self-esteem is at an all time low. I need constant reassurance of my worth and validity from those nearest me. I get extremely anxious when I am outside, particularly in a crowd. This very much impacts on where I go and particularly at what time of day. Anywhere where I feel I might encounter prejudice.”

7. “It’s the very fact of your existence that drives the other person to violence. Someone threatened to smash a glass in my face simply because of who or what I was! It’s not as if I’ve said or done something to upset them or that I have something valuable that they want to steal. When someone wants to hurt you like that simply for who you are then that makes you feel completely helpless as there is nothing you can do about it.”

8. “Random attacks aren’t really targeted, whereas someone singling you out for being different and hating you for it is a lot more unsettling. I don’t really understand the motivation for either, but I know that my recent assault where it was obviously transphobic shook me up a lot more than any previous, random attacks I’ve experienced.”

9. “One cannot take refuge in the thought that one was merely in the wrong place at the wrong time, but that the reason for the crime will continue to exist and therefore the threat of a repeat of the incident is ever present.”

10. “I once had to be given sanctuary in a train station attendant's office after a crowd of drunken yobs chased me there and started pounding on the windows chanting "we want nadia, give us nadia" (that year's big brother trans contestant). I now refuse to use public transport.”

11. “Every day is full of abuse and threats of violence and/or rape. It seems that open hostility towards non-traditional gender presentations (particularly by the middle classes) is the last (almost) uniformly accepted form of phobia and hate…People on public transport talk openly of the violence they wish to visit on you and everyone laughs, people howl abuse on the street and people laugh. I and my partner have had glasses thrown at us in pubs and the bouncers ignore it, people have followed me into toilets to scream abuse and the bar staff (nice middle class people in nice respectable middle class bars) have laughed and done nothing. The list is endless and the disturbing thing is that no one cares, they think we deserve it.”

12. “I had to move out of the town I was staying in due to violent, intolerant people in the area, including my immediate neighbours. I had people physically accost me in the street in the middle of the day, comments made in
the supermarket when minding my own business, things smashed up in my back garden. I feared for my own personal safety so much I was restricted to my flat on many occasions for weeks or even months on end. Freedom of movement could not be taken for granted, nor could personal safety.”

The Provisions of the Bill

13. The Scottish Transgender Alliance strongly supports the bill, and all its detailed provisions.

14. The Scottish Transgender Alliance strongly supports the clear definition of transgender identity contained within the bill. We strongly welcome that the bill addresses the attacker’s motivation due to perception of the possible transgender identity of the victim, rather than the victim’s actual transgender identity. It is right and just that the bill seeks proof of a transphobic hatred motivation behind an attack by considering the actions and words of the attacker rather than asking the victim to prove their identity.

15. The Scottish Transgender Alliance believes that this bill will be a very important contribution to reducing transphobic hate crime, as it will send a clear message to Scottish society that transphobic hate crime is not acceptable.

16. The creation of a statutory aggravation for transphobic hate crime will increase the confidence of victims to report crime and enable improved recording of reporting and court outcomes. Increased reporting of crime to police will result in more arrests and prosecutions. 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. Publicity about the unacceptability of these hate crimes will also act as a deterrent.

17. Finally, the outcome for victims of transphobic hate crime will be improved. It is important for a victim of crime to know that the crime has been dealt with appropriately and that their experience has been reflected in the outcome.

James Morton
Scottish Transgender Alliance Project Coordinator
Justice Committee

Offences (Aggravation by Prejudice) (Scotland) Bill

Written submission from Lesbian, Gay, Bisexual and Transgender Youth Scotland

Key Points

- LGBT Youth Scotland strongly endorses the Offences (Aggravation by Prejudice) (Scotland) Bill and calls on the Committee to do the same.
- Hate crime is socially divisive and undermines Scotland’s efforts to be an inclusive society with respect for difference and positive relationships between its people.
- The evidence base on homophobic, transphobic and disability-related hate crime is ever-growing and clearly supports a move to introduce the proposed legislation. Recent European Court of Human Rights case law points to the human rights imperative for this measure.
- The bill does not make prejudice a crime or restrict freedom of expression; rather than giving special rights to certain social groups, the bill will close an unacceptable protection gap for people who are made a target for often violent crime simply for who they are, or who they are perceived to be.

1. Introduction

1.1 LGBT Youth Scotland welcomes this opportunity to contribute to the Committee’s stage 1 scrutiny of the Offences (Aggravation by Prejudice) (Scotland) Bill. We strongly support the Bill’s provisions and our view is based on the experiences of LGBT people who use our services and research evidence, as well as police data on hate crime reports.

1.2 Since the publication of the Working Group on Hate Crime’s report in 2004 the evidence base has grown to an extent that reflects nothing short of an unacceptable protection gap for LGBT and disabled people. We are content that the Bill, once enacted, will equip police, prosecutors and the courts with the right tools to combat this appalling and highly socially divisive type of crime.

1.3 The Bill defines hate crime as ‘crime motivated by malice or ill-will relating to a certain social group’. The definition clearly focuses on the motivation of the offender rather than the identity of the victim. The Bill’s provisions therefore cover anyone who has been targeted on

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1 LGBT Youth Scotland is a charity working towards a Scotland in which every lesbian, gay, bisexual and transgender (LGBT) young person is included in society, can grow up happy and healthy, enjoys a safe and supportive upbringing, and is able to reach their full potential. LGBT Youth Scotland works towards this vision by providing specialist services to LGBT young people and their friends and families. We also conduct policy, research and practice development work. www.lgbtyouth.org.uk
account of the offender’s homophobic, transphobic or disability-related prejudice, regardless of the victim’s sexual orientation, gender identity or disability. It is important to recognise that the Bill therefore does not create a hierarchy of victims or a hierarchy of protection, or grant special rights to any particular group in society. Rather, it ends a situation where prejudice against certain social groups as a motivation for an offence is not consistently recorded and taken into consideration by police, prosecutors and the Courts.

1.4 The Bill equips the criminal justice system to effectively combat crime that can be highly damaging and deeply socially divisive. The fact that homophobic hate crime, for instance, targets the ‘inner being’, an innate characteristic of a person can be very distressing for the victim and can be highly detrimental to their sense of safety in their own community and even their own home, and have long-term effects on their health and wellbeing. On a societal level, hate crime and a criminal justice system that fails to consistently investigate and scrutinise the prejudicial motivation of those crimes undermines Scotland’s desire to be a fair and inclusive society that respects difference, ensures individual safety and values positive relationships between its people.

2. The need for this Bill

‘I get abuse on the streets near my house because people think I’m trans; I get eggs thrown at my windows and called a ‘he-she’”

‘I was called a poof and got beaten up by a group of other young people outside the place where my LGBT youth group meets”

2.1 The report of the then Scottish Executive’s Working Group on Hate Crime was published in September 2004. The Working Group’s membership included representatives of the police, the Crown Office and Procurator Fiscal Service, the Scottish Executive Criminal Justice Division, along with a broad spectrum of equality organisations. Its report brought a year’s work of the Working Group and a public consultation on its proposals to a conclusion.

2.2 The Working Group on Hate Crime’s key recommendation was that hate crime legislation in line with the existing statutory aggravations for race and religion should be introduced by the Scottish Executive to close the protection gap identified by the Group. All recommendations of the Group were based on the specialist knowledge of its membership and a wide-ranging consultation that was undertaken from January 2004.

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2 LGBT young people at a consultation event in Edinburgh, September 2007
4 Section 96 Crime and Disorder Act 1998 (c.37).
5 Section 74 Criminal Justice (Scotland) Act 2003 (asp.7).
2.3 In the consultation, 70% of respondents believed that specific legislation was necessary to address hate crime; among those who were in favour of such legislation, 60% thought that a statutory aggravation in line with the existing provisions for racist and religiously motivated hate crime would be the best option. As for the groups who should be covered by any new legislation, disabled people and LGBT people came out on top.

2.4 A major survey (n=924) of LGBT people across Scotland conducted by Beyond Barriers in 2002 found that 23% of participants had been subjected to physical assault and 68% to verbal abuse because they were LGBT (35% had experienced this within the previous year). Only 17% of victims had reported the incident to the police, and fewer than half of those felt the police had handled the report efficiently, thoroughly and sensitively.

2.5 Over the last few years, Scottish police forces have made significant progress in encouraging that homophobic and transphobic crimes will be reported, including remote reporting facilities being set up in LGBT organisations and ensuring increased visibility at community events, such as Pride. Many police forces provide equality training that includes all equality strands to their officers. The Association of Chief Police Officers in Scotland (ACPOS) has issued guidance on the recording and investigation of hate crime. However, the gap between the research evidence and the number of police reports suggests that we have only seen the peak of the iceberg and that underreporting of homophobic and transphobic hate crime is still a major issue. We believe that the Bill will give LGBT and disabled victims of hate crime a language to express what happened to them and send a strong signal that the full force of the criminal law’s protection extends to them when they are targeted for who they are because of the offender’s prejudice.

2.6 While the reporting gap will take time and further concerted efforts by police and others to build trust within the LGBT population, recent media coverage suggests a more than threefold increase in reported hate crime in four Scottish police areas over the last three years. Reports also confirmed that some police forces still do not collect information about homophobic hate crime. By requiring the recording of any aggravation under the bill at all stages of the criminal justice process, a clearer picture of the true extent of disability-related, transphobic and homophobic hate crime will emerge, and trends will be

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7 Ibid, 4.9.
8 Ibid, 4.10.
11 Offences (Aggravation by Prejudice) (Scotland) Bill: Policy Memorandum, para 9.
traceable over time and inform future strategies to effectively respond to such crimes.

3. Equality and human rights

3.1 We have considered the Bill’s equality impact beyond the intended positive impact on people with disabilities and LGBT people, and we believe that the Bill will have no negative impact on other equality groups. On the contrary, the fact that the bill reinforces the message that crime and violence that is motivated by prejudice is entirely unacceptable may suggest that a positive impact on other equality groups is likely. Similarly, we do not consider the bill to raise any issues in terms of its compliance with the provisions of the European Convention of Human Rights (ECHR), by which the Scottish Parliament is bound.

3.2 In fact, recent European Court of Human Rights (ECtHR) case law suggests that a failure to investigate the hate motive behind a crime may constitute a violation of the victim’s human rights. Consider the ECtHR’s reasoning in a case concerning the state’s failure to investigate the alleged racist motive behind the killing of two Bulgarian citizens of Roma origin:

‘(…) State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.’

(Nachova & Others v Bulgaria [2005] nos. 43577/98 and 43579/98, para 160; emphasis ours)

3.3 The Court found a violation of article 2 (right to life) in conjunction with article 14 (prohibition of discrimination) of the Convention. We would argue that the principles of this judgment could equally apply to a violent crime that is motivated by the offender’s prejudice against disabled or LGBT people. In other rulings, the Court further clarified its thinking and recognised that it is crucial that society’s position on offences that are motivated by prejudice is reasserted through the criminal justice process and that the trust of minorities in their protection from attacks must be maintained.

3.5 LGBT Youth Scotland believes that the Offences (Aggravation by Prejudice) (Scotland) Bill gives the police, Crown and courts the
tools to live up to their human rights obligations to victims of crime motivated by prejudice against LGBT people and disabled people. This would close the unacceptable protection gap that currently exists and leave no doubt that there is no place for hate crime in a modern Scotland.

Nico Juetten
Policy Manager
Thank you for your letter of 11 September 2008 inviting COPFS to submit written evidence in respect of the Offences (Aggravation by Prejudice) (Scotland) Bill. I can advise that a response has already been submitted to the Equal Opportunities Committee regarding extending the Bill to incorporate aggravations in relation to age and gender.

Given the function of COPFS, which is part of the Scottish Government, but acts as the independent prosecution service and does not have policy responsibility for the definition of offences (including aggravation), it would be inappropriate for me to offer a view on the principle of the Bill, but I can offer assistance in relation to practical implications.

It may assist the committee’s consideration of the Bill to know that 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.

If enacted, COPFS would be able to implement the provisions of this Bill by adopting and adapting current policy and practice as we have with the existing aggravations. Our approach would be to ensure that when criminal proceedings are taken, prosecutors include a relevant statutory aggravation where the aggravating factor can be proved.

We can provide some observations about the issues which might arise when considering whether to include statutory aggravations in particular cases.

Crimes can be motivated by a number of factors and in many cases vulnerability and prejudice are both likely to be motivating factors. Whereas the common law allows courts to take all such circumstances into account, the statutory aggravation would require of the prosecutor to prove that the accused was motivated by malice and ill-will. For example, in a case where a wheelchair user is the victim of a robbery, consideration would require to be given to whether the crime was motivated by hatred arising from the complainer’s disability or whether the complainer was targeted because of his or her perceived vulnerability (on the basis of a perception that such a victim would be less able to resist the accused). In the latter case it is likely that the
prosecutor would not use the statutory aggravation but would rely on the common law.

There are also cases in which that aspect of the victim’s circumstances which is believed to have been targeted (for example their sexual orientation, transgender identity or disability) is not widely known by others. In many cases the victim will not wish such sensitive personal information to be disclosed. At present careful consideration is given to the complainer’s views on the prospect of such a personal matter being the subject of a public trial. The views of the victim in such cases are important in assisting the prosecutor’s decision whether to lead evidence from the complainer about the aggravating factor or motivation for the crime. Currently, a solicitor representing an accused or an unrepresented accused may seek to explore such issues with the victim in the course of the trial. In such circumstances the prosecutor may be able to object to questions seeking to elicit such evidence on the basis of relevance. The trial judge is then required to decide whether to allow the questions.

The implementation of the provisions of the Bill would require the prosecutor to decide whether to include a relevant statutory aggravation. This would result in a specific aggravation to the charge appearing on the complaint or indictment. The prosecutor would require to prove the aggravation and this would result in evidence being led about the complainer’s sexuality, transgender identity or disability or, at least, the accused’s perception of those matters. In these circumstances it is possible that some victims will fear being “outed” through the criminal justice process with secondary fears arising about the consequences for their employment, accommodation, family, economic stability and social standing, notwithstanding the legislation is designed to protect them. Against this background, using the statutory aggravations would have the potential to focus unwanted attention on sensitive, personal and confidential aspects of victims’ lives. We would seek to minimise that impact as far as we could through internal guidance and guidance to the police. In some cases of this nature, however, we would consider that the statutory aggravation should not be included.

It should also be noted that while COPFS would be able to implement the additional aggravations, their introduction would have significant IT implications for the Service. Police reports are submitted to the Procurator Fiscal electronically, and cases considered and charges initiated by the Procurator Fiscal online. The COPFS IT system is configured to recognise the different combinations of charge which are available to prosecutors. At present the COPFS system is capable of recording a maximum of six separate aggravations against each individual charge. Officials at Crown Office Information Systems Division advise that existing aggravations currently generate 2500 combinations of charge. Adding the proposed new aggravations would generate 6500 combinations of charge. The inclusion of three new aggravations would mean that the system is approaching capacity and, therefore, while the system could accommodate the proposed changes, it is unlikely that any further aggravations could be accommodated without requiring the underlying database to be changed, which would require
significant work. In addition, some time would be required to allow for the necessary changes to be made to the COPFS IT system and we would hope that this could be reflected in any agreed commencement date for these provisions

Norman McFadyen
Crown Agent & Chief Executive
The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network’s policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us. We welcome the opportunity to provide evidence to the Justice Committee on the Offences (Aggravation by Prejudice) (Scotland) Bill.

Hate crime is a very significant issue for LGBT people in Scotland, and we have been seeking legislation of this kind for several years. The Equality Network welcomed the establishment in 2003 of the previous Executive’s Hate Crime Working Group, of which we were a member alongside other equality groups, the police and the Crown Office. We fully supported the conclusions of that Group, and we welcome that this bill implements the principal recommendation of the Group.

Why the issue is so important for us

In our consultation with LGBT people and groups across Scotland, hate crime has consistently been rated by LGBT people as one of their most important concerns. Many LGBT people have experienced hate crime themselves, or have friends or family who have. Many are aware that offences aggravated by racial or religious prejudice are reported and charged as such, and believe that homophobic and transphobic crime should be dealt with as seriously.

A number of surveys of LGBT people in Scotland have identified how many LGBT people have experienced hate crime. A 1999 study by City of Edinburgh Community Safety Unit\(^1\) found that 52% of LGBT people surveyed had experienced physical assault at some time, and 35% had experienced physical assault in the previous year. A separate Scottish Executive study, focussing on gay men in Edinburgh, and published in 2000\(^2\), found that 57% had experienced harassment, and 26% a violent incident, in the previous year.

A 1999 study of lesbians and gay men in Glasgow\(^3\), commissioned by the city council, found that 60% had been threatened with physical violence at some time because someone knew or presumed that they were lesbian or gay, 34%
reported that they had been punched, kicked or beaten for this reason, and 14% reported that they had been assaulted with a weapon.

A 2002 survey of 924 LGBT people right across Scotland⁴ found that 23% had been subjected to physical assault, and 68% to verbal abuse, because they were LGBT.

These statistics indicate a high level of homophobic and transphobic crime across Scotland. It is clear that homophobic and transphobic prejudice cause higher levels of crime targeted at LGBT people.

In recent years, Scotland’s police forces have made significant efforts to encourage victims of homophobic and transphobic crime to report this to the police. ACPOS have issued guidance on the recording of these reports. Recording is not yet fully standardised across the eight forces, but it is reported that in the year 2007-8, Strathclyde Police recorded 216 homophobic crimes, Lothian & Borders 76, and Grampian 53⁵. This is already a significant number, but comparing this number with the results of the surveys of LGBT people above, it is obvious that many crimes still go unreported.

The Equality Network has collected personal testimonies from members of our network, which leave no doubt as to the serious nature of some of the offences, including assaults to serious injury or permanent disfigurement, and repeated vandalism of houses, cars and other property, in addition to persistent harassment. The Scottish Government has reported that there were 8 homicides in 2006-7 with a homophobic motivation⁶.

It is well established that hate crime can have a particularly negative impact on the victim, since it involves a targeted attack on their core identity, and hate crime has a negative impact on society as a whole⁷.

**The provisions of the bill**

The Equality Network strongly supports the bill, and all its detailed provisions. The bill replicates the existing statutory aggravation legislation covering crimes motivated by malice and ill-will on grounds of race and religion, for malice and ill-will on grounds of sexual orientation, transgender identity and disability.

This is as recommended by the Hate Crime Working Group, which also rejected replicating for other kinds of hate crime the specific offences of

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⁴ First out – report of the findings of the Beyond Barriers survey of LGBT people in Scotland, Beyond Barriers, 2003
⁵ Daily Record, October 20th 2008
⁷ See, for example, Racist crime and victimisation in Scotland, I Clark and S Moody, Scottish Executive Central Research Unit, 2002, page 5
racially aggravated harassment and stirring up racial hatred\textsuperscript{8}. We agree with this.

The main new material in the bill, compared to the existing race and religion statutory aggravations, is the definitions of sexual orientation, transgender identity and disability (sections 1(7) & (8) and 2(7) & (8)). We support the definitions that are used in the bill. The definition of sexual orientation mirrors that already in use in other legislation. In our view, Patrick Harvie and the Scottish Government have developed a comprehensive and appropriate definition of transgender identity.

The other difference from the existing aggravations is the more detailed requirements for recording the effect of the aggravation (if proven) on the sentence (sections 1(5) and 2(5)). We welcome these requirements, and we note that the Scottish Government have announced their intention to amend the existing race and religion aggravations so that the same recording requirements apply, in the forthcoming Criminal Justice and Licensing (Scotland) Bill.

The value of the bill

We believe that the Offences (Aggravation by Prejudice) (Scotland) Bill will be a very important contribution to combating homophobic, transphobic and disability-related hate crime, for the following reasons.

\textit{Effective and consistent treatment of hate crime}

The evidence indicates a significant level of crime motivated by prejudice on grounds of race, religion, sexual orientation / transgender identity, and disability. These crimes share common characteristics: they are usually committed in public spaces (including attacks from outside on a person’s home), and by strangers or people not well known to the victim.

These crimes are also very often accompanied by expressions of the motivating malice and ill-will, such as racist or homophobic language. The proof requirements of the ‘malice and ill-will’ statutory aggravations are well suited to dealing with such crime, as is demonstrated by the high conviction rate for charges for racial and religious prejudice aggravated offences. The bill will introduce consistency into the law for the four kinds of hate crime identified above.

Anyone can be a victim of hate crime. A person could be presumed to be LGBT because they are in or outside a gay bar, or could be wrongly thought to be of a particular religion, for example, and attacked for that reason. These crimes are covered by the statutory aggravations, because the aggravation is based on the motivation of the attacker, not on the identity of the victim. The statutory aggravations do not create specially protected classes of victim;

\textsuperscript{8} Respectively, section 50A, Criminal Law (Consolidation) (Scotland) Act 1995, and sections 18 to 22, Public Order Act 1986
rather they are an appropriate response targeting a particular kind of criminal activity.

Appropriate and consistent reporting, prosecution and sentencing

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. There is no requirement in the bill for this to be automatically a heavier sentence. For example, a community disposal could be made more appropriate by including an appropriate restorative element.

The statutory aggravations will provide an excellent basis for recording and statistical analysis of the handling of homophobic, transphobic and disability-related hate crime. The Crown Office publish annual statistics on the disposal of racial and religious hate crimes – this is not currently possible for the other hate crime categories. The recording requirements for sentencing will support the identification of repeat offenders, research into sentencing, and in the longer term would support an increase in the consistency of sentencing.

Encouraging reporting, and discouraging crime and prejudice

Homophobic and transphobic crime is clearly under-reported at present. People fear that a report will not be taken seriously by the police, or they think “It’s just something that happens to people like me”.

The use of the equivalent sexual orientation statutory aggravation in England and Wales has been widely reported in the LGBT community media, with high profile reports of convictions for homophobic crime, including statements from judges passing sentence, on the homophobic nature of the crime and the effect on the sentence. Similar publicity relating to the introduction and use of the new aggravations in Scotland will assist police in encouraging more people to report these crimes.

The improved experience for victims will also encourage greater reporting. It is important for a victim of crime to know that the crime has been dealt with appropriately and that their experience has been reflected in the outcome.

The use of the aggravations could also, we think, help to some extent to deter hate crime. Increased reporting of crime to police should result in more arrests and prosecutions. More appropriate sentencing, especially community sentencing, could result in less repeat offending. Publicity about the unacceptability of these hate crimes will also act as a deterrent.
Finally, we believe that the introduction of the new statutory aggravations will send a message to the wider public that prejudice and intolerance are not welcome in Scotland, and will contribute to a more tolerant society.

Tim Hopkins  
*Equality Network*
Tackling prejudice and discrimination on the grounds of sexual orientation, gender identity and disability – the Scottish Government approach

At its private briefing on the Offences (Aggravation by Prejudice) (Scotland) Bill on 6 January 2009, the Justice Committee asked for information on the Scottish Government’s approach to tackling prejudice relating to sexual orientation, transgender status and disability.

Sexual orientation and transgender status


The report can be accessed here:
http://www.scotland.gov.uk/Publications/2008/02/19133153/0

The Scottish Government response, published 5 November 2008, can be found here:
http://www.scotland.gov.uk/Publications/2008/11/04154235/0

Disability

The Scottish Government approach to tackling disability discrimination is underpinned by the Disability Discrimination Act 2005, which places a duty on public bodies to promote disability equality. We have recently published a set of reports on progress on disability equality, and on the new Scottish Ministers’ Duty, which provide detailed information actions and priorities across the Scottish Government.

The 2008 Annual Report is here:
http://www.scotland.gov.uk/Publications/2008/12/15103651/0

Here are the electronic links to the six portfolio reports for the Scottish Ministers’ Duty:

http://www.scotland.gov.uk/Publications/2008/11/28145418/0
http://www.scotland.gov.uk/Publications/2008/11/28145502/0
http://www.scotland.gov.uk/Publications/2008/11/28145142/0
http://www.scotland.gov.uk/Publications/2008/11/28145225/0
http://www.scotland.gov.uk/Publications/2008/11/28145319/0
http://www.scotland.gov.uk/Publications/2008/11/28145628/0
And this is the report on areas for co-ordination of action, which includes specific reference to cross-cutting themes such as raising awareness and tackling negative attitudes.

http://www.scotland.gov.uk/Publications/2008/11/28145548/0

We recognise that negative attitudes can themselves prevent disabled people from participating in many aspects of daily and public life in Scotland, and that in order to progress disability equality, we need to continue to work to challenge negative attitudes. There is undoubtedly still much work to do in this area as prejudice and discrimination towards disabled people continues to be a significant problem.

We are addressing this in a variety of ways. Work to challenge negative attitudes will form part of our cross-government work to progress independent living in Scotland. We also recognise that disability equality training has an important role to play in changing attitudes and we are working with a group of disabled people involved in provision of disability equality training to explore ways of increasing the take up of disability equality training, and ensuring that the training provided is of a high standard.

The Equal Opportunity Committee’s Disability Inquiry looked at the negative attitudes in their report Removing Barriers and Creating Opportunities (2006). Our response to that report and subsequent updates to the Committee have also recognised that negative attitudes are themselves disabling, and that we need to incorporate work to challenge attitudes into our wider work on disability equality.

The response can be found here: http://www.scottish.parliament.uk/s2_EnvironmentandRuralDevelopment/Reports/DisabilityScotExecRespns.pdf

We also work closely with other organisations who run their own campaigns, and we support the work of impairment-specific campaigns such as ‘See Me’, which we know can be very effective.

Criminal Law & Licensing Division
Scottish Government
19 January 2009
Supplementary submission from the Equality and Human Rights Commission for Scotland

As a supplementary submission, the Equality and Human Rights Commission for Scotland submitted a published article for the interest of the Committee.

Supplementary written submission from Capability Scotland

Please find attached 'Getting Away With Murder', a report launched by Scope, Disability Now Magazine and the UK Disabled People's Council (UKDPC) into the failings of our justice system to effectively tackle hate crime against disabled people. Capability Scotland, as Scope's sister organisation, would like to submit this report as supplementary written evidence for the Committee's consideration of the Offences (Aggravation by Prejudice) (Scotland) Bill.

The report highlights the prevalence of hate crime against disabled people, and the urgent need for action to be taken to address this issue. It serves to illustrate the need for this Bill, as well as the steps Scotland will need to take in future to build on this measure and to effectively tackle hate crime against disabled people.

The majority of the report is based on statistics from England and Wales, and recommendations are made on what needs to be done to move forward in their context, where statutory aggravations for crimes motivated by malice or ill will towards disabled people already exist. It will be important for Committee members to be fully briefed on the differences between the Scottish landscape and that referred to in this report, and we would suggest that the Committee ask SPICe to prepare a briefing. We would be happy to support them in this.

Faye Gatenby
Campaigns, Parliamentary & Policy Manager

The report referred to above is available at:
At the meeting of the Justice Committee on 13 January 2009 I agreed to contact the committee with examples of straight people attacked because they were believed to be gay.

We have the following two Scottish examples, one English example where the statutory aggravation was used, and a more extreme example which occurred in America.

Scottish examples:

In autumn 2007, a 25 year old straight man was exercising his dog on the grass embankment between London Road and Royal Terrace in Edinburgh at around 5pm just as dusk was falling. He sat down on one of the park benches on the London Road grass embankment while his dog was exploring a few metres away. A (mixed sex) group of four teenagers were walking along the pavement of London Road and saw him sitting on the bench. The group of teenagers began verbally abusing him calling him “pervert”, “faggot”, “poofter” and “shirt-lifter”. He was quite shocked and scared and felt that if he hadn’t been able to call his dog over, the appearance of which got them to back off, then they might have hit him. He had not known that the area where he was sitting was near an area where some gay men go to meet.

On another occasion, a mixed-sex couple were returning to their hotel on Royal Terrace, on Calton Hill, another area where some gay men go to meet. The two partners were walking separately because they had had an argument. The man was assaulted by a group of men who made it clear by their homophobic abuse that they thought he was gay.

English example:

I touched on this case in my written submission to the committee, but here are further details:

In July 2007 Charles Sandey, who is straight, was returning from a night out in York and passed through an area where some gay men go to meet. He was attacked by a group of men including Gary Lee Walls, who punched him to the ground and then jumped on him, shouting homophobic abuse.

Mr Sandey’s leg was so badly broken it required a titanium rod to be inserted and took six months to heal. He was left unable to drive or play sports.
Sentencing Walls to two years’ imprisonment, Judge Stephen Ashurst said: "Three of you determined to attack someone for no reason other than you thought he was homosexual. It was a disgraceful assault by three younger men. He was put to the ground, kicked and stamped on. He has serious injuries, and there are long-term consequences for this man."

American example:

Willie Houston, a heterosexual man, was shot to death on July 29, 2001 in Nashville, Tennessee as he left a men’s room. The killer assumed that Houston was gay because he was holding the arm of a blind male friend he was assisting, and carrying his fiance’s handbag. The killer repeatedly shouted homophobic abuse at Houston before shooting him in the chest. Houston died in the parking lot outside the party to celebrate his engagement.

Christina Stokes
Communication Officer
22 January 2009
Written submissions to the Equal Opportunities Committee

Age Concern Scotland
Association of Chief Police Officers in Scotland (ACPOS)
CARE in Scotland
Crown Office and Procurator Fiscal Service
Equality and Human Rights Commission (EHRC)
Evangelical Alliance Scotland
Fife Men Project
Help the Aged in Scotland
Kenny MacAskill MSP, Cabinet Secretary for Justice, Scottish Government
Scottish Police Federation
Scottish Trades Union Congress (STUC)
UNISON Scotland
Victim Support Scotland
Patrick Harvie MSP
Barnardo's Scotland
1. Age Concern Scotland welcomes this opportunity to provide written evidence to the committee on the above topic. We have noted the Committee’s interest in whether or not hate crime legislation should, along with other areas, be extended to age.

2. It is our position that this proposed bill should not extend the definition of hate crime to cover crimes against people because of their age. 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.

3. The Working Group on Hate Crime Report (Scottish Executive 2004) defined hate crime as a ‘Crime motivated by malice or ill-will towards a social group’. The same report also noted that, in terms of hate crime, it is the ‘motivation of the offender which is important’. It is these two elements of the report that lead us to believe that this legislation should not be extended to cover age. This is because while older people are indeed victims of crime, it is men aged 16 to 24 who are more likely to be a victim of crime (2006 Scottish Crime and Victimisation Survey).

4. Yet the survey also shows that the perpetrators of these crimes are part of the same age group which suggests that lifestyle, behavior and perceived vulnerability are a much greater factor when crimes are being committed as opposed to prejudice, malice or ill-will. With regard to age related hate crimes, the Working Group recommended that ‘more consideration of crimes motivated by malice or ill-will against people of particular ages because of their age ... would be required before extending hate crime legislation in this area’ and we endorse this recommendation.

5. Instead of extending this Bill, Age Concern Scotland believes that better enforcement of current legislation would be of more benefit to older people. 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.

6. A study by the National Centre for Social Research in June 2007 found that 4.3% of older people in Scotland had been abused by family members, friends, carers, neighbours or acquaintances (Abuse and Neglect of Older People). It should also be noted that the rate in England is lower at 3.9%. Surprisingly, the 2006 Scottish Crime and Victimisation Survey stated that those aged 60 or over were the least likely to become a victim of either personal or household crime. In Scotland, this means almost 50,000
older people have been victims of crimes that have, in the main, not been reported.

7. Elder abuse is an issue that needs to be eradicated from Scottish society and the Scottish Parliament has a big role to play in that. For example, the Adult Support and Protection (Scotland) Act goes some distance in addressing elder abuse but more work needs to be done. However, the Offences (Aggravation by Prejudice) (Scotland) Bill is not the correct vehicle for this.

Douglas McLellan
Policy Advisor
Age Concern Scotland
21 October 2008
1. I refer to your correspondence dated 11 September 2008 in connection with the above matter which has been considered by the ACPOS Diversity Business Area and can advise as follows.

2. The introduction of the Aggravation by Prejudice Bill is welcomed by ACPOS, as it raises the profile of crimes motivated by hatred towards specific minority groups and in consequence may afford greater protection to them.

3. It is recognised that a significant amount of time and consideration has been given to this subject through the Hate Crime Working Group, established by the then Scottish Executive in 2003. The Group spent over a year carrying out discussions and consultation, looking at legislative and non-legislation approaches to Hate Crime. The recommendations were clearly in favour of extending current legislation.

4. Therefore, this legislation, as expected, mirrors to a great extent the offence created under Section 96, Crime and Disorder Act 1998 (aggravation in relation to racially aggravated crime) and Section 74, Criminal Justice (Scotland) Act 2003 (aggravation in relation to religious prejudice). In light of this, the police service will require to deal with this in the same manner as these pieces of legislation.

5. The Lord Advocate provided Guidelines to Chief Constables in relation to how racial crime should be dealt with, in support of the legislation recognising the aggravation. If this Bill is passed, the Scottish Police Service will require similar guidance from the Lord Advocate to facilitate the implementation of this legislation.

6. The introduction of such legislation would require training provision for police staff and, particularly, operational police officers and custody staff in relation to dealing with such instances. The police service will need to ensure that the level of commitment demonstrated at the time of the introduction of the racial aggravation is mirrored and the good robust practice of implementation recognised for these offences.

7. It would require a slight change to the information technology systems in place within the police service to accommodate this; however, this should be minimal and treated as any other new piece of legislation. Additionally, forces would need to consider their policies and procedure for any updates that may be required as a result of the new legislation.

8. It is accepted that the legislation would benefit the relevant communities by formally recognising the hate crimes being committed, and ensuring a robust
and appropriate process for dealing with these cases. It would also benefit the victim by ensuring that the perpetrator's actions are identified as within the scope of the proposed legislation, recognised within the legal system, and taken into consideration at prosecution and sentencing.

9. Although the bill specifically makes reference to victims of crimes motivated by malice on the grounds of sexual orientation, transgender status or disability, it is paramount to remember that any person can be the victim of a hate related crime if they perceive the incident to be hate related, therefore this bill is by no means insular in who it will affect.

10. The six identified strands of diversity are not, however, represented in the bill with no mention of issues concerning age or gender, albeit transgender does naturally overlap with gender. It is thought that an all inclusive bill covering all 6 strands should be considered, as malice or ill-will can be evident in all.

I trust this is helpful.

John Pow  
Interim General Secretary  
Association of Chief Police Officers in Scotland  
21 October 2008
Introduction to CARE
1. CARE is a charity and has over 30,000 registered supporters from all Christian denominations throughout the UK. CARE’s Public Affairs Department acts as a think tank on ethical issues in biology and medicine, as well as in education and social issues. CARE also briefs supporters and Parliamentarians as relevant issues are considered in Westminster, Brussels and the devolved Parliaments and Assemblies.

2. CARE for Scotland has an office in Glasgow. CARE for Scotland has approximately 3,000 registered supporters drawn from across the main denominations in Scotland. Since 1999 CARE for Scotland has maintained a significant public policy presence with a parliamentary officer liaising with the Scottish Executive/Government and the Scottish Parliament. We have responded to many consultations and given evidence to parliamentary committees.

General Approach of the Bill
3. CARE is conscious of the precedent set by the Scottish Parliament in introducing legislation, which made a motivation arising from religious prejudice an aggravating factor to be considered in sentencing in relation to conviction for a criminal offence. At that time we accepted the proposal as long as a new offence was not created. We argued that the creation of a new offence posed significant risks to freedom of speech and religious liberty. However, whilst we condemn violence directed against a person because of his/her religious faith, sexuality or other characteristics, we remain concerned that selecting specific groups for more favourable treatment potentially undermines the basic Christian and legal principle of equality before the law.

4. Biblical teaching in relation to these matters is designed to protect the poor and the vulnerable from exploitation by, and injustice at the hands of, the rich and powerful. As such, the basic principle which should be applied is one of equality before the law regardless of position in society, wealth, status etc. An argument may be made that where a group is particularly vulnerable or subject to sustained and organised abuse, that special protection in law can be justified. Previously this has been applied in relation to racial equality and more recently to offences committed owing to prejudice by the perpetrator against the victim’s perceived religion. These measures have been deemed necessary because of previous persecution of specific racial minorities and the widespread problem of sectarianism in Scottish society.

5. In seeking to implement protections for specific equality strands, 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. The six equality strands relate to sometimes delicate social
relationships and issues of identity. This underlines the imperative for treating them in a transparently equal way. The efficacy of the law will be placed in jeopardy if developments are permitted that allow a perceived advent of inequality between the strands and therein the sense of a hierarchy of rights. This must be avoided at all costs - hence the need to roll out any aggravated offences across all strands.

6. We would argue strongly that if the Scottish Parliament is minded to pass this Bill, it should be extended to cover all equality strands. However, in doing so it is important to note the limitation of this approach. There is clearly an issue of violence targeted against older people and women owing to their particular physical vulnerability. Whether this is owing to prejudice against these groups is questionable. Similarly it is not clear that disabled people are routinely targeted because of prejudice, but rather owing to their physical vulnerability. If protection is offered to all equality strands it should be based not only on prejudice against a perceived group but also take into consideration the vulnerability of the victim.

7. There is a significant security issue relating to Islamist violence within the UK, although less so in Scotland. The Committee could consider whether Section 74 of the Criminal Justice (Scotland) Act 2003 covers criminal acts motivated by an Islamist perspective. Whilst the legislation applies in relation to the motivation of the perpetrator, this is only in relation to the perceived religion of the victim. In relation to Islamist groups (and potentially to extreme groups within other faith traditions), it may be difficult to distinguish between a religious and a political motivation. The two may be intertwined with political issues being viewed as an integral part of a religious perspective. Indeed many faiths would consider that religious commitment should affect the whole person and the public life of the nation. However, in some instances there is organised violence which may be motivated for political reasons within the framework of a religious worldview (e.g. the attack on Glasgow Airport on 30th June 2007). In such cases Section 74 of the Criminal Justice (Scotland) Act 2003 is unlikely to apply.

Conclusion
8. CARE reserves judgement regarding the necessity of the proposed legislation at this stage and will take a view on this point in our evidence to the Justice Committee. However, we are of the view that if the Scottish Parliament is minded to pass the Offences (Aggravated by Prejudice) (Scotland) Bill, the legislation should be amended to cover all equality strands. In doing so, we believe that the issues of vulnerability of the victim and wider religiously motivated violence should be considered.

Dr Gordon Macdonald
CARE for Scotland
October 2008
EQUAL OPPORTUNITIES COMMITTEE

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

WRITTEN SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE

1. Thank you for your letter of 11 September 2008 inviting COPFS to submit written evidence in respect of the Offences (Aggravation by Prejudice) (Scotland) Bill. I note that this invitation is issued on behalf of both the Justice and Equal Opportunities Committees and can advise a separate answer will be submitted to the Justice Committee in due course.

2. In respect of the matters to be considered by the Equal Opportunities Committee, given the function of the COPFS, as part of the Scottish Government, but as the independent prosecution service rather than having policy responsibility for the definition of offences, it would be inappropriate for me to comment on the principle of extending the Bill to incorporate aggravations in respect of age and gender.

3. It may, however, be helpful if I explain how cases are presently handled.

4. I can advise that, when prosecuting offences at present, notice is taken of considerations associated with gender-based violence and with age. The Domestic Abuse Protocol is gender neutral, but there is recognition of the gender issues in our training and domestic violence is regarded as an aggravated form of assault which is flagged up to the court accordingly. In addition, any conviction for domestic abuse contains a text attached to the substantive charge which indicates this was a domestic incident. This appears in an accused person’s previous convictions and is available to the court when it is considering a disposal in the matter. A similar situation applies in relation to offences committed against a child.

5. In relation to the elderly, in prosecutions where it is considered that they have been deliberately targeted, this fact will be indicated to the court in the narration of facts to the court, which is of course, considered during sentence.

6. On a purely practical level, extension of the Bill to include aggravations in respect of age and gender could have significant implications for the IT systems in COPFS. At present, our system is capable of recording a maximum of six aggravations against each individual charge on the database. The extension of the Offences (Aggravation by Prejudice) (Scotland) Bill to include age and gender may involve this capacity being exceeded and require the underlying database to be changed, which would require significant work.

Norman McFadyen
Crown Agent and Chief Executive
Crown Office and Procurator Fiscal Service
21 October 2008
Introduction
1. The Equality and Human Rights Commission was established by the Equality Act 2006 and came into being on 1 October 2007. We are the independent advocate for equality and human rights across the three nations of Great Britain, and we work to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights. We enforce equality legislation on age, disability, gender, gender reassignment, race, religion or belief, and sexual orientation and encourage compliance with the Human Rights Act. In Scotland, we co-locate and work in partnership with the Scottish Commission for Human Rights.

2. The Commission welcomes the opportunity to give evidence to the Equal Opportunities Committee on the question of whether the Offences (Aggravation by Prejudice) (Scotland) Bill should be widened to include gender and age. The Commission, and its legacy organisations, the Commission for Racial Equality (CRE), Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC), have been closely involved in the debate on criminal justice responses to hate crime in Scotland, with the CRE represented on the Cross-Party Working Group on Religious Hatred, and both the DRC and the EOC members of the Working Group on Hate Crime.

3. As the Working Group on Hate Crime’s report makes clear, age and gender-related crime are both complex areas. In considering whether the Offences (Aggravation by Prejudice) (Scotland) Bill should also have provisions covering age and gender, it is important to be clear then about what question we are asking. It is undeniable that men and women, and different age groups, experience crime in different ways. At the same time, women and older people are both much more likely to be victims of certain types of crime, and this is linked to deep-rooted gender and age inequalities. The debate is therefore less about the need for new criminal justice and public policy responses to gender and age-related crime – clearly more needs to be done. Rather, the question here is whether, given the evidence, statutory aggravations for age and/or gender, modelled on those proposed for homophobic, transphobic and disability-related hate crime in the Offences (Aggravations by Prejudice) Bill, would be the most effective and necessary policy response.

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3 Ibid, 5.32-5.38
4. In considering this question, the Commission is very grateful for the guidance and advice provided by our partners in the women’s and older people’s sectors. We have consciously framed our response in light of the evidence from these sectors, and will be looking at age and gender specifically in relation to women and older people. While the Commission recognises that men can be the victims of gender-based crime, the evidence is overwhelming that women are much more likely to be victims of, for example, domestic abuse or crimes of sexual violence. For age, although 16-24 years olds are statistically most likely to be the victims of crime, particularly violent crime, and those over 60 least likely to be victims, crime and fear of crime disproportionately affect older people, impacting negatively on quality of life and exacerbating problems of isolation and loneliness.

5. Any consideration of effective criminal justice responses to crime targeting, or disproportionately affecting, women and older people must locate the question within the wider context of the deeply ingrained inequality experienced by women and older people, and the often unconscious attitudes and assumptions about their experience of crime, even the value of their lives. As one commentator put it, writing before Harold Shipman, Western Europe’s most prolific serial killer, took his own life in prison,

All of [his] victims were women, many of them elderly. In newspapers, they were frequently all called old, thus shamefully bundled together and tidied away with that one epithet ... ... Shipman is on suicide watch in prison, but warders apparently say he will not be at great risk from other prisoners. He hasn't killed children. He has only killed elderly women.

Gender

6. Scotland is the only country in the UK which takes an explicitly gendered policy approach to gender-based violence:

Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly or exclusively carry out such violence, and women and girls who are predominantly the victims of such violence. By referring to violence as “gender-based”, this definition highlights the need to understand violence within the context

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6 Age Concern, Survey of Fear of Street Crime among Older People, www.ageconcern.org.uk/AgeConcern/Documents/Fearofstreetcrimesummary.pdf, 2002 [Link no longer operates]
7 Nicci Gerard, ‘Most serial killers are icons of evil, the stuff of nightmares -Hindley, Sutcliffe, the Wests. But not Dr Shipman’, The Observer, 6 February 2000, www.guardian.co.uk/uk/2000/feb/06/shipman.health
of women’s and girl’s subordinate status in society. Such violence cannot be understood, therefore, in isolation from the norms and social structure and gender roles within the community, which greatly influence women’s vulnerability to violence.

7. The Commission fully supports this approach, and will refer to it when considering the arguments for and against a gender aggravation. In doing this, we will consider both the conceptual and practical arguments for and against.

8. As the policy memorandum at paragraph 6 makes clear, violence against women takes a multitude of forms – physical, sexual, emotional/psychological and can happen in a wide variety of settings, both in the public and private spheres. Considering this spectrum of gender-based violence is a useful place to start in examining what a gender aggravation would do. A rough typology of the kind of offence covered by existing aggravations suggests that they are used mainly to tackle public order offences or other crimes taking place in a public space. They do not therefore seem so obviously to crimes taking place in the private sphere, or crimes where the attacker is known intimately by the victim. The argument could be made, that the physical, emotional and sexual violence endured by women in abusive relationships does not fit the public character of many crimes currently dealt with by statutory aggravations.

9. Against this, one could argue that there is an imbalance when someone can be prosecuted of an aggravated offence if they use a racist, sectarian or homophobic epithet, but not if they employ equally offensive misogynist abuse. In any town centre in Scotland on a Friday or Saturday one can hear just as many demeaning references to women as to ethnic minorities or gay men, perhaps many more.

10. There is a case to be made then for a logical extension of existing statutory aggravations to cover gender, so as to ensure that the criminal law takes, for example, a public order offence accompanied by sexist language just as seriously as it would if accompanied by racist or homophobic slurs.

11. However, this leaves open whether, although applicable in some circumstances, a gender aggravation would prove useful in all instances. Or would it be more useful, while recognising the common factors in the spectrum of gender-based violence, to develop responses better attuned to its different manifestations. For example, a stand-alone domestic abuse aggravation may be more effective for tackling domestic violence, as has been suggested by Scottish Women’s Aid.

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9 See, for example a review of the first 18 months of Section 74 of the Criminal Justice (Scotland) Act 2003, which showed that 88% of proven charges were for aggravated breach of the peace, and that almost two thirds of all offences occurred in the street, in football stadia or in residential areas: Scottish Executive, Religiously Aggravated Reported Crime: An 18 Month Review, www.scotland.gov.uk/Publications/2006/11/24133659/0, November 2006
10 In its response to the Working Group on Hate Crime Consultation – para 5.36
12. Similarly, there is a question over applying a gender aggravation to rape and other crimes of sexual violence. Would an aggravation help make explicit in law the link between misogyny, gender inequality and sexual violence, or should the emphasis be more on ensuring that that this link is better grounded as a matter of course in criminal justice responses to rape? And in attempting to turn round public attitudes to rape and sexual offences, could a gender aggravation 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? 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.

13. In discussions between the Commission and the women’s sector in Scotland, it has been suggested that a gender aggravation may not be the most pressing priority in addressing violence against women; this is not due to the problem being less acute than, for example, racially aggravated crime or gay-bashing, but precisely because 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.

14. The Commission therefore feels that, at this time, a gender aggravation is not the priority in developing more effective criminal justice responses to gender-based crime. Two current pieces of work from the Commission may be useful in helping to map out where other priorities may lie. First, we will be following up last year’s Map of Gaps study by re-running the research to determine what changes there have been in the provision of services to women who have suffered violence in the past 12 months, and to provide the framework for larger campaigning work. We will be setting up an interactive website to highlight the problem in individual areas (to be launched in January), launching legal action against local authorities who have not prioritised violence against women, and we will be asking the stakeholders and individuals to take action and become involved in campaigning for change.

15. The Commission also plans to build on its dialogue with the women’s sector in Scotland with the aim of commissioning work to look in more depth at the debate on statutory aggravations and their use in addressing gender-based crime, as well as exploring the role that the Gender Equality Duty might play in embedding better policy and practice into public authorities’ responses to violence against women, looking both at what has been thus far, and making recommendations for future action.

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Age

16. As with gender, it is important to be clear on the terms of reference, namely, is there a need for a statutory aggravation to tackle age related hate crime, that is, “crime motivated by malice or ill-will towards a social group”\(^{12}\)?

17. Evidence cited above points to older people’s distinct experiences of crime (and fear of crime), and that they are targeted for particular types of crime, such as crimes of dishonesty and elder abuse. The challenge would seem to then be not whether effective, tailored criminal justice/public policy responses are needed, but rather, would a statutory age aggravation work best?

18. Again, it may be useful to look at the setting and perpetrators of crimes against older people, and assess whether this fits with the prevailing model for existing aggravated offences. While there may again 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.

19. 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. At the same time, just as tackling domestic violence entails a range of approaches, there may be virtue in looking at possible responses to elder abuse outwith the criminal law.

20. The committee may for example consider it worthwhile to take evidence from officials and Ministers working on the implementation of the Adult Support and Protection (Scotland) Act 2007, and to look at what else may be needed to prevent or detect at an earlier stage elder abuse, whether perpetrated in the home by carers or relatives or in a care setting by professionals.

21. Finally, as with gender, there is the more fundamental challenge of addressing public attitudes. Gender and age-related crime are both rooted in wider inequalities and assumptions about the relative value of women’s and older people’s lives. Changing the value systems which underpinned the responses to the Shipman murders quoted above remains the most difficult but necessary step.

Equality and Human Rights Commission
October 2008

\(^{12}\) The definition used by the Hate Crime Working Group.
Introduction

1. The Evangelical Alliance Scotland is the largest body serving evangelical Christians in Scotland and has a membership including denominations, churches, organisations and individuals. Across the UK, Evangelical Alliance membership includes over 700 organisations and over 3000 churches. The mission of the Evangelical Alliance Scotland is to unite evangelicals to present Christ credibly as good news for spiritual and social transformation. We firmly believe in a pro-community agenda with tolerance and respect at the forefront of a transforming culture.

2. The Evangelical Alliance Scotland welcomes the invitation to submit our views on the Offences (Aggravation by Prejudice) (Scotland) Bill. We were grateful that our comments were taken into consideration during the last significant consultation on this subject when the Working Group on Hate Crime was set up in June 2003. We are encouraged to see that this Bill almost entirely represents the recommendations put forward by the Working Group. We therefore agree that no further official consultation was required on the Bill by the Scottish Government before it was introduced to the Scottish Parliament.

General Comments

3. As a membership organisation the Evangelical Alliance Scotland represents hundreds of organisations, churches and individuals working to present the love of Christ credibly to our society and wholeheartedly promote equality amongst all individuals. The Evangelical Alliance believe in the basic biblical and Christian principle of a God who wants and longs for justice and equality for all people regardless of their faith, sex, ethnicity, position in society, wealth etc. Therefore, 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.

4. We recognise that unfortunately particular groups within society are more vulnerable or targeted as a result of hatred of their actual or presumed sexual orientation, faith or any other equality strand and therefore understand the need for specific legislation to protect these individuals. Such legislation protects against the particular consequences of a hate crime. For example the increased psychological damage to the victim due to the personalisation of the crime or the socially divisive nature of hate crimes. We would be particularly concerned if a particular group could not participate in normal social activities due to fear that the law did not adequately protect them against specific victimisation from others. For this reason we supported section 74 of the Criminal Justice (Scotland) Act 2003 which recognised specifically the widespread problem of sectarianism.
5. We agree with the conclusions of the Hate Crimes Working Group of the danger and precedent that legislation such as this might set for the creation of an incitement to hatred offence beyond racial hatred. Such an offence would risk penalising freedom of speech too much for it to be extended to the other equality strands. (Working Group on Hate Crime Report, Scottish Executive 2004b para 5.28)

Should similar aggravations in respect of age and gender also be included in the Bill?

6. As we have previously indicated, The Evangelical Alliance Scotland are 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 believe that no individual right should have pre-eminence, even if this means some motivations may be more difficult to judge. If we are choosing to govern ourselves by human rights legislation, we must accept that fairness in their scope be applied across the board, however hard that might be in practice.

7. The Evangelical Alliance Scotland do not accept that it is an appropriate argument to restrict a certain group from protection because evidence at this time does not show that such groups are subject to a significant level of hate crime. We would question the reasoning that law should wait until sufficient crimes, and therefore evidence, have taken place to provide protection.

8. The Evangelical Alliance Scotland recognises the difficulties and complications in legislating for statutory aggravations in relation to gender and age. This is significantly due to the difficulty in distinguishing between prejudice and a particular physical or mental vulnerability. We would suggest that very similar difficulties would be relevant to the protection of those targeted because of a perceived disability. Disability and age are also very closely linked. An individual may be disabled because of their age, and therefore more vulnerable. In general, the six equality strands at times relate to subtle social relationships and complex questions of identity. The Evangelical Alliance Scotland would therefore suggest that this cements the imperative for treating them all in a transparently equal way.

9. If the Scottish Parliament does proceed to restrict the bill to sexual orientation, transgender identity or disability we would agree with the Hate Crimes Working Group’s recommendation 1 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.” (Scottish Executive 2004, par 1.1)

Alistair Stevenson
Public Policy Officer
Evangelical Alliance Scotland
October 2008
About Fife Men Project

1. Fife Men Project is a community based project which supports the Lesbian, Gay, Bisexual and Transgender (LGBT) community in Fife by working in Partnership with NHS Fife, Fife Council and Fife Constabulary. The services we offer include Men’s Health, local access to NHS and Council services, remote reporting of Hate Crime, social inclusion, counselling, referrals and support. We have been running for the last 10 years.

Introduction

2. It is generally accepted that heterosexual couples can walk down their high street hand-in-hand and not have people stare at or shout abuse at them. Unfortunately, this is not the case for the LGBT community. Also, if a tenant is being harassed because of their sexual orientation or sexual identity, often it is the victim who will be offered a move to provide a more convenient solution to the problem. There are a number of aspects which need consideration if the LGBT community are to have equality of outcome within the law and equality under the European Anti-discrimination Framework.

3. The Fife Men Project believes that the equality strands are a core part of our business and that we need to work in partnership to challenge inequality and to secure change on behalf of the Fife LGBT Community.

4. A partnership approach is necessary in changing attitudes, improving practice of how Hate Crime situations are dealt with and also how Hate Crimes are recorded so that robust evidence is available both to prosecute such cases, to monitor trends of incidents and changes in attitude in order to support targeted interventions. Many people in the LGBT Community feel that there is little to be done to help, that the authorities do not care and that we should either accept or deal with such prejudices ourselves. We feel that there needs to be a multilateral campaign to challenge prejudice, which is based on respect in the work place and respect in our communities.

5. The Working Group on Hate Crime report (Scottish Executive 2004) defines hate crime as “Crime motivated by malice or ill-will towards a social group”. Currently, Scotland is out of Step with England, Wales and Northern Ireland in how it approaches Hate Crime. Many attitudes towards the LGBT community,
especially in rural areas do not recognise the gains which have been made through existing equalities legislation.

6. LGBT research is very difficult to carry out and is usually done through anonymous surveys or interview in known gay venues, which are attended by a particular section of the LGBT community. The pattern of behaviour is that many LGBT people will only attend these places at specific points in their life which are related to age, relationships and being out to friends, colleagues and perceived authorities. It is not necessary to have a flamboyant lifestyle to be targeted for hate crime; it is motivated by the perception of the perpetrator rather than the actions of the victim.

The Bill

1. The Fife Men Project welcomes the opportunity to comment on the forthcoming legislation. We have supported recommendations 1 and 3 from the Working Group on Hate Crime Report published in 2004. In particular recommendation 1 which states that

"The legislation should be framed in such a way as to allow this approach to be extended to other groups by statutory instrument over time if appropriate evidence that such other groups are subject to a significant level of hate crime." Scottish Executive (2004) Working Group on Hate Crime Report

[NB: Recommendation 3 in the report of the Working Group on Hate Crime, referred to above, states: The Scottish Executive should review the area of criminal law on violence against women and continue to investigate the link between the undermining of women in society and crimes of violence against women with a view to combating both. A statutory aggravation for domestic abuse should also be considered by the Executive.]

2. We view the Offences (Aggravation by Prejudice) (Scotland) Bill as progressing the recommendations in this report.

3. Our Project welcomes the Bill which, for the first time provides that either the motivation or demonstration of malice or ill-will can be taken into account when sentencing for an offence aggravated by prejudice. We believe that it is the motivation of the offender which is important in sentencing. We acknowledge that there is current provision for aggravation to be taken into account on sentencing. There are however short-falls in current sentencing. These include inconsistency in application, how the aggravation is evidenced and lack of monitoring.
4. The project welcomes provisions for a single source of evidence and the exclusion of the need for a specific or individual victim to be identified e.g. as with vandalism or graffiti of locations identified or frequented by the LGBT Community.

5. There is anecdotal evidence from our service users and clients of under reporting of offences motivated by presumed LGBT status. This is despite feedback from the Gay Police Association of improved reporting of Hate crime through remote reporting schemes. The Fife Men Project runs a helpline which is currently funded by Fife Constabulary. We welcome the remote reporting schemes and support the continued funding of these schemes by all Police Forces in Scotland.

6. The provision of this new legislation will not in itself change attitudes towards prejudice. This requires an information campaign and a support service be made available to victims of prejudice. This should be supplemented by training for staff working with the Procurator Fiscal and Scottish Court services.

7. We also welcome the publication of the report by the *Hearts and Minds Agenda Working Group*, which was published in February 2008. However, there is a need to build the confidence of the LGBT community to address under reporting. Sentencing of Aggravation by Prejudice cannot be taken in a vacuum. In addressing the wider context of equality, we hope that the message which is sent out to the people of Scotland from this legislation is one step towards achieving the vision set out in the *Hearts and Minds Agenda report*.

8. We recognise that the legislation also has the potential to support the Public Sector Equality Duties and increase the range of remedies and monitoring available for LGBT victims of anti-social behaviour from tenants and owner occupiers alike.

9. Our Project notes that the Sentencing Commission report on *The Scope to Improve Consistency in Sentencing*, had the remit of improving consistency of sentencing but failed to make any mention of the *Working Group on Hate Crime Report recommendations*. We welcome that sentencing will still be addressed by the judge rather than assigning a prescribed response to these issues. We feel this is the best way to address consistency issues. We recognise that this may not add to the sentence but that the nature of the aggravation and how it has influenced sentencing will be recorded.

10. We also welcome the costed improvements which have been identified for the implementation of the monitoring of the Bill and that both the Crown Office and Procurator Fiscal Service and the Scottish Court Services have agreed to pay for this from existing funding.
Conclusions

Hate crime is motivated by the perception of the perpetrator rather than the actions of the victim. The Fife Men Project welcomes provisions for a single source of evidence and the exclusion of the need for a specific or individual victim to be identified. There is anecdotal evidence from our service users and clients of under reporting of offences motivated by presumed LGBT status. LGBT research is very difficult to carry out due to the need to self identify, reluctance to be “out” to authority figures or researchers and only a limited proportion of the LGBT community regularly attend LGBT venues. We welcome the remote reporting schemes and support the continued funding of these schemes by all Police Forces in Scotland. However, there is a need to build the confidence of the LGBT community to address under reporting.

The provisions of this new legislation will not in itself change attitudes towards prejudice. This requires an information campaign and a support service to be made available to victims of prejudice. We feel that there needs to be a multilateral campaign to challenge prejudice, which is based on respect in the workplace and respect in our communities.

Fife Men Project
October 2008

SOURCES

EQUAL OPPORTUNITIES COMMITTEE
OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL
WRITTEN SUBMISSION FROM HELP THE AGED IN SCOTLAND

1. Help the Aged in Scotland welcomes the opportunity to contribute to the Committee’s consideration of whether the provisions in the above Bill should include aggravations in respect to age.

2. Having considered the available evidence we do not believe that aggravations in respect to age should be included in the Bill. Although older people are often specifically targeted by perpetrators of crime, we believe there is little evidence that these crimes are motivated by “malice or ill-will towards a social group” (The Working Group on Hate Crime Report, 2004). Instead, such crimes are most often directed towards older people because of their perceived vulnerability. In this sense they are crimes motivated by opportunity rather than prejudice.

3. For example, 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. Elder abuse, which has been suggested by some commentators as justification for including age in the Bill, covers a vast array of behaviours, and is often perpetrated by carers and family members struggling to cope with their care responsibilities. In other circumstances, ‘elder abuse’ may describe a situation where a family member or carer takes advantage of an individual’s vulnerability to plunder their estate. It seems unlikely that such behaviour, serious though it is, would be motivated by “malice or ill-will towards a social group.”

4. There is little reason to believe that including age in the Bill would help prevent such crimes or secure more convictions and as such we would not recommend doing so.

Nick Waugh
Policy Officer
Help the Aged in Scotland
21 October 2008
1. Thank you for your letter of 16 September on your consideration of the Offences (Aggravation by Prejudice) (Scotland) Bill and for the opportunity to provide a submission from the Scottish Government.

2. The Working Group on Hate Crime recommended in its 2004 report that the Scottish Executive (as it then was) should introduce a statutory aggravation for crimes motivated by malice and ill-will towards an individual based on their sexual orientation, transgender identity or disability.

3. Research has shown that some social groups are more often victims of harassment and crime than the rest of society and that much of this is motivated by prejudice against those groups. Everyone has the right to live in strong and safe communities without fear of harassment or victimisation. The existence of hate in all forms, against any section of community, is a blot on Scottish society and we want to make it clear that crimes motivated by hatred will not be tolerated.

4. Patrick Harvie’s Offences (Aggravation by Prejudice) (Scotland) Bill creates aggravations relating to disability and to sexual orientation and transgender status. It 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. By supporting the Bill, we aim to improve the way that crimes motivated by hatred are dealt with in Scotland.

5. If a crime has been committed and it can be shown that the motivation was malice and ill-will based on the victim’s actual or presumed sexual orientation, transgender identity or disability, then the sentence should reflect that.

6. Crimes motivated by who a person is may have a deeper and more negative impact upon the victim themselves and the community from which that victim comes. Sentencing which takes motivation into account will not only punish the individual offender, it will also send a message that crimes targeted against a section of society, simply because of who they are, will not be tolerated.

7. The Working Group on Hate Crime also considered the possibility of aggravations relating to gender. While the group did recommend that the Executive should review the area of criminal law on violence against women, it did not recommend the introduction of an aggravation relating to gender.
8. Violence against women is a serious issue within our society and one which the Scottish Government is working to address. It is a broad and complex matter and 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, including amongst women’s organisations on the best approach. We remain unconvinced that a statutory aggravation relating to gender is the correct tool to tackle this issue.

9. 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.

Kenny MacAskill MSP
Cabinet Secretary for Justice
Scottish Government
28 October 2008
EQUAL OPPORTUNITIES COMMITTEE
OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL
WRITTEN SUBMISSION FROM THE SCOTTISH POLICE FEDERATION

1. I refer to the above and thank you for your invitation dated 11th September 2008 to respond to this consultation. The Scottish Police Federation (SPF) has itself consulted widely on this matter and this response is drawn from replies received from Federation representatives across Scotland.

2. 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.

3. Notwithstanding our position on this subject, we recognise a number of statutory aggravations now exist (racial, religious etc) and our experience has shown 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 consolations. We believe, should this legislation be forthcoming, that experience will be realised once more.

4. The SPF would be surprised if the Courts were to concede the observation made at paragraph 8 of the policy memorandum and believe this perceptual issue to be instrumental in driving this consultation. This perception is not unique and indeed one of our responses stated;

   “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.”

[NB: Paragraph 8 of the policy memorandum, referred to above, states: 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.]

5. I trust you find the foregoing useful and should you require any further information please do not hesitate to get in touch.

Calum Steele
General Secretary
Scottish Police Federation
20 October 2008
INTRODUCTION
1. The STUC welcomes the opportunity to respond to the Equal Opportunities invitation for specific comment on whether similar aggravations in respect of age and gender should be included in the Bill.

2. The STUC is Scotland’s trade union centre, bringing together over 640,000 workers and linking with their communities, families, and with people not in work. Our organisation includes representative structures for Women, Black and Ethnic Minorities, Disabled Workers, and for Young Workers. The STUC affiliated trade union membership organises workers in many different environments in the public and in the private sector.

BACKGROUND
3. Members of the STUC affiliated unions have experience of tackling discrimination against different members of society, across different environments and particularly have experience of supporting members in the workplace.

4. The One Workplace Equal Rights Project, funded by the Scottish Government and based at the STUC, has considerable experience in supporting equality reps in the workplace, and in working with employers to provide a safe and healthy working environment for all, tackling discrimination wherever it occurs.

5. The STUC Women’s Committee works on tackling violence against women, tackling sexual harassment, and has taken a particular interest in the proposals in the Offences (Aggravation By Prejudice) (Scotland) Bill, including hosting a wide ranging discussion with the sponsor of the Bill, Patrick Harvie MSP.

SPECIFIC RESPONSE
6. The STUC is fully supportive of the proposals in the Bill as outlined in the Policy Memorandum and draft, and welcomes the Scottish Government’s support for this overdue legislation. A submission will be made to the Justice Committee call for evidence, raising some additional points, following further discussion with our affiliates and, in particular, with our Disabled Workers’ Conference in early November.

7. In considering the question of the possible extension of the Bill to cover similar offences in relation to age and to gender, the STUC would be concerned that this would divert from the focus which is long overdue on the
consequences of harassment and criminal offences against LGBT and disabled people in our society.

8. It is our general view that other legislation and campaigns are in place, which establish that violence and abuse against women is unacceptable and should be challenged. We also recognise that this does not always give women the protection that they deserve (and that this is being considered elsewhere), but we are not convinced that adding gender to the Offences (Aggravation by Prejudice) (Scotland) Bill will assist. This is the view shared by most, although not all, of our affiliated membership.

9. We recognise that part of the aim of the legislation will be to raise public awareness of the unacceptability of crimes committed with a motivation by prejudice, and build a consensus in society that reduces such crime. The focus of the Bill as proposed on LGBT and on disability is in line with the STUC’s policies against discrimination, and we would re-iterate our commitment to support it when it comes onto the statute book.

10. We did not give specific consideration to the question of its relevance for aggravation offences on grounds of age, but the general approach was to retain a more focussed piece of legislation.

STUC
23 Oct 2008
Executive Summary
1. UNISON Scotland welcomes the Scottish Parliament’s Justice Committee and Equal Opportunities Committee call for evidence on the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

2. We fully support the introduction of new legislation that would 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.

3. UNISON Scotland is opposed to the addition of other categories such as gender and age as we believe this would dilute the bill and detract from the focus of the legislation.

4. UNISON Scotland commends this proposed bill, as it is significantly ahead of the existing English, Wales and Northern Ireland legislation in the protection it would bring on transgender identity.

Introduction
5. UNISON is Scotland’s largest trade union with over 160,000 members working in the public sector in Scotland. UNISON Scotland welcomes the opportunity to contribute to the Scottish Parliament’s Justice Committee and Equal Opportunities Committee call for evidence on the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

6. UNISON is committed to working for LGBT rights. We facilitate lesbian, gay, bisexual and transgender members organisation in UNISON, locally and nationally, to support each other, to identify and challenge discrimination, to increase awareness of LGBT rights and to campaign for change.

7. UNISON challenges discriminatory actions and campaigns for a fair deal for disabled members. UNISON supports the Social Model of Disability. We believe it is the way society organises that creates barriers to inclusion and prevents disabled people from taking an equal part in life. As a union we campaign on important issues such as:
   - Inaccessible workplaces
   - Information systems that don't include disabled people's access needs
   - Negative attitudes and prejudices from employers

8. UNISON's priorities on disability are led by the union's own disabled members. Our union is committed to taking on the issues from those who know them best.
9. As a Union, UNISON believes that the equality strands are a core part of our business and that we need to work in partnership to challenge inequality and to secure change on behalf of our members.

The Bill
10. We welcome the Bill which, for the first time provides that either the motivation or demonstration of malice or ill-will can be taken into account when sentencing for an offence aggravated by prejudice. Our members believe that it is the motivation of the offender which is important in sentencing. We acknowledge that there is current provision for aggravation to be taken into account on sentencing. There are, however, short-falls in current sentencing. These include inconsistency in application, how the aggravation is evidenced and lack of monitoring.

11. UNISON welcomes provisions for a single source of evidence and the exclusion of the need for a specific or individual victim to be identified.

12. There is anecdotal evidence from UNISON members of under reporting of offences motivated by presumed LGBT status. This is despite feedback from the Gay Police Association of improved reporting of Hate crime through remote reporting schemes. UNISON welcomes the remote reporting schemes and supports the continued funding by all Police Forces in Scotland.

UNISON’S Position
13. The provision of this new legislation, will not in itself change attitudes towards prejudice. This requires an information campaign and support service be available to victims of prejudice. This should be supplemented by training for staff working with the Procurator Fiscal and Scottish Court services.

14. We also welcome the publication of the report by the “Hearts and Minds Agenda” Working Group, which was published in February 2008. However, there is a need to build the confidence of the LGBT community to address under reporting.

15. Sentencing of Aggravation by Prejudice cannot be taken in a vacuum. In addressing the wider context of equality, UNISON hopes that the message which is sent out to the people of Scotland from this legislation is one step towards achieving the vision set out in the Hearts and Minds Agenda report.

16. We recognise that the legislation also has the potential to support the Public Sector Equality Duties and increase the range of remedies and monitoring available for LGBT victims of anti-social behaviour from tenants and owner occupiers.

17. UNISON notes that that the Sentencing Commission report 2006, had the remit of improving consistency of sentencing but failed to make any mention of the Working Group on Hate Crime Report recommendations. We welcome that sentencing will still be addressed by the judge rather than assigning a prescribed response to these issues. We feel this is the best way to address consistency issues. We recognise that this may not add to the sentence but
that the nature of the aggravation and how it has influenced sentencing will be recorded.

18. UNISON also welcomes the costed improvements which have been identified for the implementation of the monitoring of the Bill and that both the Crown Office and Procurator Fiscal Service and the Scottish Court Services have agreed to pay for this from existing funding.

19. UNISON supports the Bill as it currently stands. We have reservations regarding including similar aggravations in respect of age and gender for the following reasons:-

**Gender:**
- the issue of gender has been a regular and high-profile feature of both administrations;
- inclusion of gender would, in our view, be a distraction from the needs of two under-represented groups who have been effectively overlooked within the criminal justice system;
- aggravated criminal offences against women are currently being covered in the Sexual Offences (Scotland) Bill;
- it would detract from the excellent work on domestic abuse that has been a positive feature of both administrations;
- we concur with the findings of the Scottish Executive Working Group on Hate Crime (2004) and in particular, Recommendations 1 and 3, Legislation.

**Age:**
- According to Help the Aged, analysis of crime figures in 2003, reveals that only about 2.7 per cent of older people in Scotland have suffered a robbery or personal attack – significantly fewer than in England and Wales.
- Physical attacks against older people 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.
- Crime surveys throughout the UK show that older people are much less likely to experience violent crime than other groups.
- Scottish Police Forces are working through the Safer Scotland campaign to reassure older people that crime here is less of a threat than they might think and that they should not allow the fear of it to inhibit their lives.
- As with gender, we concur with the findings of the Scottish Executive Working Group on Hate Crime (2004) and in particular, Recommendations 1 and 3, Legislation.

**Conclusion**
20. Disabled and LGBT Scots continue to experience some of the worst examples of intolerance and violence, and this Bill will, if Parliament backs it, help make that kind of unacceptable behaviour a thing of the past.
21. LGBT research is very difficult to carry out and is usually done through anonymous surveys or interviews in known gay venues, which are attended by a particular section of the LGBT community. The pattern of behaviour is that many LGBT people will only attend these places at specific points in their life which are related to age, relationships and being out to friends, colleagues and perceived authorities. It is not necessary to have a flamboyant lifestyle to be targeted for hate crime, it is motivated by the perception of the perpetrator rather than the actions of the victim.

22. By supporting this Bill as it currently stands, UNISON Scotland is, in no way, suggesting that crimes against women and older people are any less serious than those crimes committed against other groups in Scottish society. We have reservations, however, about the inclusion of age and gender in this particular piece of legislation and these reservations are reflected in the Working Group Hate Crime report, published 2004. We do believe that there is sufficient evidence to support Patrick Harvie’s contention that the two groups highlighted in his bill are more vulnerable at present and require statutory recognition within the criminal justice framework.

Matt Smith
Scottish Secretary
UNISON Scotland
October 2008

[NB: Recommendations 1 and 3 of the Scottish Executive Working Group on Hate Crime (2004), which are referred to in this submission, are below:

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).

Recommendation 3) The Scottish Executive should review the area of criminal law on violence against women and continue to investigate the link between the undermining of women in society and crimes of violence against women with a view to combating both. A statutory aggravation for domestic abuse should also be considered by the Executive.]
Introduction
1. Victim Support Scotland is the largest agency providing support and information services to victims of crime in Scotland. Established in 1985, the organisation currently employs around 140 staff and 900 volunteers. In 2007-2008, our community-based victim services and court-based witness services supported around 175,000 people affected by crime. With the interest of victims and witness at heart, we are pleased to provide a response to this important consultation.

Extent of the new proposal
2. The Offences (Aggravation by Prejudice) (Scotland) Bill looks to extend current ‘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 aggravations introduced by the Bill also include situations where an offender demonstrates malice or ill-will toward members of the societal group as a whole, without the need for an individual victim to be identified. Where aggravations can be proven, the court must take that motivation into account when determining sentence. The ultimate discretion of the court to impose a sentence is however not affected.

3. Statutory aggravations already exist to protect victims of crime who are targeted as a result of hatred of their racial or religious group. The Bill does not create any new criminal offences; instead it extends current statutory aggravations.

Impact of crimes motivated by malice and ill-will
4. There is an unequal risk of being a victim of crime. It is recognised that people of a certain age, sex or socio-economic group are at greater or lesser risk of being victimised than other groups. The consultation refers to the Working Group on Hate Crime who stated in its report:

   “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.”

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3 See:
   • “The Experience of Violence and Harassment of Gay Men in the City of Edinburgh” (Scotland Office Central Research Unit, 1998)
   • “First Out…Findings of the Beyond Barriers survey of lesbian, gay, bisexual and transgender people in Scotland” (Beyond Barriers, 2003)
- 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 personalizes the crime and can cause the victim a greater amount of distress.4

- 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 to paranoia and vigilantism.5

5. Through our work with victims of crimes motivated by malice or ill-will, Victim Support Scotland has gained practical confirmation of the above mentioned statements. There is general agreement that crime causes more distress than similar injury or loss resulting from other causes; physical injury caused by intent is more difficult to deal with than injury caused by accident.6 If the motivation for the crime is connected with personal characteristics and/or abilities, the victim will feel more targeted than if it is an opportunist crime where the person just happened to be ‘at the wrong place at the wrong time’. Although all crimes can bring serious consequences for victims, ‘hate crimes’ may be particularly distressing for various reasons:

- The personal nature of the crime increases the level of distress that may be experienced by the victims. Subsequently, a crime that may be seen as ‘minor’ may have profound effects on victims, their families and their whole community.

- Victims, or communities against which hate crimes are directed, may feel threatened at all times. As the crime is not motivated by the victim’s actions but by personal characteristics and abilities, feelings of vulnerability may exist continually, leading to lack of sleep, family or work difficulties, depression etc.

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4 See:
- “The Hate Debate: Should Hate be punished as a Crime” (edited by Paul Iganski, 2002)
- “Racist Crime and Victimisation” (Ian Clark and Sue Moody, 2002)
- “Consequences for Victims – a comparison of bias- and non-bias motivated assaults” (J McDevitt, J Balboni, L Garcia and J Gu, 2001)

5 See:
- “The Hate Debate: Should Hate be punished as a Crime” (edited by Paul Iganski, 2002)
- “Dealing with Racist Victimisation: Racially Aggravated Offences in Scotland” (Sue Moody and Ian Clark, 2004)

Victims of crimes motivated by malice or ill-will are at high risk of repeat victimisation. For example, in regard to racial attacks, 67% of the families are multi-victims.\(^7\) The impact of repeat victimisation is substantial; victims do not get ‘used’ to crime. Repeat victims suffer many increasing emotional and practical effects, even when the individual incident appears trivial. The incidents can also have a substantial social impact. Many repeat victims become socially excluded and withdraw, either partially or completely, from any social contact during the worst periods of victimisation.\(^8\)

Hate crime can lead to feelings of group victimisation, resulting in tension between communities.

In communities targeted due to their social grouping, feelings of fear and distrust may grow. In some instances, children may not play outside, or family and friends may be reluctant to visit, resulting in increased social exclusion.

Being a victim of a crime motivated by malice or ill-will can increase the victim’s fear of future victimisation. 50% of black and Asian people living in Scotland are worried about being attacked due to skin colour, ethnic origin or religion.\(^9\)

Other reactions for people affected by ‘hate crimes’ are dissatisfaction and mistrust aimed at the criminal justice system which fails to protect them. Europe-wide trends show that people from minority groups show less confidence than other groups in the criminal justice system. The gap is generally biggest in relation to the police.\(^10\)

**View of Victim Support Scotland**

6. Based on the information provided above, Victim Support Scotland agrees with the introduction of the extended aggravations to protect victims of crime who are targeted as a result of their actual or presumed sexual orientation, transgender identity or disability. There is no place in Scotland for criminal expressions or behaviours towards people because of who they are. We recognise that ‘hate crime’ legislation can be seen to punish individual’s opinions with the result that the same act can lead to different sentences due to the subjective opinions of the offender. This may be seen as political correctness; however we believe that the regulations are legitimate due to the increased reactions and repercussions hate crimes develop amongst victims. Primary needs in the aftermath of crime include safety and security. Being singled out due to personal characteristics emphasises the victims’ fear of repeat victimisation and feelings of humiliation and distress. To ensure that the punishment fits the crime, this increased reaction should be taken into account when deciding on

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\(^7\) *Wise After the Event: Tackling Repeat Victimisation*, National Board for Crime Prevention, Home Office 2004

\(^8\) Research on Repeat Victimisation in Scotland, Crime and Criminal Justice Research findings No. 44, Scottish Executive (2000)


\(^10\) *Findings 243 - Confidence in justice: an international review*, Home Office, 2004
suitable sentences. We therefore support the introduction of the Offences (Aggravation by Prejudice) (Scotland) Bill.

**Age and Gender**

7. The Equal Opportunities Committee has been set to consider whether or not similar aggravations in respect of age and gender should also be included in the Bill. Victim Support Scotland cannot see any major reason why this would not be appropriate; in our view there is no vast difference between malice towards particular social groups due to their (presumed) personal characteristics. We are well aware that a distinction has to be made between vulnerability on the one hand and malice and ill-will towards a social group on the other; while men may have a physical advantage over women and children, this does not automatically mean that all crimes against the more vulnerable social groups should be seen as ‘hate crimes’. Crimes against members of disadvantaged groups may be opportunistic crimes motivated by perceived vulnerability rather than malice and ill-will per se.

8. Under current Scottish common law, it is already possible to take malice and ill-will towards a particular social group into consideration when determining the sentence. The extension of aggravations to include gender and age will therefore not necessarily change any current common law practice, apart from the judge being forced to note how the malice and ill-will impacted on the sentence (if at all). By recording and monitoring the extent of hate crimes across Scotland, appropriate programmes can be set up to combat this type of behaviour and choose appropriate sentences. It is furthermore vital that justice agencies such as the Police, Scottish Court Service and Crown Office and Procurator Fiscal Service have the training, knowledge and resources to record, monitor and follow-up incidents correctly.

9. The Policy Memorandum states that “[t]he aim of the 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”. In our view, this should include protection for all social groups and we would therefore like to receive further information and clarification on how the Bill can be extended to also include crimes motivated by malice and ill-will against people based on their age and gender.

Victim Support Scotland
October 2008
Please let Margaret and the other committee members know that I do not intend to express a view on the possibility of extending the bill to cover age and gender. My intention has been to propose legislation to implement the key recommendation of the Working Group on Hate Crime, and while the group’s report left open the option for these additional categories to be looked at again in future, their report did not express the view that the case had been sufficiently made. Their key recommendation covered only sexual orientation, transgender identity and disability. For this reason, I will be remaining neutral on the inclusion of other categories.

Regards,

Patrick

Patrick Harvie MSP
Regarding the Offences (Aggravation by Prejudice) (Scotland) Bill, on balance, Barnardo’s Scotland is of the view that it would be very difficult to prove and/or evidence prejudice(s) and/or show that an act was motivated by prejudice, directly linked to a young person’s age. We appreciate this is complex and not totally clear-cut, but on balance our view is that it 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 (such as sexual abuse and physical abuse at the extremes); 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 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, say, is not in itself, evidence of the said person’s motivation.

[Obviously, other legislation applies/protects children/young people where acts of violence are committed against them, but these comments are offered in respect of aggravation by prejudice, as addressed in the Bill.

As I said, this is complex matter and we offer the above views on balance and would be very happy to discuss this matter further yourself and/or Committee members further.

Maureen Fraser
18 November 2008
Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

10:06

The Convener: The next item is evidence on the Offences (Aggravation by Prejudice) (Scotland) Bill, for which the Equal Opportunities Committee has been appointed the secondary committee for stage 1 consideration. The Justice Committee, as the lead committee, is considering the general principles and main provisions of the bill.

We have agreed to focus our consideration on whether age and gender should be included as aggravations in the bill. Today’s evidence session will focus specifically on gender. I am pleased to welcome Niki Kandirikirira—I hope that I have pronounced that properly—who is the executive director of Engender; Sandy Brindley, the national co-ordinator of Rape Crisis Scotland; and Louise Johnson, the national worker on legal issues at Scottish Women’s Aid.

We have quite a lot to get through, so we will move straight to questions. I will start by asking you to outline the views of your various organisations on whether gender should be included as a statutory aggravation in the bill.

Louise Johnson (Scottish Women’s Aid): I noticed in the papers that we were given that at some point we said that we were in favour of including gender as an aggravation. Things have moved on since 2004, and much more work has been done on violence against women—on policies, the gender duty and so on. For a number of reasons, we no longer think that it is appropriate to include gender in the bill. For example, including gender as an aggravation would imply that only some forms of violence against women are because of their gender. Unfortunately, all violence against women is due to the endemic misogyny in society. However, how could you prove that in court?

In the not-too-distant past, the issue was discussed by a number of women’s organisations. We decided, for a variety of reasons, that it would not make sense to include gender in the bill. First, which crimes would the statutory aggravation be applied to? Domestic abuse? Rape and assault? What would be the intention of applying the statutory aggravation to those crimes? Would it be to get a longer sentence, a conviction or better disposal? Further, the wording of the bill might be inappropriate for a gender aggravation.

A gender amendment would have to be gender neutral, and we are not sure how that would help in relation to violence against women. Hate crimes
of the sort that are dealt with in the bill normally occur in what is referred to as the public sphere, yet much violence against women, particularly domestic abuse, occurs in private. Would the inclusion of a gender aggravation produce some sort of hierarchy? Would gender crime be considered solely as the masked individual attacking someone in the street, which would not acknowledge that gender violence occurs in the home?

We are concerned that the inclusion in the bill of gender hatred as an aggravating factor could lead to the separating out of cases of violence against women into those that are allegedly motivated by gender hatred and those that might not be perceived as so motivated. In that situation, one rape could be defined as a hate crime while another might not. We do not want to separate out two tiers of offences in that way.

We also feel that it would be difficult for women to appear as witnesses to such crimes. First, how would the crime be prosecuted? Would the alleged offender be asked, “Did you commit this crime on the basis of your partner’s gender?” Would the woman be asked, “Do you feel that the crime was based on your gender?” Those are quite abstract questions, and we do not want abstract questions within the law, as they might serve only to irritate the judiciary. The prosecution would find it hard to prosecute or even bring a charge—how would the charge be framed?—and the judiciary might feel that the concept that was being presented to them was so nebulous that they would not acknowledge the aggravation and might dismiss the original crime to which it was attached.

The Convener: Thank you. That was a helpful statement to start off with. Who would like to go next—Sandy Brindley or Niki Kandirkirira?

Sandy Brindley (Rape Crisis Scotland): I do not mind going next.

Rape Crisis Scotland’s position is quite similar to that of Scottish Women’s Aid. There are significant difficulties with the legal responses to sexual offences. I do not think that anyone could argue with that, given that the conviction rate for rape is only 2.9 per cent. However, we are not convinced that a gender aggravation would help in any way.

It would be difficult to apply a gender aggravation to sexual offences. We are finally about to recognise male rape as part of the crime of rape, and I do not see how attaching a gender aggravation to the crime would assist us. It would be helpful if a different approach were taken on gender from those that are taken on other equality strands, and we are keen to establish an offence of incitement to hatred against women, which is worth considering in relation to, for example, pornography that is linked to sexual violence. At this stage, we do not think that including a gender aggravation in the bill would be helpful.

Niki Kandirkirira (Engender): Engender supports the views of Scottish Women’s Aid and Rape Crisis Scotland on the issue. We had a meeting in April, at which a lot of violence-against-women organisations and Amnesty International got together to discuss it. We have moved on somewhat since 2004, and there has been an acknowledgement of the relationship between power inequality and violence. 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. That would be problematic for us. We recognise that a lot of sexual violence is misogynistic, but the mechanisms would not serve the purpose and might even reinforce the idea that such violence is not misogynistic.

Also, the range of violence against women encompasses both public and private situations, which does not really fit with current patterns of the use of statutory aggravations. That, too, could be a problem. We are not saying that sexual violence is not a misogynistic crime; we are simply saying that a gender aggravation would not necessarily serve a purpose. It could also make women vulnerable as witnesses—I am repeating a point that Louise Johnson made—as even more evidence would be needed to prove misogyny. It could be difficult for women to answer the question, “Do you feel that the crime was gender aggravated?”

We recently held a meeting with the Equality and Human Rights Commission and a broad cross-section of women’s organisations, at which we concluded that it would be more useful to consider using the gender duty in an overhaul of the criminal justice system, to ensure that the system is not misogynistic and does not contain gender biases that make it more difficult to obtain convictions and that prevent witnesses from feeling safe and free to give statements. We all support that suggestion.

I realised yesterday that all of that is different from what is stated in paragraph 26 at the end of the evidence paper that the committee has been given. I phoned about that last night. The paper was written four years ago and things have moved on. There has been a lot of discourse, discussion and progress in terms of relationships around gender violence and acknowledgement of the role of gender inequalities in it.
The value of the evidence session is that you can explain how your thinking has evolved.

Sandra White (Glasgow) (SNP): I am still not convinced that we should not add the two extra aggravations of age and gender to the bill. At the moment, courts can take the motivations of an offender into account when sentencing, but that is not mandatory. You say that, if a gender aggravation were included in the bill, it would make things more difficult for women. Given the low rates of reporting and sentencing for crimes against women, would it make it even more difficult for women to report a crime against them if a gender aggravation were included in the bill? Would it provide more leeway to sheriffs and judges to give more lenient sentences to the perpetrators of crimes against women?

Louise Johnson: If the word “gender” were inserted into the bill as an aggravating factor, it would read:

“An offence is aggravated by prejudice relating to”

gender

“if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to”

the gender of the victim

“or

(b) the offence is motivated (wholly or partly) by malice and ill-will towards persons”

of the female gender—although the wording would have to be gender neutral.

In a case of domestic abuse, for example, how could the criminal behaviour that was perpetrated be evidenced as being motivated by malice and ill-will relating to the woman’s gender? If someone asked the perpetrator about that in court, they would probably get a baffled look. If they asked the woman, what would she say? We must not forget that, in some situations, women are unaware of the fact that the behaviour that has been perpetrated against them is domestic abuse. What has happened to the woman is rooted in the misogyny of society as a whole, but she is not sure that it happened to her because of that.

Sandra White: Would it be difficult to prove that in court?

Louise Johnson: It would be difficult, because the concept is so nebulous. Something somewhere needs to be looked at, but not in this bill. As Sandy Brindley and Niki Kandiririra have said, there are merits in considering introducing another piece of criminal justice legislation. I do not think that the wording on gender-based violence sits with the wording in the bill. How would the Crown Office determine that an aggravation was to be attached because the crime was perpetrated due to the person’s gender? How would it get the evidence for that, and how would it cross-examine on it? It could end up confusing the court or the woman.

It would not be correct to include a gender aggravation in the bill, but a lot more work needs to be done on gender. In our previous written submission, we suggested that there should be a domestic abuse aggravation. However, it should not go in the current bill, as the wording would have to be different. We would welcome the opportunity to discuss the matter with MSPs, whether on this committee or the Justice Committee, and with the Scottish Government. A gender aggravation would not fit in the current bill, which has specific wording for a specific purpose.

Bill Wilson (West of Scotland) (SNP): I have a quick question, which I hope will not be too awkward. You have spoken to a range of groups. Do they all agree that gender should not be included in the bill as an aggravation? If some groups do not agree with you, would you tell us their reasons?

Sandy Brindley: I should say first that it is absolutely right to consider gender in relation to the bill. Not addressing gender when we have the opportunity to do so would be an obvious omission. However, from our discussions, it is hard to see how including gender would assist us in practice. When we met the Equality and Human Rights Commission, there was consensus about that.

Bill Wilson: So no voice markedly disagreed.

Sandy Brindley: Not that we are aware of.

Louise Johnson: The last time that the issue was discussed in full was in 2004, but, as I said, we had another meeting earlier this year to discuss the issue in terms of the bill and the practicalities. We agreed that the concept was fine but that it just would not work in practice. None of our sister organisations has said that it would work in practice. We would be interested to hear other views, but we are not aware of anyone feeling that the inclusion of gender is a burning issue.

The Convener: You have spoken about the problems with incorporating a gender amendment in the bill. However, you also said that you would be keen to consider offences of incitement to hatred that related to pornography or domestic abuse, for example. How would such offences fit into the legislative framework?

Sandy Brindley: I know that the Equal Opportunities Committee has considered the issue
of pornography before, and it certainly requires further consideration. Extreme pornography will be addressed in the proposed criminal justice bill, but that will not cover the whole issue or take a harm-based approach. We are keen for such an approach to be taken to incitement to hatred in relation to domestic abuse.

Louise Johnson: The forthcoming criminal justice bill might cover the issue. Careful debate is required. We want an aggravation that is workable and worded in such a way that perpetrators cannot exclude themselves from it. Prosecutors have to be able to work with the aggravation. We want to ensure that the aggravation produces an end result. What would happen if we achieved the inclusion of such an aggravation? Would sheriffs take it into account and give more punitive sentences?

There are concerns about current sentencing policy. There is community sentencing and a move towards removing custodial sentences of less than six months, so would the aggravation make a difference? We hope that it would. It could lead to more punitive sentences or more appropriate sentences for the circumstances.

Having an aggravation would be of more use than having a specific crime, because if you did not prove the aggravation, the original crime would still stand. However, if there were a crime of domestic abuse and you could not prove it, the prosecution would probably fail or the accused would be found not guilty. If you could not prove an aggravation, the crime to which it was attached could still go forward.

The Convener: Can you explain a little more about how the aggravation would work? How would it be proved?

Louise Johnson: In our submission, we quoted wording from New Zealand’s Domestic Violence Act 1995. I can pass on a whole swathe of information to the committee. The 1995 act defines domestic abuse in terms of behaviour and the situations in which it occurs. For example, it refers to relationships. We suggest that, if an assault were perpetrated in a domestic abuse context, the aggravation would be attached to it. Not only would the perpetrator be convicted of the original offence, they would receive an additional punishment, more severe than normal, because the offence was aggravated by domestic abuse, as described in the legislation.

The Convener: Domestic abuse can be gender neutral.

Louise Johnson: Yes.

The Convener: Would the aggravation relate to the fact that the offence happened at home?

Burglary is regarded as a more serious offence than other thefts.

Louise Johnson: The legislation would have to be gender neutral. The New Zealand Domestic Violence Act 1995 says:

“In this Act, ‘domestic violence’, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.”

It goes on to say that “violence” means physical abuse, sexual abuse, psychological or emotional abuse, threats and so on. It also refers to psychological abuse of a child. The act also says that

“A single act may amount to abuse”,

and refers to a number of acts forming a pattern.

The act defines “domestic relationship” by stating:

“a person is in a domestic relationship with another person if the person—

(a) is a partner of the other person; or
(b) is a family member of the other person; or
(c) Ordinarily shares a household with the other person; or
(d) Has a close personal relationship with the other person.”

The part about “a family member” obviously goes further than the context of domestic abuse that we deal with here. The New Zealand act goes beyond someone merely breaking in: it defines relationships.

We would not necessarily want the New Zealand definitions to be used just as they are; we would have to discuss the issue with the people drafting the bill and with the Crown. We would have to consider whether the wording might have unintended consequences for the Crown in other types of prosecutions, and we would have to consider whether the wording was workable. We would like to discuss and explore all those issues, but outwith the context of this bill.

The question of including gender as an aggravation has been around since 2004. We would like to explore it as part of the general armoury of civil and criminal legislation to protect women, children and young people who experience domestic abuse.

The Convener: How long has the New Zealand act been around?

Louise Johnson: It has been in force since 1996. I can e-mail the text to the committee for your perusal. It may be a starting point. A definition from the New Zealand criminal justice system might work in our system, as they are quite similar.
The Convener: We would be interested to see that act. Has the number of domestic abuse crimes reduced as a result?

Louise Johnson: I cannot tell you just now, but I could find out.

The Convener: That would be helpful.

We asked the Cabinet Secretary for Justice about the gender aggravation and he felt that it was not really appropriate to include it. One reason he gave was the lack of consensus among women's groups. Did that influence your thinking? Your views have evolved, and it is interesting when witnesses present us with evidence that is quite different from what we were expecting.

Sandy Brindley: I did not notice until yesterday that the cabinet secretary had said that.

Louise Johnson: It did not influence our thinking.

Sandy Brindley: When the working group on hate crime's initial report came out in 2004, a number of women's organisations were quite unhappy with its approach to gender and its views on the impact of gender. Many of the initial responses were reactions to the report. However, after reflecting on the practicalities, it is fair to say that we all agree that including the gender aggravation would not be the most helpful way forward.

The Convener: It sounded good at first, but when you considered how it would be implemented and how it would work in practice, you thought that unintended consequences might lead to difficulties.

Niki Kandirkirira: We have held two roundtable meetings, one of which we called in April. In addition, the Equality and Human Rights Commission asked for our views, so we have had several opportunities to sit around and thrash out the issue. I think that there is consensus.

10:30

Marilyn Glen (North East Scotland) (Lab): It has been interesting to hear your views. I understood that there had been movement.

I want to sound a note of caution: are you giving up a chance to make a difference? Violence against women is now acknowledged. However, domestic abuse is just one small part—or one big part—of that; it does not cover the whole issue, because lots of violence against women does not happen in the home or between partners. I am concerned about getting pulled towards considering only domestic violence when, according to you, misogyny is endemic in society. That sounds like hate to me, so why are we not taking advantage of the opportunity that the bill presents?

We have to be rigorous about this. If you give up this chance, will you be able to address the issue in other legislation that might be on its way? I have heard nothing to suggest that that is the case. Why do you not want to push for the inclusion of gender in this bill, to ensure that the issue is at least discussed? Are you saying that, as others have argued, the bill will not make much of a difference, whatever equality strand it covers? You seem to be saying that it will not make any practical difference or cut the level of violence against women. Will it cut the level of violence against anyone? Indeed, what is the bill's point? If part of its purpose is to flag up different kinds of hate crime, surely you will be missing a real opportunity if you do not include gender in its provisions.

By the way, I think that such a provision would fit better into section 2, which covers "Prejudice relating to sexual orientation or transgender identity".

than it would into section 1. Indeed, some might argue that, if we consider the wider gender-neutral meaning of sexual orientation, the issue of gender is already covered in that section.

I am sorry; I did not mean to make such a lengthy comment. My question is simply this: are you actually giving up a real chance here or do you believe that something else is going to happen soon? As I say, I have seen no evidence of that.

Louise Johnson: I understand exactly what you are saying. However, we are worried about how such an offence would be proved.

Marilyn Glen: In that case, how would you prove an offence under any of the strands?

Louise Johnson: It would probably be easier to prove that hatred had been directed at someone as a result of their sexual orientation or transgender identity than to prove that a crime was committed against someone purely because of their gender.

We thought about this, and a good point was made about knife crime and gender. Young men from 16 to 25 are being attacked because they happen to be young men in the wrong place at the wrong time. However, are they being attacked purely because they are young men or because it is all to do with gang culture and they are simply in the wrong place at the wrong time? If a woman is attacked, how can you prove that the attack happened as a result of her gender? How would the fiscal take that forward?

I know that the Crown Office and Procurator Fiscal Service has made a very short submission
to the committee, but it would be really worth while asking how such an offence might be worded, how it would be taken forward and how it would be proved. After all, if someone who had perpetrated violence against a woman was told, "You did this because of malice and ill-will relating to the gender of your victim," they might simply say, "No I didn't. It was just an opportunistic attack."

Marlyn Glen: But they could say that with regard to any of the strands that are covered in the bill. Someone who was accused of attacking a person because they were gay, for example, could always claim that it was just an opportunistic attack. No matter the victim, the argument will be the same: this crime will be difficult to prove. You are actually making a strong argument against the bill itself, because the perpetrator could always deny the cause of their violence.

The Convener: This has obviously been a useful exercise, as it has allowed you to analyse and assess the suggestion that gender be included in the bill and to come up with a number of problems with it. As Marlyn Glen has said, the same problems might well arise with the bill's other provisions. It is good that you have explained to the committee why you think that the move would not work, and I hope that your views will influence the Justice Committee's own consideration of the bill.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I thank the witnesses for their evidence. Given the consensus of your organisations and others on this issue, it would be foolish of us to go against your recommendations. I have certainly found your comments persuasive, although I do not think that they necessarily rule out the bill's application to the groups that it seeks to cover.

When this bill was introduced—and, indeed, when this issue was first raised back in 2004—people made a number of points, one of which was whether we were doing enough to tackle hate crime against women. You seem to have concluded that although that problem exists, it should not be dealt with in this bill. The important thing for me is not only that we pass the bill but that we simultaneously strengthen the law on violence against women, and it might well be that the forthcoming criminal justice bill will be the place to do that.

The working group on hate crime recommended that the Executive at the time review criminal law with regard to violence against women and consider introducing a statutory aggravation offence. It appears that the Cabinet Secretary for Justice has not taken up that recommendation, and I take it from what Louise Johnson has said that you want that to be followed up.

I am interested in your original lead proposal from 2004 about introducing a new statutory offence of domestic abuse. After all, we have to be clear about your favoured way forward, and it would be helpful if all the organisations could agree on that. Despite the strong arguments that you advanced in 2004 for creating a statutory domestic abuse offence, do you now support the aggravation route for tackling this kind of violence?

Louise Johnson: At the time, we considered the pros and cons of retaining the common-law approach and introducing a new statutory offence. The drawback of a statutory offence is that it is an all-or-nothing move; if the domestic abuse element of such an offence cannot be proved, the whole thing will fall. However, if we take the aggravation route, the original crime will stand even if the aggravation element is not proven. That might be the way forward, but we will need to look at what has happened with the New Zealand domestic abuse legislation; we will also have to discuss with the Crown Office how such an offence might be worded. That said, we do not believe that such an offence should come under this bill. It should be something quite separate.

Malcolm Chisholm: The Crown Office has said that

"when prosecuting offences at present, notice is taken of considerations associated with gender-based violence"

and that

"domestic violence is regarded as an aggravated form of assault which is flagged up to the court accordingly."

Is there any evidence that that approach works in practice? The comment is somewhat worrying, because if this kind of violence is already classed as a form of aggravation it does not seem to be having much of an effect.

Louise Johnson: But it is not a statutory or official form of aggravation. I would hope that in cases in which domestic abuse was an issue the Crown would flag up that the crime was perpetrated within that context. However, there is no obligation on the court to give more serious consideration to the issue. If on the other hand a statutory offence of aggravation has been proven, it must impact on the sentencing; at the moment, any such move is purely discretionary.

We have to rely on the Crown to flag up the domestic abuse element. We hope that that is happening in every such case; however, it might not be or, if it is, it might not be taken into account. We need a more formal approach in which aggravation is set down in black and white as something that must be put before the court and must be considered in sentencing.

Malcolm Chisholm: It has been suggested that we follow up incitement to hatred against women
and consider, as Niki Kandirikirira has mentioned, a more general overhaul of the justice system with regard to the gender duty.

Marlyn Glen stated the obvious point that there are many different forms of violence against women. Should the issue of rape, for example, be left to the current major reform of the rape laws or is there anything relevant to today’s discussion that would strengthen those provisions?

**Sandy Brindley:** As you suggest, the Justice Committee is considering the Sexual Offences (Scotland) Bill, which looks at the legal framework, including the definition of rape. One of the things that is quite marked about the bill is that it does not look at evidence. We are concerned about how sexual history evidence, character and medical records are used in sexual offence trials. You might have seen last year’s evaluation of the current legislation in this area, which found that the legislation has somehow made things much worse and that seven out of 10 women are now virtually guaranteed to be asked about their sexual history in court. Since the evaluation came out, there has been some debate about whether the problem is with the implementation of the legislation or with the legislation itself. That definitely needs to be considered further. My view is that there needs to be further legislation. However, we get the sense that that issue will not be included in the Sexual Offences (Scotland) Bill, so I would certainly support its being considered elsewhere.

**Hugh O'Donnell (Central Scotland) (LD):** It is interesting that Louise Johnson has enunciated the position that she has, because a similar discussion was had around the original legislation, in which religious bigotry was included. At one stage, there was a member’s bill that looked at addressing religious bigotry. The route that you propose in relation to the aggravation is the one that gained the most support among the people who gave evidence on that member’s bill, and it was enshrined in the legislation subsequently. It is reassuring that we seem to have got it right on that occasion. I hope that we will get it right this time.

Is there a danger that, by excluding the gender issue, we are somehow indicating that crimes against women are taken less seriously? Alternatively, do you still stick to the position that we should address that issue by a different route?

**Louise Johnson:** I do not think that the bill is a missed opportunity; it is a different opportunity. Given the wording of the bill, we have concerns about how it would work. What would be the result of it? Would it be used? Would it be used by the prosecution? What would sheriffs do with it? Would they think that it was something nebulous and get annoyed by it, which would impact on sentencing?

The whole issue of gender and violence against women should be looked at, as Sandy Brindley and Niki Kandirikirira have said. The issue of violence against women in relation to the criminal justice sphere and improvements in the criminal justice system as a whole should also be considered. Earlier, we discussed the irony of prosecuting a crime that includes gender as an aggravation, given that there are situations in the criminal justice system in which misogyny is prevalent. Until the position of women within the criminal justice system is ameliorated or resolved and the issue of violence against women is looked at, I really do not think that the bill will help us. Much more needs to be done on the position of women; sentencing; how domestic abuse, rape and sexual assault—crimes against women—are dealt with; and the outcomes of prosecutions.

I understand precisely what Marlyn Glen is saying. We would not want to lose a resolution that was within our grasp, but we cannot see how the bill would work without making the position worse. Something needs to be done, but I do not think that this bill is the answer. We have all discussed that. We do not know what—

**Marlyn Glen:** And you do not know when.

**Louise Johnson:** We do not know when, but there is hope. A criminal justice and licensing bill is coming up, but we do not know whether something could be included in that. We would like to get some sort of commitment that the issue will be looked at further to find a workable solution. Any solution that is found must be workable; it must be able to be applied; and it must be accepted.

10:45

**The Convener:** You referred to the criminal justice system almost as the favoured option. What about the Sexual Offences (Scotland) Bill? Would it sit within that?

**Louise Johnson:** Are you talking about a gender aggravation?

**The Convener:** Yes.

**Sandy Brindley:** I do not think that a domestic abuse aggravation would fit in the Sexual Offences (Scotland) Bill.

**Louise Johnson:** Did you mean something about violence against women in general?

**The Convener:** Yes.

**Louise Johnson:** I do not know. I think that that might detract from what is happening in the Sexual Offences (Scotland) Bill. We have come so far with that bill; it is the first attempt to put in legislation everything that is covered and we do
not want anything too controversial to torpedo it. Sandy Brindley might have a view on that.

The Convener: I was wondering in particular about incitement to hatred. I think that you mentioned pornography as an example of that. Would that not fit into the same category?

Sandy Brindley: That would be quite a significant amendment. I am not aware that we have discussed that in relation to the Parliament taking evidence on the issue of incitement to hatred. I am not sure that the Sexual Offences (Scotland) Bill would be the best place for that, but it would be really helpful to consider it.

We do not want our position on gender to undermine the bill as it stands or our support for an aggravation in relation to sexual orientation or transgender identity. A lot of really important work has been done to get us to this point.

Louise Johnson: I agree.

The Convener: By making the suggestion, discussing it and perhaps deciding at the end of the day that there is a more appropriate place for the gender issue, you are at least raising the issue and are almost setting things up for the next time that it is considered. It might be worth considering whether you can usefully make some comments. At the end of the day, you might decide to withdraw your suggestion or the committee might not look at it, but at least you will have started to get your foot in the door. That is just a suggestion.

Marlyn Glen: I have a question about how the bill might be amended. However, this evidence session is an opportunity for the three organisations present to call for a real commitment for action to be taken soon, whether in the Offences (Aggravation by Prejudice) (Scotland) Bill, the Sexual Offences (Scotland) Bill or the forthcoming criminal justice bill. You should be calling for a commitment to make something happen quickly. Putting other people first is commendable, but I do not think that this is the time for us to be defensive. You have to watch that this is not a missed opportunity.

Do you have any views on the idea of amending the bill to allow protection to be extended to other groups at a later date by statutory instrument?

Niki Kandirikirira: We do not have any objection to that.

Louise Johnson: We do not have any objection to it. That might be the way to bring in other groups.

Marlyn Glen: Do you think that it might be a good idea?

Louise Johnson: Yes. I do not think that we would lose anything by making that amendment. In due course, something different might be introduced. Having a catch-all provision in the bill would be useful, because it would certainly allow us to discuss what would be the most workable option.

What you said is right, Marlyn. Thank you for making the point about our calling for a commitment to take action. We would like to discuss that further with the Scottish Government and various committees and MSPs, to see whether we can get a solution that is workable for women.

Marlyn Glen: The working group recommended that an amendment could be made in future by statutory instrument. Do you support that?

Louise Johnson: Yes.

Bill Kidd (Glasgow) (SNP): So far, the evidence has been informative and useful. The three witnesses have given evidence on the basis that things have changed over the past four years and that we should be aware that there is a new approach—which has come from the organisations that work particularly with women on a gender basis—to how we should respond to misogyny and aggravation in terms of gender.

However, the Scottish Trades Union Congress argues that including gender in the bill might divert us away from the long-overdue focus on the consequences of harassment and criminal offences against lesbian, gay, bisexual and transgender people and disabled people. The idea of including the issue by statutory instrument seems to make sense, but is it possible that including too many elements in the legislation might not achieve anything and might be to no one’s benefit because there would not be enough focus on any strand to ensure that such forms of behaviour are treated seriously by the courts?

Niki Kandirikirira: That may be the STUC’s argument, but that is not where we took our analysis from. Our analysis is that, because some forms of violence against women would not be an aggravation, it would not necessarily serve our purpose to include such an aggravation in the bill. The idea that including an offence of aggravation based on gender would dilute the focus on other things was not in our discussion. That point may have been made by the STUC, but it is not where we are coming from.

Sandy Brindley: I do not find the STUC’s reasoning helpful. As Marlyn Glen said, hatred towards women should not be seen as less important than hatred towards other groups. The suggestion is perhaps symbolic of the fact that sexism may be a bit more invisible than other forms of discrimination. We came to our position not for that reason but very much on a practical basis. As Malcolm Chisholm outlined, there is a real issue with crimes of hatred against women.
Work needs to be undertaken on that, but the bill is not the route for pursuing that.

Bill Kidd: Without in any way wishing to undermine the importance of the issue, would we be wrong to have gender aggravation tacked on to the bill just for the sake of getting something done? Would it be better to have a properly worked-up bill that dealt specifically with gender aggravation?

Louise Johnson: The danger with any add-on is that people have to work with something that has not been thought through properly. If an offence cannot be prosecuted and the judiciary is uncomfortable with it or has a downright resistance towards it, that will simply aggravate the situation and make it worse. We should not go pell-mell into something just because a bill is before the Parliament and we should not think that no further opportunity will arise. We certainly hope that political policy to advance the work on violence against women will provide further opportunities to engage with the Scottish Government and with members of the Scottish Parliament.

I do not think that including such a provision in the bill just in case would work. It is important that we have information on how such offences are prosecuted currently—the Crown Office and Procurator Fiscal Service submission refers to that—but there is no point in having a provision that the Crown Office cannot work with. That would just give women false hope. As I said, how such a provision would be applied might result in unforeseen consequences. For example, instead of supporting and protecting women, the gender aggravation might end up being applied in all sorts of other cases, such as those involving young men between the ages of 16 and 25—although that might be no bad thing.

We need to consider how such a provision would work in terms of what we want to achieve in dealing with the underlying cause. It is difficult to prove hatred of women because people who have evidenced a hatred towards their partner have always been regarded as having a deviance or pathological or mental problem rather than a societal view. Trying to put that across to people who might not be fully engaged with the concept would be difficult. We do not want to undermine the position of women, so the wording of such a proposal would need a lot more consideration.

However, it is fair to say that we do not want the idea to be lost. Something needs to be done to take forward the idea of crimes based on gender hatred and misogyny, but that needs to be done somewhere else rather than in the bill.

Marlyn Glen: The timing for the bill allows us plenty of time to consider the issue and to consider the idea of including it by statutory instrument. From the point of view of the organisations, the idea of multiple discriminations will be important. Does the panel want to comment on the fact that women with disabilities and women in the LGBT communities will be covered by the bill?

Louise Johnson: Absolutely. That is a helpful point.

Niki Kandirikirira: I am not sure whether linking together multiple discriminations would help, given that the bill deals with aggravations. Aggravations are usually very specific, so an offence would be aggravated by prejudice on the basis of, for example, gender or disability. Is the suggestion that there should be a multiple aggravation?

Marlyn Glen: No, I was not suggesting that. I was just saying that women will be covered by the bill. It is an interesting point that a lesbian with disabilities suffers multiple discrimination, which the bill will need to address.

Niki Kandirikirira: Certainly, the multiple discrimination aspects need to be considered.

One of the biggest issues in our discussions is that sexism is so entrenched across society that it could be difficult to include it as an aggravation. If a person punches someone in the face and—excuse the language—calls them a nigger, the response to that is very different from the situation in which someone punches someone in the face and calls them a bitch. It is difficult for that sort of language to be taken into account in the system because of the concern about the system’s ability to respond to that.

In our discussions, we have considered whether we can use the gender duty to get a better analysis of the criminal justice system and how it might be part of the problem. We need to ensure that the gender duty is used to provide a thorough analysis of the criminal justice bill to analyse whether it is gender biased or misogynistic or sexist. For example, does that bill include gender biases that have not been picked up because people have not been looking for them? That is where we were coming from in our discussions. We need to get those things right so that, when people come to court, they receive justice and a fair assessment.

This issue is so insidious. Every day, the papers contain misogynistic messages. The issue is so visible and invisible at the same time that it is difficult to deal with. People react to racist comments, but many people do not react in the same way—although I do—to misogynistic comments. I am not sure that including a gender aggravation would help us with that. We need to be very systemic in ensuring that the gender duty, which is a powerful ministerial duty, is used to...
ensure that the systems, policies and practices of our institutions do not carry sexism. That is probably a more important point for us.

The Convener: That brings us nicely to Sandra White’s question.

Sandra White: This is aimed at Niki Kandirikirira—not at her personally, but she might give an answer that is different from the Engender quotations that I have here—and is about the recording of crime. If gender was included in the bill, there would be a statutory duty to record such crime. I find it unbelievable that, given all the evidence, we do not already record crime based on gender. I was also amazed by the Crown Office’s comment that the computer system could not cope with that. I find that not just ridiculous but disturbing. However, in Engender’s submission to the working group on hate crime—as I said, the submission might not have been written by Niki Kandirikirira, but it came from Engender—it was suggested that improvements in recording and monitoring the potential increase in sentence length would send a clear message to the courts and to the public about the unacceptability of violence against women.

The bill as drafted will not result in improvements in recording and monitoring of gender crimes. If the panel accepts that that is the case, could the Government in any other way send out a message about the unacceptability of violence against women, if the gender strand is not included in the Offences (Aggravation by Prejudice) (Scotland) Bill?

11:00

Niki Kandirikirira: The gender duty itself offers the opportunity to demand good-quality gender-disaggregated data across the board on conviction rates and on reporting at all levels. The gender duty can be a powerful instrument because many of the problems that we face are about institutional sexism in the criminal justice system and at societal level. The term “aggravation” is clumsy and will not really help us in trying to deal with the problems—it is not subtle enough, in some ways.

The inclusion of a gender duty would allow us to push for good-quality monitoring evidence. It would put the emphasis on the criminal justice system, which would have to prove that evidence was being gathered as opposed to its having to be proved that it was not. The criminal justice system would have to be able to collect gender-disaggregated data, otherwise it would not comply with the gender duty. We need to push for that because to address institutional “isms” we must use institutional processes.

Sandra White: Like Malcolm Chisholm, I am undecided whether the Offences (Aggravation by Prejudice) (Scotland) Bill should include the strands of gender and age—we will deal with the latter at a later date. However, if the groups that work with women, and which have the expertise, say that including those strands in the bill would not be any good, I would obviously bow to their vast experience. However, if gender were not included in the bill, I would be worried about what road we could go down, apart from the gender-duty one, to make it mandatory for crimes to be recorded by gender. Can we put the gender strand in, for example, the Sexual Offences (Scotland) Bill or the proposed criminal justice bill?

Louise Johnson: It could be put in the proposed criminal justice bill. You need to look at current criminal statistics because there are all sorts of statistics on all sorts of things. I cannot remember off the top of my head how they are recorded, but they are split according to gender. For instance, police statistics on domestic abuse are split into the gender of perpetrator and gender of victim, to use the terminology. Some criminal statistics are split into gender. It depends what we are trying to achieve—for example, are we examining what crimes are perpetrated more often against women or what types of behaviour women more often face?

We also need consistency in sentencing for rape, sexual assault and domestic abuse and to have the behaviour recognised for what it is. We are slightly concerned about sentencing policy in that regard, in that we would be disturbed if every case that could carry a six-month sentence went to community sentencing. That needs to be looked at carefully. The idea of perpetrator programmes also needs to be looked at carefully to ensure that, when they are used, they are used correctly and that not everybody is referred to such a programme willy-nilly. We need to consider the whole area of evidence taking, support and police response. We have had “Her Majesty’s Inspectorate of Constabulary for Scotland Thematic Inspection: Domestic Abuse”, and I spoke to the Association of Chief Police Officers in Scotland last week about how it will take forward some of that review’s recommendations.

There is no single approach; there must be a cohesive approach. We have some of that in the expansion of the domestic abuse courts and the domestic abuse toolkit, but we need a cohesive approach in dealing with violence against women in order for it to be recognised that it exists, that it is inherent, that it is everywhere and that its tendrils spread much further than people appreciate. The criminal justice response must acknowledge that.

Sandra White: I asked about evidence gathering because I understand that the Scottish Government currently does not record crime
according to gender. Obviously, in instances of sexual assault or rape, it is easy to record the crime according to gender. However, if we cannot get the gender strand included in the Sexual Offences (Scotland) Bill, can we get it into one of the bills that Marlyn Glen mentioned? The panel agreed that we could consider adding the strands of age and gender to the Offences (Aggravation by Prejudice) (Scotland) Bill. If we had evidence that showed that crime against women—gender crime—was overwhelmingly prevalent, we would be able to propose including the gender strand at a later stage of the bill. That was why I asked my initial question. Surely if we had the evidence, it would be easier to include the gender strand.

Sandy Brindley: I will add to what Louise Johnson said. Sandra White is right to highlight data about violence against women as a crucial issue because the data are incredibly poor, particularly on rape and sexual assault. It is said that only 2.9 per cent of rapes that are reported to the police lead to convictions. We know that the data are not entirely reliable, but they are all we have. There seems to be no way of linking police statistics with court statistics. It is incredible that we cannot track in the way that we might expect.

The national group to address violence against women, which the Minister for Communities and Sport chairs, has a sub-group that has been working for some time on how we could improve the data on violence against women: a number of recommendations are coming from that. However, we need leadership from the Scottish Government in respect of improving the data on violence against women. We raised the importance of data in our written evidence to the Sexual Offences (Scotland) Bill.

Our current definition of rape is gendered, so there is no issue about victim and perpetrator not being defined in gender terms. However, there will be an issue if the new definition is agreed. We need to be able to gender disaggregate data. Given the problems that we have in Scotland in prosecuting rape, it is self-evident that we need data about what makes a difference and what does not in that regard. That is an important area to look at.

Louise Johnson: The Equal Opportunities Committee could recommend to the Scottish Government that the office of the chief statistician undertake work in that area. Such work would be helpful and would support what we are doing.

The Convener: I wonder sometimes whether we automatically always look to legislation to solve all problems. There is certainly an awareness-raising issue in this area. If we look at drink-driving, many years ago it was not considered to be the enormous crime that it is now considered to be. However, many awareness-raising television adverts and so on highlighted the issue, and similar work has been done on domestic abuse. Can the panel comment on that? How could we bring violence against women a little bit more to the public’s attention and accentuate the fact that certain things are not acceptable, as Niki Kandirikirira said?

Louise Johnson: I can comment on the Judiciary and Courts (Scotland) Bill, which was recently enacted. There was much discussion during the bill’s passage on the proposals for judicial training, as it was called. The Judicial Studies Committee does a lot of good work on training or awareness raising for the judiciary. However, as part of that, we would certainly like a planned session on domestic abuse, rape and sexual assault, and violence against women. When the Lord President reviews the training situation, we would like those issues to be taken on board in a more formalised training programme. As I said, we have the “Her Majesty’s Inspectorate of Constabulary for Scotland Thematic Inspection: Domestic Abuse”, and ACPOS is taking steps to rationalise training throughout Scotland, so we would work with ACPOS on that. It would be useful to report back to various committees and MSPs on that. The whole issue is about awareness raising. I do not know what my panel colleagues have to say about campaigns.

The Convener: Can I just stop you there? You have sort of gone to the other end of things. Given that prevention is better than having to deal with the crime itself, can we look more at doing something in the education system to address the issue?

Niki Kandirikirira: One of the issues around the Offences (Aggravation by Prejudice) (Scotland) Bill is that we cannot imagine any act of male violence against women that is not gender aggravated. In saying that, we would have to prove gender aggravation, which sort of undermines the idea that all violence against women is misogynistic and gender-aggravated crime. It is important to bring in some of the work that we have been doing around recognising that violence against women is about gender power relations as a cause and a consequence. The move to broadening out a domestic violence strategy to a much wider violence against women strategy would be a really useful way forward. Progress has been made on that, but we must look at broadening the strategy and acknowledge that violence against women is about gender power relations. We are not talking about opportunism or guys looking for a quick sex fix—it is misogyny in action. The problem is not limited to Scotland, but is global.

The Convener: Can you say that every single attack on a woman is aggravated by gender?
Niki Kandirikirira: I am trying to imagine one that is not.

The Convener: If someone had attacked Myra Hindley because of the crime that she committed, would that attack have been gender based?

Niki Kandirikirira: If someone wrote a thesis on the issue, they would probably deduce that it was, because Myra Hindley was vilified by the press in a particularly gendered way. I would argue that.

The Convener: That is interesting.

Sandra White: A number of members are looking at the issue of prostitution. As you say, violence against women is not limited to domestic violence. I and others hope that new legislation will define prostitution as violence against women, in line with the Swedish model. That would create a new ball game, as we have statistics on how many people are involved in prostitution. The problem is all-encompassing, but there are moves to classify prostitution as violence against women.

I agree with Louise Johnson that we should write to the office of the chief statistician to push for stats on violence against women. If we do not have them, judges and sheriffs have no way of knowing how huge the problem is. We could start with stats for domestic violence, prostitution and trafficking.

Sandy Brindley: It is important to make links between different forms of violence against women, such as prostitution, pornography and sexual violence. We must take a preventive approach. The phrase “a rape culture” is often used in relation to rape. It is difficult to prove that there is a causal link between the availability of pornography and the prevalence of rape, but pornography contributes to a culture in which women’s bodies are objectified and are seen as being accessible in any terms. I have suggested that pornography should be considered as incitement to hatred against women. In my view, until we start to tackle pornography, we will get nowhere near the root causes of sexual violence; I encourage the committee to think about that. It is necessary to consider what is included in pornography—especially these days, with the internet. If the level of hatred that is expressed against women in pornography were expressed against any other group in society, it would not be tolerated. The violence becomes invisible because it is sexualised violence.

Bill Wilson: You mentioned the New Zealand domestic violence laws as an alternative way of solving some of the problems that we face. Can you provide us with other international examples of legislation that would be worth pursuing?

Louise Johnson: For this discussion, I have not looked at any laws apart from those to which members have referred. However, I can undertake to look at parallel legislation in other jurisdictions. In respect of the USA, for example, that could be difficult because the legal system is quite different from ours. It is necessary for us to draw parallels between the system and legislation that we are examining and our own, because evidential and prosecution processes are sometimes different. There is gender aggravation legislation in the States, but the literature that we have examined suggests that it is not used much. I do not know why, but I can find more information and pass it to the committee. Nineteen states in the USA have gender aggravation legislation, but we do not hear much about it and do not know whether it is working.

Bill Wilson: It would be interesting for us to get an interstate comparison. If some states are using the legislation and others are not, that may provide some interesting insights.

Louise Johnson: Yes. We need to find out whether the legislation is not being used because it is unworkable, because people are not coming forward or because offences are not being prosecuted under it. Although we must take into account the differences between the systems and the limitations of some comparisons, it would be useful for us to examine the matter. At a meeting in April, we discussed looking into it, but time constraints and intervening circumstances prevented that. However, I will see what I can find for the committee.

11:15

The Convener: That would be very welcome.

Niki Kandirikirira: In the US, 19 out of 41 statutes cover victims who are chosen by reason of gender. To charge a person with a hate crime, prosecutors must have concrete and admissible evidence of a bias. The offence has been reserved largely for cases in which perpetrators did not know their victims. There has not been an overwhelming number of gender-based crimes reported, and the legislation is used mainly for racially and religiously motivated crime.

In Belgium, gender aggravation legislation was introduced in 2003, but some people think that enforcement agencies have failed to adopt effective procedures. In Canada, the legislation that defines gender as an aggravating factor has been used only in cases where attacks were perpetrated by strangers—it has not been used in cases of domestic abuse. In Spain, article 22 of the penal code makes provision for gender to be considered as an aggravating factor, but we have no information on how it is being used. We found no evidence that legislation in any of those jurisdictions is making a major difference.

Niki Kandirikirira: I am trying to imagine one that is not.
The Convener: In conclusion, would panel members like to make any comments on the general principles or provisions of the bill, so that we can pass them on to the lead committee, which is the Justice Committee? Who would like to start?

Niki Kandirikirira: I will leave it to the lawyer.

Louise Johnson: We commend the bill and have no objection to its provisions. It is important for us to look at crime that is defined by sexual orientation and transgender identity, because crimes against LGBT people have taken a back seat. The bill brings that criminal behaviour to the fore and is a good move.

The Convener: So you have no problems with, or reservations about, the bill’s provisions. Are you not concerned that we will run up against the same difficulties with sexual orientation, transgender identity and disability that you ran up against with gender? Are the definitions in the bill clear enough?

Louise Johnson: I have not given full consideration to issues other than gender, but no glaring difficulties jumped out at me—I did not think, “This’ll be very hard to prove.” If anything occurs to me, I will be happy to pass it on, but I have seen no major inconsistencies or problems in the bill.

Sandy Brindley: We support the bill. Further work is required in relation to hate crime against women; I am sure that the committee has considered that point. We have made two proposals today, on incitement to hatred and on domestic abuse aggravation, which Louise Johnson mentioned. Even if it is not recommended that gender be added to the bill, further work on the issue is required.

Niki Kandirikirira: We have discussed the issues of gender and disability and the distinction between what happens in private spaces and what happens in public spaces. What are the implications of abuse of disabled people by their carers? Will such offences be seen as being aggravated by the fact that the victim is from a disabled identity group, or is the main issue the relationship between the carer and the cared-for person? The same debate can be had about domestic violence. That is one issue to flag up, although I am sure that disability groups have already done so. It may have an impact on other legislation; it is also a concern in relation to gender.

Sandra White: I have a point of clarification, which shows my ignorance about the bill.

You mentioned care and disability. Will the bill cover public and private care homes? I raise the point because at a meeting that I attended with the Equality and Human Rights Commission and various lobbying groups reference was made to violence or, rather—because they do not call it violence—to certain circumstances in care homes, which involve mainly elderly people. If the incident takes place in a public care home, there is a duty of care and the matter can be reported, but it cannot be reported if it takes place in a private establishment. Will the bill cover public and private care homes, in particular when disabled people are being cared for in an institution?

The Convener: We can raise the issue in our report.

Sandra White: I wanted clarification.

Sandy Brindley: If it is an offence, it is an offence, irrespective of whether it takes place in a public or private care home.

Louise Johnson: Unless there is any caveat or limit to the provision, it should be all-purpose. The Adult Support and Protection (Scotland) Act 2007 covers the kind of behaviour that Sandra White mentioned. It empowers local authorities to enter premises, which I think would include care homes, if they suspect that a vulnerable adult is at risk.

Sandra White: As far as I know, that provision covers only public premises, but not private premises.

Louise Johnson: Does it not? It covers houses.

Sandra White: I will need to check that, because the issue was raised with me.

Louise Johnson: The 2007 act allows social workers to go into someone’s house if there is a person there who is, by virtue of age, a disability or a mental disability, experiencing some form of harm. I cannot remember the exact definition. I think that the act probably also covers care homes—that provision would probably cover disabled people. Unless the bill has any limitation, the provision would be all-encompassing.

Sandra White: I would like clarification of that, convener.

The Convener: Yes, because there can be private carers in a person’s private home as opposed to a care home. We will flag up that interesting point.

I thank the witnesses for a worthwhile and surprising session, which is always good. We appreciate the work that you have done and the thought that you have given to your evidence, which has been helpful.
Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

The Convener: Item 2 is a round-table evidence-taking session on the Offences (Aggravation by Prejudice) (Scotland) Bill, for which we have been appointed as the secondary committee for stage 1 consideration. The Justice Committee, as lead committee, is considering the general principles and main provisions of the bill.

We have agreed to focus our consideration on whether age and gender should be included as aggravations. On 4 November, the focus of our evidence taking was gender. In today’s session, we will focus primarily on age, although we will also touch briefly on gender to allow attendees to record their views on that, if they wish.

Before we move to questions, it would be good to introduce ourselves. I am Margaret Mitchell, the convener of the Equal Opportunities Committee.

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I am the member of the Scottish Parliament for Edinburgh North and Leith.

Dr Gordon Macdonald (Christian Action Research and Education for Scotland): I am the parliamentary officer of CARE in Scotland.

Marilyn Glen (North East Scotland) (Lab): I am an MSP for North East Scotland.

Euan Page (Equality and Human Rights Commission): I am the parliamentary and government affairs manager for the EHRC.

Sandra White (Glasgow) (SNP): I am an MSP for Glasgow.

Alistair Stevenson (Evangelical Alliance Scotland): I am the public policy officer for the Evangelical Alliance Scotland.

Nick Waugh (Help the Aged in Scotland): I am the policy officer for Help the Aged in Scotland.

Bill Wilson (West of Scotland) (SNP): I am an MSP for the West of Scotland.

Alan Cowan (Unison Scotland): I am from Unison Scotland’s lesbian, gay, bisexual and transgender committee.

Bill Kidd (Glasgow) (SNP): I am an MSP for Glasgow.

The Convener: Thank you. We want to ask the panellists about a number of areas. Having read the submissions, we are aware that there is diversity of opinions on the bill. Given that, I invite the panellists to justify their perspectives and to say whether they are in favour of an amendment to include in the bill age as an aggravation.
Euan Page: This is a complicated area, as the EHRC made clear in its written evidence. Rather than start by wading into the question whether age and gender should be covered, it might be useful to give members a sense of the principles on which we have based our approach to the bill.

The phrase “hate crime” is enormously useful shorthand for describing a particular type of crime. However, it can also be hugely misleading and can create a series of misconceptions. We need to be clear that we are not talking about instances of hatred that fit well with people’s ideas of racist and homophobic crime but less well with other types of targeted crime. If we ground the discussion in the definition that was used by the working group on hate crime in 2004, which talks of “malice” and prejudice “towards a social group”, we get a better understanding.

We are talking about targeted crime. Hate crime is useful shorthand, but it is shorthand for crime that is qualitatively different because of the underlying motivations. It does not downplay the anguish and pain that a victim of crime experiences, but recognises that when prejudice manifests itself as a criminal act, there is an added dimension to the dynamic, which is important in understanding the motivation of the perpetrator and the impact on the victim. It is not that a hate crime is more serious—sometimes it is crudely put that a crime matters more if one is black or gay. It is about recognising that—as well as all the compounded problems that a victim of crime faces, regardless of the nature of the crime—the victim’s perception of it as an attack on a fundamental part of who they are, and on a core aspect of their personality, adds even more to the overall impact of that crime.

The other important point to get across is that the principle of equality is not about treating everyone the same. I know that that is an area that other panellists will want to discuss, so I look forward to hearing what they have to say.

The commission’s approach to the question whether there should be statutory aggravations covering different types of targeted crime has been to acknowledge that statutory aggravations are not the only response to targeted crime or hate crime. We must not get caught up in a debate in which we say, “It’s all or nothing for statutory aggravations.”

We need to be clear that there are rough typologies that we can apply to where particular types of crime happen. Homophobic crime tends to happen in the public sphere, and the perpetrator and victim tend not to be well known to each other, although there can be bad-neighbour dynamics and so forth. That may not hold true for what is going on in an abusive relationship, where victim and perpetrator are very well known to each other and the crime happens in the private sphere.

Without being dogmatic, I think that we need to ask what is different and what it means for effective application of a statutory aggravation. The commission’s approach throughout has been that we should be pragmatic. We should be clear both about where there is evidence that a statutory aggravation would make a difference—there is a compelling case that it would in relation to homophobic, transphobic and disability-related crime, although I know that there are concerns about disability—and about the circumstances in which a statutory aggravation may not be the most appropriate intervention. I am not saying that the debate should end there; rather, I think that is where it should begin. We must recognise where there are deficiencies in criminal justice and wider policy responses to targeted crime. We need to be alive to those issues and to map out what can be done to tackle gender-based crime, elder abuse and other types of targeted crime. We must not get into a polarised argument that states that there must be either statutory aggravations or nothing at all.

The Convener: Those are helpful comments. You have set the scene and have addressed one of the concerns that respondents have expressed—the notion that a hierarchy of crimes may emerge. You made it clear that that is not the intention and that the issue is the effectiveness of the legislation, if particular strands are included. Who is in favour of including in the bill aggravation for other strands?

Dr Macdonald: Over the past few weeks, as I have read other people’s evidence, my thoughts on the issue have evolved, which is not surprising. We remain concerned—not just in relation to the bill, but more generally—about creating the perception that there is a hierarchy of rights. Cases involving clashes of rights between different equality strands have already come before employment tribunals and courts; those must be worked through in the legal process. Nevertheless, over the past few weeks my view on the bill has changed.

The basic principle should remain that people are treated equally before the law. In a perfect world, no statutory aggravation would be needed, because the existing law would deal adequately with problems. However, if a problem affecting a specific group is identified, the taking of specific measures in relation to that group can be justified. The first question that we must consider is whether the problem is sufficient to justify specific measures. The second question that arises is whether the implementation of specific measures for crimes that are targeted at certain groups will have adverse consequences for other groups. We
remain concerned about creating a hierarchy of rights but, while reflecting on the issue, I have come to the view that that concern can probably be addressed adequately in implementation of the eventual legislation, rather than necessarily by applying the same legislation to all six equality strands.

The arguments that Euan Page put forward on age and gender, especially in relation to vulnerability issues, complicate the situation. I am not yet persuaded on the disability strand. It has not yet been shown — partly because the police and others do not collect the relevant statistics — that the problem of people being targeted because they are disabled, rather than because they are vulnerable, is sufficient to justify a change to the law in that area. However, I am open to arguments for including disability as an aggravation in the bill.

The Convener: It is interesting that your thoughts have evolved after reading some of the evidence that has been given on the bill. One of our reasons for choosing the round-table format is that it provides an informal setting in which people can make comments and new ideas can emerge. I was interested to hear your comments on whether the scale of problems is sufficient to justify legislation and whether statutory aggravation is the most effective way of addressing them.

10:15

Sandra White: Euan Page mentioned elder abuse taking place behind closed doors. Should a statutory aggravation relating to age be included in the bill because it would be much more difficult to prove? That leads me on to an issue that has already been raised, which is the possibility of a perceived hierarchy among the various strands. If a statutory aggravation relating to age is not included in the bill, would that give the impression that the bill takes crimes against people of a certain age less seriously than it takes crimes against people who come under other equalities strands that are included? It is open to all the witnesses to answer that question.

Dr Macdonald: There may be a difference between perception and reality. The bill may give that perception to the general public, but in reality a court would have to ask: Has the crime been motivated by "malice and ill-will towards" the person because of their age, whether they are elderly or young, or did it take place because they were in the wrong place at the wrong time or because they are vulnerable? It might be more difficult to prove that motivation, so such a provision would not necessarily be effective. A gap between reality and perception might be the issue. However, there is a strong argument for saying that if people are particularly vulnerable and are targeted for whatever reason because of their vulnerability, that should be an aggravation that the courts take into consideration.

Sandra White: So, it should not necessarily be in the bill, but it should be an aggravation.

Dr Macdonald: Yes — unless it is possible to legislate on vulnerability. I do not know whether Euan Page has views on that.

Euan Page: I do not want to hog the meeting, but can I come back on that, convener?

The Convener: Yes.

Euan Page: First, it is important, and it is incumbent on us, that we do not create the perception that there is a hierarchy of equalities. We must think through the way in which we approach this debate and the equalities debate more generally, and we must be clear that equality is not necessarily about treating everyone the same.

Misconception of what is meant by vulnerability is one problem that has dogged approaches to the concept of disability aggravation, and it has plagued the effective implementation of the Criminal Justice Act 2003 in England and Wales, which has provisions on the issue that are broadly similar to those in the bill. It has caused a lack of effective implementation of the disability aggravation down south.

The former director of public prosecutions in England, Sir Ken Macdonald, put it very well a few weeks ago. He pointed out that we must be able to distinguish between people who are in vulnerable situations and people who are inherently vulnerable. We must ensure that we do not proceed on a false prospectus that dismisses sections of society, particularly people with learning disabilities or mental health problems, as somehow being inherently vulnerable and inherently victims who are more open to attack and crime than the rest of society, and which treats that as something that we cannot change — as a reality with which we have to deal. As Sir Ken Macdonald said, if we do that, we run the danger of almost legitimising crime that targets such people.

I highlight people with learning disabilities and mental health problems because the evidence that we have of targeted crime is that those two impairment groups in particular, within the wider grouping of disabled people, experience such crime. They are often harassed in public and harassed when they leave pubs, or cannot leave their houses because of abuse, threats and so forth.

If we want to take vulnerability into account, 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. It is hard to imagine a sheriff not taking into account, through the common-law aggravation route, the fact that a frail old woman who had her handbag stolen had a visual impairment.

We are talking about targeted crime. Gordon Macdonald is right to say that we must proceed on the basis of clear evidence, but there is compelling evidence that the impairment groups of the learning disabled and people with mental health problems are much more likely to face abuse, harassment and threats of physical violence. There has been a spate of murders of young people who had learning disabilities. It is clear that those people were targeted because they had learning disabilities. Their impairment might have heightened their vulnerability but, as Sir Ken Macdonald said, we must be clear that they were not inherently vulnerable. They were in a vulnerable situation, and the perpetrators took advantage of that.

As with other types of targeted crime, including those on which there are already statutory provisions, perpetrators will target people if they think they can get away with it. People will commit a racist offence if they think the Asian shopkeeper will not bother contacting the police because it happens every Friday night. Such things become normalised. There is lots of evidence about LGBT people who live with the reality of being verbally abused or threatened with physical violence when they are on a night out.

The feeling of impunity among perpetrators is at play in existing hate crimes. We must be clear that the picture is complicated, not only because that feeling of impunity exists, but because we must distinguish between inherent vulnerability and vulnerability that arises because of situations in which people find themselves.

The Convener: Yes—in some cases such crimes are almost opportunist. I wonder whether this is a good opportunity for Bill Kidd to ask his question.

Bill Kidd: I am worried that the bill will be diluted if we introduce too many elements. However, it is important that we cover every aspect of people being targeted by criminals or perpetrators of violence for whatever reason.

The 2006 Scottish crime and victimisation survey suggested that people aged 60 or over are least likely to be victims of personal or household crime, although they are frequently targeted for bogus calling, theft and elder abuse. However, even if only relatively small numbers of older people are victims, should not aggravation related to the age of the victim be included in the bill so that the perpetrators face suitable sanctions for targeting elderly people?

The Convener: Nick, do you have views on that?

Nick Waugh: The problem is not that older people do not experience much crime or that the crimes that they experience are not serious: it is simply that inclusion in the bill of an aggravation related to age would probably not address many of the crimes that they do face. As Sandra White said, elder abuse is difficult to pick up on and to prove. There is a raft of issues around that. People who abuse older people for whom they care often do so because they are unable to cope with their responsibilities. That approach was taken with the Adult Support and Protection (Scotland) Act 2007, which emphasises trying to support carers before problems get so serious that people end up in hospital or in prison, although there are sanctions, should they be needed.

There are many other ways in which to address the problem of bogus callers. We trialled a system in Argyll under which there was a ban on cold calling: no one would come to an older person’s door unannounced. If someone did, they did not answer it. That system was effective, and there were ways in which legitimate businesses could work around it so that it did not impact on them. It is probably more important to focus on addressing crimes through measures such as that than it is to include an aggravation relating to age in the bill.

Bill Kidd: It is probably more important to focus on addressing crimes through measures such as that than it is to include an aggravation relating to age in the bill?

Nick Waugh: Yes. Even in a case where the perpetrator was someone in the family who was motivated by malice or ill-will, it would be difficult to prove it. There is a risk that, if aggravation related to age was included in the bill but the provisions were not used regularly, some older people might perceive that crimes were not being taken seriously. They might think, “The provisions are not being used, but they are being used for other groups.”

Malcolm Chisholm: If people here do not accept that there should be an aggravation relating to age, it would be useful for the committee if you could suggest alternatives, as happened at the previous meeting, when witnesses on gender did not support there being a gender aggravation in the bill, but made many suggestions about alternative provisions because they accept that there are problems. I imagine that Nick Waugh feels the same from Help the Aged’s point of view.
Nick referred to the Adult Support and Protection (Scotland) Act 2007. I know that it is early days, but it would be useful for the committee to know how you feel that is going and whether there is a way of strengthening, through the bill, the kind of approach that is embodied in the 2007 act. Would that be more attractive to Help the Aged than including an aggravation relating to age? Do you have other suggestions about how we could further improve protection of older people?

**Nick Waugh:** It is a bit too early to tell how the 2007 act is going, but we will watch it carefully. Further improving protection of older people could be done in various ways. For example, the recent tightening of trading standards to try to outlaw pressure selling could be effective. Education is also hugely important in that many old people probably do not realise that they should no longer be subjected to pressure selling. We should not only introduce alternative measures outside the aggravation relating to age, but ensure that people know about them. Generally, we are minded not to be in favour of an aggravation relating to age, but to pursue other measures instead.

**The Convener:** Awareness raising is at the heart of what you want.

**Nick Waugh:** Awareness raising is a huge aspect.

**The Convener:** Your view is that prevention is much more effective than trying to legislate.

**Nick Waugh:** We have done a lot of work on trying to increase older people's confidence when it comes to people calling unexpectedly at their doors. We want to make them aware that a legitimate caller will wait while they check their identification, look up their number in the phone book and so on. Many older people feel put upon and that they must open the door because a person seems official. Similarly, many old people fall for scams that look official because they are on official-looking paper—I have a family member who has been the victim of that kind of crime. A large part of why it happened was because he felt that people could not make such documents unless they were legitimate or for real. He did not realise that it is easy to do. With a scanner or a photocopy shop, any of us could probably put together something that looked official.

**The Convener:** Thank you for that. I am conscious that one respondent, Gordon Macdonald, who was in favour of including aggravation relating to age in the bill, has probably changed his mind a little bit. I wonder whether Alistair Stevenson's views have changed. Are you in favour of the aggravation being included?

**Alistair Stevenson:** I have listened to what everyone has said and read through some of the written submissions, but the hierarchy of rights issue remains the core of what we believe. For us, it comes down to the protection element. If the bill was enacted as it stands, would older people feel that they had greater protection? I am not sure that I have the answer to that—maybe Nick Waugh does. If the aggravation relating to age was added to the bill, we would hope that that would provide some protection for older people. However, that would have to be weighed against the arguments for not including the aggravation to assess what the most appropriate response would be.

For us, it is a question of public perception as well as one of protection. If the bill was enacted as it stands, would the public perception be that the further two equalities strands of age and gender would just be added to the act four years down the line? I think that the public perception would be that the legislation would just continue to move down the road on which it has been moving already. 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. I hope that makes some sense.

**The Convener:** That is helpful. I think Marlyn Glen wants to tease that out a little bit more.

**Marlyn Glen:** Yes, because I appreciate Nick Waugh's argument entirely. My problem with making lots of suggestions about what should happen in legislation is that, in fact, this bill is the only legislation on the table—nothing else is coming up. The bill is what we have and, as I said at the previous meeting, if we do not take this opportunity, it will be gone. We do not know whether it will be four or eight years before we get a similar opportunity. That situation needs to be teased out.

Nick Waugh mentioned the need to consider the issue from the point of view of the protection that might be afforded to older people—or to younger people or to any of the other social groups—but we should also consider the situation from the other point of view. I would like to hear people's opinions on this. Part of the point of this kind of legislation is to raise awareness and to allow the number of crimes to be monitored. Perpetrators should know that knocking on doors in a sheltered housing complex is not just cold calling but definitely illegal. From the point of view of the perpetrator and of public perception, would it not be a good idea to include age? I am playing devil's advocate a bit.

10:30

**Nick Waugh:** It could be a good idea, but it would largely depend on how the provisions were implemented. If, despite a big fanfare about
including an age aggravation in the bill, the provision was never used in court, so no one was ever convicted of harassment with aggravation on the ground of age, older people might feel that nothing had actually happened. Largely, it comes down to how the issue is presented to the public.

I take the point about the need to consider the issue from the perpetrator's point of view, but the problem is that people never think that they will get caught, even if they know that what they are doing is illegal. We hear a lot about problems with gangs of youths gathering around sheltered housing. Particularly in some parts of Scotland, where sheltered housing complexes no longer have a warden, older people have started to feel a little bit more vulnerable. However, I do not know that including age in the bill would make much difference to how safe older people feel.

The Convener: I think that Unison was also against including age in the bill. Does Alan Cowan want to respond to those points?

Alan Cowan: Unison feels that age and gender are very much a part of hate crime but that they should be taken forward, as the working group suggested, by means of a statutory instrument at the appropriate time. That should be written into the bill, but that is not the case as things stand.

A range of issues needs to be considered in addressing how relative values are perceived in society. Legislation such as the bill should allow that to start. We have a long road to travel before we can change how society views people's relationships and people who are targeted, but the lack of agreement on what steps should be taken next should not stop us taking this important opportunity. That is our position. Our national policy is to support both gender and age.

We also need to consider sentencing. It will still be up to judges to decide which offenders fall into the new categories and whether the evidence supports the case that a hate crime was involved. For example, the submission from the Association of Chief Police Officers in Scotland suggests that any case that is felt to involve a hate crime must be looked into, but whether that has an effect on sentencing will still be for judges to decide.

Bill Wilson: Nick Waugh referred to gangs of youths gathering outside sheltered housing, which is close to what many people might recognise as a hate crime.

Nick Waugh: From a legal point of view, that would depend on whether it could be proved that the youths were gathering around the sheltered housing complex because the residents were old. Being vulnerable people, they might not be able to chase the youths or harass them in return or take any action. However, quite often, the geography of sheltered housing just makes for a good place to kick a football about. There might not be any malice or ill-will towards older people as a social group, so including age in the legislation might not be useful in stopping that happening. Perhaps other legislation could better stop that, through public order offences such as breach of the peace or harassment—although defining harassment and teasing out what is and what is not harassment is another kettle of fish.

Sandra White: The answers to a couple of questions that I wanted to ask have been teased out and expanded on by Euan Page and Gordon Macdonald. I would like to hear other people's ideas.

The big problem is that determining whether something involves hate or vulnerability can be a grey area. I would like the other witnesses to expand on the concept of vulnerability. Disabled groups have been mentioned, as has the fact that 16 to 24-year-olds are more likely to be victims of crime than are older people. As the convener of the cross-party group in the Scottish Parliament on older people, age and ageing, I know that many older people do not think of themselves as old. The word "old" is difficult to define. An older person might take offence at the fact that the crime that was committed against them was a hate crime just because they were old, when they feel fitter than many other people. Vulnerability is a key issue.

Euan Page and Gordon Macdonald have given us some good answers. Do any of the other witnesses want to elaborate on what they said? We have considered disability and, as Euan Page said, it is difficult to prove whether disabled people are targeted because they are disabled or because they are vulnerable. That is where the difficulty lies when it comes to incorporating age-related aggravation in the bill.

Nick Waugh: The report that the working group on hate crime did a few years ago explicitly addressed that issue. In a long paragraph, it said that there was an important distinction to be made between vulnerability and malice or ill-will. It argued:

"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."

To an extent, we would probably work with the same definition.

Euan Page: Sandra White got to the heart of the matter with her observation about older people's self-perception. At a round-table meeting on disabled people that the EHRC held down south, it
was said that giving older or disabled people a choice between being hated and being vulnerable was Hobson’s choice, because neither is an empowering option for a human being. We must ensure that we do not get into such a debate and that whatever policy responses we consider, whether criminal justice or otherwise, we acknowledge that we are dealing with individuals who have more facets to them than simply being victims of hatred or of bullying and exploitation.

That takes us on to the wider point that several people have picked up on, which is crucial. Someone asked what we can do if we miss the opportunity that the bill gives us. What will the bill mean for the guy who chaps on doors in sheltered housing schemes, and whether what he is doing is illegal? The offence of aggravation can be applied only to an existing offence, so unless someone is already committing a criminal offence, it cannot be used. We might have to revisit issues such as whether the guy who goes round sheltered housing schemes would be covered by the provisions only when he acted in a way that attracted the police’s attention.

The vital wider point is about public perception and the extent to which we can use the bill to raise people’s awareness of their rights and of the unacceptability of targeted crime. There are buttons that we can press, but they are perhaps subsidiary to the main point. If we want to make changes to the criminal law, the paramount consideration in our minds should be whether what we propose will signify better and more effective outcomes for victims of particular types of crime.

The wider imperative is about changing public attitudes. It is extremely important that we do that. I will use the parallel of the Sexual Offences (Scotland) Bill, which the Justice Committee is considering, which will reform the law on rape and sexual offences. As women’s organisations have said, although that bill contains many welcome provisions and will change how the police, prosecutors and the judiciary view the investigation and prosecution of sexual crime, a change in the criminal law will not in itself change public attitudes, whereby misogyny, the denigration of women and the belief that a woman can sometimes be responsible for being raped are, unfortunately, still widely tolerated.

Debates about changing the criminal law can help to inform the wider debate and what we might want to do about public perception, but we need to be clear about what we want to do with the law to achieve better outcomes for people who experience targeted crime and about the wider— and much more difficult—question of what we do to change the mindset that somebody who is disabled is inherently vulnerable.

Sometimes, we might become caught up in the itch to legislate and end up in precisely the scenario that Nick Waugh described, in which our moral outrage at targeted crime leads us to think that we must take the opportunity to legislate. However, we might not produce effective statutes, and that could blind us to other avenues that are worth exploring.

The Convener: You are saying that legislation might send out a message but, if it is not effective and does not address attitudes, it might end up almost as tokenism, which you are trying to avoid.

Euan Page: I do not want to dismiss legislation to that extent. We must make it clear that saying that one criminal justice response—such as statutory aggravation—might not work in a particular scenario does not close down debate about other policy interventions that we might have to make, including criminal justice responses. However, we must be clear about what we want to do with the law and about the wider job of changing the public perception.

Dr Macdonald: I will make a few comments on what other people have said. The committee must remember that an aggravation relating to age would not apply just to old people. I recall that one of a group of young people who were causing much grief in the community and drinking large amounts of alcohol was chased by somebody who was subsequently arrested and charged with breach of the peace. If a conviction were sought in that scenario, it might be argued that that person had developed malice and ill-will towards young people, because of their behaviour.

I return to what was said at the start. The bill was introduced because of the disproportionate effect that crime has on some groups of people. Elderly people might be the least likely to be the victims of crime, but the effect on them can be quite significant—a crime can lead to people dying when they would not have died if their age was different. The committee might want to think about that factor also. In addition, many older people are disabled, which means that there is a crossover between strands.

I do not know whether I am allowed to ask other witnesses questions, but I shall suggest a question that a member might ask. If the committee were minded to go down the proposed route and to suggest a provision in the bill to allow a statutory instrument to be made later, why would it not just suggest including the other two strands now, rather than leaving that up to a minister to decide later? Providing for a statutory instrument might be a pragmatic way forward but, in principle, it is not—
The Convener: Practical or effective.

Dr Macdonald: Such a move might be practical and effective, if evidence emerged, but the principle would not be right. As a principle, a change in the law should come before Parliament. Perhaps Malcolm Chisholm disagrees as an ex-minister.

The Convener: We would almost be waiting to see whether something turned up or evidence appeared. Does anyone else have a view on that?

Alan Cowan: The converse is 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.

We need to consider carefully the opportunity that we have. We do not know what will happen in the future. If we do not use this opportunity and we hope for a change in the future that will deal with all the problems of targeted groups, we could wait a long time.

10:45

Malcolm Chisholm: The idea of using a statutory instrument is interesting, but I agree with Gordon Macdonald. If someone feels that the aggravations should not be included in the bill, they should not argue for a statutory instrument either. When the working group made its original recommendation, it had not reached a conclusion on the other aggravations—certainly not on the gender aggravation.

Will Alan Cowan clarify Unison’s position? Is Unison’s position that it supports the aggravations but it does not want them in the bill, or is it open-minded and it would like to hear further evidence before coming to a conclusion?

Alan Cowan: We want this bill to be passed as it is. As for the issues that other equalities groups have raised, there is no consensus within Unison. It is important that self-organised groups are able to produce solutions to the problems, but it is a fact that such solutions do not always keep pace with the legislative framework. We are therefore in favour of using a statutory instrument for provisions relating to the other aggravations. That will take account of the realities, and it will allow the bill to be passed. It is important that our disabled members and LGBT members have recourse in law. They must be able to see an acknowledgement of the effects that hate crimes have on them.

We also have to consider whether the Offences (Aggravation by Prejudice) (Scotland) Bill would comply with the Human Rights Act 1998 if, in future, other groups could not be added. I do not have the expertise to say definitively whether the bill as it stands would comply with the act.

Euan Page: Neither do I.

Alan Cowan: But I still look to my colleague, who might be able to shed some light on that.

The Convener: I think that means you, Euan.

Euan Page: I do not know the answer, but my hunch is that not including the other groups would not lead to a problem with HRA compliance. However, I will put Alan’s point to my legal colleagues. If anything comes out of that discussion, I will be happy to write back to the convener about it.

I want to widen the debate slightly. The remit of the Equality and Human Rights Commission covers equalities, but it also covers good relations and human rights. We have to ask what those wider considerations mean for the wider debate. Public authorities have responsibilities under the Human Rights Act 1998—they have to take into account the right to life, the right to a private family life and so forth. The EHRC might want to take into account other ideas in relation to the bill. The Scottish Commission for Human Rights might also be interested, as its remit extends to devolved human rights issues. Human rights issues arise, but the jury is out as to whether the bill as drafted would be struck down for not being HRA compliant. However, we have to remember, as Gordon Macdonald said, that the experience of crime and antisocial behaviour can have a hugely negative impact on people’s lives.

The third area of the EHRC’s work is good relations. While listening to other speakers, I was struck again by the fact that part of the problem is the appalling gulf in this country between young people and older people. We have two sets of people who just do not interact. Part of the commission’s work is to consider how we can facilitate intergenerational dialogue, so that people can get over some of the deeply ingrained misconceptions on both sides. Younger people are dismissed by many older people as being criminals and vandals who are up to no good, and older people’s concerns are routinely marginalised and dismissed by a society that is obsessed with youth. We should think about how we can debate that issue in Scotland. The debate might not be best conducted through the courts.

The Convener: The clerk has just passed me the policy memorandum, which states clearly:

“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 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
I suppose that is about competing rights and where malice and prejudice, or perhaps a direct causal link, can be proven. Marlyn Glen, do you want to come in here?

**Marlyn Glen:** Yes, I have two points. Do the witnesses want to suggest any other policy interventions? Also—an important point after our previous session—I want to give witnesses the opportunity to clarify that they are not arguing against the bill as it stands. Do you support the bill?

**The Convener:** The flavour of what we have heard so far is that there is a clear case to be made for including an aggravation relating to sexual orientation because that seems to be easier to prove. Is an aggravation relating to disability in the same sphere as one relating to elderly people and the vulnerable? Could there be a problem with the bill there?

**Alistair Stevenson:** Our written evidence sets out our concern that, because disability and age are so closely linked, in the sense that people become more disabled for whatever reason as they grow older, the fact that the bill includes disability means that the issue of age has to be addressed alongside it. Age and disability might be intrinsically linked in many areas.

To go back to some earlier points, I question the reasoning that the law should wait until sufficient crime has taken place and evidence gathered before we provide protection. We should not just wait until the evidence is there; we need to provide protection before the crime happens.

My third point is about our coming into line with the law in England and Wales, which covers four of the six equality strands. If we put the final two equality strands into the bill, what might the implications be for the interplay with the law in England and Wales? There would be some question marks about that.

**Bill Wilson:** Various witnesses are giving their views on statutory instruments, so it might be a good time to get the views of the other members of the panel.

**The Convener:** It would be good to hear from all the panellists whether they would be in favour of including a power to make statutory instruments after the bill is passed.

**Dr Macdonald:** I come back to what I said earlier. For the law to change, whether by way of a bill or a statutory instrument, a judgment has to be made by Parliament or a minister, depending on the mechanism, that there is a sufficient need for the measure to address a problem. At the moment, from all the written and oral evidence, it would appear that people are not convinced that there is a need for specific measures in the bill in relation to gender and age. That does not mean that people do not recognise that there are problems that need to be addressed.

On that basis—this is not necessarily a position that CARE would take; it might just be my personal view—I think that it is unnecessary to include a power to make a statutory instrument. If it becomes evident over time that there is a problem with people hating old people just because they are old or middle-aged people just because they are middle-aged, Parliament might want to take that seriously enough to consider it on its own merits.

**The Convener:** I cannot remember whether it was you or Euan Page who said that an aggravation can be an aggravation only if there is an existing crime.

**Dr Macdonald:** Indeed.

**The Convener:** So should we be looking more closely at bogus calling on the elderly and setting down a marker that it should be regarded as an aggravated crime?

**Dr Macdonald:** Yes, or there should be some sort of licensing system. A person has to have a licence from the local authority if they want to collect money door to door. Other mechanisms could be used to address some of the issues that you are talking about.

Earlier, the issue of freedom of speech was touched on. Our concern about a clash of rights relates specifically to situations in which people from different equality perspectives end up in breach-of-the-peace-type situations and the breach of the peace is interpreted in a way that unduly restricts freedom of speech or religious liberty. We are concerned in particular about a policeman or a court perceiving that only one of two individuals acted out of malice and ill will when in fact both of them acted out of dislike of the other person or of their beliefs, behaviour or whatever.

**The Convener:** We are starting to tease out the issue and it is proving to be complicated. Have you come to a conclusion on the statutory instrument question, Euan?

**Euan Page:** The commission does not have a position on the matter, although I reiterate other panel members’ concern about the removal of parliamentary oversight. We have identified some practical steps outwith the creation of an aggravation that might be useful in looking at age. Certainly, the commission is keen to work with our partners in the older people’s sector to see what further policy work can be done.

Marlyn Glen asked about possible policy interventions. The commission is just about to
commission a piece of research on criminal justice and other policy responses to gender-based crime. We hope to have that under way very shortly. The aim is to encapsulate some of the complicated arguments over whether there should be a gender aggravation. We will also look more widely at various manifestations of gender-based crime with the aim of looking across the board at crimes of sexual violence and domestic abuse. We may also look at issues such as human trafficking, prostitution and pornography as an incitement to violence. There is a series of questions that we might want to consider around criminal justice responses to gender-based crime.

Also, as custodians of the statutory equality duties, we are very interested in getting outside perspectives on any further work on the application of the gender equality duty and public agencies’ responses to gender-based crime.

We hope to have the research ready by spring next year, in time for the stage 1 debate. Hopefully, we will have some research that will help to inform the discussion.

The Convener: That will be very helpful in informing the discussion.

Euan Page: Lastly, given that I spent quite a bit of time talking about the vulnerability dimension to disability, I will not reiterate that other than to say that I will send our submission to the Justice Committee, which is considering the general principles of the bill. The submission probably makes the arguments on disability more succinctly.

The Convener: That is handy.

I return to the question of including a power to make a statutory instrument. I am looking for a yes/no answer from you, Alistair.

Alistair Stevenson: In our submission, I said yes. Now that I have listened to the arguments against from around the table, my thoughts on the subject are mixed. The fundamental issue, however, is parliamentary oversight.

The Convener: Thank you for that. What about you, Nick?

Nick Waugh: I have a similar story. We will probably sit on the fence on that one, although I am personally slightly minded towards the Parliament having ultimate oversight.

The Convener: Okay. I think that Alan Cowan has come out in favour—quite decidedly in favour.

Alan Cowan: Yes.

The Convener: Before we give panellists the opportunity to comment on the general question of gender, I have a final question. Panellists may know of an older or younger person who was the victim of crime and who has said that the fact that they were older, or younger, was the motivation or reason for the attack. Is anyone aware of such an instance? Panellists are shaking their heads; no one has an instance to relate, which in itself is telling.

Bill Wilson: People might not regard themselves as being victims for that reason. Someone can be a victim because someone else has a strong bigotry against them on the ground of age and yet the victim does not realise that that was the reason for the crime. People do not necessarily describe themselves in that way.

The Convener: Therefore, that would be a difficulty for the legislation, as there would be no corroboration and it would be very much a matter of whether the individual felt that they were being targeted because of their age. There are potential difficulties.

11:00

Bill Wilson: I recall the matter being discussed with the witnesses last week, when there was concern that some women who are victims because of their gender do not recognise the crime that is committed against them as a gender-oriented crime. The fact that nobody on the panel knows a person of a certain age who believes that a crime was committed against them because of their age is not an indication that that does not happen.

The Convener: The question was not about the issue in general; it was specifically about whether they knew of anyone to whom that had happened.

Alan Cowan: The answer to your direct question whether we know of specific examples is no. However, it is an important area to monitor, and a statutory aggravation would allow cases to be recorded so that we could develop an evidence base.

Dr Macdonald: I would have thought that there would be evidence from England and Wales if age is already a statutory aggravation there. It would be worth looking to see what evidence exists there.

Sandra White: There is evidence of older people who are in care homes or who have been admitted to hospital being victims of crime; the difficulty is in proving that they are victims specifically because they are old and in a care home or hospital. Are older people in care homes targeted because they are old and in a care home or because they are vulnerable? That is the big question.
Malcolm Chisholm: You may not all want to express a view on the gender issue, but it is interesting for us to consider the two issues together. At our previous session, there was consensus among the groups that were represented that a gender aggravation should not be included in the bill on the ground that it is not the correct vehicle by which to address the complex issues to do with violence against women. However, they were not saying that there is no hate crime committed against women because of their gender. That may be the difference between the situation that we were discussing then and the one that we have discussed today. Although they accepted that there is a problem, they were concerned that it might be difficult to prove that a crime was committed against someone purely because of their gender and difficult for women to appear as witnesses to such crimes.

Do you have any views on the gender issue or the point of view that was expressed at our previous meeting, which I have tried to summarise? What alternative measures do you think are needed to address the complex issues to do with violence against women? Would you support a gender aggravation, or can you suggest other action that should be taken?

The Convener: Euan Page has suggested that work is on-going in the Equality and Human Rights Commission, which will be completed in the spring. Do you have any view on the matter in the interim?

Euan Page: We were mindful to work closely with the women's sector in drawing up our position on this. The strong indication that we have had is that the case has not been made for a gender aggravation. That is the point that I made at the start of this evidence session. However, that is not for a second to say that we do not recognise gender-based violence as a problem. The problem is that the issue is multifaceted and more profound than other issues, and statutory aggravations do not appear to be perceived as the most appropriate response.

The Convener: Okay. No one else wants to comment on the gender issue.

At this point, it is always good to go round the table and give people the opportunity to sum up—very briefly—what they think has been useful in the session, what points they want to emphasise that have arisen in the session or any last points that have not been made but which they want to make.

Malcolm Chisholm: It has been a useful session because of the range of views that have been expressed. It is unusual for people to come to a committee and say that, having thought about the issues and seen the evidence, they have slightly shifted their position. MSPs should be equally open minded. I was quite persuaded beforehand by the Age Concern and Help the Aged view that there is little evidence that people are targeted solely because of their age, and that continues to be my view. That is different from the gender situation and the situations that are described in the bill. Nevertheless, it has been useful even for people such as me, who already had a fairly strong view on the matter, to listen to the nuances of the debate. I will certainly reflect on the evidence before coming to a firm conclusion.

Dr Macdonald: The committee has to ask itself whether there is a sufficient problem. Parliament judged—and many agreed—that there was a sufficient problem to act on sectarianism, and many people would probably agree that there is a sufficient problem in relation to sexual orientation. On the other equality strands, however, the answer is maybe. In particular, it would be worth the committee considering what evidence has come from England and Wales in relation to disability.

The question is therefore whether the problem is of a sufficient scale to justify including an aggravation. That is a judgment that people have to make. Obviously, nobody approves of even just one case in which there is a problem, but the judgment has to be made. That applies to all the other equality strands, too.

Marilyn Glen: It has been an interesting session, particularly considering work that the committee might want to follow up. The timing of when we should consider the Adult Support and Protection (Scotland) Act 2007 is important as there is no point in doing the work too early. It is also very important that we follow up the research conducted by the EHRC, so we should have an evidence session with the commission in the spring, or whenever the research is finished.

Euan Page: First, to reply to Marlyn, I would be delighted to return for that discussion.

I have covered most of my points. We have recognised disability as a particularly contentious and complicated area, and I urge members to consider some of the evidence from down south. However, they should not consider a lack of successful implementation of an aggravation as evidence of there not being a problem. They should instead question the conceptual baggage brought to the table when considering disabled people's experiences of crime in general and targeted crime in particular. I hope that the EHRC's submission to the Justice Committee will help you with that.

In response to a point that Alistair Stevenson made about coverage of the equality strands, it is
worth pointing out on the record that the bill will, for the first time, introduce coverage of transphobic crime. That is different from the legislation in England and Wales. Other organisations, such as the Equality Network and Scottish Transgender Alliance, will have more expertise on that. There appears to be broad read-across in the rough typology of homophobic and transphobic crimes, so there could be a read-across in how an aggravation could be applied.

We have to be aware of a clash of rights between different strands, but we must return to the fact that, under the bill, someone has to commit an offence in the first place in order for an aggravation to be activated. Finally, I did not say this succinctly, but the EHRC whole-heartedly supports the bill as it stands.

Sandra White: The most interesting thing for me was the lack of clarity in determining whether a crime is a hate crime or is committed because the person is vulnerable. It is very grey area, as has been pointed out already with the disability issue. I originally thought that it might be a good idea to include an aggravation relating to age but, having heard evidence not just this week but from other groups, I am not persuaded that it should be included. I would hate to give people false hope, which might happen. How would an aggravation be proved in a court of law? If that protection was included in the bill, people might have expectations. They should have the same protection as everybody else, so considering sheriffs’ sentencing is perhaps more important than including an aggravation relating to age in the bill. For me, this evidence session has clarified that point.

Alistair Stevenson: I do not have much to add, except to reiterate that, if you are considering disability, age has to be considered, too, because they are so closely linked. It is difficult to distinguish between the two.

Nick Waugh: The main question for Help the Aged was whether a provision would offer greater protection or better outcomes for older victims of crime. On balance, we think that it probably would not. Our position has not really changed.

Bill Wilson: Like Malcolm Chisholm, I have been struck by both this and the previous week’s evidence. There seems to be a lot of movement of opinions and changing of minds. I had not expected, after the evidence that we received a couple of months ago, that all three witness groups last week would say that an aggravation relating to gender should not be included. I get the impression that, with the possible exception of Alistair Stevenson, most witnesses today do not think that an aggravation relating to age should be included in the bill. There seems to be a lot of flexibility of thought as the arguments develop.

Alan Cowan: For us, it is important to recognise the effect that hate crime has on victims and to ensure that people feel that that is acknowledged. That is what we want to take from the bill. The focus on people being in vulnerable situations is more appropriate than consideration of when people are inherently vulnerable but, in saying that, we support the bill.

Bill Kidd: I thank the witnesses as their evidence has been extremely interesting. However, it is obvious that evidence has still to be gathered on an aggravation relating to age, and a great deal more thought has to be put into how the current legal process would be affected if we introduced such an aggravation. I would like the bill to be passed as it stands; it can be expanded on at a later time.

The Convener: I thank all the panellists for what has been a worthwhile session. The round-table format has given people the opportunity to develop arguments and think through the propositions before us rather than just give the fixed view that they have already given in written evidence. I hope that the bill will be all the better for your detailed evidence.

The main decision will rest with the Justice Committee, which is the lead committee, but I thank the witnesses for their attendance and for all their contributions, which will make an incredible impact on the final passage of the bill.

We move into private session to discuss the committee’s work programme.

11:12

Meeting continued in private until 12.17.
Offences (Aggravation by Prejudice) (Scotland) Bill: Patrick Harvie moved S3M-3694—That the Parliament agrees to the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

After debate, the motion was agreed to (DT).
Offences
(Aggravation by Prejudice)
(Scotland) Bill: Stage 1

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-3694, in the name of Patrick Harvie, on the Offences (Aggravation by Prejudice) (Scotland) Bill.

15:08

Patrick Harvie (Glasgow) (Green): I am delighted to open the debate. When opening a debate on a member’s bill, it is usual for the member in charge to begin with thanks to the lead committee for its work and for a positive report. I am certainly happy to offer those thanks, but wider thanks are needed in this case, as the bill is the result of a great deal of work over years by many people outside Parliament, some of whom have joined us in the gallery.

I pay tribute to the organisations that contributed to the working group on hate crime and which have campaigned since then to have its key recommendation accepted. I also thank the people who were willing to talk in Parliament and in the media about their experiences of being on the receiving end of hate crime. Their first-hand accounts have helped to build the majority that I hope will enable the bill to progress today.

Thanks are also due to the Scottish Government for agreeing to support the proposal through the handout bill process and to the bill team, which has helped me to reach this stage today. I also thank the 45 members who added their names in support of the proposal to enable it to reach stage 1.

I mentioned the working group on hate crime that was established by the previous Administration, but the issue is older than that. Under the Crime and Disorder Act 1998, the Westminster Parliament required that the aggravation of an offence by racial prejudice should be taken into account in sentencing. That was the first time a statutory basis was given to the use of aggravation as a means of addressing hate crime. After that, Donald Gorrie extended the concept—he was successful in amending the Criminal Justice (Scotland) Bill that was passed during the Parliament’s first session—by using the same mechanism to address religious prejudice. At that time, my colleague Robin Harper made a similar attempt to include prejudice on other grounds, including sexual orientation and disability. Robin Harper’s amendments were not accepted by the Government at that time, but they led to the working group on hate crime.
It is perhaps a little frustrating that it is only now, seven years later, that Parliament will have the opportunity to vote on a proposal to implement the working group’s key recommendation, but there we are—such things sometimes move slowly. There have been delays, but I am hopeful that we will reach agreement tonight that a mechanism that is an important part of Scotland’s response to crimes of prejudice should be extended to additional categories.

What is the evidence of the extent of the problem that the bill seeks to address? I acknowledge that one reason why we need legislation to provide a statutory basis for such aggravations is to build up a clearer set of data—a clearer picture—on the issues, although we know that the problems exist and are significant. In 2008, the charity Scope published a report that found that 47 per cent of disabled people in the UK had either experienced physical abuse or had witnessed physical abuse of a disabled friend.

The report also stated that

“disabled people were four times more likely to be violently assaulted than non-disabled people”

and that

“visually impaired people were four times more likely to be verbally and physically abused than sighted people.”

It also pointed out that

“people with mental health issues were 11 times more likely to be victimised”.

In 2003, a survey of lesbian, gay, bisexual and transgender people in Scotland found that 23 per cent had been physically assaulted because of their sexual orientation or transgender identity. According to a survey by the Scottish transgender alliance, 21 per cent of transgender people have experienced violent or sexual assault that was motivated by prejudice towards them.

We also know—increasingly, Scottish police forces are responding to this with real concern—that many people simply do not report such crimes to the police. Perhaps people fear being outed, do not expect a supportive response or cannot be bothered with the hassle. Perhaps people have simply come to believe that such offences are to be expected and should be accepted as a normal part of their lives.

Such crimes can have a profound impact on people’s quality of life. If we leave aside serious violent offences, experiences of persistent low-level harassment, intimidation, vandalism and threats can be deeply demoralising and can come to reinforce an internalised prejudice that can leave many people believing that they are not worthy of the protection of the law. This Parliament should disagree—I hope that it will do so tonight.

In addition, we should consider the stress and emotional toll that many disabled people and transgender people deal with in engaging day to day with public institutions, which hold a great deal of power over the most intimate aspects of their lives and identities. In association with such experiences, hate crimes represent a level of harm that Parliament should not ignore.

The arguments in favour of the bill are clear. If we compare its provisions with the existing race and religion aggravations, we see a picture of a mechanism that is working effectively. I have not heard a single call—I doubt that any credible voice would do so—for abolition of the existing aggravations on race and religion. That leaves us with the long-standing question: if that is the right mechanism for those types of hate crime, why is it the wrong mechanism for other comparable types of hate crime? There is general agreement that the current aggravations are working and can be effectively used by the courts.

Such aggravations also help to ensure that we can find out the extent of the problem. In that context, I mention Bill Butler’s recent written question, through which he was able to get from the Government information about the number of religious aggravation convictions in each procurator fiscal area. We are not able to find out the number of offences that are aggravated by prejudice because that information is simply not recorded, which is partly why we need to make aggravation by prejudice a statutory aggravation and why there should be a duty on courts to record their reasons for varying, or not varying, particular sentences.

The additional categories of aggravation with which the bill deals have been in place in England and Wales since 2003, and in Northern Ireland since 2004, with the exception of aggravation on the basis of transgender identity, on which I hope very much the other parts of the United Kingdom will catch up with us.

The creation of a new statutory aggravation will help the police and the courts to develop an approach that will encourage offences to be reported and will build confidence among members of the affected communities to increase reporting. It will also ensure that we pass appropriate sentences and that we build up a national picture of the extent of the problems, which will help us to make the most appropriate and most effective sentencing response.

Some people have argued that the flexibility that is inherent in the common law is sufficient to deal with the offences in question. In theory, it allows sentences to be varied, but in practice it is not used nearly enough. It is clear that there is less focus on the offences that we are discussing than there is on those that are defined in legislation.
Moreover, there are things that the common law cannot do. I repeat that if we record the number of such aggravations and build up a national picture, police forces will be able to gather intelligence that they can use to prevent future offences, which is far preferable to merely responding to offences.

An inconsistent approach is adopted to different types of hate crime. Many police forces want to respond coherently and consistently to the various manifestations of hate crime and would prefer the legislation to be consistent.

Some people have argued that the bill will create a hierarchy of victims or of rights, but even those who might once have argued that straight, white, able-bodied men would be left as an unprotected group in law have now come to reflect on their position and to recognise that that was an inappropriate response. Everyone has the right to be protected by the law—that will continue to be the case. However, we know that some sections of society are specifically targeted and made victims of crime. The bill is about adopting the appropriate response, given the motivation of the offender. It is about the motivation of the offender rather than the identity of the victim.

The bill will extend protection to anyone in society against whom an offence is committed because of their actual or presumed sexual orientation, transgender identity or disability. A hierarchy of rights exists in the minds of some people who commit such offences and who believe that their prejudice is justified and that their victims deserve what they get. The bill is about tackling and overturning that hierarchy.

It has been suggested that the new aggravation could be used maliciously, but it can be argued that the potential for misuse of it should not be a bar to legislating. We would not, simply on the basis that some people might be accused of it falsely, refuse to create a criminal offence if we thought that a phenomenon was real and was harmful. It is for the courts to determine whether the aggravation should stand and the sentence should be varied.

The witnesses from the Law Society of Scotland who explored some of the issues said that the existing statutory aggravations on race and religion are effective and useful, and that the introduction of new categories of aggravation would be beneficial. The Association of Chief Police Officers in Scotland told the Justice Committee that it was not aware of any cases of false accusations relating to the aggravation of offences by racial or religious prejudice. It is a question of the appropriate and effective application of the law; any potential for misuse of the new aggravation should not be a bar to our passing the bill. Ultimately, it will be for the courts to make a decision on that.

Some people have argued that the bill raises an issue to do with freedom of speech. The Christian Institute said that the bill “could give gay rights groups a legal mechanism for targeting those who disagree with them. It could undermine free speech and religious liberty”, but it could not give a single example from south of the border of the misuse of such mechanisms leading to inappropriate convictions. I agree that those objections are not serious, which was the conclusion of the committee’s report.

The bill is not a magic wand. It will not, in itself, spell an end to crimes of hatred against many in our society. I hope, however, that the bill will, combined with the other actions that the Government is taking to tackle prejudice in all its forms, help to mark the beginning of the end of the days when people felt that there was nothing they could do and that prejudice and hate crime were simply things that they should expect and accept.

I am happy to move.

That the Parliament agrees to the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

15:20

The Cabinet Secretary for Justice (Kenny MacAskill): I am pleased to reiterate the Scottish Government’s support for Patrick Harvie’s bill. I concur in his thanks and tributes to individuals who have campaigned for the issue to be dealt with and legislated on. I am pleased, too, that the Justice Committee recommended in its stage 1 report that the general principles of the bill be agreed to. It is encouraging that the committee has recognised that it is appropriate to create the statutory aggravations in the bill.

As part of our manifesto commitment to working towards a safer, stronger Scotland, we promised to carry out the recommendation of the working group on hate crime and introduce these aggravations. We were therefore happy to have the opportunity to support Mr Harvie’s bill and to co-operate with him to take it forward, as we are doing today.

People—whichever they are, whatever disability they are afflicted by and whatever sexual orientation they possess—are entitled to the full protection of the law, to be treated with dignity and compassion, and to be fully and properly protected.

We aim to improve the way in which crimes motivated by hatred are dealt with. The aggravations that are created by the bill will protect victims of crime who have been targeted as a result of their sexual orientation, transgender identity or disability—actual or presumed. We need to remember that, as Patrick Harvie said,
that does happen—far too often, frankly. That is why action is needed.

If a crime has been committed and it can be shown that the motivation was hostility and ill will based on the victim’s sexual orientation, transgender identity or disability, the sentence should reflect that. As Patrick Harvie commented, that is already the case for crimes motivated by a victim’s race or religion.

The bill does not create any new offences. Hate crime can include harassment, property damage, violence and, in extreme cases, murder. The aggravations can therefore apply to any crime or offence. The bill is simply a reflection of our belief about the view that we, as a society, should take on the basis of the aggravation added to the offence perpetrated.

Evidence that was presented to the Justice Committee by organisations such as the Equality and Human Rights Commission expressed clear and strong support for the use of statutory aggravations in the case of hate crime. Not only do statutory aggravations help to underline the seriousness with which hate crime is viewed, they help to ensure a consistent approach from law enforcement and criminal justice agencies. The Justice Committee considered that matter in some detail and examined the arguments for and against the creation of statutory aggravations.

Similar aggravations that are already in place for racially and religiously aggravated offences have been shown to serve a number of purposes: they ensure that, throughout Scotland, there are appropriate and consistent reporting and prosecution policies from the various agencies in the criminal justice system; they send a clear message that prejudice and hatred towards social groups as a motive for committing a crime are unacceptable and will not be tolerated; and they allow us to monitor the extent of such crimes in Scotland and tailor our approaches to tackling them.

The bill will ensure that an aggravation must be acknowledged and taken into account at the point of sentence. It will be clear to the offender at the point of sentence how seriously the aggravated nature of an offence is viewed.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): How will the Scottish Government monitor the number of offences that are treated as aggravations under the bill? How will that information be recorded and gathered, and how will the Scottish Government learn from it?

Kenny MacAskill: These matters are dealt with and recorded in a variety of ways. We have the Scottish Court Service and the Crown Office and Procurator Fiscal Service, and we are building on what we already do. As Patrick Harvie said, we already have information on the existing aggravations in relation to race and religion and, quite correctly, we record information when we have a significant social problem such as assaults on emergency workers. The systems exist, and the Government will ensure that such matters are taken into account. The impact on the sentence will be a matter for the discretion of the judge, but the existence of the aggravation will require to be recorded at all stages in the criminal justice system. That will enable Government and practitioners to build up a much more accurate picture of the extent of such crimes in Scotland.

Both the Crown Office and the police, in their evidence to the committee, acknowledged the value of more accurate knowledge and a better understanding of hate crimes, and the value of giving the victims of the crimes more of a voice in the criminal justice system. We believe that this type of crime is substantially underreported in Scotland. That is shameful, but one of the aims of the bill is to tackle the phenomenon. We wish to encourage people who have experienced hate crime to come forward, confident that they will be taken seriously and that the crime that has been committed against them will be dealt with appropriately.

The working group found evidence of some social groups being proportionately more often the victims of harassment and crime. Much of that is motivated by prejudice against those groups. Research that was commissioned by the Disability Rights Commission in 2004 showed that 47 per cent of disabled Scots had experienced hate crime because of their disability. Research that was undertaken by the beyond barriers project in 2002—Patrick Harvie commented on similar projects—showed that 23 per cent of LGBT people in Scotland had been physically assaulted as a result of their sexual orientation or transgender status. The evidence shows clearly that LGBT and disabled people are much more likely to be the victims of crime—and, too often, crime that is motivated by prejudice against them.

The Justice Committee discussed the fact that our courts can, and do, take into account a wide range of factors when sentencing offenders. Why then focus on hate crime? Hate crime has a destructive effect not just on victims but on whole communities. As the working group discovered, hate crime not only causes greater damage to a victim than crimes that are not motivated by hatred but is socially divisive. Hate crime damages communities. It prevents people from engaging fully in their social and working lives. Hate crime demands a priority response because of its particular emotional and psychological impact on the victim and the victim’s community. The damage that hate crime causes cannot be measured solely in terms of physical injury or cost.
Such incidents can damage the fabric of our society and can fragment our communities.

These are hard times for businesses and families, and we need to move forward as a nation. We need a vision of a more successful country—a country that will tackle crimes motivated by hatred or prejudice.

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. We want a Scotland where all are treated with dignity and respect. The Government is committed to tackling inequality and creating strong communities. The bill is part of the work that we and many others are doing to help to create a Scotland in which people can live alongside one another, respecting difference and celebrating diversity.

Patrick Harvie is correct to say that the common law is good and has served us well. However, it will be important to take account of aggravations and try to drive attitudinal change.

I thank the Justice Committee for its report, and I thank the Equal Opportunities Committee for its consideration of the scope of the legislation. I congratulate Patrick Harvie on bringing the bill so far. The Government looks forward to it making continued progress. We will give it our full support.

15:29

Bill Aitken (Glasgow) (Con): I rise to submit the Justice Committee’s report on the Offences (Aggravation by Prejudice) (Scotland) Bill. After following sundry parliamentary procedures, the committee called for evidence and received written submissions from 25 individuals and organisations. Those submissions were, largely, supportive of the proposed legislation, apart from two caveats, to which I shall come later.

The committee took oral evidence from 18 witnesses over a three-week period in January. Those witnesses were from equalities groups and groups that work with those suffering from disability. We also heard from the police, the Crown Office and Procurator Fiscal Service, Scottish Government officials, the Law Society of Scotland and Patrick Harvie, the proposer of the bill. On behalf of the committee, I thank all the witnesses for giving their evidence, which they invariably did in a reasoned, courteous and moderate manner, which greatly assisted the committee in the preparation of the report.

The committee’s view was, of course, that offences—it is usually assaults that we are talking about in this connection—that are perpetrated against individuals because of their actual or presumed sexual orientation or disability are totally unacceptable. Those convicted of such crimes should be left in no doubt that the courts take a more serious view of those crimes, as we expect them to. In fairness, at the moment, there is little evidence to suggest that they do not.

However, as Patrick Harvie said earlier, there was evidence to suggest that offences of the type that the bill is concerned with are sometimes not reported. It is a valid argument that, by legislating, we will ensure that those who are the victims of this type of crime will be encouraged to report the crime to the police.

At the moment, there is no statistical base for estimating the prevalence of this type of offence. That is another justification for legislating. Crimes are simply recorded as a breach of the peace, an assault, a serious assault or whatever and there are no statistics to indicate the number of crimes that are committed in respect of the prejudices to which the bill refers. Of course, there is a general point to be made about unreported crime, but that is perhaps a debate for another day.

It is important to remember that, as the committee’s report stresses, sentencing is a matter that is entirely for the judiciary. Indeed, in paragraphs 76 and 84, the committee agrees that the court should continue to exercise its discretion on whether to impose a greater or, indeed, a different sentence, based on the facts and circumstances of each individual case.

As has been recognised in earlier debates, sentencing is a complex matter and requires not only the severity of the offence and the offender’s record, or lack thereof, to be borne in mind but whether the circumstances of the case merit the matter being dealt with in a different way from what would be usual in such instances.

There was some interesting evidence from the Equality Network, Enable Scotland and the Scottish Association for Mental Health. Their thinking was that community sentences could be tailored to break down the prejudice that was the basis of the offence. Patrick Harvie stated that, in some situations, that would be appropriate and that the legislation would, perhaps, encourage sentencers down that route in appropriate cases. Once again, however, the committee has recognised that it is for the court to decide the sentence in relation to these offences, as, indeed, it is in relation to all offences. However, it encourages the Scottish Government to work within the system to ensure that disposals of that type are available where that is practical or desirable.

The committee examined in some depth the contrary arguments. One of those arguments was freedom of speech. We took the view that, in light
of the fact that, currently, in order to substantiate and prove a crime of breach of the peace, the Crown has to demonstrate that alarm would have been experienced by a reasonable person in the prevalent circumstances, the bill will not prejudice freedom of speech.

I come now to the two caveats that emerged from our consideration. The first comes under the dreaded statute of the law of unintended consequences. At present, the matters that the bill is concerned with are dealt with under common law, and the committee acknowledges the flexibility of the status quo, and the possible problems that the proposed change might cause the police and the Crown.

The other argument against was encapsulated in the evidence of the Scottish Police Federation, which pointed out the danger that the bill might create a “hierarchy of victim”, although it recognised that the provisions are an extension of existing statutory aggravations. Nonetheless, its point cannot be overlooked and the committee was mindful of it. We recognised the principled nature of the concern but, having considered all the evidence, which was generally in favour of the bill, and all the arguments, we agreed on balance to take the view that the bill should proceed.

15:35

Paul Martin (Glasgow Springburn) (Lab): I congratulate Patrick Harvie on the progress that he has made so far on the bill. Members who are progressing a member’s bill, or who have completed that process, appreciate the hard work and commitment that are required to progress a bill through the Parliament.

At decision time, Labour members will support the motion in Patrick Harvie’s name,

“That the Parliament agrees to the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.”

Most of those who gave evidence to the Justice Committee were genuinely supportive of the aims of the bill and were clear on its provisions and what it would achieve. I will highlight some of the issues that were raised in the stage 1 process. The committee recognised that the common-law system allows courts to take account of aggravating factors in determining sentences. However, a number of witnesses told us that the common law cannot send a clear message that such hate crimes are unacceptable in Scotland. The general feeling was that having a statutory aggravation will address the motivation behind such crimes.

On balance, Labour members are content that the statutory aggravations should be created. We need to ensure that we take every possible step to send out a clear message to those who commit crimes of hatred because of an individual’s presumed sexual orientation, transgender identity or disability.

The bill contains no provision for mandatory sentences. Many witnesses made the case that an appropriate response was the way forward and that the judiciary should have discretion in sentencing. Although I accept the right of the judiciary to have discretion in sentencing, I believe that we need to monitor carefully the effectiveness of sentencing policy in dealing with those who commit hate crimes. The Parliament needs to acknowledge the unacceptable fact that some individuals react only to the possibility of a prison sentence. Patrick Harvie has to take that into consideration and he may want to address it in his closing speech.

Although the community sentencing disposals to which Tim Hopkins referred in his evidence can be considered as a serious alternative to prison, I am not convinced that they are always appropriate sentencing options for the perpetrators of the crimes that were described to the committee.

The bill requires that, in recording a conviction that contains an aggravation relating to disability, sexual orientation or transgender identity, the court must do so in a manner that shows that the offence was motivated by prejudice on one of those grounds. The step is to be welcomed, but I would have expected such information to be recorded at present, although we heard evidence about the difficulties of recording such crimes. On a positive note, Superintendent David Stewart told the committee that recording these statutory aggravations will give police forces baseline figures to work from and allow them to target resources. That is a positive step in the right direction.

There can be no doubt that training plays a crucial role in raising awareness of legislation. As we have heard on many occasions in the chamber, it is important for new legislation to be implemented consistently and robustly. In this case, additional resources may be required. I would welcome a commitment from the minister in his closing speech that resources will be provided to the relevant agencies.

There is no point in passing the bill if crimes are not reported, so we must ensure that victims are given respect and proper consideration. In its written submission, the Royal National Institute for Deaf People Scotland 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.”

If people are to be convinced that they should report crimes and that they will be taken seriously, we must ensure that an action plan is in place to deal with such experiences.

I call on the Parliament to support the motion.

15:41

Gavin Brown (Lothians) (Con): The Scottish Conservatives agree with the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill and we will vote for it at decision time. We agree with the Justice Committee’s conclusion 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.

The debate that took up most of the committee’s time at stage 1 of the bill was whether there should be a statutory aggravation or whether we can rely on the common law. A couple of other speakers have already made the point that one of the strengths of the common law in Scotland is its flexibility to adapt to circumstances that arise. To an extent, therefore, it already allows aggravating factors to be taken into account. However, the committee heard persuasive evidence that a statutory aggravation would improve the current position. There are three reasons for that.

First, the common law is not being used in practice. In its evidence to the committee, the Equality Network said:

“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.”—[Official Report, Justice Committee, 13 January 2009; c 1494.]

A similar point was made by Capability Scotland, which said:

“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.”—[Official Report, Justice Committee, 13 January 2009; c 1499.]

The common law exists, but it is clear from the evidence that was presented that it is not being used in practice to deal with the issue.

The second reason why a statutory aggravation is helpful and required is that it will send out a clear message and direction to society at large, and particularly to those people to whom it needs to be sent out. The Association of Chief Police Officers in Scotland stated 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.”

The third reason, which is not an argument in itself but is helpful, is that the bill will create consistency with the remainder of the United Kingdom. It will bring into play laws that are similar to ones that are already in place in England and Wales and Northern Ireland. On that point, ACPOS stated:

“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.”

There are clear benefits in having the statutory aggravation, and I can see why the Justice Committee reached its conclusion.

As members have already pointed out, the bill has a number of other benefits, particularly with regard to the reporting of crimes. As statistics that have already been highlighted demonstrate, there is a general perception that this type of crime is underreported. I believe that all types of crime are underreported, but I think that a specific case can be made in this respect.

It is bad news for any crime to go underreported, so I hope that the bill will encourage victims to come forward. After all, that is their only hope of achieving justice. I add in passing that I hope that victims of this type of crime do not feel that they have to wait until stage 3 or the bill’s enactment to come forward. Even though the bill’s provisions are not yet in force, I hope that even this stage 1 debate will encourage people to do so.

Another very serious issue is the recording of crime, and sections 1(5) and 2(5) make the recording of the aggravation a statutory duty. The fact is that we need accurate recording from the initial reporting of the offence through prosecution and conviction to sentencing. As Bill Aitken made clear, these crimes are reported simply as breaches of the peace or assaults, without any reference to the hate element of the crime. After all, we can deal with a problem effectively only when we know its full extent.

Of course, certain areas require further consideration. Bill Aitken, for example, talked about the possibility of creating a hierarchy of victims and mentioned the law of unintended consequences. No doubt the committee will examine those points in more detail.

It could also be argued that we need a more realistic financial memorandum. The Scottish Prison Service and the Scottish Police Federation, for example, expressed concern about the current memorandum’s statement that...
"The effect may be a slight upward pressure on the prison population."

We need to hear more from ministers on that point.

That said, we agree with the Justice Committee’s conclusions and will vote for the bill’s general principles at decision time.

15:47

Robert Brown (Glasgow) (LD): The Liberal Democrats support the bill’s general principles. After all, its aim was a Liberal Democrat manifesto commitment for this session of Parliament, and we are pleased that it has been taken forward. In that respect, we thank Patrick Harvie for preparing and progressing the bill, which, as others have mentioned, must have put a considerable burden on him.

Although the bill is modest—it has only three sections—it will help to improve and standardise the reporting of crimes aggravated by prejudice against disabled people and the LGBT community; to focus the attention of the police, the prosecuting authorities and the courts on the issue and possible solutions to it; and, in consequence, to improve rates of reporting and people’s confidence in the criminal justice system. Like Gavin Brown, I hope that more people will come forward to report such crimes.

It might be an obvious starting point, but the Universal Declaration of Human Rights and various other international treaties oblige signatory states, including the UK, to treat everyone with equal dignity and respect and to ensure that they can enjoy their human rights free from discrimination, including on the basis of disability, sexual orientation or gender identity. It is clear, however, that some people in our society have fewer human rights than they should have. The Cabinet Secretary for Justice illustrated very well the general divisive effects of hate crimes on society, while Patrick Harvie highlighted the various surveys that have been carried out and detailed the abuse, threats and physical assault that disabled and LGBT people have experienced. The fact that the level of such crimes is well above the level for the general population is one of the rationales behind the bill. People with mental health or learning support issues are particularly and peculiarly vulnerable in this respect.

As the Law Society of Scotland has pointed out, the courts may currently take account of aggravating circumstances in a flexible way, as indeed can the Crown Office and Procurator Fiscal Service in determining the charge and forum for prosecution. There is no particular evidence one way or the other that, when faced with a homophobic or disablist crime, the courts do not treat that element as aggravation, but there is no satisfactory recording at present. That is an important background consideration to the bill.

Important information as to the frequency and outcomes of such prosecutions is difficult to pin down, and it is unclear whether the police or prosecutors in individual cases always bring out the aggravating features clearly. The obligations that the bill will place on those people will assist in that regard. As Andrew McIntyre from the Crown Office and Procurator Fiscal Service told the committee,

"the impact of the aggravating factor on the court’s handling of the case, particularly on sentencing, will be clear."


He also pointed out that the bill will provide a much clearer framework in which to operate and more clarity on what is expected from the police and the prosecution.

It is important to realise that the bill sits on top of existing crimes: it creates no new crimes and prescribes no new penalties. The aggravation— unlike the principal offence but like present common law aggravations—will not require corroboration, although sufficient credible evidence will be required to satisfy the court as to the truth of an allegation. The committee recognised that, as with any crime, false allegations might arise, but argued that it will be up to prosecutors and courts to determine their legitimacy. That was the balanced conclusion that we arrived at.

It is important to be clear about the effect of a proven aggravation. There has been discussion both today and in the committee about the fact that, with serious crimes, the aggravation might well add to the length of a prison sentence but, as many witnesses and Patrick Harvie said, for more minor offences the appropriate response might be a community sentence that could impact on the reasons for the offender’s ill will towards someone from one of the specified groups. Either way, the bill sends a firm message and is part of the wider range of measures that are needed to undermine and eliminate homophobic crime or crime against disabled people.

As several members have said, rather than take action after crimes are committed, we would prefer to avoid such crimes and the culture that supports them in the first place. Norman Dunning of Enable Scotland told the committee that one of the best ways to tackle the bullying of young people with learning disabilities is to let the offender see them as real people and hear what their lives are like and to start breaking down the barriers and prejudice.
Charlie McMillan of the Scottish Association for Mental Health talked about the relationships between discrimination, prejudice, anger and hatred, and about change. We all know from meeting people who are in institutions or who face the criminal justice system just how much anger and hatred there is. That is one of the difficulties and challenges with which we must deal, and our ability to effect change is central.

Tim Hopkins of the Equality Network, who as always gave impressive evidence, talked about addressing the underlying prejudice that causes people to commit such crimes. We already know about those issues from considering the race and sectarian legislation and programmes. The insights that have come from the operation of that legislation in Scotland and throughout the United Kingdom will help in understanding the best ways to tackle some of the challenges.

I began by saying that the bill is modest but, for all that, it is important. It is part of the progress towards a more enlightened, liberal and tolerant society in which everyone is regarded as an individual with his or her rights and talents and as someone who enhances and enriches our world. I hope that the day will come when specific legislation such as that proposed in the bill is redundant. Sadly, that day is not yet with us, so accordingly the Liberal Democrats support the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

15:53

Linda Fabiani (Central Scotland) (SNP): It is good to hear so much consensus, but we have that because the issue is straightforward. It was correct that offences that are motivated by racial prejudice were recognised in the Crime and Disorder Act 1998; it was correct that, in 2003, the Parliament agreed to introduce a statutory aggravation for crimes that are motivated by religious prejudice; it was correct for the Parliament, at the same time, to consider Robin Harper’s amendment that related to disability, sexual orientation, gender and age; and it is absolutely correct for the Parliament to agree to the principles of the Offences (Aggravation by Prejudice) (Scotland) Bill.

I commend Patrick Harvie for his work on the subject and the Cabinet Secretary for Justice and the Government for their commitment and the assistance that they have given. Just as no one in Scotland should be targeted or victimised because of their race or religion, no one in Scotland should be targeted because of their sexual orientation, transgender identity or disability. The proposals will mean that the divisive and scarring crimes that we are talking about are taken more seriously by the justice system and by society more generally. That is a very positive message to send out, and it should lead to more effective deterrence. It will also bring us into line with the rest of the UK, which dealt with the matter in 2003.

As has been said already, the bill does not propose any new offence; instead a new statutory aggravation will be applied to any crime of motivation by “malice and ill-will” on the ground of the victim’s actual or presumed disability, sexual orientation or transgender identity, in parallel with existing statutory aggravations of motivation by “malice and ill-will” on the ground of the victim’s actual or presumed race or religion. The perpetrator will be guilty of an aggravated offence and the court will have to take that into account when deciding a sentence.

It is important to remember that the aggravation is based on the motivation of the accused, not the identity of the victim. That will send out a strong message and introduce greater consistency. Like others, I hope that it will encourage more victims of such crime to report offences because of the clear message that society recognises the abhorrence of the motivation behind them. It will ensure the recording of the levels of such crimes, which is crucial for any nation that believes in parity of esteem and respect for all whose actions do not harm others.

Figures provided by Inclusion Scotland show that people with disability are four times more likely to be violently assaulted than people without disability and almost twice as likely to be burgled. The organisation states that visually impaired people are four times more likely to be verbally and physically abused than sighted people. People with mental health issues are 11 times more likely to be victimised and 90 per cent of adults with a learning difficulty report being bullied.

Some people are sceptical of such figures but, whether or not there is doubt about them, one instance of abuse is too many and once is enough for a message to be sent out. The motive of such crimes can be to take advantage of a victim’s vulnerability or their being a bit different. If it is about easy targeting and perceiving people as weak, it is about preying on the vulnerable, which is just not acceptable.

Some people think that introducing legislation is unnecessary and that society should consider other ways of dealing with the problem, such as taking action at the other end. The two options are not mutually exclusive, and work goes on at both ends across society. I commend cultural and arts organisations for the action that they take, such as Lung Ha’s Theatre Company in Edinburgh, which has long worked with adults with learning difficulties. Many members have attended their plays, which have portrayed the difficulties of living with learning difficulties and shown how people...
are bullied, both institutionally and by society in general. More great work is done by Theatre Nemo in East Kilbride, which deals with mental health issues in the health service and justice system. The work that we do is two-pronged, and we have to look at the issues from both sides.

The National AIDS Trust wrote to us all. It has a particular interest in section 1(8) of the bill about the definition of disability, which includes any “condition which has (or may have) a substantial or long-term effect”, such as HIV/AIDS. Stigma and discrimination are a distressing and dangerous reality for many people who live with HIV. One in three people with HIV has experienced discrimination linked to their HIV positive status. Again, it is very important that we take measures to show everyone that that is not acceptable.

The bill has a journey to make through stages 2 and 3, and changes may come its way, but in general I am content that it moves us in the right direction. The ultimate aim of us all is to get to the point where people are accepted with no prejudice and no law is needed to enforce that principle. We are not there yet, so I support absolutely the bill.

15:59

**Bill Butler** *(Glasgow Anniesland) (Lab):* I support the motion in the name of our colleague Patrick Harvie on the Offences (Aggravation by Prejudice) (Scotland) Bill, and I congratulate the member on the progress that he has made thus far.

As deputy convener of the Justice Committee, I put on record my thanks to the committee clerking team and the Scottish Parliament information centre for their exemplary support. I also thank the witnesses who gave evidence to the committee.

As colleagues will be aware, the aim of the 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, gender identity or disability. Members will also be aware that similar statutory aggravations already exist to protect individuals and groups who are targeted on racial or religious grounds.

Those of us who served in previous sessions of the Parliament will recall that a former colleague, Donald Gorrie, moved an amendment to the Criminal Justice (Scotland) Bill in 2002 to make provision for the statutory aggravation of an offence as a result of religious prejudice. Mr Gorrie’s amendment was agreed to and became section 74 of the Criminal Justice (Scotland) Act 2003, which was a good reform. Although Robin Harper’s amendment to that bill was not accepted by the then Minister for Justice, Jim Wallace, an amendment similar to the objective of the bill under discussion today led to the setting up of the working group on hate crime in June 2003, whose first recommendation of 14 was the general thrust of Mr Harvie’s bill. I am genuinely pleased that we have arrived at a point where all the Justice Committee members agree in principle to the policy intention of the bill. I suspect that Parliament will agree at 5 o’clock.

The cabinet secretary was correct when he said in response to a parliamentary question from Mr Harvie some time ago:

“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.”— [Official Report, Written Answers, 15 January 2008; S3W-8323.]

Scottish Labour whole-heartedly supports that vision of a tolerant, inclusive, equal Scotland.

In the time remaining, I will touch on two or three specific issues that arise from the bill. First, I will outline some of the benefits that the bill, if enacted, will offer all the groups prescribed it. It will mean that the hate crime laws that offer protection to ethnic minorities and religious groups are extended to the LGBT community and to those who are disabled. It will mean that an approach that has proved successful in tackling racist and sectarian hate crime is naturally extended.

That way of dealing with such offences has not only proved useful in individual cases but focused police attention on the problem. There is no reason to think that that way of proceeding will be any less successful in supporting and protecting the LGBT community and the disabled. Such an increased focus will mean that appropriate recording of such offences will be undertaken, which we hope will lead to a greater level of confidence in the criminal justice system among those sections of society.

As the committee’s report concludes at paragraph 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.”

That is why I believe that the committee was correct when it welcomed

“...the provisions in the Bill that will ensure the accurate recording of aggravat ed offences from the initial reporting of an offence through to prosecution, conviction and eventual sentence.”

I know that the Parliament is not under this misapprehension, but no one out there should be under any misapprehension: the problem is
significant. As the Scottish Association for Mental Health stated in its briefing:

“A survey in 2004 found that 47% of disabled people had experienced hate crime because of their disability, with 31% of those reporting that they suffered verbal abuse, intimidation or physical attacks at least once a month.”

If one of the effects of the bill is to focus police attention on the problem, that will be a welcome advance.

A related matter raised by the Law Society of Scotland in its letter to members of 17 March points to a possible gap in respect of one aspect of the bill: the ability to ensure that “the outcome of the legislation is monitored.”

Mr Alan McCreadie, deputy director of law reform for the society, suggests that to improve the legislation’s effectiveness monitoring must be improved and that one way to do that is to “assign crime codes to aggravations. Currently, only offences themselves are given crime codes.”

It is argued that, if such a procedure were put in place, monitoring the use of aggravations and the rate of successful prosecutions would be easier. I do not know whether a stage 2 amendment would be required to achieve that, but I intend to pursue the suggestion in whatever way is appropriate.

The Law Society’s second concern—the need to ensure that the diversity training that is offered to police officers and police staff is up to date—is a related matter that might require further exploration.

The Justice Committee felt—rightly—that, on balance, 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. The Scottish Labour Party agrees with the committee’s conclusion and will support the bill at 5 o’clock. The bill is a focused reform that will help the Parliament’s drive to create a modern, inclusive and tolerant Scotland—a Scotland of equals.

16:06

Hugh O’Donnell (Central Scotland) (LD): I am happy to make a small contribution to the stage 1 debate on the bill. It would be remiss of me not to mention the role of the former member Donald Gorrie in a previous session of Parliament, particularly as he was my employer at the time.

The bill lays down yet another marker that discrimination is unacceptable in this country of ours, although—like other members—I fully recognise that we have a long way to go before we can confidently say that Scotland is free from discrimination.

My small role in the bill’s progress at stage 1 involved my membership of the Equal Opportunities Committee. I thank the members of the public and of organisations who gave the committee oral and written evidence as part of our consideration of the bill. My comments are personal views and not those of the committee.

Patrick Harvie must be congratulated on keeping the issue on the agenda and moving forward, notwithstanding the failure of Robin Harper’s original proposals. I hope that, with the Parliament’s support, the bill will continue to progress through the various stages.

Much of the Equal Opportunities Committee’s debate in its evidence sessions hinged on the range of perspectives about what the bill should and should not include. We discussed at length whether it should be adjusted to include a gender aggravation—given the scale of violence against women, that was a legitimate and valuable use of the committee’s time.

It was clear from the evidence that opinions were mixed, even among organisations that represent women who are victims of violence. Women’s groups told us that they had changed their collective position that a gender aggravation would develop the legislative framework for tackling domestic abuse. They opposed such a provision because it might not be appropriate given the complexities of the motivations behind domestic violence.

We also learned in taking evidence that the Equality and Human Rights Commission would shortly—it might now have begun to do so—gather research on criminal justice reactions to gender-based crime and violence, primarily against women. Evidence shows that the specific domestic abuse legislation that is in place throughout Europe and the wider world has been reasonably successful in highlighting what some argue—legitimately—is an aspect of discrimination. I would like to hear whether the Government has any plans in that area.

The other broad area on which the Equal Opportunities Committee took evidence was age. Once again, the committee was faced with diverse perspectives. On balance, we believed that the weight of evidence was not sufficient to support the inclusion of age in the framework of Patrick Harvie’s bill.

In concluding my brief contribution, I again thank and congratulate Patrick Harvie. As Robert Brown said, the Liberal Democrats will support the bill at stage 1. I look forward to some of the issues that have been raised during today’s debate being addressed more fully at stage 2 and give a personal commitment to support the bill today.
Anne McLaughlin (Glasgow) (SNP): I congratulate Patrick Harvie on introducing the bill, which provides us with the opportunity to give vulnerable groups in Scotland the same protection and safeguards that they enjoy in our neighbouring countries of Northern Ireland, Wales and England. More important, as Robert Brown mentioned, the bill will bring us into line with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which prohibit discrimination against people on the basis of disability, sexual orientation and gender identity.

I wish Patrick Harvie a happy birthday. As a Sunday newspaper has already nicknamed me Mystic McLaughlin, I thought that I would look at what the true owner of that trademark had to say about the member's fortunes today. Mystic Meg's words of wisdom for Patrick are as follows:

"The Moon focuses on your community chart, helping you bring out the best in people."

So far, so good. However, she slips up when she tells the member to

"Be tactful when your ideas are smarter than the boss's."

That is where it all falls apart—as we know, there are no bosses in the Green party, only co-bosses.

I doubt that many of us would argue with the first part of what Mystic Meg had to say. I am delighted by the consensual nature of today's debate, which is bringing out the best in members. That is not before time, as the issue should have been resolved by the previous Administration when Robin Harper moved an amendment to the Criminal Justice (Scotland) Bill six years ago.

As we have heard, the purpose of the bill is to protect the rights of people who are targeted because of their sexual orientation—or presumed sexual orientation—transgender status or physical or mental disability, or because they are living with certain medical conditions, such as HIV or cancer. If, in 2009, someone is afraid of being who they are simply because part of being them means being homosexual, they are not being afforded equal treatment in our country. For someone to grow up knowing that they have been born in the wrong body must cause more soul searching and stress than most of us can imagine. If they then have the courage to go through gender reassignment, they deserve our admiration and support, not our scorn.

The bill is not about harmless banter. We all know the difference between banter and abuse, and it is up to us to give clear guidance to those who do not. The bill will do that. It is not about harmless banter but about physical attacks and real emotional abuse. We all know the saying, "Sticks and stones may break my bones but names will never harm me." As a child, I always thought that that was nonsense, because it is. If name calling is aggressive and abusive and targets the core of someone's identity, the effects can be dramatic—no more so than for the group on which I wish to focus.

Being a victim of crime is an horrific experience for anyone, but the consequences for someone who suffers from a mental health problem are potentially extremely damaging. The Disability Rights Commission and Capability Scotland published a report on hate crimes against people because of disability. I hope that all members were as horrified as I was to read that 47 per cent of the people who were questioned believed that they had experienced a crime because of their disability. The people participating in the research were broken down by type of disability. One of the most commonly abused and attacked groups was people with mental health problems. SAMH reports that if people are targeted because of a mental health problem, it results in the victims experiencing further isolation, greater stigmatisation and yet more alienation, which often worsens their condition. I applaud the work of mental health organisations such as SAMH, and the see me campaign in particular.

I do not need an organisation to tell me about the damage that we as a society do to people struggling to manage a mental health problem, however. I have first-hand experience from a number of angles and this is a subject that is extremely important to me. I am sure that, at some stage in my parliamentary life, I will share some of those experiences with members. I will not do that today, but I can tell the Parliament that I will work tirelessly, for as long as it takes, to tackle our attitudes towards all the groups that are mentioned in the bill. That starts with educating our children, many of whom will inevitably fit into one or more of those groups at some point in their lives. I hope that we can consider that in more detail in the near future.

The bill will not only offer protection to individuals, but create a better and fairer society. That, after all, is why we are all here. There are currently no robust statistics around the type of crime that the bill is concerned with but, as we have heard, the research that is being carried out by disability and LGBT organisations clearly demonstrates a problem that needs to be tackled.
As Patrick Harvie said, the bill is not a magic wand, but it sets a standard. It gives us a basis on which to build. It sends a clear message to the perpetrators of these crimes that verbal and physical attacks on people because of their disability, sexual orientation or transgender status will no longer be tolerated. More important, it sends that very same message to the victims.

The bill is a good start—a late one, but a good start nonetheless—as long as we remember that there is more to be done. I look forward to working with all my colleagues in this consensual chamber and with the organisations that have contributed so much to the bill to ensure that it gets through.

16:17

Marilyn Glen (North East Scotland) (Lab): I am pleased to speak in support of the general principles of the Offences (Aggravation by Prejudice) (Scotland) Bill at stage 1. I hope that the bill will signal that Scottish society takes seriously and condemns incidents motivated by malice and prejudice, and that it will help to put an end to fear of attacks among the minority groups that it covers. The bill at last brings Scotland into line with the rest of the UK, and it begins to meet the requirements of article 7 of the Universal Declaration of Human Rights, on equality before the law.

The bill is short, and it largely mirrors the existing race and religion aggravation provisions. Groups such as the Equality Network recognise and applaud the definitions of disability, sexual orientation and transgender identity as having been well and inclusively drafted. As we have heard, the new statutory aggravations in the bill will be applied to existing offences, which will encourage consistency and transparency. The bill will focus the attention of the police on the problem, and they will ensure proper recording and monitoring. I welcome the changes to the systems that will allow that.

Hate crime can have a major impact on its victims’ lives. It can force people to change their habits and even to move their homes. The number of disabled people who have suffered verbal abuse, intimidation and physical attacks is truly shocking. We should be ashamed of the statistics that have been quoted in the briefings that were supplied to us by Amnesty International, Inclusion Scotland and SAMH, the mental health charity. A disproportionate number of disabled people are assaulted, abused, bullied and victimised. That is unacceptable for all victims. For people with mental health problems, the resulting loss of confidence and alienation can seriously exacerbate their condition.

There is a need to build the confidence of both disabled and LGBT people in order to address the problem of underreporting. I await comment from the minister on how that will be developed.

The bill will implement recommendation 1 of the previous Executive’s hate crime working group. I welcome the extension of the existing hate crime provisions, and I look forward to the cabinet secretary and the minister presenting proposals to implement the working group’s remaining 13 recommendations. The bill implements only the first of three recommendations for legislation; a further seven recommendations were for the criminal justice agencies and a further four related to other areas.

As Hugh O’Donnell, who is a fellow member of the Equal Opportunities Committee, said, the committee took evidence on the bill and concluded that this is not the time to extend the protection in the bill to cover age or gender. However, in its report to the Justice Committee the committee recommended that the bill be amended 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 went on to say:

“there should be an element of parliamentary scrutiny and … 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.”

Engender, Scottish Women’s Aid and Rape Crisis Scotland all agreed that such an approach would be useful and would allow a discussion on the most workable options.

I accept that there are difficulties with the approach, but I draw members’ attention to other recommendations of the working group on hate crime and to the evidence that the Equal Opportunities Committee received. The reasons that have been given for not wanting an amendment on gender seem to stem from a profound distrust of the legal system and the system’s inherent sexism, and from a realisation that the problem of men’s violence towards women is so vast that such an amendment might add complexity rather than help.

In evidence, the witness from Engender said:

“The gender duty itself offers the opportunity to demand good-quality gender-disaggregated data across the board on conviction rates and on reporting at all levels. The gender duty can be a powerful instrument because many of the problems that we face are about institutional sexism in the criminal justice system and at societal level.”—[Official Report, Equal Opportunities Committee, 4 November 2008; c 697.]
We should act to improve the situation as soon as possible, instead of waiting for challenges to be made under the gender duty.

There is a call for a root-and-branch review of our systems. The Equal Opportunities Committee urged the Justice Committee to consider:

“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 EHR-commissioned research and any other relevant research on gender-based crime.”

In time, I would welcome a considered response from the minister on those issues. For now, I am pleased to support the bill at stage 1, with the caveat that this is just a start and a great deal remains to be done.

16:23

Mike Pringle (Edinburgh South) (LD): The bill is perhaps the shortest that I have seen since I was elected in 2003, but it is important and I congratulate Patrick Harvie on introducing it and the Scottish Government on accepting it. As Paul Martin and Robert Brown said, any member who has introduced a member’s bill knows how much work and effort are required to do so.

The process was started in 2003 by the then Minister for Justice, Jim Wallace, who established a working group on hate crime, to consider the most appropriate measures to combat crime that is based on hatred of particular social groups. I was pleased that Patrick Harvie gave the working group the credit that it deserved. The group, which reported in 2004, defined hate crime as:

“Crime motivated by malice or ill-will towards a social group.”

It went on to say:

“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.”

Individuals who have a mental health problem or a disability, or who are gay or transsexual, are significantly more likely to face abuse, threats or violence simply because of who they are. That is completely unacceptable in today’s Scotland, as Bill Aitken and other members said.

I think that I am the only MSP who is registered disabled, but I confess that I have never been targeted or victimised because of my disability—at least, not recently. At school, many of my fellow pupils called me “peg leg” but I did not worry too much about it then. On the other hand, many disabled people are often discriminated against. Linda Fabiani expressed well in her speech how varied disabilities can be and Marlyn Glen told us vividly how often such discrimination happens.

Scotland is currently alone in the UK in not having legislation on sexual orientation hate crime so the bill, which addresses hate crimes relating to sexual orientation and disability, is of the utmost importance. However, it is important that the Parliament focuses not only on legislating, but on working to create a cultural shift towards a more tolerant and accepting society. We must tackle the root causes of people’s motivation for committing hate crimes. Issues such as drug and alcohol addiction, mental health problems and poor education must be addressed to prevent people from committing such crimes in the first place.

In 2008, “Homophobic hate crime: The Gay British Crime Survey” found that one lesbian or gay person in five in Britain had been the victim of at least one homophobic hate crime or incident in the previous three years. One in eight had been a victim in the previous year. Those incidents ranged from regular insults on the street to serious physical and sexual assaults.

As Robert Brown and Gavin Brown said, few of those who experienced hate crimes or incidents report them to the police, which is sad. I encourage anybody who is discriminated against in any way to report it to the appropriate authorities. I agree with Gavin Brown that they should not wait until stage 3 of the bill. If somebody is discriminated against, they should report it now.

A third of victims do not report incidents to the police because they do not think that the police could or would do anything about them. Therefore, I am pleased that ACPOS—among many other organisations—has agreed with the need for legislation and welcomed the bill. After all, the police will be at the forefront of enforcing it when it becomes law, as I am sure it will.

The bill seeks to ensure that, when 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. As the minister said, that is only right. The policy memorandum points out that conviction of an aggravated offence may lead to a longer custodial sentence, higher fine or different type of disposal than might have been the case if the offence had not been aggravated. However, the bill will create no new criminal offence.
It is already possible under the common law for Scottish courts to take an offender’s motivation into account when determining what sentence will be imposed, along with other factors that the court or jury might feel are relevant in particular cases. However, the proposed statutory aggravations would ensure that the courts must consider evidence that the offender was motivated by hatred towards the groups that are included in the bill and sentence offenders accordingly. As Paul Martin and Gavin Brown said, it is only right that the judges be able to weigh up the seriousness of the aggravation when considering their sentences, but I agree with Paul Martin that that aspect of the bill must be kept under review and considered at a later date.

I congratulate the Justice Committee on providing a good and comprehensive stage 1 report and congratulate the committee clerks who did a thorough job on it.

The Liberal Democrats will support the bill.

16:29

David McLetchie (Edinburgh Pentlands) (Con): Like other members, I congratulate Patrick Harvie on bringing the bill to the stage 1 debate after a long campaign by him and others in support of its principles.

We have heard a number of thoughtful contributions to the debate. If Anne McLaughlin’s was her maiden speech, it was good and I look forward to further speeches from her in future.

The concept of creating statutory aggravations for offences committed out of prejudice towards a specific group in our society is not new. As others have pointed out, we already have legislation for crimes motivated by racial hatred in the Crime and Disorder Act 1998, which was passed at Westminster. More recently, in section 74 of the Criminal Justice (Scotland) Act 2003, this Parliament created an aggravated offence for crimes motivated by religious prejudice.

At the time, I did not vote for the provision on offences aggravated by religious prejudice and I still have considerable reservations about the way in which the matter is policed. That is not because I object to having an aggravation for offences arising from motivations of religious prejudice but because, in the specific context of section 74 of the 2003 act, it was said that the purpose of the new law was to deal with sectarian behaviour in Scotland. It manifestly does not do that. On one side of Scotland’s sectarian divide, the aggravation clearly applies to malice that is directed towards people of the Roman Catholic faith; however, the contrary sectarian behaviour in Scotland is, in practice, primarily expressed through the glorification of Irish nationalism, republicanism and terrorism against the British state. In itself, such glorification has no religious connotations—nationalist and republican movements in Ireland have historically been of a secular nature—so such conduct cannot fall within section 74 even though it is plainly sectarian in nature. The result, certainly at football matches, is that the police have taken so-called anti-sectarian initiatives that have caused considerable resentment because the emphasis is on one set of supporters. The temptation is to make a point by policing the statutory aggravation rather than the primary offence. Perhaps it is time for a review of the operation of that statutory aggravation and of how it fits in with other aggravations, including those that are proposed in the bill.

One of the most striking features of hate-motivated crime is its ability not only to affect and scar emotionally the individual who is the victim of that crime but to create a whole community of victims. Evidence was presented to the Justice Committee that victims of hate crimes can suffer additional psychological trauma in coming to terms with the offence that has been committed against them. Furthermore, an attack on one person or organisation that is born out of prejudice or hatred is, in essence, an attack on all the people who are members of that group. A climate of fear can be created in members of a community because an aspect of their identity that they cannot change—or certainly would not wish to change—is hated by another person.

Courts in Scotland can and do take account of a wide range of factors—which can be mitigating or aggravating—when deciding on a sentence. By including the aggravations that are specified in the bill in the statute book, the motivation behind such crimes can be addressed. As Gavin Brown said, we welcome the provisions in the bill that will enhance and ensure accurate recording of aggravated offences and enable us to track trends. It was pleasing to hear the Cabinet Secretary for Justice acknowledge that point in his speech. Until now, the monitoring of such offences appears not to have been as robust as it might have been. If we know and have that information, we will be in a better position to tackle such types of crime in the future through a variety of policing, community-engagement and educational strategies. We also welcome the fact that the bill will not impose any mandatory sentence on proof of aggravation. In that respect, the independence of our judiciary is paramount. Judges are best placed to make an informed decision in each case in deciding on the appropriate sentencing option that is available to them.

As many have said, hate crime legislation sends out a signal to society that criminal conduct rooted in intolerant views and values will not be tolerated, but—as Patrick Harvie rightly point out in his
opening speech—legislation alone will not drive social change. It would be wrong to adopt such a self-satisfied and complacent approach. Passing the bill is the start, not the finish, of a process. Some people hate their fellow man for reasons known only to them. In itself, such hatred is not criminal, nor should it be. We cannot police thoughts nor should we limit freedom of expression, but we can target and highlight criminal conduct that is motivated by such hatred. The creation of a new statutory aggravation to give specific recognition to victims who are targeted as a result of hatred of their actual or presumed disability or transgender or sexual orientation is now appropriate, given the statutory aggravations that are already in place for other groups and to bring our law into line with that of England, Wales and Northern Ireland.

As Martin Luther King said:

“It may be true that the law cannot change the heart, but it can restrain the heartless.”

We cannot outlaw hatred, but we can outlaw the harm that is caused by hatred. That is why we should support the bill.

16:35

Richard Baker (North East Scotland) (Lab): I congratulate the Justice Committee on its scrutiny of the Offences (Aggravation by Prejudice) (Scotland) Bill, and I congratulate Patrick Harvie on bringing it to the Parliament. We very much support it.

This has been a good and consensual debate, in which members have reflected on the fact that the journey to this point has not been short. It was in 2003 that Robin Harper lodged an amendment to the Criminal Justice (Scotland) Bill that would have addressed the forms of prejudice that we are discussing. Since then, the working party on hate crime, which was established in the previous parliamentary session, has produced its deliberations. Marlyn Glen mentioned its wider work. In addition, the Sentencing Commission for Scotland has done work on the issue, and provisions have been introduced in England and Wales on offences that are motivated by the victim’s sexual orientation. I congratulate Patrick Harvie on ensuring that the bill has come this far, which has given us the opportunity to debate and pass it.

In the light of the Justice Committee’s scrutiny of the bill and the extensive consideration of the issues that has taken place within and without Parliament, I believe that a clear case has been made for the bill. The evidence that the committee received was compelling.

As Patrick Harvie and the cabinet secretary said, the 2002 beyond barriers survey of almost 1,000 LGBT people from across Scotland found that 23 per cent of them had been subjected to a physical assault and 68 per cent of them to verbal abuse, just because they were LGBT. Mike Pringle mentioned the worrying evidence of “The Gay British Crime Survey 2008”. Worse still, in 2006-07 eight homicides in Scotland were recorded as having a homophobic motivation. That truly shocking statistic appears in the Scottish Government’s criminal justice statistics.

However, it has rightly been pointed out that the bill is not simply about doing all that we can do to ensure that the LGBT community can live free from fear of intimidation and victimisation. It is also about doing more to tackle crimes against people who have disabilities. A survey that was conducted in 2004 by the Disability Rights Commission and Capability Scotland found that some 47 per cent of disabled people in Scotland had experienced hate crime as a result of their disability, with 31 per cent of respondents reporting that they had suffered verbal abuse, intimidation or physical attacks at least once a month.

The problem is clear and the scale of it could not be clearer, so it is vital and absolutely right that Parliament does everything that it can to tackle it. We need to increase confidence in the criminal justice system that deals with hate crime. Too many lesbian and gay people believe strongly that the police cannot and will not take homophobic hate crimes seriously. We must change that, and I believe that the bill will help.

We must improve local responses to hate crime. Ultimately, we must increase the proportion of people who commit hate crimes who are brought to justice. Robert Brown spoke well on how the bill will ensure that such crimes are dealt with most effectively in the courts. We in Scottish Labour are keen that even more action is taken to support the victims of crime. We want to increase the proportion of victims or witnesses of hate crime who come forward to report what they have suffered or what they have seen.

We must confront the fact that we are not doing enough for the victims of such offences. We know that three out of four LGBT people who have experienced hate crimes or incidents did not report them to the police and that some seven out of 10 people to report crimes. It is likely that in the first couple of years after the bill 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.”—[Official Report, Justice Committee, 13 January 2009, c 1489.]
Paul Martin covered the recording of such crimes, which is another vital issue.

SAMH identified the fact that people who have mental health problems can face hate crimes of a prolonged nature and that they are often targeted as a result of fear and ignorance. It can, of course, be even more difficult for people who have mental health problems to have the confidence to face such crimes and to report them.

In Labour, we are proud of our record in standing up for the rights of people with disabilities—for example, through Jackie Baillie’s bill on parking—and the rights of members of the LGBT community. However, on whether it is right to pick out certain groups in that way, and whether we are in danger of creating a hierarchy of victims—Bill Aitken referred to evidence to the Justice Committee on that—the case was well made by Stonewall Scotland that what is sought here is not special treatment, but fair treatment. The aggravation is based on the motivation of the accused, not on the identity of the victim. It is also about the accused’s perception of the victim. Non-disabled and non-LGBT people can be victims of hate crimes. Stonewall Scotland has provided examples of that.

The bill is not simply about the rights of disabled and LGBT people; it is about the right of all of us to live in a society that does its utmost to tackle hate crimes and to ensure that they are reported and appropriately dealt with in our justice system. It is our responsibility to ensure that we have the right approach, and that we effectively tackle crimes that are targeted at people who are either among the most vulnerable in our community or perceived to be so. That is why Labour welcomes the bill and will vote for it at decision time.

16:41
The Minister for Community Safety (Fergus Ewing): I add my praise for Patrick Harvie’s persistence in what we learned was a seven-year struggle to arrive at this day. I pay tribute to all the colleagues in his working group, and to others who had the courage to speak out, for their work over a long period, which brings us to this afternoon’s debate.

The debate has been extremely consensual. The support from all parties should be welcomed when we pass the legislation. The work of the Equal Opportunities Committee and the Justice Committee in scrutinising the bill has, rightly, been acknowledged. The Government, for its part, is keen that the provisions of the bill should come into force and that there should be an improvement in the way in which we deal with hate crimes in Scotland.

As Bill Aitken outlined, the Justice Committee explored a number of lines of inquiry during its consideration of the general principles of the bill. The committee opened up a number of areas of concern for thorough discussion. Those have been considered by various members during the debate.

We are pleased that the committee has acknowledged that the bill does not present a threat to freedom of speech. The bill, in itself, does not create any new offences; it simply allows an existing offence that has been motivated by prejudice relating to disability, sexual orientation or transgender status to be tagged as such. It recognises that when the motivation for a crime has been prejudice against an element of the core identity of a victim or group of victims, that should be reflected in the sentence.

The Justice Committee addressed concerns about the creation of a hierarchy of rights. As Richard Baker pointed out, we must remember that the bill is about not the identity of the victim, but the twisted motivation of the offender. That recognition leads us to conclude that the argument that there would be a hierarchy of rights among victims is wrong. It is not so much about the victims—although we are here to protect the victims in so far as the law can do that—as it is about the motivation of the assailants. Once one recognises that, concerns about hierarchies and so on can be put into proper perspective.

The Justice Committee addressed the broader issue of the necessity of the legislation and came to the conclusion that statutory aggravations are the appropriate response to crimes that are motivated by hatred and prejudice based on the actual or presumed sexual orientation, transgender identity or disability of a victim. The need for the legislation was reflected clearly in the comments from mental health charity SAMH, which said that the bill “addresses the needs of the community, based on people’s experience.”—[Official Report, Justice Committee, 13 January 2009; c 1505.]

Many members alluded to the plight and experiences of those who suffer from ill health. I, too, have encountered that in my work as an MSP over the past decade. Like David McLetchie, I was particularly struck by Anne McLaughlin’s contribution, in what I gather was her maiden speech.

Anne McLaughlin indicated disagreement.

Fergus Ewing: Apparently, it was not her maiden speech. It was maiden to me. Putting aside that minor faux pas, I was about to say—before I misinformed myself—that Anne McLaughlin’s speech was thoughtful and passionate. It was passionate because of her
obvious understanding of the issues. Like David McLetchie, I look forward to hearing more about her experience and her work before she came to this place.

I enjoyed Linda Fabiani’s remarks, too. She suggested that all the groups that will be afforded protection by this legislation are united by their vulnerability to attacks caused by prejudice. It is not that the people themselves are vulnerable or in any way weak or inferior, but that they are exposed to a form of prejudice to which the rest of us may not be so exposed. Linda Fabiani brought out that point well.

I was asked to respond to other points and, as the Presiding Officer knows, I try not to disappoint members in that regard. What about protection for women? Many members have asked whether there should be an aggravation for assaults against females if those assaults are because of their gender. The issue is finely balanced. Liberal Democrat members in particular have raised it, and it was the subject of much debate in the Justice Committee. We can all agree that violence against women is a most serious issue. Rightly, it has been debated regularly in the Parliament. The Government is working to address the issue and will continue to do so with the assistance of all members of the Parliament. However, the conclusion that appears to have been reached by consensus is that considering the issue is not necessarily appropriate in respect of this bill. However, we may consider the issue again in due course.

Gavin Brown talked about costs and suggested that the financial memorandum to the bill may be considered to be on the light side. I therefore read the memorandum closely and it appears to me that paragraphs 27 and 28, on the Scottish Prison Service, indicate that the likely additional costs in our jails are likely to be relatively few. Although one might say that the cost of retaining a prisoner in Scotland is £40,000, that cost does not apply where there is a relatively marginal change. That is set out in the financial memorandum, but if the Conservatives wish to pursue the issue, we are of course willing to discuss it with them.

Figures from the United States and the London Metropolitan Police suggest that race hate crimes substantially outnumber crimes that are motivated by sexuality and disability. Whether that will prove to be the case here in Scotland remains to be seen. As Paul Martin pointed out, we do not yet have a clear steer on the numbers because there is as yet no aggravation. Patrick Harvie made that point too.

The main assurance that I want to give to Parliament—although it will not be a blinding surprise—is that the bill requires that the aggravation is recorded throughout the criminal justice process. Those records will enable us to monitor the use of the aggravations. Indeed, I noted that the financial memorandum provides even for the costs of changing the information technology in the prosecution system. The initial cost to record the information will be about £20,000 for the Crown Office and £5,000 for the police. The information will be recorded; it will inform future policy; and it will allow us to get a clear picture. That will be welcomed on all sides of the chamber.

The evidence shows clearly that certain groups in Scotland regularly face crime based on prejudice. That is repellant, repugnant and wrong. Law in itself cannot tackle that; law is just words on a page. Nonetheless, this bill will give a clear signal to everyone in the criminal justice system, and to society as a whole, that such crime is not on and will not be tolerated. It will now be dealt with more seriously and consistently, and with the full will of every member of this Parliament.

16:50

Patrick Harvie: I am grateful for the many supportive speeches that have been made. I am genuinely delighted at the mood of consensus that has been struck and I hope that it will lead to a unanimous vote on the bill at decision time. I express my gratitude to all those who have argued the case in their party groups for the bill to be supported.

It was encouraging to hear Kenny MacAskill setting out a clear statement of intent. He said that the Government is committed to building a Scotland in which all people are treated with dignity and respect. I am sure that that would be true of the Government no matter which party was in power, but we should not undervalue it.

The cabinet secretary described as shameful the underreporting that we see in relation to such offences. I endorse that, but it is worth exploring a little further the reasons for that level of underreporting. The easy explanation, certainly with regard to offences relating to sexual orientation, would be to dismiss underreporting as simply a hangover from the days of criminalisation that will disappear through time, as generations move forward. However, I do not think that that is the case and I think that comparing it with the level of underreporting that exists with regard to offences relating to disability demonstrates that the existence of prejudice and bullying in schools is one of the things that continually undermine the likelihood of raising those levels.

I commend the Government for the work that it is doing, particularly in its response to the “Challenging Prejudice” document and the education aspects that it contains. There is much
Bill Aitken asserted that those who are convicted should be left in no doubt that courts take these offences seriously, and I am glad that he is persuaded of the need for legislation. He also mentioned freedom of speech. While I agree with his conclusion and that of the committee in that regard, I want to pick up on the language that was used in paragraph 118 of the committee’s report, which refers to those who hold “traditional, mainstream beliefs about marriage and sexuality”.

I am not aware that any of the mainstream churches submitted evidence on the bill, or that they have expressed a view one way or another. I question whether views on sexuality that I might describe as outdated and antique are still mainstream views. I do not think that they are any more. We need to move beyond that.

Bill Aitken acknowledged that sentencing is a complex matter. It is important to remember that, under the proposals, courts will retain flexibility. Varying a sentence might be necessary if the motivation of the offender demonstrates a continued threat to society. That could, in some circumstances, justify a longer custodial sentence. However, alternative, non-custodial sentences might be appropriate in other circumstances. Paul Martin explored some of those issues, too. I reassure him that I do not want to abolish the jail. We might have disagreed in previous debates about the appropriate use of prison sentences, but I do not think that anyone wants to abolish the jail. I think, however, that we should use it more carefully.

We need to be careful to monitor the effectiveness of sentences. However, the committee agreed—I think that Paul Martin would agree, too—that mandatory sentences are not appropriate for the aggravation of what could be a serious, or a much more minor, offence.

Robert Brown began by referring to the right for all people to freedom from discrimination, as set out in the Universal Declaration of Human Rights. He emphasised that such rights have to be claimed, guarded and protected because they are not automatically accessed by all people equally. The bill will give clarity to the courts and the public, which will help us to do that.

Robert Brown mentioned the efforts that we have to make to overcome prejudice, and argued that building a society without the crimes that the bill is concerned with is dependent on seeing others as real people and overcoming ignorance and prejudice. I endorse that strongly.

Linda Fabiani made some important points about HIV status, which is covered in the disability definition. Although treatment options have improved dramatically and many HIV positive people live long and healthy lives, stigma and discrimination have not gone away.

Bill Butler and other members mentioned the long history of the proposal, which has led, at last, to consensus. It is important to remember that the aggravations under the bill are not restricted to specific victim groups. Racial aggravation is not limited to minority ethnic groups and neither is the sexual orientation aggravation limited to lesbian, gay or bisexual people; they apply to all people who can be given protection in law from crimes that are motivated by prejudice.

Hugh O'Donnell and Marlyn Glen spoke of the work of the Equal Opportunities Committee. I express my thanks to the committee for its work on the bill. It is entirely appropriate for the Parliament to examine the potential for age and gender, too, to come under the mechanism of statutory aggravation. Even if we agree—I think that we have agreed—that the mechanism is inappropriate in tackling the type of offence that is aggravated by prejudice based on someone’s age or gender, we should agree, absolutely and universally across the chamber, that that is no reason for us ever to relent from the drive against those forms of violence. When we take account of the circumstances under which the offences are committed, we may agree that we need to approach gender-based violence and violence and prejudice on the ground of age not by way of legislation, but in other ways. That said, I am sure that the whole Parliament agrees that we should not relent from the task.

David McLetchie made one or two contentious comments, but I endorse strongly his clear exploration of the ways in which hate crime can be far more than a crime against one individual and can become a crime against a whole community. I thank him for those comments.

I cannot finish without mentioning Anne McLaughlin. First, I thank her for her birthday wishes, which are much appreciated. However, I am not sure about the moon bringing out my community mindedness. I am more excited by the spring sunshine at the moment; it is having more effect on me than anything else is. As for the horoscope advising me to be tactful in dealing with the boss, I would have thought that the advice was more for SNP members than for someone in my party. I take her comments in good part.

Anne McLaughlin moved on to address the serious issue of mental health. People with mental
health problems are another poorly understood outgroup in society. Many people like to think that mental health issues apply to other people and not to themselves, but any one of us can experience mental health issues, and many of us will during our lifetimes. I return to Robert Brown’s point: we need to see others as real people, with whom we can have empathy. That is one of the most important ways of overcoming prejudice and discrimination.

The bill has been described as small but perfectly formed. Indeed, as its proposer, I have been described in similar terms. Robert Brown described it as a modest bill. I am not sure that that description is equally applicable. I believe that the bill, and the wider action that Government is taking—right across the policy spectrum—will integrate to overcome prejudice and discrimination. I am grateful for the strong measure of consensus in the chamber. I look forward to further discussion on the detail at stages 2 and 3 of the bill.
Present:

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

Offences (Aggravation by Prejudice) (Scotland) Bill: The Committee considered the Bill at Stage 2.

Sections 1, 2 and 3 were agreed to without amendment.

The Long Title was agreed to without amendment.

The Committee completed Stage 2 consideration of the Bill.
On resuming—

**Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 2**

*The Convener:* Item 3 concerns stage 2 of the Offences (Aggravation by Prejudice) (Scotland) Bill. As there are—uniquely, in my experience—no stage 2 amendments, the committee is simply required to agree to the sections and the long title.

*Sections 1 to 3 agreed to.*

*Long title agreed to.*

*The Convener:* That concludes stage 2 proceedings. That must be some kind of record.
Offences (Aggravation by Prejudice) (Scotland) Bill: Patrick Harvie moved S3M-4286—That the Parliament agrees that the Offences (Aggravation by Prejudice) (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Patrick Harvie (Glasgow) (Green): In the stage 1 debate, I remarked that the bill was small but perfectly formed, and so was its proposer. Now that we come to stage 3, we see that it is so perfectly formed that no member saw fit to find any way at all of improving it during its parliamentary process, and therefore we have a stage 3 debate without amendments. I am glad and grateful that we have got to this stage with cross-party consensus. The bill is a small but nonetheless necessary step.

I am also extraordinarily grateful that we have got to stage 3 on such a quiet news day in politics to maximise the coverage of the bill, which addresses an important issue. Unlike the shenanigans in politics that captivate and engage most of us who are involved in the political bubble, hate crimes reach down into every community and affect real lives daily in a deeply harmful way. Although the bill is one small step in the right direction, we should be glad that we can take it.

I thank the many people who have enabled us to reach this stage. Obviously, I thank the Government for helping me to produce the bill and for supporting it all the way along. The Cabinet Secretary for Justice and his colleagues in the Government helped to put the work together and bring us to where we are. Members in other political parties supported the bill at the proposal stage and at stage 1, and I hope that they will do so again at stage 3. Many other people have been involved, including the Justice Committee and its clerks and those who gave evidence to the committee.

Also, many organisations took part in the expert working group on hate crime, which the previous Administration initiated and which will reach its conclusion in legislation that will enact the group’s key recommendations. Those organisations, and many individuals who have experienced various forms of hate crime over the years, have been willing to speak out in the Parliament and the media. People do not always feel safe or supported when they do that, but their doing so has enhanced the scrutiny and understanding of the issue in Parliament. I thank everyone who has helped the bill to reach this stage.
When I was growing up in Dumbarton, it was pretty much accepted that homophobic language was just playground banter and par for the course. It was unexpected even to challenge it, and to do so was to take a risk with personal safety. That was in what was supposed to be the protective and safe environment of a school. The situation has changed to an extent, but the issue has not gone away in schools or in the rest of society. The kind of behaviour that might wrongly be dismissed as mere playground banter can, in fact, involve deeply harmful criminal offences and bullying. Many people experience such behaviour and the harm that comes with it throughout their lives.

Later in my life, as a youth worker with a lesbian, gay, bisexual and transgender youth group, I became aware of the wide range of experiences of the young people with whom I worked. Some of them had a safe, supported and inclusive experience, not just in their education but in their wider life as they went into the workplace and in their communities. Others could not have had a more difficult and distressing experience. Some young people still have such experiences.

As well as prejudice in relation to the LGBT community, the bill covers prejudice in relation to disability. I have less personal experience of such prejudice, although I have been a worker for an HIV agency. HIV status is covered by the Disability Discrimination Act 1995 and therefore is also covered by the bill. Many people who experience crimes that are motivated by prejudice or hatred with regard to HIV status are marked for life.

The bill will not wave the problem away, resolve it overnight or solve every aspect of it. However, it is a necessary part of the overall picture and it is consistent with other Government action to address hate crime. The benefit from the bill will not simply be that we pass the appropriate sentences. I repeat that they will be appropriate sentences. The bill is not, as some would have it, a silver bullet; it is one part of a programme of action, many aspects of which are being developed by Government in relation to the forms of equality in the bill.

...
Opportunities Committee and the Justice Committee for their careful and thorough scrutiny of the bill.

Hate crime, put simply, is an offence motivated by an offender’s hatred of a core element of someone’s identity. There is no place for that in a modern Scotland; it is as entirely unacceptable as it is entirely unreasonable. The provisions in the bill will improve the way in which we deal with hate crime. If a crime has been committed and it can be shown that the motivation was hostility and ill-will based on the victim’s sexual orientation, transgender identity or disability, the sentence should reflect that.

The bill requires the courts to consider the aggravation at the point of sentence, as indeed is the case for other statutory aggravations that the Parliament has put in place. One such example came up in relation to questions raised by Bill Butler at question time. The bill provides an opportunity for the sentence to reflect both the serious nature of the offence and its motivation.

The bill does not create any new offences. Hate crime can range from harassment to property damage to violence and, in some tragic and extreme cases, even to murder. The aggravations can therefore apply to any crime or offence no matter how serious or trivial. The provisions in the bill will help to ensure that there are appropriate and consistent reporting and prosecution policies from the various agencies in the criminal justice system in Scotland. They will send a clear message that prejudice towards and hatred of social groups as a motive for committing a crime is unacceptable and will not be tolerated. They will allow us to monitor the extent of those types of crimes in Scotland and tailor our approaches to tackling them.

The bill will ensure that an aggravation must be acknowledged and taken into account at the point of sentence. It will be clear to the offender and the broader public, at the point of sentence, just how seriously the aggravated nature of an offence is viewed by both the sentencer and wider society. The impact of that on the sentence will obviously remain a matter for the discretion of the judge or sheriff who is presiding, because they are dealing with the particular individual and instance, but the existence of the aggravation will require to be recorded at all stages in the criminal justice system.

It is the role of Government and Parliament to put law on these aggravations in place. It will, of course, be for the police, the Crown Office and Procurator Fiscal Service and other criminal justice services to ensure that the law is made full use of.

We believe that this type of crime is substantially underreported in Scotland, which is rather tragic. The bill will not simply ensure that the law recognises how we wish such crime to be seen, but transmit a message to all those who might be victims that we are taking it seriously.

We hope that the existence of the aggravations in statute will encourage more victims of hate crime to come forward. We want people to be secure in the knowledge that what has happened to them will be taken seriously and will be dealt with effectively. Equally, we want offenders to realise that their actions are entirely unacceptable and that they will face stern consequences for them. We believe that the bill will help to make that possible.

The bill is not focused on the identity or situation of the victim of a hate crime or the perceived or actual vulnerability of any victim; its sole focus is the prejudiced motivation of an offender.

The policy intention behind the bill is to provide criminal justice agencies with an additional means of tackling crime motivated by prejudice. That is why I am pleased to confirm that the Government supports Patrick Harvie’s bill. I urge members to do likewise in order to help create a Scotland in which diversity is respected and can be celebrated and tolerated by all.

15:52

Richard Baker (North East Scotland) (Lab): We are taking an important step today towards ensuring that homophobia and other forms of discrimination have no place in Scotland. Legislating for these aggravations will send out a clear message that we will not tolerate the victimisation of groups who should be valued in our society. The bill will also be an asset to our courts in dealing effectively with the perpetrators of these crimes.

I pay particular tribute to all those who have worked so hard to ensure that the bill is passed today: the Justice Committee and its clerks, who have worked with ministers and civil servants; all the external groups who have presented such thoughtful and well-researched evidence; and, of course, Patrick Harvie, who has done so well in forging a strong evidence base for proceeding with the bill and, just as important, a broad coalition of support for it, if not complete unanimity. I know that that has taken perseverance and tenacity on his part and that the bill has followed the work of the sentencing commission and the deliberations of the working group on hate crime. I believe that the process of the bill has better enabled consensus. We have had the kind of cross-party dialogue and engagement that is too often missing
around legislative proposals, for which Patrick Harvie deserves great credit.

In Scotland and throughout the United Kingdom the need to redouble our efforts to tackle crimes of discrimination is clear. In Westminster, the response has been to make new provisions in law to deal with such offences.

The Scottish Government’s criminal justice statistics show that in 2006-07, eight homicides in Scotland were recorded as having a homophobic motivation. The British gay crime survey of 2008 showed that one in five lesbian and gay people had experienced a homophobic hate crime or incident in the past three years. Those are truly shocking statistics.

Of course, the bill is not just about LGBT people, important though that aspect of it is. It is also absolutely right that it addresses the problem that people with disabilities are more likely to be victims of hate crimes. The briefing that we have had from the Royal National Institute for Deaf People referred to a survey of its members, which found that 14 per cent of respondents in Scotland said that they had been a victim of physical or verbal assault because of their deafness.

The bill is also about encouraging more people to report these kinds of crimes, which, as Patrick Harvie said, too often go unreported. Tim Hopkins of the Equality Network gave persuasive evidence to the Justice Committee on how the introduction of the legislation will encourage greater reporting of these crimes. That has been the experience following the introduction of other aggravated offences legislation.

Good proposals were made in the Justice Committee’s stage 1 report, as was the case in evidence, to ensure that we get the most from the bill. The committee urged the Scottish Government to work with criminal justice partners to ensure that disposals can—across the country, where practicable—include elements that aim to address attitudes that lead to hate crime.

I welcome the suggestion in the committee’s report, echoed by the Law Society of Scotland, that in order to ensure that we monitor effectively the use of the legislation, crime codes should be assigned to aggravations. If a code were assigned not only to the offence, but the aggravation, it would be easier to monitor use and establish the rate of successful prosecutions. It is right to highlight the need for appropriate training. Such training will ensure that police and prosecutors influence the legislative provisions.

We want the legislation to be as effective as it can be. We all want to live in a society that does all that it can to tackle hate crimes, to ensure that they are reported and that our justice system deals properly with offenders. Doing that protects people in our society who are among the most vulnerable or who are perceived to be so.

Labour welcomes the bill. We will support it at decision time.

15:56

Bill Aitken (Glasgow) (Con): I, too, begin by congratulating the sponsor of the bill, Patrick Harvie, for bringing things to a successful conclusion in the chamber today. He lobbied unmercifully—indeed, he was becoming a nuisance—but, at the end of the day, he has got the bill through. I congratulate him on achieving that. I understand and possibly share his frustration that activities elsewhere are detracting from the publicity that he deserves to receive today.

The bill is an exemplar of how legislation should and can be dealt with. From the outset, the unanimity of view on the Justice Committee was that the bill had a degree of merit in it. We sought to examine it and kick it about a little bit. In the circumstances, we have ended up with appropriate legislation.

Throughout the passage of the bill, I was extremely impressed by the quality of evidence that the Justice Committee heard and which individual members received. The witnesses who appeared before the committee represented their case in a measured, reasoned and reasonable manner. That enabled the committee—and then the Parliament—to consider the matter in a way that meant that the bill deserved to succeed. Those who gave evidence did so not in a vengeful or irate manner but in a measured and reasonable way. They did not seek vengeance; they simply wanted to right a wrong. I hope that the passage of the bill later this afternoon will do that to an extent.

The issue of reporting was, of course, raised. The evidence throughout was clear on the matter: many victims of this sort of crime—particularly where threats of violence are made or actual violence occurs—are reluctant to report it. An important spin-off of the legislation will be that that inhibition is lost. That will be no bad thing.

The Justice Committee recognised that the issue is not about sentencing. That said, I make it clear that acts of violence against a person because of their sexual orientation—or, in particular, their disability, where someone is not in a position to defend themselves—must be viewed seriously indeed. Where such assaults are serious, custody is clearly the only option that is available to the courts in many instances. It is important that the various social work and community justice authorities make available the
appropriate disposals that allow the justice system to deal with issues at the lesser end of the scale.

One thing that we fail to do under so many legislative headings is to review the effect of legislation once it has been in operation for a time. We have to get a much tighter handle on the way in which we view the impact of legislation four or five years down the road. I certainly hope that that will happen in this case.

There is no need for me to detain the chamber for long. We have all reached measured agreement on measured legislation. Conservative members are content that it should proceed.

16:00

Robert Brown (Glasgow) (LD): As the cabinet secretary indicated, relatively few members’ bills survive all hurdles to pass into law. Like other members who have spoken, I begin by congratulating Patrick Harvie on his success on this occasion. I am sure that he will not mind if I say that it is based partly on the previous work of Jim Wallace, who, as Minister for Justice, established the working group on hate crime, which was responsible for a body of related work, and on the work of the present Government, which supported the bill. I agree with Bill Aitken’s comments on the quality of the witnesses from whom the Justice Committee heard.

Against that background, I am glad to offer the Liberal Democrats’ support for the bill, which was a commitment in our 2007 manifesto. We must take the bill in context—as Patrick Harvie said, it is a small step towards supporting and developing a more tolerant and inclusive society. However, he was right to say that the bill will affect real lives on a daily basis—that is the context that must always be remembered.

In recent years, there has been much progress, both legislatively and in cultural terms, in tackling and reducing discrimination and making hate crimes unacceptable. As might be expected, attitudes change more readily among young people, who tend to be significantly more outward looking than previous generations. However, whatever one’s age or background, in 21st century Scotland it should be unacceptable for people to face discrimination, abuse or outright violence because of who they are—their actual or perceived sexual orientation, disability, race or religion.

Members of the Justice Committee, which examined the bill at stage 1, had to be convinced that the aggravation that already exists in common law needed to be supplemented by a formal statutory aggravation. Our conclusion was that that would be useful, because it would direct more effective recording of the extent of the problem, allow the situation to be monitored and, perhaps, allow sentencing disposals that involve an increased tariff for serious crimes and begin to tackle at its heart the cause of the offending, which is based—as such things often are—on ignorance, ingrained attitudes and social alienation. The bill’s sponsors made it clear that they were open to that approach; Patrick Harvie has done so again today, with his reference to appropriate sentences.

I return to the nature of the challenges. There have been various studies of the extent of the abuse that is suffered by various groups, not least disabled people. In some ways, there is an additional conceptual problem in the case of disabled people, as many people find it difficult to accept that anyone would deliberately target a disabled person. However, it is clear that fear of violence, abuse or nastiness is a severe inhibition for many disabled people, as well as for many LGBT people. In effect, it is an extra, unnecessary disablement.

The RNID has pointed out that 60 per cent of crimes go unreported. The percentage is probably higher among deaf people and disabled people who face additional hassles, such as the need for an interpreter to report and obtain action on their complaint. One of the virtues of the bill is that it will contribute, along with other measures, to a situation in which LGBT and disabled people will feel more confident about reporting crime and that their complaints will be taken seriously. The RNID’s suggestion that a code of practice be introduced to support implementation of the bill may have value. Inclusion Scotland highlighted the need for suitable, rigorous training for the police and prosecution authorities.

In short, there are three core reasons for the bill. First, it serves as a marker of society’s view that hate crimes are unacceptable and illegal. Secondly, it is an important stimulus for better recording of the extent of the problem, as part of recorded crime. Thirdly, it is one of a number of measures to encourage victims to report crimes.

On the day before the European elections, it is worth saying that the existence and work of the European institutions and the example of other European countries have been important drivers of liberal reform in areas such as this and of the entrenchment of individual rights at the heart of the European project. I ask the chamber to support the passage of the bill, which will mark a small but significant step in favour of the civil liberties of a number of people in our society.

The Deputy Presiding Officer (Trish Godman): We move to the open debate, in which time is very tight. Members will have four minutes.
Bill Kidd (Glasgow) (SNP): I am very pleased that we have reached this stage of the bill, at which, as Patrick Harvie said, there is unanimity across the chamber. He deserves real credit for introducing the bill, the purpose of which is to enable the consideration of crimes aggravated by prejudice against sexual orientation, transgender status or disability in the same way as racially motivated attacks are now considered.

As the disability reporter to the Equal Opportunities Committee, I am particularly pleased that disablism has been included. Disablism is not a word in common parlance, but it means the abuse of, or discrimination against, disabled people arising from a belief that they are inferior to others, less than human in some cases, or of no value to society. Sadly, we must recognise that there are people in our society who will abuse anyone who they deem to be different or who they view as an easy target.

With an estimated 800,000 disabled people in Scotland, and approximately 500,000 LGBT citizens, it is our duty to provide in law safe and strong communities where no one faces the fear of crime or intolerance born from the cowardice or ignorance of others. Discrimination on the ground of disability was legislated against only with the passing of the Disability Discrimination Act 1995, 20 years after the outlawing of racial and gender discrimination. That gap was a serious lapse in equalities legislation, which we should have learned from. It is time for us to bring aggravations by prejudice against disability or sexual orientation or status fully into line.

The 2004 research by the Disability Rights Commission and Capability Scotland found that 47 per cent of disabled people in Scotland reported experiencing hate crime. A third had to avoid certain places, and a quarter had moved home as a result of an attack. Disabled people are four times more likely to be violently assaulted than non-disabled people. Visually impaired people are four times more likely to be assaulted or attacked than their sighted neighbours. People with mental health issues are 11 times more likely to be victimised, and 90 per cent of adults with a learning disability report being bullied.

All of that says more about the perpetrator than about the abused. Let us put the abuser and the bully in full sight of the public gaze, name their crime and have it taken into account when sentencing is carried out so that, as Patrick Harvie said, the sentence will be appropriate.

Most, if not all of us will have had constituents come to us with cases of discrimination due to disability. In the worst cases, that will include fears for their physical safety.

After today’s vote, I will be proud to say that we in the Scottish Parliament, the Parliament for all the people of Scotland, are specifically targeting those people who carry out disgusting antisocial behaviour towards people simply because of their disability or sexual orientation. Let us vote to pass the bill and, in doing so, let us oppose discrimination in Scottish society and help to improve the lives of so many of our fellow citizens.

Bill Butler (Glasgow Anniesland) (Lab): I support the motion in the name of our colleague, Patrick Harvie, and I congratulate Mr Harvie on introducing this progressive legislation. As colleagues will be aware, the aim of the 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.”

As members will also be aware, “Similar statutory aggravations already exist to protect individuals and groups targeted on racial or religious grounds.”

Those of us who served during previous sessions of the Parliament will recall—as Mr Robert Brown did—that a former colleague, Donald Gorrie, moved an amendment to the Criminal Justice (Scotland) Bill in 2002 to make provision for the statutory aggravation of an offence as a result of religious prejudice. Mr Gorrie’s amendment was agreed to, and it became section 74 of the Criminal Justice (Scotland) Act 2003, as was referred to at question time by the cabinet secretary. That was a good reform.

Although Robin Harper’s amendment to that bill was not accepted by the then Minister for Justice, Jim Wallace, an amendment whose objective was similar to that of the bill that is under discussion today led to the setting up of the working group on hate crime in June 2003, the first recommendation of which forms the general thrust of Mr Harvie’s bill. I am genuinely pleased that we have arrived at a point where Parliament will unanimously agree to the bill at 5 o’clock.

The Cabinet Secretary for Justice was correct when he said in a reply to a parliamentary question from Mr Harvie:

“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 crime but where crime does happen … it will not be tolerated.”—[Official Report, Written Answers, 15 January 2008; S3W-8323.]

Scottish Labour whole-heartedly supports that vision of a tolerant, inclusive, equal Scotland.

In the short time that I have, I will talk about issues that arise in the context of the bill. First, I
will talk about the benefits of the bill—if it is enacted, as I am sure that it will be—to all the groups that it will cover. It will mean that the hate crime laws that offer protection to ethnic minorities and religious groups are extended to the LGBT community and to people who are disabled. It will mean that an approach that has proved successful in tackling racist and sectarian hate crime will be naturally extended. The approach to dealing with such offences has not only proved useful in individual cases but focused police attention on the problem. There is no reason to think that the approach will be any less successful in supporting and protecting the LGBT community and people who are disabled. The increased focus will mean that there will be appropriate recording of offences, which we all hope will lead to greater confidence in the criminal justice system among those sections of society.

As the Justice Committee said in its stage 1 report, at paragraph 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.”

That is why the committee was correct when it went on to welcome

“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.”

The problem is significant. The Scottish Association for Mental Health said in its submission to the committee at stage 1:

“A survey in 2004 found that 47% of disabled people had experienced hate crime because of their disability, with 31% of those reporting that they suffered verbal abuse, intimidation or physical attacks at least once a month.”

If an effect of the bill is to focus police attention on the problem, that will be a welcome advance.

Scottish Labour agrees with the committee that the bill is good. We will support it at decision time. It provides for focused reform, which will help the Parliament in its drive to create a modern, inclusive and tolerant Scotland—a Scotland of equals.

16:12

Nigel Don (North East Scotland) (SNP): I echo members’ comments and I applaud Patrick Harvie’s determination. I would not go so far as to say that he made a nuisance of himself—he did not.

Patrick Harvie: I tried.
Michael McMahon (Hamilton North and Bellshill) (Lab): I congratulate Patrick Harvie on securing the safe passage of his bill. As the convener of the cross-party group in the Scottish Parliament on disability, I have been made very aware of the view of organisations that take forward issues on behalf of disabled people—like those who take forward issues for the LGBT community—that the bill is of huge significance to them.

With the passing of the bill, we will send a clear message to Scotland that hate crime, no matter what form it takes, is unacceptable. However, let us not forget that, although they have always existed, hate crimes of any sort have never really been acceptable in Scotland, either to the majority in society or in Scots law. The bill will introduce no new offence or sentencing measures, but it will bring greater and welcome consistency to the handling, recording and sentencing of hate crime. That is why I support it.

Unfortunately, as with our attempts to legislate away race hate and sectarianism, nothing in the bill says to me that our society will be freer from hate crime just because we pass the bill. Perhaps I see the situation as a glass that is half empty rather than a glass that is half full, as my colleague Bill Butler sees it. That is because, although our police have had numerous additional powers given to them by the Parliament on a range of issues, such as sectarianism and antisocial behaviour, there is little evidence that the police and our courts are using those powers in proportion to the occurrence of the crimes that they exist to tackle.

For example, a few months ago, I witnessed two inebriated men outside Central station in Glasgow singing “The Famine Song” at the top of their voices. Two police officers were asked by a few people to do something about the racist chanting that they were being subjected to, only to find that the officers were not really interested in tackling the incident. I can therefore only hope that the police will reflect on that, given the decision that is likely to be taken today to pass the bill. There is no point in having the law if our law officers do not act on it.

As I said, all disability organisations welcome the bill, with Inclusion Scotland calling on us to ensure in particular that the Crown Office and Procurator Fiscal Service and the police are equipped to recognise hate crime against disabled people for what it is. I hope that we can achieve that, but if the police’s recognition of anti-Irish racism is anything to go by, I have my doubts.

The bill was introduced as a recommendation of the “Working Group on Hate Crime Report”, which also recommended doing 13 different things in addition to the bill. I therefore hope that all the other recommendations can be acted on as quickly as the call to have legislation enacted was. Again, though, I have my doubts about that.

In 2004, Capability Scotland conducted a survey that showed that nearly 50 per cent of disabled people had experienced some sort of hate crime in their lives. I was horrified to learn that some disabled people indicated that they accepted hate crime as part of their daily life because of their impairment. That situation is utterly unacceptable and I am pleased that the Parliament has sought to address it, but we should not let people believe that the bill will be an end to the matter. We must continue to address this serious problem in the future, because, as important as the bill is, it is not a panacea. I do not believe that Patrick Harvie believes it to be that; he said that the bill was not a silver bullet.

The bill should be the starting point of the Parliament driving forward an agenda to address the concerns of the LGBT community and disabled people, and all those minorities who are affected by hate crime, which has not been acceptable and will not be acceptable. We must all encourage the agencies involved to drive forward an agenda that will ensure that hate crime, where it exists, will not be acceptable and will be dealt with, and that Scotland will become a better society because it is the will of the Parliament that it should be so. For that reason, I support the bill.

Bill Wilson (West of Scotland) (SNP): In some ways, it is difficult to imagine why we are here and why any of this is necessary. For a normal, sane, balanced human being—I see members looking round wondering who that might be—or for anyone resembling such a being, it is truly difficult to comprehend why someone might threaten or attack others merely because they are, or are imagined to be, a little different.

Nonetheless, as we all know, such attacks occur. In 2000, a Mencap survey found that nearly nine out of 10 respondents had been bullied in the past year. In 2007, the mental health charity Mind reported that individuals with mental health issues were 11 times more likely to be victimised. Who here has not read reports of attacks or abuse directed against individuals who are, or were thought to be, members of the LGBT community?

Some social groups are proportionately more frequently victims of harassment and crime. Surely such groups need extra protection. Would we not discriminate against such groups if we failed to give them the protection that they so desperately need? Let us also not forget that hate crimes can
be particularly psychologically damaging, because they attack the victim’s core identity.

Hate crimes are highly divisive. Failure vigorously to condemn such crimes can leave the affected groups feeling isolated from society. Such isolation harms not just the victimised group, but all of society. How true ring John Donne’s words:

“No man is an Island, entire of it self; every man is a piece of the Continent, a part of the main”.

Why do we need the bill? Some social groups are proportionately more often victims of harassment and crime, but evidence suggests that victims in those groups are also less likely to report the crime that has been committed against them. Hate crimes can be—indeed, are—intentionally distressing for their victims and past experience or fear can lead many victims to believe that there is no point in reporting them. Adding a specific offence of aggravation will make it clear to victims that such crimes are viewed seriously, that their suffering is taken seriously and that they will be listened to.

Yes, it is possible under common law for motivation to be an aggravating factor, but such aggravations under common law are not recorded. Statistically, we do not know how often such offences occur. An important point is that, because such offences are not recorded in criminal records, repeat offenders cannot be identified. Adding an aggravated offence will not stop common-law aggravations being used in other cases and will not reduce the protection that is offered to any other social group, but it will ensure that two groups obtain the extra protection that they need.

The importance of good statistical records should not be underestimated. Are certain social groups more likely to commit hate crimes? Are hate crimes concentrated geographically? Are campaigns against hate crime having any effect? Statistical data are vital. Without such data, any effort to reduce this most pernicious of crimes will be, at best, haphazard.

Hate crime is debilitating. One cannot run or hide from hate crime—people are who they are—so, in an intolerant society, people have no escape from bigotry and the permanent feeling of being threatened. People do not choose to be disabled. They do not choose to be gay or transgender. That is what they are. They cannot change that. If they are to be true to themselves, they cannot hide that and nor should they have to. In a civilised society, individuals should be accepted as they are. In a society cursed with intolerance, anyone who is a member of a group that is held in disdain has no escape but must live in fear or hide.

We need the bill. We need the bill to make it clear that, in our Scotland, the “our” means all, regardless of physical or mental ability and regardless of sexual orientation. We need to make it clear that all who live in our country are part of the family of Scots and that, in Scotland, we accept your right to be yourself.

16:23

David Whitton (Strathkelvin and Bearsden) (Lab): On this rare occasion, it is a pleasure to follow Mr Bill Wilson in the debate. Like others, I congratulate Patrick Harvie on getting the bill to this stage.

Others are obviously more knowledgeable on the topic than I am, because they have been more closely involved with the proposals during both the current and previous parliamentary sessions. Therefore, I will concentrate my remarks on the measures in the bill that will require the courts to recognise hate crime that is carried out against people simply because they are disabled. I am grateful to Mr Kidd for his definition of “disabilism”, which was a new word for me as well.

I confess that I had not intended to speak in today’s debate, but, while listening to the preview of the debate in this morning’s edition of “Good Morning Scotland”, I heard one blind lady describe how she was accosted in the street and how frightening that had been for her. She was attacked simply because she is blind and, therefore, vulnerable. I am sure that all members would deplore attacks of that kind. I am positive that they would similarly deplore crimes that are carried out against people because of their sexual orientation or transgender identity. As others have said, the bill is not about special treatment for people in those categories; it is about addressing the motivation behind the crime. The introduction of a statutory aggravation will make it possible for a specific crime, such as a crime against a disabled person, to be identified as a hate crime and to be recorded properly.

I believe that Labour has a strong track record of combating discrimination on the grounds of disability and sexual orientation. Although I was not an MSP at the time, I was special adviser to Donald Dewar when Scotland repealed section 28 and section 2A. Indeed, I still carry the scars from handling a lot of the press coverage at the time, much of which amounted to red-top tabloid frenzy. It is to the credit of the first Scottish Government that it did not allow itself to be swayed by a despicable campaign, with the result that Scotland led the way in repealing those sections.

More recently, the Parliament united behind my colleague Jackie Baillie’s Disabled Persons’ Parking Places (Scotland) Bill, which will ensure that disabled people have better access to the parking spaces that can make such a difference to their mobility by assisting them to do the day-to-
It is always useful to look back through consultation when one is preparing a speech, and I would like to quote what Capability Scotland said about the prevalence of attacks against people with disabilities. It commented:

“We have long been involved in the call for measures to tackle hate crime against disabled people”.

Both Bill Kidd and my colleague Bill Butler spoke about the survey on the experience of disabled people who had been the victims of crime. I see no need to repeat what they said, but I cannot agree more with their view that such crime is unacceptable in 21st century Scottish society. What concerned me more was that the research showed that most disabled people were not confident that they could get help to stop the attacks. The cabinet secretary said that he hopes that more victims of assault will come forward as a result of the passing of the bill—so do I. The bill has resulted in another of those rare occasions on which I agree with Kenny MacAskill on something.

Margaret Smith (Edinburgh West) (LD): The member mentioned the repeal of section 2A. Does he accept that it is extremely important that we develop better education from a very early age so that people know that such behaviour against LGBT people and disabled people is quite unacceptable?

David Whitton: That is exactly what the repeal of section 2A sought to do, and I whole-heartedly agree with that view.

Norman Dunning, the chief executive of Enable, made the point that although the common law might be adequate, the contents of the bill are necessary to ensure that the issue of aggravated crime is brought to the fore. He believes that the bill represents a step forward in common law and I agree with him. Indeed, I venture to suggest that the whole Parliament agrees with him.

As I said, Labour has a strong record on tackling discrimination, but so does this Parliament—it is a dividend of devolution. As the cabinet secretary pointed out, the bill will establish no new offences or sentencing measures, but it will bring consistency to the handling and recording of hate crimes and the sentencing of those who commit them, and will send a clear message that, in Scotland, our courts will recognise hate crime against people on the grounds of disability, sexual orientation or transgender identity and will deal with offenders accordingly.

Stewart Maxwell (West of Scotland) (SNP): Like other members, I congratulate all those who have been involved in getting us to this stage, especially Patrick Harvie. As someone who has experience of trying to get a member’s bill through Parliament, I understand how difficult that can be. The bill has been a long time coming, given that it is many years since Patrick Harvie’s colleague Robin Harper tried to amend the Criminal Justice (Scotland) Bill. Like other members, I am certainly glad that we are finally here.

Other members have mentioned the problem of the lack of statistical data. When I did my research for the debate, I found it almost impossible to find solid information. Surveys and reports have been carried out, which I will refer to, but there is no solid statistical data. One of the benefits of the bill will be that we will get better statistical data.

I hope that another achievement of the bill will be that we will see an increase in confidence when it comes to the reporting of crime towards LGBT people and disabled people. One of the most important issues is that people in that position lack the confidence to report such incidents to the police, and I hope that the bill will help to change that situation. I also hope that it will help to bring about cultural change and a change in the general public’s attitudes to such crimes, even if, as has been said, it is not a silver bullet.

Other members have mentioned various statistics, but the figures are worth repeating. Disabled people are more likely to be the victims of hate crime. In the 2004 survey by the Disability Rights Commission and Capability Scotland, 47 per cent of respondents had been attacked or frightened by someone because of their impairment; one in five had suffered an attack at least once a week; and of those who had been attacked, 35 per cent were physically assaulted, 15 per cent were spat at and 18 per cent had something stolen. There must be a problem in our society if people feel that such behaviour is acceptable.

However, a more recent report by the charity Scope in collaboration with the magazine “Disability Now” and the United Kingdom’s Disabled People’s Council found that disabled people are four times more likely to be violently assaulted than non-disabled people and almost twice as likely to be burgled, and visually impaired people are four times more likely to be verbally and physically abused than sighted people.

As Minister for Communities and Sport, I was responsible for equalities. In various discussions that I had, I found a clear and urgent demand for this legislation and widespread support for it from a range of groups. Something that sticks in my mind was a visit to the Dumfries LGBT youth group, who explained in very strong terms the problems that they faced, particularly in living in a rural community, and the differences between their...
position and the position of those in more urban communities. One problem was isolation; those in the group felt that living in such communities created added pressures and difficulties for young lesbian, gay, bisexual or transgender people. Of course the sole purpose of legislation should not be to send out a message, but I hope that an important part of this legislation will be the message that it sends to all communities in Scotland that it is unacceptable to hold certain attitudes and behave violently or aggressively towards LGBT people.

I will now do something unforgivable, for which I must apologise: I will quote myself. My plea in mitigation is that the document that I want to quote from is the Scottish Government’s response to recommendations of the LGBT hearts and minds agenda group. It says:

“Changing attitudes will be good not only for LGBT people but for all the people of Scotland. … We recognise the prejudice and discrimination that LGBT people have faced historically. And while there have been significant strides in law and policy over the last 30 years, we know discrimination still exists”.

That sums up the attitude of the Government and my attitude when I was minister. I wholeheartedly and 100 per cent support the bill.

16:32
Angela Constance (Livingston) (SNP): Because of the short time available and given my previous life as a mental health officer, I want, like some other members, to focus on disability hate crime. However, I make clear my support for the eradication of all forms of hate crime.

As others have said, the bill is not an end in itself but another crucial step on a journey and—unusually for me—I echo Bill Aitken’s call for a review of the impact of the legislation.

Any crime that is committed because the victim is a member of a minority group deserves to be treated as an aggravated crime, because it is an assault not only on the person but on their identity. Like Bill Kidd and Bill Butler, I realise that in many ways the bill is playing catch-up and creating a level playing field for disabled and LGBT people. As statutory aggravations already exist for other forms of hate crime, it is incumbent on us to level the playing field for other excluded groups.

At this point, I thank Leonard Cheshire Disability for its particularly illuminating briefing. There are 800,000 disabled people in Scotland, 59 per cent of whom are women—I am advised that that is because we live longer than our male counterparts. However, as every study makes clear, a disabled person is five to 10 times more likely to experience hate crime than a non-disabled person is. We have already heard the statistics that show that those with mental health issues are 11 times more likely to be victimised and that 90 per cent of people with a learning disability report experiences of being bullied. What is absolutely clear is the persistent and repetitive nature of the offences against and harassment of disabled people.

In the past, there has been some confusion about what has been considered, treated and responded to as antisocial behaviour when offences should have been prosecuted as hate crimes. It is interesting to note that the perpetrators of hate crimes against disabled people are often strangers. They often participate in groups and the crimes are often committed in public places, although there is some differentiation between rural and urban areas. In rural areas, the crime against the disabled person is more likely to occur in a domestic setting. Like Michael McMahon, I think that we need to be alarmed and concerned at the number of disabled people who accept harassment as part and parcel of their impairment. Leonard Cheshire Disability eloquently talks about the need to prevent attacks on disabled people by shining a light into a dark corner of our society. By passing the bill, we will ensure that hate crime will not be shielded from the public view.

There is some information on the prevalence of the attacks on and the offences that are committed against disabled people, but I believe that it only scratches the surface. The bill is vital in uncovering the hidden world of hate crime that, unfortunately, exists in our society.

16:36
Margaret Smith (Edinburgh West) (LD): I am delighted to speak in this afternoon’s debate. I pay tribute to the tenacious and determined way in which Patrick Harvie has brought the bill to Parliament. Robert Brown was right to acknowledge the work that was done by the previous Administration. It is also right that we acknowledge the work that has been done and the support that has been given to the bill by the current Government. It is heartening to members of the LGBT and disabled communities in Scotland to hear of the degree of support that the bill will receive in our Parliament this afternoon.

Bill Wilson was right to say that it is unbelievable and shocking that we need to have this type of legislation. Yes, we have the common law—the issue was considered carefully by the Justice Committee and the Equal Opportunities Committee, and I pay tribute to them for the thorough work that they did, as always, on the bill—but there are reasons why we need the bill. We have heard about the need to ensure that there is proper monitoring and recording of these
types of crime. It is not about a hierarchy of rights; it is about acknowledging that the groups of individuals who are covered by the bill—LGBT people and disabled people with physical or mental health issues—are more likely to be the victims of crime and, crucially, are less likely to come forward and report it. If the bill does nothing else, if it encourages people in those communities who are victims of crime to come forward, it will have been worth while.

In passing, I pay tribute to the work that has been done by police forces throughout Scotland. I am aware of the work that has been done over the years by Lothian and Borders Police with the LGBT community to increase the recording of hate crimes. Police forces throughout Scotland are taking forward that work, and I believe that the bill will assist them in doing that.

The bill focuses on the motivation of somebody who thinks that it is okay to give somebody a doing or to assault somebody because they happen to be disabled or gay, or because they perceive them to be gay. As I said to Mr Whitton, the attitude starts very early in somebody’s life that it is okay to assault or verbally assault somebody because they are perceived to be different, whether because of their race, their religion, their colour, their sexual orientation or their disability. That is why education is important. Over the years, I have been extremely concerned by some of the reports that Stonewall and others have produced about, for example, the amount of homophobic bullying that goes on in schools and the fact that some teachers, even now, do not feel able to challenge that or comfortable doing so. However, those sorts of things have to be challenged early on.

Today, we are sending a strong message that the Scottish Parliament believes in and will do everything in its power to deliver a society that tackles discrimination in all its forms, whether it is based on sexual orientation, disability, race or religion. I am pleased to support the bill.

16:40

John Lamont (Roxburgh and Berwickshire) (Con): Like other members, I congratulate Patrick Harvie on bringing this bill to stage 3. Mr Harvie, along with others, has long campaigned for the creation of new statutory aggravations to protect those who are the victims of a crime because of their actual or presumed sexual orientation, transgender identity or disability.

Patrick Harvie lodged the final proposal for the bill in November 2007, which means that he has had to show a great deal of patience and dedication in getting the bill to this stage. Hopefully, he will feel some satisfaction when the bill is passed this afternoon.

Our passing of the bill will send a clear message to those who carry out criminal action that is rooted in the hatred of another human because of who they are perceived to be that we will not tolerate such behaviour. One of the most striking features of hate crime is its ability to affect not only an individual but an entire community of people who find themselves turned into victims because of another’s intolerance. A culture of fear is created in a community—a fear because a part of someone’s identity that is beyond their control is hated by another. Behaviour of that sort is unacceptable.

We already have statutory aggravations for offences that are motivated out of prejudice of some kind. The offence of racial hatred was created in the Crime and Disorder Act 1998 at Westminster, and the offence of religious prejudice was created in the Criminal Justice (Scotland) Act 2003, which my colleague David McLetchie talked about eloquently during the stage 1 debate on this bill.

As Robert Brown and others have said, the flexibility of the common law allows aggravating factors to be taken into account. Why, then, do we need to create statutory aggravations for sexual orientation, transgender identity and disability?

The first reason is that, although the common law exists, it is not being enforced. Evidence that was presented to the Justice Committee demonstrated that, although the law was available to deal with aggravations, it was very rarely used, and few people who were subjected to hate crimes had experienced its use. The creation of aggravated offences sends out a clear message that society will not tolerate such an expression of hatred. Hatred itself is not criminal. We cannot police people’s thoughts, and we should not limit freedom of expression, but we can target and highlight criminal conduct that is motivated by such hatred. The legislation will give specific recognition to victims who are targeted as a result of hatred of their actual or presumed disability, transgender identity or sexual orientation. It will also bring our law into line with that of the rest of the United Kingdom.

As Patrick Harvie stated, the bill will also ensure the accurate recording of aggravated offences of the types that are mentioned in the bill. Until now, that has not been particularly robust, as those offences have been recorded as breaches of the peace or assaults. We cannot deal with a problem effectively until we know its full extent. The recording of this kind of information will give those who deal with crime far more insight into the motivation behind the crimes and will place them in a more powerful position to tackle them.
Attitudes may be constrained by laws and sometimes led by them but, ultimately, it is only by fostering a shared feeling of responsibility that we can promote a tolerant society where people are considerate towards others and their feelings, and where they exercise judgment in what they say and do. However, as Michael McMahon pointed out, we should not believe that laws are a panacea. We will never outlaw hate, any more than we can outlaw anger, but we can set a careful framework to outlaw hatred that does harm, while protecting fundamental liberties.

We are happy to confirm that we will be supporting the bill tonight.

16:44

Paul Martin (Glasgow Springburn) (Lab): Patrick Harvie and I have disagreed with each other on many issues in the chamber, from identity cards and DNA retention to ways of tackling antisocial behaviour. However, I am delighted to say that, on this occasion, we whole-heartedly agree with each other. I commend Patrick Harvie and the organisations that have ably supported him during the passage of the bill and have provided us with useful information, such as the Equality Network and Stonewall, for the work that they have done.

There have been a number of thoughtful and powerful speeches in the debate, and it is clear that there is cross-party support for the bill at stage 3. I will touch on a number of the themes that have been raised today and at stages 1 and 2.

As John Lamont mentioned, the common-law system allows courts to take account of aggravating factors in determining sentences. It is important that we recognise and respect that, as I said during the stage 1 debate, it is also important that we represent the views of those who contributed to the evidence sessions. Witnesses told us that the common law cannot send out a clear message that such hate crimes are unacceptable in Scotland, and it was generally felt that establishing an offence of statutory aggravation would address many of the motivations behind such crimes.

I am disappointed that the bill does not contain any provisions for mandatory sentences. As Patrick Harvie will be aware, I have raised that point on a number of occasions in a constructive manner. I made the point, which Margaret Smith and Bill Kidd also touched on, that there are some individuals who, as a result of their social profile—as I would refer to it—will not respond to anything other than a robust mandatory sentence. It is important that the bill offers an opportunity to send out messages.

Like others, I welcome the fact that we are clearly moving in the right direction. It is important that training is put in place in the various organisations that will play a key role in implementing the legislation. That point has been made on many occasions in the chamber.

Michael McMahon gave an example that highlighted clearly the importance of reporting such incidents, which Nigel Don also touched on. Sometimes our authorities do not get it right in dealing with members of the public, and particularly with disabled groups, as the RNID points out. That is not a poor reflection on our police officers, and I do not wish to suggest that it is, but, as members of the Scottish Parliament, we should ensure that, as well as recognising when an authorities gets it right, when an authority does not get it right we take action on behalf of our constituents and communities to ensure that the law is robustly enforced.

I have mentioned a number of examples that members have given during this short debate, and I believe—to pick up on Michael McMahon’s point—that it is important that we ensure that the law is robustly enforced. The bill will have no effect unless we do that, but it is clearly a step in the right direction and I congratulate Patrick Harvie on bringing the bill to stage 3.

16:48

Kenny MacAskill: Members have been remarkably united today—and rightly so, because the bill is about doing what is right. There have been excellent speeches by members on all sides of the chamber, and it is recognised that it is appropriate that we pass the bill. Equally, it is clear that the bill alone will not be the solution, because we have to change attitudes, and ensure that the law is implemented.

The bill is about doing what is right for our people, irrespective of whether they have disabilities, and whatever sexual orientation they may choose. They have been victims of low-level antisocial behaviour on some occasions, and serious assaults that have resulted in tragic murders on other occasions. Each individual has a personal tale.

There are areas not far from the Parliament where what was euphemistically known as queer bashing used to take place, and I remember such instances from my 20 years as a defence agent in these cities. It involved premeditated attempts by individuals to perpetrate serious assaults on people simply because they did not like the sexual orientation of those people, and that is unacceptable. The people responsible for those assaults were punished, but it is appropriate that we not only recognise the gravity of such crimes
but record them so that people do not feel that they have to shy away and make changes. We must encourage people to report such crimes. Margaret Smith is correct to say that the police have come a long way, but it is clear that all of us, including police officers and our broader society, still have a distance to travel.

Many people were perhaps sceptical about how disabled people have been affected, but I was at an event in Kilmarnock this week at which an old lady aged 79 complained about instances of antisocial behaviour including the throwing of stones, which is clearly an assault, at her middle-aged daughter, who suffers from learning disabilities. That was clearly distressing not just for the daughter, as the recipient of that bile and anger, but for her elderly mother, who has looked after her throughout her life and is clearly worried about what will happen to her daughter when she passes away. It is important that we make it clear that such behaviour is unacceptable in 21st century Scotland.

I say to Richard Baker that the Government recognises the need to assign codes to aggravations in order to track them. The Crown Office, which is responsible for the matter, has assured us that it assigns codes to aggravations and that it will therefore be possible to record and track crimes. That will help us to determine the extent of the problem that we face and to continue the good work, whether in law enforcement or in education, to change the culture in Scotland.

Bill Aitken asked whether the bill will be reviewed in four or five years’ time. Irrespective of who the Cabinet Secretary for Justice is at the time or the nature of the Administration, the Crown Office tracking means that we will be able to track the impact of the bill year by year and begin to gather evidence on the extent of the types of hate crime that it covers. Whether that is done by the Justice Committee, the Parliament or the Government, we will be able to consider, to review and to act accordingly.

As Patrick Harvie said at the beginning, the bill is not simply about recording how opposed we are to hate crimes and ensuring that society recognises their gravity. It is also about tracking and recognising the extent of the problem, and that might mean that further changes are required. To some extent, the bill simply builds on a journey that we are making as a society, and one that was initiated by previous Executives—Robert Brown and others mentioned the establishment of the working group on hate crime. The bill represents a further small, but significant, step.

In the year of homecoming, when we seek to celebrate Scottish identity, both for those who have stayed here in Scotland and for those who have travelled far and wide, it is appropriate to remember that we are all Jock Tamson’s bairns and state that, as a Government, a Parliament and a country, we will not tolerate hatred or the perpetration of low-level or serious assaults against any individual, and certainly not on racial or religious grounds. Equally, in 21st century Scotland, we will not tolerate, condone or allow to go unchallenged assaults that occur because of someone’s sexual orientation or disability.

The bill might represent a small step, but it is a great credit to Patrick Harvie and those who assist him. It is an appropriate step towards making Scotland all that it can be and making the law fit for purpose by reflecting all our communities in the 21st century.

16:53

Patrick Harvie: I thank all members who contributed to the debate at stage 3 of the bill. The debate was shortish but, of all members in the chamber, perhaps Robin Harper would most agree with me that, as the bill has been seven years in the making since his first proposal, it is not a problem for the final stage to be concluded as rapidly as possible.

Bill Butler and Robert Brown mentioned some of the historical steps that have been taken, including the proposals from Donald Gorrie and those from my colleague Robin Harper. Robert Brown argued that we are building on previous work, and I am happy to endorse his comments. Indeed, the measure was the key recommendation of the working group that was established as a result of the early proposals, which reported five years ago.

Robert Brown also mentioned the changing attitudes to equality and the progress that has been made in society. I agree with what he said about that as well, but I point out that it did not happen by magic or because people wished for it. It happened because many people way outside the political bubble worked hard and took risks for it, and also experienced risks in their lives. That is what makes progress happen—people working for it, not wishing for it.

David Whitton also gave a bit of an historical perspective from his point of view. He says that he bears the scars of the section 28 debate. I might once have felt that I bore one or two of those as well myself, but I felt that we won that argument in the end not only in the Parliament but outside it because the repeal was the right thing. Sometimes—at least for my community—what does not kill you makes you stronger. Here we stand.

Some technical issues have been raised on the bill. Paul Martin talked about mandatory sentences. I had hoped that he would—and still hope that he will—accept that they are not the
right mechanism for the bill, which will cover
offences ranging from low-level vandalism or
threatening behaviour right up to extremely
serious assaults and murder. It may be wrong to
attach mandatory sentences to such a broad
range of offences.

Several members mentioned the flexibility of the
common law. We are clear that the common law
has flexibility but that that flexibility is not currently
exercised sufficiently to address the problem.

Nigel Don mentioned the scope of the bill. I
accept that we are not proposing a new
mechanism. The mechanism already exists, but its
present scope is narrow, as it covers only race
and religion. There has been an argument about
whether the bill should extend to prejudice on age
and gender, but both committees recognised that
the people who work in the fields of age and
gender and who support those who experience, as
well as other offences, the domestic violence that
Nigel Don outlined do not feel that an aggravation
is the right mechanism for those offences. That is
not to say that the issue should not be addressed.
Many actions are required from government at all
levels to do that, but introducing an aggravation is
perhaps not the right one.

I will draw out an issue that was raised by a
number of members who focused on disability in
their speeches. I do not have time to mention
everybody, but Bill Kidd, Kenny MacAskill, Richard
Baker, Angela Constance and others mentioned it.
We need to recognise the reality of disablism as
Bill Kidd defined it, but it is also important not to
confuse hate crime on grounds of prejudice
against disabled people with vulnerability. They
are separate issues. Many disabled people are
additionally vulnerable to particular offences, but
that is a different phenomenon from hate crime,
which specifically concerns the motivation of a
crime by prejudice. Vulnerability is a different
issue; the bill is intended to address hate crime.
When we make arguments on vulnerability, we
must be careful not to imply that disabled people
should accept being, or expect to be, vulnerable to
such offences.

Michael McMahon expressed concern that
existing powers are not being sufficiently used. I
agree with much of what he said, but how much
clearer does that make it that we cannot rely on
the common law and that the aggravation is right?
However, he is correct that a much wider range of
measures is needed to overcome prejudice,
including challenging the perception of some of
moral disorder in relation to sexual orientation.
What an angry response there would be if
disabled people were accused of being in some
way morally inferior in the way that people are in
relation to their sexual orientation in some
situations. I endorse Bill Wilson’s vision of our

Before I sit down, it would be wrong of me not to
mention Bill Aitken’s suggestion that, during the
process, I made something of a nuisance of
myself. I have mulled over a few possible
responses to that comment. All I will say is that the
celebration of the passage of the bill will be
happening shortly in the Regent Bar. Members are
welcome to come and hear my many responses to
Bill Aitken’s suggestion, some of which I will
rehearse repeatedly during the evening.