

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.

EXPLANATORY NOTES

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.

These documents relate to the Offences (Aggravation by Prejudice) (Scotland) Bill (SP Bill 9) as introduced in the Scottish Parliament on 19 May 2008

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.”

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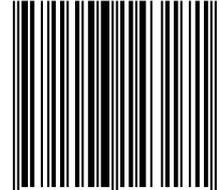
EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

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