

EQUAL OPPORTUNITIES COMMITTEE

Tuesday 18 November 2008

Session 3

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EQUAL OPPORTUNITIES COMMITTEE

16th Meeting 2008, Session 3

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DEPUTY CONVENER

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*Malcolm Chisholm (Edinburgh North and Leith) (Lab)

*Marlyn Glen (North East Scotland) (Lab)

*Bill Kidd (Glasgow) (SNP)

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*Sandra White (Glasgow) (SNP)

*Bill Wilson (West of Scotland) (SNP)

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Johann Lamont (Glasgow Pollok) (Lab)

Mary Scanlon (Highlands and Islands) (Con)

Margaret Smith (Edinburgh West) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Alan Cowan (Unison Scotland)

Dr Gordon Macdonald (Christian Action Research and Education for Scotland)

Euan Page (Equality and Human Rights Commission)

Alistair Stevenson (Evangelical Alliance Scotland)

Nick Waugh (Help the Aged in Scotland)

CLERK TO THE COMMITTEE

Terry Shevlin

ASSISTANT CLERK

Joanne Clinton

LOCATION

Committee Room 2

Scottish Parliament

Equal Opportunities Committee

Tuesday 18 November 2008

[THE CONVENER *opened the meeting at 10:03*]

Witness Expenses

The Convener (Margaret Mitchell): Good morning, everyone, and welcome to the 16th meeting in 2008 of the Equal Opportunities Committee. Mobile phones and BlackBerrys should be switched off completely, as they interfere with the sound system even when they are switched to silent.

Agenda item 1 is a decision on whether to delegate to the convener responsibility for arranging for the Scottish Parliamentary Corporate Body to pay under rule 12.4.3 any witness expenses that may arise from our evidence-taking session on sexual imagery in goods that are aimed at children. Are members content for me to have that power?

Members *indicated agreement.*

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.

Marlyn 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 at play 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: On that basis, do you believe that—because many crimes against older people are opportunist, are perpetrated by someone within the family, or at least are perpetrated by someone who is known to the person—we would not gain much by including 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 still 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 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

protection of the rights and freedoms of others and the prevention of disorder and crime.”

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.

The Convener: That is a good suggestion.

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.

Marlyn 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.

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