

JUSTICE COMMITTEE

Tuesday 13 January 2009

Session 3

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JUSTICE COMMITTEE

† 2nd Meeting 2009, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)

*Angela Constance (Livingston) (SNP)

*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)

*Nigel Don (North East Scotland) (SNP)

*Paul Martin (Glasgow Springburn) (Lab)

*Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)

John Lamont (Roxburgh and Berwickshire) (Con)

Mike Pringle (Edinburgh South) (LD)

Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Norman Dunning (Enable Scotland)

Faye Gatenby (Capability Scotland)

Charlie McMillan (Scottish Association for Mental Health)

James Morton (Transgender Alliance)

Christina Stokes (Stonewall Scotland)

Tim Hopkins (Equality Network)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 6

† 1st Meeting 2009, Session 3—held in private.

Scottish Parliament Justice Committee

Tuesday 13 January 2009

[THE CONVENER *opened the meeting at 10:01*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Apologies for the slightly late start. The gremlins had got into the broadcasting system, but all has now been satisfactorily resolved.

Under item 1, does the committee agree to take in private item 4, which involves consideration of whether to seek approval for the appointment of an adviser in connection with the anticipated criminal justice and licensing (Scotland) bill?

Members *indicated agreement.*

Offences (Aggravation by Prejudice) (Scotland) Bill: Stage 1

10:02

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 measures—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 attack 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, 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 attendee 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 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

associated with their perceived mental health problem and the behaviours that are explicitly linked to that.

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.

11:11

On resuming—

11:13

Meeting continued in private until 12:55.

Subordinate Legislation

Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 (SSI 2008/404)

The Convener: Agenda item 3 is consideration of one piece of subordinate legislation subject to negative procedure. The Subordinate Legislation Committee drew the regulations to our attention on the ground that it considers the use of negative procedure appropriate in this case but that it would have been helpful if the choice of procedure had been set out in the accompanying Executive note.

The Subordinate Legislation Committee also noted that, when an instrument affects primary legislation, the starting point should be a presumption in favour of affirmative procedure. It would then be for the Scottish Government to explain and justify the use of negative procedure.

Neither of those points affects the validity or operation of the regulations. Do members have any questions or are they content to note the regulations?

Robert Brown: I have just one question. I am starting to make a reputation for myself for this sort of thing.

The Convener: That reputation has been in existence for quite some time. [*Laughter.*]

Robert Brown: The cover note states that the regulations amend the Prescription and Limitation (Scotland) Act 1973. Against the background of the debates that have taken place about asbestos and about historic abuse, I wonder whether we can be assured that the regulations do not do anything peculiar in that direction and deprive people of rights that they would otherwise have. I do not think that they will create a situation in which some cases are time barred and some are not, but I would like an assurance about that.

The Convener: I am pretty certain that the regulations do not do that, but I am more than happy for us to institute the appropriate inquiries of the Government.

Robert Brown: Thank you.

The Convener: Is it agreed that we should write to the Government in those terms?

Members *indicated agreement.*

The Convener: That concludes the public part of the meeting.

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