JUSTICE COMMITTEE

Tuesday 27 January 2009

Session 3

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JUSTICE COMMITTEE
4th 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:

Linda Cockburn (Crown Office and Procurator Fiscal Service)
Patrick Harvie (Glasgow) (Green)
Andrew McIntyre (Crown Office and Procurator Fiscal Service)
Jetinder Shergill (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 27 January 2009

[THE CONVENER *opened the meeting at 10:18*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome you to the meeting, and remind everyone to switch off their mobile phones. We have one apology this morning, from Cathie Craigie MSP.

Agenda item 1 is a decision on taking business in private. The committee is invited to consider whether an options paper and draft report on the Offences (Aggravation by Prejudice) (Scotland) Bill should be considered in private at future meetings. Is that agreed?

Members *indicated agreement*.

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

10:18

The Convener: Item 2 is the continuation of evidence taking on the Offences (Aggravation by Prejudice) (Scotland) Bill. Today is the final scheduled evidence-taking session. I welcome again Andrew McIntyre, head of the victims and diversity team; and Linda Cockburn, principal procurator fiscal depute in the victims and diversity team, policy division. Both are from the Crown Office and Procurator Fiscal Service.

We move straight to questions, which will be led by Nigel Don.

Nigel Don (North East Scotland) (SNP): Thank you, convener, and good morning. It has been pointed out to the committee by several witnesses that the common law is well capable of dealing with the issues that we have been discussing. Do you agree with that statement in general and, if you do, why do you think that the bill is necessary?

Andrew McIntyre (Crown Office and Procurator Fiscal Service): That is right—the common law covers the range of offences that we expect the bill to deal with if it is enacted. The bill does not propose any new offences, and we will continue to prosecute the same kinds of crimes in broadly the same manner as we do now.

However, if the bill is enacted, an important distinction will be created in the explicit recognition that certain crimes are motivated by hatred of a particular group because of an aspect of their identity. That will be explicitly recognised through the nomen juris and the reference to the aggravation. An important point is that the impact of the aggravating factor on the court's handling of the case, particularly on sentencing, will be clear. To be clear and to reassure, however, I say that if crimes are aggravated by elements that current legislation covers, that is recognised in the charges that we bring and the information that we provide to the court. If it is clear that a crime is aggravated by such a feature, that makes it worse than if it is not, and we draw such an aggravating feature to the court's attention.

Linda Cockburn (Crown Office and Procurator Fiscal Service): We can incorporate aggravation elements under the common law, but we cannot monitor how many such cases there are in a year because the aggravation is included in the text of the charge. The bill will allow us to monitor such cases and to count how many we deal with in a year.

Nigel Don: I understand. To an extent, you will just be ticking boxes, but it will be important and appropriate to do so.

Linda Cockburn: It will be very important because it will send out a message.

Nigel Don: Yes. However, we have heard from a number of folk who believe that the common law is not properly or extensively used because aggravations are not signalled to the court and possibly not even picked up by the police because they perhaps do not think that they matter. Is that a fair reflection of the world as you see it?

Andrew McIntyre: It is impossible to say what we do not know, because we get what the police identify and report to us. If these aggravating features were present in a case, it is safe to say that they would be regarded as such at the moment. However, you are right that providing for such aggravations in legislation raises their profile, allows us to be clear about what amounts to an aggravation and gives us a much clearer framework in which to operate and be clear about what we expect from the police and how we can bring the aggravation to the courts' attention. The courts will have to take into account the fact that Parliament has said that crimes are necessarily worse if they are motivated by certain prejudices. Referring to aggravations in legislation therefore gives them a much higher profile and clarifies for us what we are dealing with and what is expected.

Nigel Don: So you would expect the bill to impact on what the police do on the ground and how they fill in the forms that inevitably must be filled in.

Andrew McIntyre: Absolutely. Filling in forms sounds like an unimportant exercise, but the way in which the system works is that we, as prosecutors, can bring to the court's attention and rely on in trials evidence that the police reports bring to our attention. It is therefore important to focus on gathering evidence of aggravation if that kind of evidence is to come to the attention of courts in Scotland. If Parliament legislates as proposed, that will have an impact on how the work is undertaken because we, as prosecutors, will look afresh at how we handle such cases. We will issue guidance to prosecutors around the country about what impact such evidence will have on their decisions, and we will offer guidance to the police about how they should deal with such evidence if they come across it.

Robert Brown (Glasgow) (LD): The bill retains the discretion of the sheriff, other than in the need to give reasons, so there will be no mandatory sentence if an aggravation is established. Does that match how offences that are aggravated by racial or religious prejudice are currently dealt with?

Andrew McIntyre: The bill's provision on sentencing is the same as that for existing aggravations and we expect it to work in the same way. Obviously, the court is independent of the prosecution service, so we do not control what weight is placed on the aggravations. However, if the bill is enacted, we will get to know, as with existing offences, what weight is attached to the fact that an offence was motivated by an aggravating factor.

Robert Brown: On the basis of your experience of cases involving other aggravations, should sentences be more punitive in cases in which an aggravation is proved? Should the people who are found guilty of such offences receive longer prison sentences or bigger fines?

Andrew McIntyre: It is hard for us to say. We get to find out what the overall sentence is and how it reflects the aggravation. By its very nature, an aggravation is something that makes an offence worse than would have been the case if that aggravating factor were not present, so one would expect that reflecting the aggravation in the sentence would have an impact on the severity of the sentence that was imposed.

Robert Brown: We have had some evidence—from Mr Hopkins, for example—about community sentences and whether more satisfactory community sentences would be more effective in tackling the reason why people commit such offences. Would you expect more use to be made of community sentences to reflect and respond to aggravation by prejudice?

Andrew McIntyre: That is quite a difficult issue. We must be clear that such aggravation can attach to the whole spectrum of criminal offending, from breach of the peace—which, although it can be extremely serious, is an offence that is often regarded as being at the lower end of crime—to homicide. Aggravation does not apply only to particular crimes. We are talking about a range of crime, so it is difficult to predict what the disposals should be.

Equally, it is important to look at the range of disposals that exist—we in the prosecution service, at least, are always open to that—and to think creatively about whether particular community-based disposals are appropriate for particular categories of offending. When we are dealing with vulnerable groups or groups that are targeted because of a particular feature of their identity, the paramount consideration must be safeguarding the interests of those groups. It is easy to see how many community disposals might not safeguard the interests of a group that has been the focus of the perpetrator's hatred, but we are always open-minded about the options that are available, and the courts should be, too.

Robert Brown: In fairness, those are primarily matters for the judiciary rather than for you.

Andrew McIntyre: Exactly.

Robert Brown: On the basis of your experience of offences that have been aggravated by racial or religious factors, is it your impression that the people who have been found guilty of such offences have received more punitive sentences or that greater use has been made of community sentences for those offenders? Depending on the severity of the offence, a mixture of both forms of disposal might be used.

Andrew McIntyre: In general, I am not aware of a reliance on community-based sentences in such cases, although it is fair to say that, across the justice system, it is universally recognised by the prosecution service and by the courts that a crime that has been motivated by racial hatred, for example, is by its nature more serious than it would have been had it not been motivated by racial hatred. That is now part of the understanding of such crime.

Robert Brown: I am trying to get at the fact that there are a number of reasons for having aggravation by prejudice, but I presume that one of them is to strike at the heart of the cultural factors that underlie that prejudice and to reduce people's propensity to commit such offences in the first place. Such prejudice is sometimes associated with ignorance or other background factors such as attitudes. Do you accept the view that a number of people who have given evidence have expressed, which is that we should focus on trying to change people's attitudes and behaviour in that regard?

Andrew McIntyre: I think that that is right. We do that in a number of ways. For example, we do it by having a rigorous prosecution policy that brings into the public domain and to the attention of the courts how seriously such crimes should be treated. At the other end of the system, the courts have a range of powers. If there were a creative disposal that evaluation had shown to have an impact on the propensity of people to commit such offences, it would be extremely difficult to suggest that that was not an appropriate disposal in such cases, but we are dependent on the availability of schemes that have been evaluated so that we can be utterly confident that they will achieve what they seek to achieve.

Robert Brown: Do you have anything to add, Ms Cockburn?

Linda Cockburn: It depends entirely on the person who commits the offence. We could not say that someone who was guilty of such an offence would definitely get community service. It would depend on their record. As well as having a law that says that aggravation by prejudice is wrong, there must be a programme of education. People might need to be taught tolerance.

10:30

Robert Brown: On the role of the Crown Office and Procurator Fiscal Service, I think that I am right in saying that there is currently a policy—I am not sure whether it is a presumption, but there is an instruction—on accepting pleas that would result in the removal of an aggravating factor. What exactly is the policy?

Andrew McIntyre: There is a very logical policy, which makes it clear that when there is evidence of an aggravating factor, for example in relation to racist crime, that should be brought before the court's attention when possible. We should make full use of the statutory aggravations rather than rely on our previous powers to make the courts aware of the facts and circumstances of a crime. Thereafter, when we charge cases, we should ensure that we maximise the potential of the statutory aggravations and do not delete those key elements, the aggravating factors, from the case as part of plea negotiation. For example, if there is a racist element in a breach of the peace, it is clearly in the interests of the accused person to seek to agree a plea of guilty to the breach of the peace under deletion of the racist aggravation. We have given very clear guidance on policy to indicate that that is not generally in the public interest. That is an interesting aspect of our policy, because it is clear and it has been in force for a number of years. If you asked people across the prosecution service how they are to approach racist crime, you would find that that policy is clear in their minds. There is a universal understanding of what it is intended to achieve.

A caveat is that there can be cases when, for some evidential reason, we can no longer prove the aggravating factor. For example, if a breach of the peace is aggravated because, in the course of the shouting and swearing, a racist remark was made then, as with the bill, the aggravating factor may be proved on the basis of only one source of evidence. If, in the course of our case, we lose that source of evidence because the witness does not come to court, or for any other reason, we might still be able to proceed with the substantive breach of the peace and we might legitimately—in fact, we would have no choice but to—delete the aggravating factor. We do that on some occasions because there is no choice, but the policy is clear on how seriously racist cases, for example, should be taken to ensure that we maintain the evidence of the racist aspect throughout the proceedings and bring it to the court's attention.

Robert Brown: The committee follows that clearly, but what about situations when there is a particularly anxious complainer, who is definitely

not keen to give evidence—more so than in the average case—because of potential health damage or suchlike? Do you still retain discretion in cases in which it is manifestly in the interests of the victim that a plea be negotiated in suitable instances?

Andrew McIntyre: Absolutely. We have policy on a range of crimes and how they should be treated. Our policy in this instance is clear and it is regarded as being a very strong policy, which is to be departed from only in the most exceptional cases. Our overriding duty is to prosecute cases in the public interest. That means that we must always take account of all the circumstances of the case; there can be a number of unforeseen factors in cases and we have to be open to considering them. In the example that you give, if the witness had particular anxieties, our first option would not be to delete the aggravation or to discontinue the proceedings but to give advice and support to the victim to help them through the prosecution, so we would have recourse to, for example, special measures and the range of other support mechanisms that are there to make the process better for victims. We feel strongly, particularly when vulnerable groups are targeted, that it is generally not in the public interest to allow the fear that the perpetrator has brought to bear on a witness to bring proceedings to an end, but a different approach sometimes has to be taken in very extreme cases.

Robert Brown: On a practical point, if you drop the aggravation, does that have to be indicated on the case papers, with some reason given for it and some justification for higher-up officials?

Andrew McIntyre: Absolutely. Would Linda Cockburn like to comment?

Linda Cockburn: Yes. That would be the advice to every prosecutor when they depart from a policy. In any type of case, the advice is to write on the case papers the reasons for departing from a policy. If the prosecutor is asked about the issue six months down the line, because they deal with so many cases, they might have forgotten reasons, so those would be marked on the papers.

Andrew McIntyre: Our system requires us to give the reasons for such decisions, which are approved by a senior member of the prosecution service.

Linda Cockburn: Yes—a legal manager ultimately takes that decision.

The Convener: What do you do in a case of assault or breach of the peace that includes in the libel sectarian or racist remarks if, in the course of the Crown case, your evidence does not sustain the sectarian or racist element? That inevitably happens from time to time. If the defence does not make a no-case-to-answer submission, do you seek to delete that element from the complaint?

Andrew McIntyre: There are several options. The prosecutor might feel that it is patently obvious that the evidence is not sufficient and that, as an officer of the court and an independent prosecutor, they cannot properly ask the court to consider that element. In that situation, they will delete it. Alternatively, the prosecutor might feel that an argument can be made. The comment that was made might be on the boundary, so it is not clear whether the remark was racist or motivated by hatred. The prosecutor might make an argument about that, which may or may not be successful. The prosecutor will either delete the element or argue the case, with the court then deciding whether that aspect should be removed. However, the substantive charge will not be lost as a result.

The Convener: There have been complaints, which are too frequent to be apocryphal, that in some cases the Crown, through no fault of its own, cannot sustain the effective aggravation but still seeks a conviction.

Andrew McIntyre: I cannot speak about individual cases or the decisions that people take. However, people prosecute such cases daily and make immediate decisions about the evidence and its significance. Sometimes, there is a subjective element in relation to what a particular remark means. For example, there might be a question as to whether a remark was really racist, as it might be interpreted in several ways. If an argument can be made, it is proper for the prosecutor to make that argument and to let the court decide. However, if it is patently obvious that there is no evidence to support that element, it will be perfectly appropriate to remove the aggravation—personally, that is what I would do.

Linda Cockburn: I agree. Obviously, we can still go for conviction on the substantive charge, but the aggravation should probably be removed. However, I cannot speak for every individual case in the country.

The Convener: Clearly not.

Paul Martin (Glasgow Springburn) (Lab): We have had evidence that the creation of a new statutory aggravation might impose additional burdens on the Crown. What is the panel's experience of that? Do you envisage any difficulties with implementing the bill?

Andrew McIntyre: There are two aspects to that. It will be clear to prosecutors that an additional element must be considered. The word "burden" sounds slightly negative—there will be duties on prosecutors to look for evidence of the new aggravations, to ensure that charges are libelled effectively, and to lead the evidence on

that explicitly in such cases. There will be additional duties on us to ensure that we do all that we can to secure and bring before the court the available evidence of any such aggravating factors. There will therefore be work for us in developing policy and guidance and work for individual prosecutors in individual cases.

Linda Cockburn might say something about the impact on our information technology systems.

Linda Cockburn: So that the committee understands the process, I point out that our reports are received electronically from the police. Every report has a charge, which we will adjust. Obviously, there is a huge number of possible charges. The police also send aggravation codes, which we can add to or take away from. With the aggravations that already exist, there are 2,500 combinations of the aggravation codes. The bill will introduce more, so that we will have 6,500 combinations. That is not the problem; our system can cope with that. The problem is that the charge can hold only six aggravations. It might seem unusual that one charge would have six aggravations, but there are not only textual aggravations but aggravations relating to domestics and whether someone is on bail. Our system can cope just now, but if we keep adding to the law by way of aggravations, our system will eventually become full up; six characters will not be enough and we will have to rewrite the whole system. That is a word of warning. We can cope just now, but if there were any more aggravations, we would begin to struggle.

The Convener: There would be computer overload.

Linda Cockburn: Yes.

The Convener: We will follow that up later.

Paul Martin: What are the implications for witnesses and victims who will be giving evidence in these cases?

Andrew McIntyre: That is an important issue for us to consider. If we choose to libel these aggravations, they will be part of the charge and victims and witnesses will be required to give evidence that speaks to them. We have to be careful that we are comfortable with that and that it is in the public interest in the individual case. In relation to homophobic crime—or indeed any area of crime—there is a clear prospect that someone might have to talk about sensitive and, sometimes, private matters relating to their personality or identity, which they might not wish to have aired in a public forum. We have to be careful that we have information about that. Where that is a real problem for the victim or witness, we have to consider what is in the public interest. In some cases, it will not be in the public interest to air that part of the crime in the public forum of the criminal trial.

The other option, which is always our first option, is that we do whatever we can to support the victim or witness through the process. I know that the Government is considering provisions on witness anonymity. We will follow closely what emerges from that. A sufficient degree of anonymity might be afforded to victims and witnesses in some categories of case to allay their fears about aspects of their private life being aired in public. We have done that in the past under the common law. There is a lot to think about, but the implication for witnesses and victims is one of the most sensitive areas and we would have to be clear about the impact on them and what was in the public interest.

Paul Martin: The evidence that we have received is that, in evidential terms, the common law is much more powerful than this statutory aggravation would be. Do you agree with that?

Andrew McIntyre: I do not think I can say that the current common law is more powerful. At present, if we were dealing with, for example, an assault that was motivated by homophobia, we would prosecute it and choose whether to lead evidence about the particular aggravation involved, such as remarks made at the time of the assault. We might choose not to lead evidence on that, for the reasons of sensitivity that I outlined. The same will apply with the new aggravation. We will have to decide whether it is in the public interest to bring out that aspect of the case. If we choose to do that, we will do it using the aggravation and there will be express reference to it.

Paul Martin: In response to a previous question, you said that these cases would be treated in a high-profile manner. You used the term “high profile”. Will you elaborate on what you said?

Andrew McIntyre: I do not think I said that these cases would be high profile, but their general profile would be raised by virtue of the aggravation. They will absolutely not all be high-profile cases. This is not to diminish any kind of crime, but some cases will be a breach of the peace or a minor assault that is made more serious because of the aggravation. Given the aggravation, the profile of these cases would be raised in the context of the court, because of the new duties that would be imposed on the judge. Some cases might be high profile, but they will not all be high profile.

Paul Martin: That is not to do with the resources that will be attached to the case.

Andrew McIntyre: No. I was talking about the way in which the crimes are regarded. We are raising the profile of crimes that are aggravated by

virtue of hatred against a particular group, because Parliament will have raised the profile of those crimes by recognising their particular seriousness. The profile of the crime—its seriousness—will necessarily be raised in the court because of the provisions that will be enacted if the bill is passed.

Linda Cockburn: It is important to emphasise that the bill is seeking to introduce not a new category of crime but aggravations to an existing common-law crime.

10:45

Bill Butler (Glasgow Anniesland) (Lab): Previous witnesses have suggested that a significant number of false or exaggerated claims of racial aggravation have been made in an attempt to ensure that prosecutions take place. Indeed, last week, a witness claimed that that was an element in 20 per cent of such cases. Have you found that to be a particular problem?

Andrew McIntyre: In the absence of any sound research showing the exact proportions, I would be loth to put a figure on that.

Bill Butler: Like, I am sure, the rest of the committee, I was surprised that the witness felt able to do so. In any case, I was simply referring to the evidence that we took last week. What is your view on the general point?

Andrew McIntyre: As I say, we certainly cannot put a figure on it. With any crime, we as prosecutors have to examine the evidence carefully and take into account any suggestion that the complaint is ill-motivated or not founded on credible and reliable evidence. However, it is safe to say that our anxiety over people making false allegations with regard to this type of crime is no greater than our anxiety over such allegations in relation to other types of crime.

Linda Cockburn: Absolutely. What Bill Butler suggested can happen with any crime. Anecdotal evidence is one thing, but sound research might need to be provided to back up such claims.

Bill Butler: That is very clear.

Are you content with the provision that evidence from a single source is sufficient to prove that an offence has been aggravated by one of the various types of prejudice that are set out in the bill?

Andrew McIntyre: It is a very important provision, because it does not give us any more of a burden than the common law already imposes on us. As Linda Cockburn has pointed out, we will still be prosecuting the same substantive crime. We will still require corroboration of the fact that the crime has been committed and of the perpetrator's identity, but, as with the common law, particular features of an account and particular aggravations will not require corroboration. It is important that a standard is set that will allow us to admit that evidence but which is not unreasonable or unachievable.

Bill Butler: In fact, the standard has already been applied hitherto.

Andrew McIntyre: Absolutely.

The Convener: Obviously, if there is sufficient evidence, you are perfectly entitled to proceed with a case. Sometimes, when you assess evidence in a crime, you might well have reservations about any racial or sectarian aggravation before the case is marked. In such cases, would you rely on the sufficiency of the evidence and go ahead with the prosecution or would you apply the same standard that you would apply to any run-of-the-mill case?

Andrew McIntyre: Prosecutors always face that dilemma. Our primary role is not to determine the facts of a case but to look independently at the evidence and bring it before the court for a judge or a jury—as the case may be—to make a decision. However, in certain situations, we might have to go further than that. For example, a piece of evidence might not only make us question the principal evidence in a case but substantially contradict the principal evidence. If, as a result, it is clear that the allegation cannot be true or is seriously in question, we have to pause and think about whether we can properly bring the case before the court. On the other hand, if it is a matter of the individual prosecutor believing the account, we are probably going too far. Deciding who is or who is not telling the truth is not a luxury that we as prosecutors have, particularly given that, in Scotland, corroboration is required and we can bring a case only if there is principal and supporting evidence.

Stuart McMillan (West of Scotland) (SNP): Will you elaborate on the difficulties that prosecutors face in differentiating between offences that are motivated by prejudice and those that are carried out due to a person's perceived vulnerability? What effect, if any, will the bill have on prosecution decision making in such cases?

Andrew McIntyre: We already have that dilemma, but it will be crystallised by the creation of particular aggravations. Our approach will be simple: the fact that a crime has been committed against someone in one of the protected groups will not be enough to prove to the court that the offence was motivated by a hatred of that group. It is important to be clear about that, because there could be an expectation that whenever a crime is committed against someone who is disabled, for

example, the aggravation will be triggered. It will not.

We will have to look into the mind of the perpetrator, in so far as we can do that. In general, we will look for any evidence that demonstrates that they were motivated not just because they are a bad person or because the other person was vulnerable but because they have a hatred of the protected group in question. We will need to find evidence of something that they said at the time of the offence, or before or after it, that shows us their motivation.

Linda Cockburn: Andrew McIntyre is right. The fact that someone perceives that something was the cause of what happened does not mean that we can prove it. We need objective evidence that we can provide to the court.

Stuart McMillan: Might cases be prolonged because you need to seek specific evidence?

Andrew McIntyre: I do not think so. Cases will not be dragged out beyond what is right and proper, given our investigation and inquiries. What might happen—although it should not happen if we give clear guidance to the police—is that we get a report of an assault against someone in a wheelchair, for example, and nothing is said about the motivation for the crime. An obvious question for us would be whether the crime was motivated by a hatred of people in wheelchairs or by the person's vulnerability. We would ask the police to consider that and report back to us, and we would then consider the evidence. There might be some work involved in that, but it would be quite proper for that to be undertaken.

However, cases should not be prolonged. Either there will be evidence or there will be none. If there is evidence, it will be brought out at the trial. I do not think that undue delay will be created in the investigation and prosecution of cases.

Bill Butler: As Ms Cockburn said earlier, the bill does not create any new offences, but it has been suggested that it might pose a threat to freedom of speech for those who hold mainstream Christian beliefs about sexuality, marriage and so on. For example, let us say that, outside a gay bar, a church organisation distributes pamphlets that contain material about sexuality that some people might perceive to be alarming or upsetting. Could that lead to a charge of aggravated breach of the peace?

Andrew McIntyre: I anticipated that question, because we have discussed how we will approach such cases. Such issues arise, and have arisen in the past in respect of the existing aggravations, so they are important to consider.

In the first instance, our primary function will be to decide whether a substantive crime has been committed. It is worth while to look at the definition of breach of the peace, which requires a standard of conduct that would be

"alarming or seriously disturbing to any reasonable person in the particular circumstances."

Taking account of that definition, it would be for us to consider the facts and circumstances and decide whether the conduct amounted to a breach of the peace. One view would be that distributing leaflets is simply a legitimate expression of freedom of speech. I think there would need to be something more—something in the nature of what was said in the leaflets or about the way in which the protest was undertaken or a view was expressed—for an incident to meet the definition of breach of the peace.

On the basis of a bald scenario, it is impossible to say whether a breach of the peace would be committed, but we are clear that the definition of breach of the peace sets a certain standard that goes beyond someone expressing their views freely and legitimately.

Where expression of views goes further and breaks the law, not only could it conceivably be a breach of the peace—as is the case at present—but it could be a breach of the peace that is aggravated by one of these specific aggravations.

If the bill is passed, there will be no significant change, and there should be no greater anxiety over such situations than exists at present. As prosecutors, we have to weigh up such dilemmas in taking decisions. However, we recognise the difference between the legitimate and lawful expression of views and a breach of the peace.

Bill Butler: So it would all hinge on the circumstances, the reasonableness of the material being distributed and/or the actions of those distributing said material.

Andrew McIntyre: Absolutely. We would have to consider all the circumstances: what was being said, how it was being said and who it was being said to, and the nature of any publications. Only when something breached the criminal law would an issue arise.

Linda Cockburn: Objectively, an issue would arise only if the action would alarm or seriously disturb any reasonable person. That is the objective test that the court would set.

Articles 9 and 10 of the European convention on human rights protect one's right to religious expression and freedom of speech. Any legislation has to be ECHR-compliant.

Bill Butler: You are content that the bill's definition of prejudice as "malice and ill-will" is sufficiently clear to allow prosecutors to decide in

examples such as the one I have attempted to outline.

Andrew McIntyre: I think so. The expression "malice and ill-will" is quite old fashioned, but it is used daily in the courts and we are familiar with it. It says what it sounds like it says, and it is something that we can recognise generally when we see it in the evidence. We are not uncomfortable with the test. It does not change the standard to any significant degree. Importantly, the root offences will continue to be the same, so our handling of them will be the same as it is now. However, if there is evidence of a particular motivation, that will be highlighted differently under the bill.

Bill Butler: So there will be no real change in the procedure and the approach.

Andrew McIntyre: That is correct. Although there will be a change in the court's recognition of breach of the peace—its profile in the court—we will still have to make the same decisions about what is a breach of the peace and what is not.

The Convener: Surely the issue here is the question of alarm, which was originally defined in the case of Logan v Jessop. The alarm has to be real. It should not be exaggerated, and it should not be the alarm that would be experienced by a particularly sensitive person. Has the law moved on from that definition of alarm?

Andrew McIntyre: The current definition is that in Smith v Donnelly, which states it slightly differently, although the way in which you expressed it is exactly the way in which we would apply it. The prospect that someone could potentially suffer minor annoyance or disagreement, or hold a different view, would absolutely not be a breach of the peace. There has to be something more, and it must always be judged, as with all such standards, against the standards of the reasonable person taken in the whole.

Robert Brown: Are there two exercises that have to be carried out by the prosecutor and the sheriff?

Andrew McIntyre: Yes.

Robert Brown: One exercise is to identify whether there is a breach of the peace in the first place. Does an aggravation influence or affect the definition of breach of the peace in any way?

Andrew McIntyre: No, it does not. The first test is whether there is a breach of the peace. If there is, the next test is whether the comments—comments that would be likely to cause alarm and distress to a reasonable person—were made because the person who made them had a hatred of, or was evincing malice or ill-will towards, a particular group. Those are the two tests, although they will be closely linked. With a breach of the peace in particular, the issue will probably hinge on the comments that were made, and we will have to consider whether those comments meet both parts of the test. There will be other factors, such as the way in which something is articulated and where it is articulated.

Those are difficult decisions when it comes to someone who is expressing their views, and we have to be very clear. We agonise over such cases when they come in to ensure that they meet the standard set in the criminal law rather than just accepting that they represent someone exercising their legitimate freedom of speech.

11:00

Robert Brown: The key point is that you do not anticipate that an aggravation per se will influence or change the definition of breach of the peace.

Linda Cockburn: No. There must always be an objective, reasonable test.

The Convener: There is a little concern about one of your earlier answers on IT, Miss Cockburn. Perhaps it is worthy of further explanation.

Stuart McMillan: Can you provide some further detail on the implications for IT if the bill is passed? Have you anticipated a timescale for making any necessary changes?

Linda Cockburn: As I explained, we have a finite number of characters that can be put into aggravation codes, with a maximum of six aggravations per charge. At present, we might see three aggravations. As I said, they do not all represent racist or religious aggravations but include aggravations related to bail and domestics, for example. The codes can be used to flag up in court a previous conviction for a domestic, for example. That is the reason for them.

When the question whether to introduce age and gender aggravations was raised by the Equal Opportunities Committee, our IT department started to think about the situation. We will run out of space for aggravations if they keep being added. The implication is that our whole system would have to be rewritten. I am told by the information systems division that that would cost £300,000 for us alone. The courts and the police would also have to realign their computer systems so that we could all work in unison, as we do now.

Stuart McMillan: You mentioned the cost implication, which is substantial. There is also the problem of the number of back-office hours needed to make the changes.

Linda Cockburn: A lot of hours would be needed. Someone from our policy division would need to sit and input the text for 4,000 extra

combinations. There is no doubt that the job would be time consuming, but it could be done. The timescale would be 12 weeks. We would have to meet the police and the Scottish Court Service to ensure that everyone was using the same aggravation codes. There would be a policy aspect to take into account, too, as well as the time that it would take someone to write the 4,000 extra combinations.

Stuart McMillan: Would that be done in-house, or would you bring in external expertise to assist you?

Linda Cockburn: The codes would be written by a member of staff from the policy division.

Andrew McIntyre: We are clear that the current proposal would pose no problem for the capacity of the IT system. Although there would be work to configure all the different possible charge codes that would need to be configured, the system has the capacity to deal with what has been proposed.

Linda Cockburn: And the cost is minimal.

Stuart McMillan: When legislation is being made in any Parliament, the focus should not be on the short-term view alone; a longer-term view should also be taken. You have flagged up an important issue.

Andrew McIntyre: We are not making any judgment or comment about what might or should happen in the future. The point is that the current system is capable, but it is reaching its capacity.

Linda Cockburn: We are merely flagging up that point to everyone.

The Convener: As there are no further questions, I thank Miss Cockburn and Mr McIntyre for attending. In your case, Mr McIntyre, it might have been an action replay of an earlier briefing, but you appreciate that we require to put your evidence on record. I thank you both for the quality of your evidence this morning.

Andrew McIntyre: Thank you very much.

11:04

Meeting suspended.

11:09

On resuming—

The Convener: I welcome our second panel: Patrick Harvie MSP introduced the bill; Sara Stewart is from the Scottish Government criminal law and licensing division's sentencing policy unit; and Jetinder Shergill and Marie-Claire McCartney are from the Scottish Government legal directorate. We will move straight to our first line of questioning, which is led by Angela Constance.

Angela Constance (Livingston) (SNP): Good morning. I ask Patrick Harvie to give an overview of the main purpose of the bill.

Patrick Harvie (Glasgow) (Green): Good morning, colleagues.

As members are aware, the proposal is a long-standing one. During the first session of the Scottish Parliament, moves were made to introduce a statutory aggravation of prejudice on the ground of religion. Questions started to be asked about which of the equalities strands such a mechanism would be appropriate for. The case for the bill has become very strong over the years since then. In Scotland, offences committed on the grounds mentioned in the bill are not being reported often enough, and the nature of the offences involved is not being sufficiently and explicitly recognised.

Such offences have a disproportionate impact on people's lives, not just because of their scale, but because of the emotional impact that they can have, given the nature of the targeting or malice or ill-will that is shown. It is also arguable that it is sometimes necessary to vary sentences, which does not happen often enough.

The arguments were debated at length in the discussions on the extension of statutory aggravation to the ground of religion in the first session of Parliament. At that point, Parliament took the view that statutory aggravation gave greater clarity and helped to address some of the problems with underreporting. Since then, it has been shown that the religious and racial aggravations have been effective—I hope that the committee agrees that some of the evidence that it has heard shows that—and a clear case has been made that extending statutory aggravation to the grounds that are mentioned in the bill would also be effective.

The Scottish Executive working group examined a range of options, including non-legislative options. It made several recommendations, many of which have been acted on, but the headline recommendation was to extend statutory aggravation to cover the grounds of sexual orientation, transgender identity and disability. My intention in introducing the bill was to allow the Parliament to decide whether to support that recommendation, and I hope that the case in favour of it has been made.

Angela Constance: You will have heard that previous witnesses have stated that the common law is already well-equipped to deal with the aggravations that are outlined in the bill. What is your view?

Patrick Harvie: A number of witnesses have argued that the common law is technically sufficient. However, there has also been a

substantial amount of evidence that the common law is not being effectively applied or is unable to perform some of the functions that we seek from legislation. In particular, common-law aggravations are not being used frequently enough in cases in which they might be appropriate, and there is no regular recording of those aggravations. There is no guidance to the police or to procurators fiscal on how to deal with such crimes.

There are also some things that the common law cannot do. Recent answers to written questions from Bill Butler gave, for example, the number of convictions for religious prejudice aggravations in each procurator fiscal area in 2006-07. I have asked similar questions. At the moment, it is completely impossible to get such data for the crimes that the bill covers.

We could introduce guidance for the police and PFs without legislation, but only through legislation can we impose the requirement that the court must make a decision about the aggravation and state whether the sentence has been varied as a result and, if so, how. This nice, short, simple little bill is the simplest, easiest and most effective way of putting together the package of measures that we need if we are to treat these hate crimes in a way that is consistent with the way in which hate crimes that are already recognised are treated.

Another thing that the common law cannot do is allow us to draw comparisons across the different forms of aggravation, so we cannot tell whether we are having an impact. The Scottish Government has a large number of strands of work, involving a huge amount of activity, related to tackling prejudice in all its forms in our society. We need to be able to ascertain whether such work is effective. We need data on the operation of the justice system in relation to hate crimes, so that we know whether the way in which we treat them is effective.

11:15

Angela Constance: You said that although witnesses said that the common law is technically capable of dealing with aggravations, the reality is somewhat different and the law is underutilised. Can you cite evidence that supports your view?

Patrick Harvie: "There are known unknowns"—is that Rumsfeld's phrase? As witnesses on the previous panel said, it is about knowing that offences are not being reported to the police, that cases are not being brought and that hate crimes are not being explicitly recognised as such, which means that data on them do not exist. It will be possible to give the fullest answer to the question only after legislation has been in operation for a while and we know whether the Association of Chief Police Officers in Scotland was right to say that more hate crimes will be reported if the bill is passed. The statistics might go up for a while, simply because offences would be recognised as hate crimes. I hope and believe that sentences would be effective and that the evidence and intelligence information that are gathered by the police and by the courts will be used effectively.

Angela Constance: You hope that the bill will improve the situation and enable us to know what is currently unknown.

Patrick Harvie: Yes. The committee heard from equality organisations that there is not just anecdotal evidence but research evidence that people who experience such offences come to accept them as a given that they have to live with. We should not allow that to persist—we should not expect people to think that they must deal with hate crimes as a given. [*Interruption.*] That is not the kind of society that Parliament wants, nor is it the law of nature; it is something that we can tackle. Passing the bill is just one of the necessary actions that we must take if we are to tackle such offences more effectively.

The Convener: The gremlins are around this morning. Will everyone please ensure that their mobile phones are switched off?

Robert Brown: It seems that two issues are involved in what Patrick Harvie has been telling us about common-law aggravations: first, the extent to which aggravations in reported crimes are not being drawn out by procurators fiscal and sheriffs; and, secondly, the extent to which such crimes are underreported as a result of perceptions about what the law does about them. Do you accept that there is no clear evidence that common-law aggravations are not used in cases that come before the procurator fiscal? Is it fair to say that there is no evidence one way or the other on the matter?

Patrick Harvie: I am not sure that I agree. When witnesses from the Law Society of Scotland gave evidence to the committee they made a case for the common law's ability to achieve what I hope the bill will achieve, but their case was not entirely consistent. David Cabrelli said:

> "The issue might be inherent in the common-law system, but it is not so much at the forefront of it."—[*Official Report*, *Justice Committee*, 20 January 2009; c 1528.]

A number of witnesses have told the committee that the introduction of statutory aggravations on racial and religious grounds brought the issues to the fore much more effectively. The introduction of the aggravation drew attention to such crimes, increased the focus on them and has been a necessary part of tackling them.

A comparison can be made with the debates that took place a few years ago on domestic violence, which was not then thought to be as

important an issue as we now recognise it to be. It was not treated in the way it is currently—there is now a clear legislative, judicial and political focus on the issue. We regard that kind of violence as being completely unacceptable and we have put in place systems to ensure that we fulfil our objective of eradicating it. If the Law Society is right in saying that the issues that we are discussing are

"not so much at the forefront of"

the common-law system, legislation is needed to ensure that that situation is overturned.

The Law Society representative, after expressing some concerns, said:

"I do not think that the concerns are a bar to legislating in this area, but they are a consideration."—[*Official Report*, *Justice Committee*, 20 January 2009; c 1531.]

That is an entirely balanced and proportionate response. We should work through any issues that arise, rather than use them as a reason not to put in place legislation. We could continue to rely on the common law and perhaps introduce some additional guidance, but it is clear that that would be a less effective system for dealing with these crimes. It would also perpetuate a situation in which we deal with hate crimes in different ways. We might talk about the workload of various organisations such as the police or the Crown Office, but having different systems introduces additional complexity, and the system is not particularly easy to deal with anyway. That would also reinforce the view that some offences or forms of prejudice are less significant and worthy of attention than others.

Robert Brown: My question was related to the evidence that exists with regard to whether the common law is used to deal with aggravation. In your answer, however, there was quite a strong suggestion that the bill is intended to send out a message, as part of a number of other mechanisms to identify the importance and significance of those issues. I will ask you about two points in relation to that. First, is it an appropriate job for criminal law to send messages, as opposed to dispensing justice in individual cases? Secondly, will the bill alone be effective in conveying that message and increasing the profile of that type of offence?

Patrick Harvie: I am not sure that I agree that the core purpose of the legislation is to send a message. Most of us take the view that legislation is not a flag-waving exercise—it is not just about sending smoke signals.

I agree with the witnesses who have argued that we require legislative change to ensure that there is an appropriate response to offences that are committed, and that courts pass appropriate sentences and give reasons for them: that is the bill's core purpose. Several witnesses also argued that, in addition, a message will be sent or received, so it is perhaps a factor that we should take into consideration.

To leave the situation as it stands would be interpreted as meaning that crimes that are motivated by prejudice on the grounds of sexual orientation, transgender identity or disability are less significant or worthy of attention than those that are motivated by prejudice on the grounds of race or religion. That would be a very negative message for people to hear. The core purpose is not to send a message, but that can be a secondary factor. If we send a signal in addition to ensuring that the right sentences are passed and that useful data are generated under the legislation, that is not necessarily a bad thing.

Robert Brown: So your view is—if I understand it correctly—that a range of things are being done and should be done to tackle that particular difficulty.

Patrick Harvie: Yes indeed.

Robert Brown: Is one of the high points of the legislative change that it gives a direction of travel, in addition to other things?

Patrick Harvie: Yes. I have with me a copy of the report of the working group on hate crime, with which I am sure the committee is familiar. The working group produced a number of recommendations, most of which were not legislative in nature. There were only two proposed legislative changes, of which the provision under discussion was the clearest. In introducing the bill, I sought to give Parliament the opportunity to enact that provision.

The other proposed legislative change is somewhat more complicated and was made simply for consideration. It posed the question whether harassment should be considered—that question remains open. The working group made a host of other recommendations and we also took account of the Scottish Government's recent response to the "Challenging Prejudice" document.

Prejudice throughout society should be tackled in diverse ways. No one should give the impression that they can simply wave a magic wand and make everything perfect. I have always argued that the progress that has been made over recent decades did not happen by magic but because people came out—they became open, honest and willing to express the reality of their lives in an explicit and direct way. I expect no less from the legal system. If we continue not to explicitly recognise, label and name homophobic crime, it will become more difficult to continue to challenge and reduce it. Being explicit creates the kind of progress that we have seen over recent decades.

Robert Brown: That links directly to my question on underreporting, which can be said to be the elephant in the room. Underreporting is a serious matter in this regard, as it is in the reporting of rape and sexual offences where, for all sorts of linked reasons, it is difficult to get people to come forward to make complaints and so forth. Will the bill help to counter underreporting? If so, to what extent should the provisions in the bill be matched by others that would encourage people to stand up for their rights in the way that you implied in your response to the previous question?

Patrick Harvie: The bill will certainly have an effect. That said, the bill is necessary but not sufficient in itself. A host of other things must be done. If someone's friend or partner has gone through a process of reporting such a crime and is treated with respect by the police and courts—in other words, their experience is recognised—that person will, if they are in such a situation, recount to the court how an aggravation was demonstrated and the sentence will be varied as a result. That sort of experience is likely to increase willingness to report.

The opposite could also be said to be true. If the evidence is not led on an aggravation because the prosecution does not, at the end of the day, expect it to make a difference to the sentence, if the sentence is not changed as a result of the aggravation, or if no information is given on whether a decision was made differently, people's confidence and trust in the system will take a bit of a knock.

We recognise the profound change and progress that has been made over recent decades, but it is important to remember that we live alongside people—offenders, victims and even police officers—who were adults when homosexuality was illegal. Police forces still have serving police officers who were trained at that time. If we are to eradicate or tackle more effectively these types of crime, a profound level of cultural change will need to take place. The situation is not yet "Job done." It remains the case that it is entirely necessary to build people's confidence. As I am sure ACPOS made clear, police forces in Scotland are already considering how to improve their work on sexual orientation as an aggravation. They have made a lot of progress in that regard and there is a genuine will to make further progress.

The bill also makes provision for disability, but we are not quite there yet in that regard. We still need to put in place additional systems, including for third-party reporting and additional forms of support.

I am not going to go through all the statistics—the committee has heard them and has had them in written evidence—but it is clear to us that, on all three grounds, there is a far greater experience of living with the criminal offences than is shown in the reported figures. If we are going to get there, we must build confidence among the public that, on all those grounds, their experiences will be taken seriously. Sometimes, bespoke systems are required to deal with those groups in society.

11:30

Paul Martin: The bill does not make provision for the imposition of mandatory sentences when an aggravation has been proven. What are the reasons for that?

Patrick Harvie: As has been made clear, the bill does not create new offences; it introduces a statutory basis for an aggravation for offences that could be either extremely serious or more low-level—offences that might attract a custodial sentence or a community sentence. It would be difficult effectively to specify in legislation what variation to a sentence should be required. It would be better to leave that in the hands of the court, which will know the facts of each case. The court may determine that a sentence should not be varied as a result of the aggravation, but it would have to explain why. If it chose to vary the sentence, information would have to be given on the nature of that variation.

A little while ago, we talked about whether the common law is sufficient. I do not think that anybody would argue that the flexibility in the common law does not have advantages. The idea of the aggravation retains the advantage of flexibility, as it allows the court to hear the evidence and to make a decision based on the facts of the case. It does not bind the court's hands in any way, but it requires that the decision-making process be clear and explicit. The reasons behind the decision will have to be made available not only so that the system can continue to improve, but so that the data can inform the system.

Paul Martin: Do you accept that sentencing is an important part of the process? We heard earlier from Mr McIntyre that some victims may find it difficult to give evidence in court. If the outcome was a sentence that was not as punitive as they had expected it to be—perhaps they expected a mandatory sentence, but that was not what the offender received—would not that be disappointing for victims who have gone to the trouble of giving evidence in court? They may have wanted to remain anonymous but decided not to do so because they thought that the offender would receive a mandatory sentence.

Patrick Harvie: The purpose of the court passing a sentence is to serve the best interests of

the public—it is not necessarily to send every victim away not feeling disappointed. People go through difficult emotional experiences when they report an offence and when they go through court proceedings as witness or victim. We cannot pretend that we are going to make everybody happy. What we must have, as Tim Hopkins from the Equality Network has said, is the appropriate response. In some circumstances, that will be a severe sentence; in other cases, it might be a different sentence. It is for the court to determine the response that is appropriate for the offender. That is what we should be looking for.

The Scottish Government and I agree on the policy, which is why we are working together on it. However, speaking personally, I think that there is a powerful argument for developing a more sophisticated response by considering the ideas that Tim Hopkins has raised around more appropriate community sentences that actually get to grips with the reasons why somebody has committed an offence, rather than saying simply that offences must be treated more severely. If that were an area for sentencing guidelines, we would have a very strong system.

Paul Martin: Do you accept that the victim would have to feel comfortable giving evidence? Surely if they were convinced that a trial would result in not just a community sentence but a more effective community sentence, they might feel more confident about coming forward in the first place.

Patrick Harvie: I believe that making the reasons for varying a sentence very clear will have a knock-on effect for future victims of offences. If victims are aware that that happens in Scotland, it will help to build confidence in reporting. I stress the word "help", because it will not build confidence on its own.

I hope that that is clear. If I have not responded to some of your question, it might be because I have not fully understood it.

Paul Martin: I understand the response.

Jetinder Shergill (Scottish Government Legal Directorate): I might be able to shed some more light on the question of cases in which a sentence might be considered to be particularly low. The Crown would still be able to pursue the case under the appeal procedures in the Criminal Procedure (Scotland) Act 1995; indeed, under the bill's provisions, the court would have to explain how the sentence has been affected by the aggravation.

Patrick Harvie: As I said earlier, there is a need to be clear and explicit and to recognise these offences. I am sure that in some circumstances someone might be uncomfortable about the inference that might be drawn about their transgender identity or sexuality based on an aggravation, but we should remember that the aggravation is about the offender's motive, not the victim's status or identity. In such cases, there must be appropriate support through victim support agencies and organisations, but that is no reason for not recognising that, in many cases, victims are angry and assertive, or for not having the aggravation.

Paul Martin: Let us get back to the real world for examples. Some individuals will continue to carry out homophobic attacks unless a clear message is sent out by having a mandatory sentence. I am not necessarily saying that such a sentence should be introduced; however, a very clear message has to be sent to certain individuals, who will simply not respond to community sentences.

Patrick Harvie: I am still minded to leave such matters in the hands of the court, which will base its decision on the specifics of the case and the information that is available. Of course, some individuals will continue to hold such attitudes, to believe that they have the right to act on them and to commit further offences. If a court were convinced that an offender's motivation demonstrated a continued—and higher—threat to the public, it would take account of that and express those reasons in passing and varying a sentence. It would be very hard to specify that in legislation. What you suggest might be appropriate in some cases, but not in every case.

Stuart McMillan: You have already answered part of my question. However, as far as appropriate community sentences or appropriate responses from the court are concerned, would educating offenders on such matters have benefits? Would educating school pupils also have future benefits in that respect?

Patrick Harvie: Very much so. The Scottish and United Kingdom Governments have identified a large number of areas where work on this issue has to improve. I will probably not surprise anyone if I say that the way in which racism in schools has been dealt with much more seriously in recent years has not been paralleled by a change in how homophobia is dealt with. Some schools and teachers are better than others, but many teachers still feel uncomfortable about challenging homophobia. In many schools, homophobia is still just normal. We should not allow it to be just normal. The Government document that I mentioned identifies several ways in which it is working on that. I hope that the Justice Committee and others will continue to take an interest in the matter. I certainly will.

On the issue of offenders who commit aggravated offences under the bill, I believe that there will be many situations in which a real

difference can be made. As Paul Martin hinted, that is more likely to happen at the lower end of the spectrum, with the less serious offences. I can give a second-hand report of an example of that—it was written about in *Gay Times* last year, so I cannot give an update on how the matter panned out. An offender who assaulted a gay man in Brighton was ordered to spend a short time working with a local gay magazine, with a probation officer present throughout. That was reported as having positive results.

That approach would not be appropriate in every case. The courts would have to decide whether such opportunities should be explored. However, in some situations, it would be appropriate for the court to pass a sentence that engages with the reasons why an offence was committed, rather than one that merely responds or reacts to the offence. That is an issue for the Scottish Government and, perhaps, for the proposed sentencing council to consider in the future. I am sure that the committee, too, would consider it as part of the parliamentary process. The approach is not explicit in the bill, but the opportunity will exist in the future.

Stuart McMillan: The written submission that we received from Leonard Cheshire Disability quotes *Disability Now* magazine. At the bottom of page 3, the submission states:

"Disability Now concluded that their investigation shows 'that police are not taking disability hate crime seriously enough and that disabled people are being attacked for the 'crime' of living independent lives'".

I was taken aback when I read that comment. Is it a legitimate comment and, if so, do you agree or disagree with it?

Patrick Harvie: As I mentioned in relation to sexual orientation and transgender identity, police forces in Scotland have made progress towards having in place specific systems to deal with offences related to those issues. However, we are less advanced when it comes to disability. I hope—in fact, it is more than a hope, it is a clear expectation that is confirmed by the comments of police representatives—that if the bill becomes legislation it will help to bring us up to speed on offences that are motivated by prejudice on the ground of disability.

We should not think of that as a scathing criticism because the simple fact is that progress takes time. We are where we are, and the next thing we must do is to put in place statutory aggravations, which will help to crystallise the issue and to focus minds. We are likely to have substantial progress from the police on the issue.

The Convener: We received evidence a few weeks ago on the Brighton case that you mentioned.

Patrick Harvie: Okay—thank you.

Bill Butler: As Patrick Harvie knows, under the bill, evidence from a single source will be sufficient to prove that an offence was aggravated by prejudice relating to disability or sexual orientation. How confident are you that that will not lead to false accusations being made about aggravation? Last week, we heard the assertion that in perhaps as many as one in five cases involving racially aggravated offences—20 per cent—an issue arises about the veracity of the accusation. What is your view on that?

11:45

Patrick Harvie: To be clear about what was said, I do not think that it was suggested that one in five cases involved false accusations; it was suggested that, in about one in five cases, there is an issue about veracity. That is very different from saying that a certain number of allegations have been found to be false.

Bill Butler: Sure.

Patrick Harvie: An issue might be raised about the veracity of evidence in substantially more cases than that, for any particular criminal offence that we might mention. We took the view that the statutory aggravations on the new grounds should be modelled on the existing ones. That is the nature of racial and religious aggravations, as well as others, as the committee heard earlier this morning. An additional feature of an offence does not necessarily need corroboration. We took that view in order to be consistent. I also think that it is the appropriate view. It will ultimately be for the court to decide whether sufficient evidence has been presented to justify a view on aggravation.

I refer again to the written answers that Bill Butler and I have received from ministers, which demonstrate that a clear majority of cases in which an aggravated charge is brought go to court proceedings, of which a clear majority result in the aggravation being proved. I question the idea that we should, in that respect, be worried about one in five cases. Even if we were worried about a large number of false accusations, that would not be a reason not to put the proposed legislation in place.

Let us imagine that we are thinking about a new offence to deal with a serious crime that we had become aware of. We might be worried about false accusations in the area of sexual offences, for example. I do not think that we would consider that a reason not to legislate. If false accusations are made, our systems would be perfectly adequate to deal with that. Courts will be perfectly capable of making their minds up on the basis of the information that is before them, and I do not think that that would overload the system. When it comes to racial and religious grounds, I do not think that that is causing a problem.

Bill Butler: That was a clear answer. You will realise, of course, that I was acting as advocatus diaboli—and I will do so again, with the next question. It has been suggested that, although the bill does not create any new offences, it might pose a threat to freedom of speech, particularly for those who hold what could be described as traditional, mainstream Christian beliefs about marriage and sexuality. How would you, as the bill's proposer, respond to those concerns?

Patrick Harvie: We are working within the limits of the human rights legislation that is in place. I am sure that Bill Butler knows that I am not likely to wish to infringe on people's right to public protest, freedom of speech or even civil disobedience, if it came to that.

Bill Butler: And you would not be allowed to introduce the bill in the first place—you are absolutely right about that.

Patrick Harvie: I believe strongly in freedom of speech, and I do not believe that the bill infringes on it at all. The organisations that have submitted written evidence expressing that concern have done so on the basis of fear and apprehension, rather than on the basis of actual experiences. The Bishop of Chester might have had a phone call with the police that he did not enjoy, but no charges resulted. If aggravations could be misused in the way that has been suggested, examples would have occurred in England and Wales, but that is not the case.

Bill Butler: That was very clear. Thank you.

Jetinder Shergill: I would like to add something in relation to the convener's earlier question. My colleague from the Crown Office did not touch on this technical aspect to how the provisions would work. Because of section 1(1)(b), the provisions will bite only where the Crown has libelled the relevant offence with the aggravation. Paragraph (b) is an important technical provision: the Crown must prove

"that the offence is so aggravated."

Where sufficient evidence has not been adduced, and where the aggravation has not been proved, the provisions will fall away. As with all the rest of the evidence that it must prove at trial, the Crown is under an obligation to prove aggravation beyond reasonable doubt. If the evidence on that point is not corroborated, there is no difference from the current common-law situation.

Bill Butler: The reasonableness test will again apply.

Jetinder Shergill: The standard of proof will be no different—it will be the criminal standard. The provisions relating to corroboration reduce the amount of evidence that is required, but the Crown will be obliged to provide the tribunal of fact with the same sufficiency and level of proof.

Bill Butler: So, it is the status quo ante.

Jetinder Shergill: Indeed.

The Convener: Given the special circumstances of the bill, which is a member's bill promoted by Patrick Harvie, it is appropriate for me to revert briefly to you, Mr Harvie. The committee has attempted to deal with the matter as thoroughly as it can, but we may have missed issues that are to the fore in your mind. Is there anything you would like to raise with us?

Patrick Harvie: You will be aware of the Equal Opportunities Committee's report and recommendation that other forms of hate crime and bases for statutory aggravation be included in legislation by ministerial order at some future point. When I introduced the bill, my intention was to base it on the key recommendation of the working group on hate crime; I did not intend to express a view on whether it was appropriate to extend the legislation to age or gender. The Equal Opportunities Committee has taken the view not that that is necessarily appropriate but that the option should be left open to ministers. The Justice Committee may feel that the proposed power is very broad.

The committee should also consider whether that is the right approach in the light of the information that was provided on IT systems. A number of MSPs would expect legislation to be brought before them for consideration before ministers could add further categories.

The Convener: That is certainly my view, and many members may share that opinion. Would you like to raise any further issues?

Patrick Harvie: No. We have covered more or less everything that I expected to cover. Thank you for your time.

The Convener: Not at all. Thank you for giving evidence to the committee.

11:52

Meeting suspended.

11:53

On resuming—

Subordinate Legislation

Act of Sederunt (Fees of Sheriff Officers) 2008 (SSI 2008/430)

The Convener: Item 3 is consideration of an instrument that is subject to the negative procedure. I draw members' attention to the cover note that is attached to the instrument.

Bill Butler: This is one of the few instances in which negative procedure and no procedure are combined. I make that point just for the practical amusement of those who enjoy the theory of subordinate legislation.

The Convener: That is the position, but I doubt whether anyone in their right mind could enjoy the theory of subordinate legislation.

Bill Butler: I was not making that claim for myself.

The Convener: Are members content to note the instrument?

Members *indicated agreement*.

The Convener: That concludes today's business.

Meeting closed at 11:54.

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