

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) BILL

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The Offences (Aggravation by Prejudice) (Scotland) Bill was introduced in the Scottish Parliament by Patrick Harvie MSP on 19 May 2008. The Bill will extend hate crime legislation, providing for new statutory aggravations which may be applied in cases where there is evidence that a crime has been motivated by malice or ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability. This briefing outlines the provisions contained within the Bill and provides relevant background information.

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KEY POINTS

- The existing legislative framework in Scotland already provides for statutory aggravations in relation to offences that are racially aggravated or motivated by religious prejudice
- An amendment to the Criminal Justice (Scotland) Bill (2003), lodged by Robin Harper MSP, covering offences aggravated by prejudice on grounds of disability, sexual orientation, gender and age, was rejected by the previous administration
- A report by the Working Group on Hate Crime (2004) stated that research consistently shows that some social groups are proportionately more often victims of harassment and crime and that much of this is motivated by prejudice against those groups
- With regard to statutory aggravations in relation to age and gender, the Working Group on Hate Crime concluded that (a) more consideration and consultation with relevant organisations would be required before extending hate crime legislation to cover age; and (b) recommended that a review of the criminal law in relation to violence against women should be undertaken to investigate the link between the undermining of women in society and crimes of violence against them
- On 27 November 2007 Patrick Harvie MSP lodged his final proposal for a Member's Bill requiring that any motivation of an offence flowing from prejudice on grounds of disability, sexual orientation or transgender identity be taken into account in sentencing
- On 15 January 2008, the Scottish Government announced that it would be giving its backing to Patrick Harvie's proposal and that the Bill would be taken forward as a "Handout Bill" – a member's bill which is sponsored and supported by the Government
- The Offences (Aggravation By Prejudice) (Scotland) Bill was introduced in the Scottish Parliament by Patrick Harvie MSP on 19 May 2008
- The Bill seeks to extend hate crime legislation, providing for new statutory aggravations which may be applied in cases where there is evidence that a crime has been motivated by malice and ill-will based on a victim's actual or presumed sexual orientation, transgender identity or disability

INTRODUCTION

The [Offences \(Aggravation by Prejudice\) \(Scotland\) Bill](#) ('the Bill') was, together with [Explanatory Notes](#) (and other accompanying documents) and a [Policy Memorandum](#), introduced in the Scottish Parliament by Patrick Harvie MSP on 19 May 2008. The Policy Memorandum states that:

“The policy objective of this Bill is to create new statutory aggravations to protect victims of crime who are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability. Similar statutory aggravations already exist to protect individuals and groups targeted on racial or religious grounds. No new criminal offences are created.” (para 3)

A statutory aggravation requires the courts, in passing sentence, to take into account the prejudicial context (i.e. either the motivation or the demonstration of malice or ill-will) of an offence when that prejudicial context has been one of hatred towards persons within certain groups.

The Justice Committee of the Scottish Parliament has been designated as lead committee on the Bill and the Equal Opportunities Committee has been designated as secondary committee.

BACKGROUND

CURRENT LEGISLATIVE PROVISIONS

Scotland

The existing legislative framework in Scotland already provides for statutory aggravations in relation to offences that are racially aggravated or motivated by religious prejudice.

Section 96 of the Crime and Disorder Act 1998 (“the 1998 Act”) makes provision for offences which are racially aggravated (‘racial hatred’), requiring courts to take such aggravations into account when determining sentence. The 1998 Act defines “racial group” as being a group of persons defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins. Section 96 of the 1998 Act provides that the court shall, on convicting a person, take the aggravation into account when determining sentence but does not require the court to state the extent of, and reasons for, any consequent difference in the sentence imposed.

In December 2002, following publication of the report of a Scottish Executive Working Group on Religious Hatred, Donald Gorrie MSP lodged an amendment to the Criminal Justice (Scotland) Bill, to make provision for the statutory aggravation of an offence by religious prejudice (‘religious hatred’). The amendment was agreed and became section 74 of the Criminal Justice (Scotland) Act 2003 (‘the 2003 Act’). Section 74 requires the courts to take any such aggravation into account when determining sentence, and also to state the extent of, and reasons for, any consequent difference in sentence.

Robin Harper MSP lodged a similar amendment to the same Bill, covering offences aggravated by prejudice on other grounds, including disability, sexual orientation, gender and age. During stage 3 consideration of the Bill the then Justice Minister, Jim Wallace MSP, commented on the Harper amendment lodged:

“As Mr Harper indicated, the groups that are covered by his amendment 1 are based on the European anti-discrimination framework, which is designed to prevent people from discriminating against each other on certain grounds and provides for civil remedies for such discrimination in certain circumstances. However, it is not quite so simple to transpose that framework into the criminal law—indeed, it may not be appropriate to do so. The four groups that are covered in amendment 1 might not all be in need of the protection in quite the same way.

People in those different groups should be safe and should feel safe. No one is suggesting that it is somehow all right for those groups to be subjected to crime, but hate crime is a crime and such assaults and abusive behaviour are dealt with day in, day out in our criminal justice system. People who are defined by age, including the elderly, and by disability may arguably be subject to attacks simply because they are vulnerable rather than because of some provable motive of ill-will or malice against them because they are elderly or have a disability.

Amendment 1 does not deal with those groups' vulnerability; it deals only with social prejudice. The common law deals with a broader spectrum of aggravations in respect of those groups than does amendment 1. That is not to say that the underlying principle that Robin Harper has offered for debate is not worthy of further consideration. However, we believe that much more work needs to be done to determine the place of different groups in respect of aggravations”. (Scottish Parliament 2003)

Robin Harper's amendment was not accepted, but during stage 3 consideration of the Criminal Justice (Scotland) Bill the Justice Minister announced the establishment of a Working Group on Hate Crime to examine the law on offences aggravated by prejudice on other grounds (discussed below).

Other Parts of the United Kingdom

Statutory aggravations relating to sexual orientation and disability already exist in England and Wales, and Northern Ireland alongside statutory aggravations in relation to offences that are racially aggravated or motivated by religious prejudice.

In relation to England and Wales, provisions similar to those contained in the Bill are set out in section 146 of the Criminal Justice Act 2003. In relation to Northern Ireland, section 2 of the Criminal Justice (No 2) (Northern Ireland) Order 2004 sets out similar provisions.

DEVELOPMENT OF THE CURRENT PROPOSALS FOR REFORM

Working Group on Hate Crime

A Working Group on Hate Crime ('the Working Group') was set up by the previous administration in June 2003 to consider the most appropriate measures needed to combat crime based on hatred towards particular social groups. The Working Group had the following remit:

“To look at the current criminal justice system and consider improvements, including legislation, which might be made to deal with crimes based on hatred towards social groups.” (Scottish Executive 2003)

As noted above, the establishment of the Working Group followed on from the provision introduced by the Criminal Justice (Scotland) Act 2003 of a statutory religious hatred aggravation.

The Working Group's [consultation paper](#) (Scottish Executive 2004a) was published on 27 January 2004. The consultation focussed primarily on whether legislation was needed to help tackle hate crime and if so, in what form. It also asked for views on whether the service provided by the police, the Crown Office and Procurator Fiscal Service and the Scottish Court Service could be improved. A total of 175 written responses to the consultation were received, with the majority of those responses coming from individuals (58%).

Seventy per cent of respondents felt that legislation should be introduced in order to address hate crime and a significant majority of respondents stated that this should be achieved by the introduction of a statutory aggravation.

[The Working Group on Hate Crime Report](#) (Scottish Executive 2004b) was published in September 2004.

The report stated that a number of detailed discussions on the nature of the crimes which the Working Group had been set up to examine had taken place, leading to the following definition of hate crime:

“Crime motivated by malice or ill-will towards a social group.” (Scottish Executive 2004b, para 1.4)

The Working Group pointed out that the expression “malice and ill-will”¹ is used in existing legislation which targets racism and religious hatred, and that this “provides a more suitable and subtle definition of this type of crime than the stronger term “hatred”. A number of consultation respondents had expressed concern about using the term “hate” in any future legislation because of the difficulty in proving that an act or action was motivated by hatred.

The Working Group’s report stated that:

“Research consistently shows that some social groups are proportionately more often victims of harassment and crime and that much of this is motivated by prejudice against those groups;

Hate crimes can cause more psychological damage to a victim than crimes that are not motivated by hatred, because the victim's core identity is being attacked. This personalises the crime and can cause the victim a greater amount of distress; and

Hate crime is socially divisive. Such crimes need to be particularly condemned in order to avoid a situation in which the relevant group feels victimised as a group, with members in constant fear of attack. Prejudice against groups can lead to a number of consequences, ranging from fear of crime and inability to participate in normal social activities through to paranoia and vigilantism.” (Scottish Executive 2004b, para 3.2)

The Working Group also concluded that part of the particular evil associated with hate crime is that it is motivated by malice or ill-will towards a social group. Thus the malice or ill will may, but need not, be directed against a particular victim who is part of that social group:

¹ The Policy Memorandum to the Offences (Aggravation By Prejudice) (Scotland) Bill refers to “malice or ill-will” whilst the Bill itself refers to “malice and ill-will”. Relevant sections in the Crime and Disorder Act 1998 and the Criminal Justice (Scotland) Act 2003 both refer to “malice and ill-will”.

“This means that the question of whether the victim of a hate crime belongs to a particular social group or not is irrelevant, for example, whether a victim of a homophobic attack is actually gay or not. It is the motivation of the offender which is important.” (Scottish Executive 2004, para 1.6)

The Working Group put forward 14 recommendations, including a recommendation for the statutory aggravation of offences based on the sexual orientation, transgender identity or disability of the victim:

“Recommendation 1) The Scottish Executive should introduce a statutory aggravation as soon as possible for crimes motivated by malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability. The legislation should be framed in such a way as to allow this protection to be extended to other groups by statutory instrument over time if appropriate evidence emerges that such other groups are subject to a significant level of hate crime. The legislation should ensure the recording of hate-motivated incidents (by the police), and reports and decisions of proceedings (by Crown Office and Procurator Fiscal Service) and convictions (by Scottish Criminal Records Office).”

Response to the Working Group’s Recommendations

In June 2006 the then Scottish Executive published its response to the Working Group’s report (‘Response to the Recommendation of the Working Group on Hate Crime’) (Scottish Executive 2006). In relation to recommendation 1) above, the Executive responded:

“Reject. The Working Group’s recommendation to introduce a new statutory aggravation has been given careful consideration and the Executive has noted the fact that these provisions are already in place across the rest of the UK and that many of the respondents to the consultation expressed support for the introduction of a new statutory aggravation. However the Executive believes that there is a risk that the introduction of a new statutory aggravation may work against the objective of ensuring consistency in sentencing.

The Executive is committed to a robust, fair, consistent and transparent justice system for all. We agree that it is important for offences motivated by hate to be recognised as such and sentenced appropriately. Our preferred approach to this issue is to consider how the courts should deal with hate crime in the context of a wider and more comprehensive look at sentencing generally. The Sentencing Commission are considering ideas on improving consistency in sentencing and will report in August.” (Scottish Executive 2006, page 4)

The [Sentencing Commission for Scotland](#) (‘the Commission’) was an independent, judicially-led body which was set up by the previous administration.² The Commission, which was launched in November 2003, was given the remit to review and make recommendations on:

- the use of bail and remand
- the basis on which fines are determined
- the effectiveness of sentences in reducing re-offending

² The Commission, having completed its remit, was dissolved on 1 November 2006.

- the scope to improve consistency of sentencing
- the arrangements for early release from prison, and supervision of prisoners on their release

On 27 April 2006, Patrick Harvie MSP asked the then Deputy Minister for Justice, Hugh Henry MSP, whether the Scottish Executive intended to introduce a statutory aggravation for offences motivated by malice or ill-will towards an individual based on sexual orientation, transgender identity or disability, as recommended by the Working Group on Hate Crime. In reply, the Minister responded:

“In the debate on the legislative programme on 6 September last year, I announced that we intend to strengthen the laws that deal with hate crime. That remains our intention. The Scottish Executive is committed to tackling prejudice in all its forms, as we believe it has no place in our society”.(Scottish Parliament 2006a)

On 29 June 2006, Patrick Harvie MSP asked the then First Minister whether the Executive’s forthcoming sentencing bill would be used to address the issue of hate crime. The First Minister responded:

“As we set out in last week's legislative statement, measures on hate crime will not be included in the sentencing bill. However, this Government is committed to tackling prejudice in all its forms. We will look at that again once we receive the Sentencing Commission for Scotland report on this issue in August”. (Scottish Parliament 2006b)

In September 2006, the Commission published its report [‘The Scope to Improve Consistency in Sentencing’](#). (Sentencing Commission for Scotland 2006) The report included recommendations relating to the production of sentencing guidelines. In looking at what happens in other jurisdictions, the report referred to the work of the Sentencing Guidelines Council for England and Wales and reproduced some of its work, including ‘Sentencing Guidelines Council – Overarching Principles: Seriousness’ (see Annex E of the Sentencing Commission’s report). In relation to factors indicating higher culpability, these guidelines include reference to offences motivated by hostility based on the victim’s sexual orientation or disability (or presumed sexual orientation or disability). The Commission made a total of 25 recommendations in its report but did not include recommendations on hate crime specifically.

No further progress was made on introducing any new aggravation in relation to hate-related crime during session 2 of the Parliament (2003 – 2007).

OTHER OPTIONS FOR REFORM

New Hate Crime Offences

The Working Group on Hate Crime also considered the creation of new offences of aggravated harassment and incitement to hatred. With regard to the creation of a new offence of aggravated harassment, the Working Group concluded that it was concerned at the number of victims of hate crime who suffer from hate-aggravated harassment or alarming or distressing conduct, and suggested that further consideration should be given to the introduction of a general statutory offence covering those kinds of behaviour.

With regard to an offence of incitement to hatred, the Working Group pointed out that the Public Order Act 1986 made it a criminal offence throughout Britain to incite racial hatred. The offence

covers the use in public of words or behaviour, the display, publication or distribution of written material, the public performance of plays, and the public distribution, showing, playing or broadcast of video or audio recordings, if the material concerned is intended to, or is likely to stir up racial hatred. It is also illegal to possess such material with a view to making it public. The Working Group concluded that an incitement to hatred offence would risk penalising freedom of speech too much for it to be extended beyond racial hatred. The Group recognised the concerns of some religious organisations who felt they should legitimately be able to express their own views on homosexuality, without being convicted of an offence. (Scottish Executive 2004b para 5.28)

The Policy Memorandum to the Offences (Aggravation By Prejudice) (Scotland) Bill states that an aggravated harassment offence would be aimed at behaviour which could be construed as harassment of an individual or acting in a manner aggravated by prejudice which causes or is intended to cause alarm or distress:

“The risk with such an offence is that it may be difficult to prosecute, relying as it does on proving both the act of harassment itself and the motivation. With a statutory aggravation, even if the motive cannot be proven, the accused can still be convicted of the non-aggravated offence. Behaviour which constitutes harassment or acting in a manner intended to cause alarm or distress could be dealt with using the existing common law offence of breach of the peace, with or without the addition of a statutory aggravation. An offence of incitement to hatred could well risk penalising legitimate freedom of speech and expression. Furthermore, incitement to commit any crime is already an offence under Scots common law, making a new incitement to hatred offence somewhat unnecessary”. (Scottish Parliament 2008)

Statutory Aggravations Relating to Other Groups

The Working Group also considered statutory aggravations in relation to gender and age. It concluded that these are more complicated areas in which to legislate for statutory aggravations. With regard to age, the Working Group’s report stated that while the most obvious example in popular debate of a person’s age affecting their susceptibility to crime is someone who is older, more vulnerable and less physically able to defend themselves, survey evidence indicates that men between the ages of 16 and 24 years old are the age group most likely to be the victim of violent crime (eg see the [2006 Scottish Crime and Victimization Survey](#)). (Scottish Government 2007a)

The Working Group’s report went on to say that the fact that most violent crime against young men is perpetrated by other young people and, typically, other young men, would suggest that behaviour and lifestyle, rather than prejudice against people because of their age, contributes to the high levels of crime against younger people.

However, the statistical evidence in surveys such as the [2006 Scottish Crime and Victimization Survey](#) does not exclude the possibility that a significant number of crimes may (at least in part) be motivated by malice or ill-will towards a particular age group. Even if such crimes were uncommon, it might be argued that where they do occur they should be treated in the same way as other crimes motivated by malice towards a particular racial group or other identifiable group within society.

Of the three age organisations which responded to the Working Group’s consultation, two were opposed to the introduction of legislation covering age. The Working Group concluded that more consideration of the extent of crime motivated by malice or ill-will against people of particular

ages because of their age, in consultation with relevant organisations, would be required before extending hate crime legislation in this area.

With regard to gender, the issue of crimes committed against women by men was of particular concern to the Working Group because of the number of organisations who responded to the consultation on the issue, and evidence of a gender-divide in criminal offences. Although survey evidence indicates that men are more likely to be the victim of a violent crime than women (with most assailants also being male), the Working Group did recognise that abuse of women by men is a major problem and related to wider gender inequality. A number of submissions to the consultation from women's organisations argued that when women are abused this is often because they are women, and that this implies gender-based malice and ill-will on the part of the abuser. Statistics on domestic abuse clearly indicate a gender divide:

Table 10 Incidents of domestic abuse recorded by the police – relationship between victim and perpetrator, by sex of victim and perpetrator, Scotland, 2006-07

	Female victim and male perpetrator	Male victim and female perpetrator	Male victim and male perpetrator	Female victim and female perpetrator	Not recorded	TOTAL
Spouse	7,114	1,019	8	10	86	8,237
Co-habitee	10,166	1,267	127	119	81	11,760
Partner	7,382	998	117	92	71	8,660
Ex-spouse	1,882	273	3	-	14	2,172
Ex-partner	12,744	1,417	147	149	107	14,564
Other	2,189	512	43	56	573	3,373
Not recorded	21	3	7	4	-	35
TOTAL	41,498	5,489	452	430	932	48,801

Source: Scottish Government CrJ/2007/11 (Scottish Government 2007b)

The Working Group received evidence on domestic abuse from a representative of the then Scottish Executive's Violence Against Women Unit. The Unit's view was that domestic violence is abuse of power within a relationship, whereby (mainly) the man seeks to exert his power over a female partner but does not generally abuse other women. Therefore, the unit did not view domestic violence as a hate crime. However, a number of Working Group members disagreed with this view, along with respondents working in this field who saw domestic violence as part of a spectrum of gender-based violence committed against women, and thus a gender hate crime as the woman is targeted because of her gender. At the same time, the Working Group noted that hate crime against other groups has a certain random nature to it, and that individuals are targeted because of their real or perceived membership of a particular social group, rather than because of any prior relationship between perpetrator and victim.

Among the consultation submissions, Scottish Women's Aid proposed that consideration should be given to the introduction of a specific statutory aggravation of domestic abuse. In other words, where an offence is committed in the context of domestic life or a domestic relationship,

that should be treated as an aggravation. The Working Group felt that this suggestion was worthy of further consideration by the then Scottish Executive.

More generally, the Working Group concluded that violence against women is related to attitudes and behaviour in our society which undermines the position of women, ranging from the media's sexualisation of girls and young women through to pornography, prostitution and the trafficking of people. Nevertheless, despite lengthy consideration, the Working Group did not reach agreement that a statutory aggravation on grounds of gender could be used effectively to tackle these complex inter-related and diverse issues. In particular it was felt that there would be practical difficulties in gathering evidence in individual cases of malice and ill-will on gender grounds. The Working Group recommended that the Scottish Executive should review the area of criminal law on violence against women and continue to investigate the link between the undermining of women in society and crimes of violence against women with a view to combating both.

The Policy Memorandum to the Bill points out:

“The Working Group concluded that age is a very complex issue in relation to crime. While it might seem obvious that someone who is elderly, vulnerable and less physically able to defend themselves is likely to be more susceptible to crime, evidence suggests that young men between the ages of 16 and 24 are in fact most likely to be the victims of crime, in particular violent crime. Like age, gender is also a much broader issue in relation to crime. Domestic abuse and other forms of violence against women are serious issues within society. However, the Working Group’s consultation revealed a lack of consensus over whether domestic violence should be considered a hate crime in the same way as crimes motivated by prejudice based on sexual orientation, transgender status, disability, race or religion. As a result, the arguments in favour of a statutory aggravation aimed at tackling violence against women and gender based violence remain unconvincing”. (para 16)

THE BILL

On 2 October 2007, Patrick Harvie MSP lodged a [draft Sentencing of Offences Aggravated by Prejudice \(Scotland\) Bill: Statement of Reasons](#). (Scottish Parliament 2007a) The proposal for a Member’s bill sought to require that any motivation of an offence flowing from prejudice on grounds of disability, sexual orientation or transgender identity is taken into account in sentencing. The draft proposal also set out a statement of reasons as to why no further consultation was necessary prior to the introduction of a bill in this area. On [6 November 2007](#), the Equal Opportunities Committee unanimously agreed that there was no need for further consultation on the proposed Bill, accepting the argument that extensive consultation had already been carried out by the Working Group on Hate Crime. The final proposal was lodged on 22 November 2007 having gathered sufficient support for a Bill to be introduced.

On 15 January 2008, the Scottish Government [announced](#) (Scottish Government 2007c) that it would be giving its backing to Patrick Harvie’s proposal to extend hate crime legislation in Scotland. As the Scottish Government opted to back the Bill, it will be taken forward as a ‘Handout Bill’ – a member’s bill which is sponsored and supported by the Government.

The Offences (Aggravation by Prejudice) (Scotland) Bill (‘the Bill’) is a short one containing only three sections. The Bill as introduced, seeks to ensure that, where it can be proven that an offence has been motivated by malice or ill-will based on the victim’s actual or presumed sexual

orientation, transgender identity or disability, the court must take that motivation into account when determining sentence. The Policy Memorandum points out that this may lead to a longer custodial sentence or higher fine, or a different type of disposal than might have been the case if the offence was not so aggravated. These aggravations also extend to situations where an offender in committing an offence demonstrates malice or ill-will towards a particular group as a whole without the need for an individual victim to be identified.

It is already possible, at common law, for Scottish courts to take the motivations of an offender into account when determining sentence, along with any other factors which the courts feel are relevant in particular cases. However, the proposed statutory aggravations would ensure that the courts must consider evidence that the offender was motivated by hatred towards those groups included in the Bill and sentence offenders accordingly.

The Policy Memorandum states that the provisions in the Bill will also allow the existence of the aggravations to be recorded at all levels in the criminal justice system from the initial recording of a crime through to the charging stage, prosecution, conviction and eventual sentence. On conviction, where the sentence is different as a result of the aggravation, the court will be required to state and record the extent of, and reasons for, that difference. According to the Policy Memorandum, this will enable the Government and practitioners to build up an accurate picture of the extent of these particular hate crimes in Scotland and inform policy accordingly.

Section 1 of the Bill relates to prejudice relating to disability and applies where it has been specified that an offence was motivated by prejudice relating to disability and it has been proven that the offence was motivated by that prejudice. Section 2 of the Bill applies in the same way to prejudice relating to sexual orientation or transgender identity.

Subsection 1(2) sets out when an offence is aggravated by prejudice relating to disability. There are two types of situation where this can arise. First, where an offender has demonstrated prejudice towards the victim based on their actual or presumed disability and secondly, where the offence was motivated by general malice and ill-will towards people who have a disability or particular disability. The Explanatory Notes point out that this means that the aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without the need for a specific or individual victim to have been identified. For example, where a building used by disability organisations is vandalised or daubed with graffiti that suggests prejudice against disabled people. The prejudice may have been demonstrated before, during or after the offence was committed. Subsection 2(2) of the Bill applies in the same way where offenders have demonstrated prejudice towards victims based on their actual or presumed sexual orientation or transgender identity and where the offence was motivated by malice and ill-will towards people of a certain sexual orientation or transgender identity.

Subsections 1(3) and 1(4), of the Bill are evidential provisions. Subsection 1(3) provides that the aggravation can apply even if prejudice relating to disability is not the sole motivation for the crime while subsection 1(4) provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to disability. Subsections 2(3) and 2(4) apply in the same way for crimes relating to sexual orientation or transgender identity.

Subsection 1(5) provides that where an aggravation relating to prejudice is proved, the court must take that aggravation into account when determining sentence. The court must also explain how the aggravation has affected the sentence and record the conviction in a manner which shows that the offence was aggravated by prejudice related to disability. Subsection 2(5) applies in the same way for aggravations relating to sexual orientation and transgender identity.

Subsections 1(7) and 1(8) define what is meant by disability in the Bill. Disability is defined widely by reference to physical and mental impairments (which is a recognised way of defining disability). It includes learning difficulties, mental illness, physical disabilities and sensory impairments. Subsection 1(8) ensures that the definition also expressly includes any medical condition which has, or may have in the future, a substantial or long term effect or is progressive – examples of such conditions include HIV/AIDS, Hepatitis C, cancer and multiple sclerosis.

Subsection 2(7) of the Bill defines what is meant by sexual orientation in the Bill. This is heterosexuality, homosexuality or bisexuality. Subsection 2(8) provides the definition of transgender identity and gives four specific examples: transvestism (often referred to as ‘cross-dressing’); transexualism; intersexuality³; and where a person has changed gender in terms of the Gender Recognition Act 2004. However, the definition also extends expressly to cover other persons under the generality of broad reference to non-standard gender identity. For example, those who are androgynous, of a non-binary gender or who otherwise exhibit a characteristic, behaviour or appearance which does not conform with conventional understandings of gender identity.

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³ Intersexuality is a term used to describe people born with external genitals, internal reproductive systems or chromosomes that are in-between what is considered clearly male or female.

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