

LORD ADVOCATE'S GUIDELINES ON OFFENCES AGGRAVATED BY PREJUDICE

LORD ADVOCATE'S GUIDELINES TO CHIEF CONSTABLES

INCORPORATING

CRIMINAL JUSTICE (SCOTLAND) ACT 2003 - OFFENCES AGGRAVATED BY RELIGIOUS PREJUDICE

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) ACT 2009- OFFENCES AGGRAVATED BY PREJUDICE RELATED TO DISABILITY, SEXUAL ORIENTATION OR TRANSGENDER IDENTITY

INTRODUCTION

Section 74 of the Criminal Justice (Scotland) Act 2003 (the 2003 Act) created an aggravation of religious prejudice in relation to any offence. Where an offence has been proved to be aggravated by religious prejudice then the court must take that aggravation into account in determining the appropriate sentence.

The Offences (Aggravation by Prejudice) (Scotland) Act 2009 will be in force as of 24 March 2010.

Section 1 of that Act provides that where an offence has been proved to be aggravated by prejudice related to disability then the court must take that aggravation into account in determining the appropriate sentence.

Section 2 of the Act provides that where an offence has been proved to be aggravated by prejudice related to sexual orientation or transgender identity then the court must take that aggravation into account in determining the appropriate sentence.

INVESTIGATION AND REPORTING OF OFFENCES AGGRAVATED BY PREJUDICE

For the purposes of investigating such incidents the Lord Advocate directs that the following definition be used:

"an incident is aggravated by prejudice if it is perceived to be aggravated by prejudice by the victim or any other person".

It is of crucial importance therefore that the Procurator Fiscal is advised whether the victim or any other person has perceived an incident to be aggravated by prejudice.

The Lord Advocate therefore directs that, in the investigation of crime, police officers must ascertain the perception of the victim and witnesses as to the motive for the crime. This must be fully investigated and clearly recorded. Leading questions should not be used and the sort of questions which could be used includes:

“Why did this happen?”

or

“What do you think was the motive behind this incident?”

The Procurator Fiscal should always be advised in police reports of the perception of the victim and witnesses as to motive.

The victim's belief alone that the offence was aggravated by prejudice does not justify the charging of a statutory aggravation, but if there is **evidence** to support that opinion, whether from one or more sources (including the victim) that should be reflected in the draft charge presented to the Procurator Fiscal by including the relevant aggravation:

- ◆ Section 74 of the Criminal Justice (Scotland) Act 2003 (the 2003 Act) in relation to religious prejudice
- ◆ Section 1 of the Offences (Aggravation by Prejudice)(Scotland) Act 2009 in relation to prejudice relating to disability
- ◆ Section 2 of the Offences (Aggravation by Prejudice)(Scotland) Act 2009 in relation to prejudice related to sexual orientation
- ◆ Section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 in relation to prejudice related to transgender identity.

This evidence will most frequently come from words spoken by the accused, but the **important point is that there is evidence, not simply a belief on the part of the victim.**

CUSTODY/USE OF UNDERTAKINGS

The Lord Advocate directs that in cases in which there is evidence that an offence has been aggravated by prejudice accused persons should be reported in custody where that is consistent with the Lord Advocate's guidelines on bail which are already in existence. Furthermore, where reporting in custody is not suitable in terms of the existing guidelines, accused persons should be liberated subject to an undertaking to appear at court in early course unless there is a good reason not to proceed in this way.

In cases where offences appear to have been aggravated by prejudice and an early arrest is not possible, the police should ensure that an early report is submitted to the Procurator Fiscal in order that consideration may be given to an application for a warrant to arrest the accused.

IMPACT OF CRIME OF VICTIMS & ADDITIONAL INFORMATION

As with all crime, when reporting offences that appear to be aggravated by prejudice, police officers should include details in the standard prosecution report of the impact of the crime on the victim. This should include information such as

- ◆ whether the victim is in a state of fear due to the crime;
- ◆ whether the victim is considering moving home or business due to the nature of the crime;
- ◆ whether there is any impact on the victim's family and community as a result of the crime;
- ◆ whether their disability, sexual orientation or transgender identity is known to their families or other persons;
- ◆ in relation to transgender victims, how they wish to be addressed. If you are in any doubt about how to refer to the sexual orientation or gender of the victim or witness, ask the person concerned how they wish to be addressed

THE NATURE OF RELIGIOUS PREJUDICE

Section 74 of the Criminal Justice (Scotland) Act 2003 creates an aggravation of prejudice relating to religion and can be libelled on an indictment, or specified on a complaint, as an aggravation to any substantive offence. An offence is aggravated by religious prejudice if:

- ◆ at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; **or**
- ◆ the offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.

Note that 'membership' in relation to a group includes association with members of that group; and 'religious group' means a group of persons defined by reference to their –

- ◆ religious belief or lack of religious belief
- ◆ membership of or adherence to a church or religious organisation;
- ◆ support for the culture and traditions of a church or religious organisation; or
- ◆ participation in activities associated with such a culture or such traditions.

Whilst it is most likely that police officers will encounter offences aggravated by religious prejudice in a sectarian, football – oriented Roman Catholic/Protestant basis, police officers should bear in mind that this

legislation will apply where the accused shows or has shown towards the victim (if any) of the offence some form of malice or ill will based on the victim's membership (or presumed membership) of any religious group – or of a social or cultural group which is perceived to have a form of religious affiliation. The legislation covers offences aggravated by religious prejudice towards any of the world's major or minor religious groups or of groups which are perceived to have some form of religious affiliation.

Police officers should also bear in mind that there may be instances where the same conduct may have elements of behaviour aggravated by religious prejudice as well as being racially aggravated. In such cases the Lord Advocate directs that the standard prosecution report submitted to the Procurator Fiscal should highlight both the religious and racially aggravated aspects.

THE NATURE OF PREJUDICE RELATING TO DISABILITY

Section 1(2) sets out when an offence is aggravated by prejudice relating to disability. There are two types of situation where it can arise

- ◆ at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to a disability (or presumed disability) of the victim, **or**
- ◆ the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or a particular disability.

This means that the aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without the need for a specific or individual victim to have been identified – for example, where a building used by disability organisations is vandalised or daubed with graffiti that suggests prejudice against those with a disability.

THE NATURE OF PREJUDICE RELATING TO SEXUAL ORIENTATION OR TRANSGENDER IDENTITY

Section 2 (2) sets out when an offence is aggravated by prejudice relating to sexual orientation or transgender identity:

- ◆ at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to the sexual orientation (or presumed sexual orientation) of the victim, or the transgender identity (or presumed transgender identity) of the victim, **or**
- ◆ the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a particular sexual orientation, or a transgender identity or a particular transgender identity.

This means that the aggravation can be applied even in cases where the malice or ill-will is expressed towards a wider group as a whole, without the need for a specific or individual victim to have been identified – for example, where a premises frequented by individuals of a particular sexual orientation is vandalised or daubed with graffiti that suggests prejudice against those of a certain sexual orientation or transgender identity.

It should be noted that whilst the aggravations in relation to sexual orientation and transgender identity appear in the same section of the Act they are **separate aggravations and should be treated as such**.

In all aggravations, “presumed” means presumed by the offender. Thus, it is irrelevant whether the victim is of a particular religious group, disabled, homosexual or transgender, it is the motivation of the accused which is the relevant factor.

Glossary of commonly used terms in relation to disability, sexual orientation and transgender identity

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

Sexual Orientation: is defined in the Act as sexual orientation towards persons of the same sex or of the opposite sex or towards both.

Other commonly used terms in relation to sexual orientation

LGBT: Acronym for Lesbian, Gay, Bisexual, Transgender.

Gay: Refers to someone who is emotionally and sexually attracted to people of the same gender. Some women prefer to refer to themselves as gay women, but lesbian is the word more often preferred by women and the word gay is often used to specifically refer to men.

Homophobic: A fear of or a dislike directed towards lesbian, gay or bisexual people, or a fear of or dislike directed towards their perceived lifestyle, culture or characteristics, whether or not any specific LG or B person has that lifestyle or characteristic. The dislike does not have to be as severe as hatred.

Lesbian: Refers to a woman who is emotionally and sexually attracted to other women.

Out: The term used by lesbian women, gay men, bisexuals and trans people to describe their experience of self-discovery, self-acceptance, openness and honesty about their sexual orientation or gender identity and their decision to share this with others when and how they choose

Straight/Heterosexual: Refers to someone who is emotionally and sexually attracted to people of a different gender.

Transgender Identity: is defined in the Act as transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender and any other gender identity that is not standard male or female gender identity. This refers to a whole range of people who find their gender identity or gender expression differs in some way from the gender assumptions made by others about them when they were born. The umbrella terms transgender people and trans people can include:

Androgyne / Bigender/ Polygender People: Refers to people who identify their gender as not conforming to the traditional western model of gender as binary. They may identify their non-binary gender as a combination of aspects of men and women or alternatively as being neither men nor women.

Cross-dressing/ Transvestite People: Refers to people who dress, either occasionally or more regularly, in clothes associated with the opposite gender, as defined by socially accepted norms. Cross-dressing people are generally happy with the gender they were regarded as at birth and usually do not want to permanently alter the physical characteristics of their bodies or change their legal gender.

Intersex People: Refers to people born with external genitals, internal reproductive systems or chromosomes that are not considered clearly either male or female. There are many different intersex conditions.

Transsexual People: Refers to people who consistently self-identify as the opposite gender from the gender they were labelled at birth. Depending on the range of options available to them during their lives, most transsexual people try to find a way to transition to live fully as their self-identified gender. Most, but not all transsexual people will take hormones and also undergo surgery to make their physical body match their gender identity better.

Other terms

Transphobic: A fear of or a dislike directed towards transgender people, or a fear of or dislike directed towards their perceived lifestyle, culture or characteristics, whether or not any specific trans person has that lifestyle or characteristic. The dislike does not have to be as severe as hatred.

A female to male (FTM) **trans man** is someone who was labelled female at birth but has a male gender identity and therefore transitions to live permanently as a man.

A male to female (MTF) **trans woman** is someone who was labelled male at birth but has a female gender identity and therefore transitions to live permanently as a woman.

Crown Office
March 2010