

## Statutory Aggravations

### Current hate crime legislation

The existing core method of prosecuting hate crimes in Scotland is via the attachment of a statutory aggravation when a person has committed an offence. A statutory aggravation ‘attaches’ to an offence in certain circumstances based on the conduct or motivation of the offender. In order for an aggravation to attach there needs to have been an offence (this is sometimes referred to as the ‘baseline’ offence). The circumstances that require to be met are sometimes referred to as the ‘threshold’, or test for proving the aggravation.

In Scotland, the law currently recognises hate crimes as offences aggravated by prejudice based on:

- race: section 96 of the Crime and Disorder Act 1998,
- religion: section 74 of the Criminal Justice (Scotland) Act 2003,
- disability: section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009,
- sexual orientation: section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, and
- transgender identity: section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

At present, the various statutory aggravations in relation to different characteristics share a common framework as to when the aggravation will apply, and a similar ‘threshold’ for proving an aggravation applies in each case.

### What the Hate Crime and Public Order (Scotland) Bill will do

The characteristics which are listed in the new Bill in relation to the aggravation of offences by prejudice are:

- Age (this is a new characteristic);
- Disability;
- Race, colour, nationality (including citizenship), or ethnic or national origins;
- Religion or, in the case of a social or cultural group, perceived religious affiliation;
- Sexual orientation;
- Transgender identity;
- Variations in sex characteristics (this characteristic was previously included as ‘intersexuality’ within the definition of transgender identity).



An offence can be aggravated by prejudice in respect of more than one characteristic. For example, an assault may be aggravated by prejudice in respect of both race and religion. Evidence of each separate aggravation would be required.

In the Bill, an offence can be aggravated by prejudice if either:

- where there is a specific victim, at the time of committing the offence or immediately before or after doing so, the offender evinces malice and ill-will towards the victim based on the victim's membership (or presumed membership) of a group defined by reference to a listed characteristic.
- the offence is motivated (wholly or partly) by malice and ill-will towards members of a group defined by reference to a listed characteristic. There does not require to be a specific victim of an offence for this aggravation to apply.

The concept of the 'group' refers to a group of people who may never have met one another but who share a listed characteristic.

The Bill provides that all of the hate crime statutory aggravations apply in relation to people who are presumed by the offender to be a member of a group defined by reference to a characteristic. For example, if a person is targeted because the perpetrator presumed they were gay, the offence would still be aggravated by prejudice in respect of sexual orientation even if the person is not gay.

The Bill also provides that all of the hate crime statutory aggravations apply in relation to people who have an association with a characteristic. For example, if the offender, say, shouts aggressively in a manner that amounts to threatening or abusive behaviour at a person (the victim) who was collecting money for a charity that works with the disabled and in so doing the offender evinces malice and ill-will towards the victim based on the victim being associated with the disability charity then that is sufficient for an offence to be aggravated by prejudice.

The aggravation does not require there to be a specific victim, meaning that the aggravation can be applied even in cases where the malice and 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 church, synagogue or mosque is daubed with graffiti the offender might, in committing the offence of vandalism, be found to have been motivated by malice and ill-will towards people (comprising a group defined by reference to religion) who worship at those places.

Corroboration is not required to prove that an offence was aggravated by prejudice. Corroboration will still be required for the purposes of proving the baseline offence.



The way in which statutory aggravations operate in hate crime legislation (as well as other legislation) is that when proven, the court is required to undertake a certain number of specified steps. In hate crime legislation specifically, these are as follows:

- state on conviction that the offence was aggravated by prejudice in relation to one or more particular characteristics;
- record the conviction in a way that shows that the offence was so aggravated;
- take the aggravation into account in determining the appropriate sentence. This does not mean in itself that a sentence should be more severe than it otherwise would have been, but it does ensure the court will need to consider as a relevant sentencing factor that an offence has been aggravated by prejudice; and
- state, where the sentence in respect of the offence is different, such as being more severe, from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or, otherwise, the reasons for there being no such difference.

### **Further Information**

Further information about the Hate Crime and Public Order (Scotland) Bill can be found on the Scottish Government webpage <https://www.gov.scot/policies/crime-prevention-and-reduction/hate-crime/>.