

# **OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) ACT 2009**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government on behalf of Patrick Harvie MSP, the member in charge of the Bill for the Act. They have been prepared in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. This Act makes provision for the prejudicial context (i.e. either the motivation or the demonstration of malice or ill will) of an offence to be taken into consideration when an offender is sentenced when that prejudicial context has been one of hatred towards persons within certain groups.
4. The Act provides 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 the victim's actual or presumed sexual orientation, transgender identity or disability. The aggravations also cover situations where an offender demonstrates malice and ill-will towards a relevant societal group as a whole, without the need for an individual victim to be identified. Further explanation on the two types of situation where the aggravations apply is contained in the commentary on sections below.
5. Where aggravations are proven, the court must take that motivation into account when determining sentence. However, the ultimate discretion of the court to impose a sentence is not affected. In some cases this may well lead to a different sentence (e.g. a longer period of custody, a higher fine or an appropriate community disposal) than might have been the case if the offence was not so aggravated. In other cases, an aggravating factor may not have any bearing on sentence. Similar statutory aggravations already exist to protect individuals targeted on racial or religious grounds. Statutory aggravations relating to crimes motivated by prejudice based on disability and sexual orientation are already in place in England and Wales and Northern Ireland.

### **COMMENTARY ON SECTIONS**

#### *Overview*

6. The aggravation for prejudice relating to disability is contained in section 1 and the aggravation for prejudice relating to sexual orientation or transgender identity is contained in section 2. Both sections contain the same procedural elements in

subsections (1) and (3) to (5) and the commentary which follows on these subsections is substantially the same in relation to either aggravation.

### ***Section 1: Prejudice relating to disability***

7. This section 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.
8. Subsection (2) sets out when an offence is aggravated by prejudice relating to disability. There are two types of situation where it can arise. First, where the 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. 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 prejudice may have been demonstrated before, during or after the offence was committed.
9. Subsections (3) and (4) are evidential provisions. Subsection (3) confirms that the aggravation can apply even if prejudice relating to disability is not the sole motivation for the crime and subsection (4) provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to disability.
10. Subsection (5) requires that, where an aggravation relating to prejudice is proved, the Court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to disability.
11. Subsections (7) and (8) define 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.

### ***Section 2: Prejudice relating to sexual orientation or transgender identity***

12. This section applies where it has been specified that any offence was motivated by prejudice relating to sexual orientation or transgender identity and it has been proved that the offence was motivated by that prejudice.
13. Subsection (2) sets out when an offence is aggravated by prejudice relating to sexual orientation or transgender identity. First, where the offender has demonstrated prejudice towards the victim based on their actual or presumed sexual orientation or transgender identity and, secondly, where the offence was motivated by general malice and ill-will towards people of a certain sexual orientation or 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. The prejudice may have been demonstrated before, during or after the offence was committed.
14. Subsections (3) and (4) are evidential provisions. Subsection (3) confirms that the aggravation can apply even if prejudice relating to sexual orientation or transgender

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identity is not the sole motivation for the crime and subsection (4) provides that corroboration is not required to prove that a crime was aggravated by prejudice relating to sexual orientation or transgender identity.

15. Subsection (5) requires that, where an aggravation relating to prejudice is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by prejudice related to sexual orientation or transgender identity.
16. Subsection (7) defines what is meant by sexual orientation in the Act. This is heterosexuality, homosexuality or bisexuality.
17. Subsection (8) provides the definition of transgender identity for the Act. The definition gives four specific examples: transvestism (often referred to as ‘cross-dressing’); transexualism; intersexuality; 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.

### **Section 3: Commencement and short title**

18. Sections 1 and 2 will commence by order while section 3 commenced on the date of Royal Assent. The order may include transitional or saving provisions.

### **PARLIAMENTARY HISTORY**

19. The following sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place and the references to the official reports of those proceedings. It also shows Committee reports and other papers and provides references to those reports and other papers.

<i>PROCEEDINGS AND REPORTS</i>	<i>REFERENCE</i>
<b>Introduction</b>	
19 May 2008	Bill as <a href="#">introduced</a>
<b>Stage 1</b>	
<i>Equal Opportunities Committee (secondary Committee)</i>	
15 <sup>th</sup> Meeting 2008, 4 November 2008	<a href="#">Equal Opportunities Committee Official Report</a>
	Cols 680 - 706
16 <sup>th</sup> Meeting 2008, 18 November 2008	<a href="#">Equal Opportunities Committee Official Report</a>
	Cols 708 - 730
3 <sup>rd</sup> Report, 2008	<a href="#">Stage 1 Report</a>
<i>Justice Committee (lead Committee)</i>	
2 <sup>nd</sup> Meeting 2009, 13 January 2009	Justice Committee Official Report
	Cols <a href="#">1484-1506</a>
3 <sup>rd</sup> Meeting 2009, 20 January 2009	Justice Committee Official Report

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(Scotland) Act 2009 (asp 8) which received Royal Assent on 8 July 2009*

<i>PROCEEDINGS AND REPORTS</i>	<i>REFERENCE</i>
	Cols 1509 - 1534
4 <sup>th</sup> Meeting 2009, 27 January 2009	Justice Committee Official Report
	Cols 1556 - 1584
6 <sup>th</sup> Report, 2009	Stage 1 Report
<b><i>Subordinate Legislation Committee</i></b>	
19 <sup>th</sup> Meeting 2008, 3 June 2008	Subordinate Legislation Committee Official Report
	Cols 308 - 309
21 <sup>st</sup> Meeting 2008, 17 June 2008	Subordinate Legislation Committee Official Report
	Col 317
Stage 1 Report	Stage 1 Report
<b><i>Finance Committee</i></b>	
22 <sup>nd</sup> Meeting, 22 September 2008	Finance Committee Official Report
	Cols 709 - 710
<b><i>Consideration by the Parliament</i></b>	
18 March 2009	Official Report
	Cols 15870 - 15907
<b>Stage 2</b>	
<b><i>Justice Committee</i></b>	
28 April 2009	Official Report
	Col 1707
<b>Stage 3</b>	
<b><i>Consideration by Parliament</i></b>	
3 June 2009	>Official Report
	Cols 18098 - 18126
<b>Royal Assent</b>	
8 July 2009	2009 asp 8