

OFFENCES (AGGRAVATION BY PREJUDICE) (SCOTLAND) ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Overview

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 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.