

# Aggravations (Statutory)

## Bail aggravation

### Law: Bail aggravation

#### General References

[Criminal Procedure \(Scotland\) Act 1995, section 27](#) as amended by [section 3 of the Criminal Proceedings etc \(Reform\) \(Scotland\) Act 2007](#).

#### Legal Principles

**1** When trial judges require to refer to charges under the Bail Act or, more recently, the aggravation of a charge by reason of its having been committed while the accused was on bail, very little requires to be said in regard to such consequential matters. All that a judge requires to do is to direct the jury that, if they convict on the charge it follows that conviction of contravention of the Bail Act will follow.

Conversely, if they acquit on the relevant charge, it will follow automatically [that] they acquit in regard to that matter. Any explanation which is given to the jury about the significance of the accused being granted bail should be expressed in words that are chosen with care and restraint ([Friel v HM Advocate 1998 SCCR 47](#), at 49).

**2** Section 27(4A) of the 1995 Act, which applies to a bail aggravation occurring after 4 July 1996, provides that the fact that the offence libelled was committed while the accused was on bail is held to be admitted, unless challenged by a notice of preliminary objection under section 72(1)(b) (or that provision as applied by section 71(2)). Where there is a challenge, or in relation to a contravention of a bail order between 31 March 1995 and 4 July 1996, the Crown has to prove the bail order.

**3** Section 27(4B) of the 1995 Act, which came into operation on 10 December 2007, provides that the fact that the accused was on bail, was subject to any particular bail condition, failed to appear at a diet, or was given due notice of a diet, is held to be admitted, unless similarly challenged.

**4** It should be noted that a reasonable excuse may be raised by the defence: see sections 27(1) and 27(7).

## Possible form of direction: bail aggravation

“You will see that, at the end of the charge, it is said that the accused committed the crime while on bail. If a court grants someone bail, it does so on condition that the person does not commit any crime while on bail. If the person does commit a crime, that crime becomes more serious.

In this case, there has been no challenge, and therefore the accused is held to have admitted, that [he/she/they] [was/were] on bail at the time.”

## Statutory aggravations (other than bail aggravation)

### General Reference

Renton and Brown *Criminal Procedure Legislation Vol 2* para A6-38

### Introduction

It is common for a charge to libel that the crime was aggravated in some way or another. There are various statutory aggravations which might apply. For example, it is sometimes alleged that a crime was motivated, and thereby aggravated, by some form of prejudice against the complainer based on a protected characteristic, such as race, religion or sexual orientation. Aggravations relating to prejudice against the complainer are now provided for by the [Hate Crime and Public Order \(Scotland\) Act 2021](#) which consolidated former statutory aggravations and expanded the list of characteristics to which an aggravation can apply.

It is also common for the Crown to libel that an offence was aggravated by the fact that it involved domestic abuse of the accused’s partner or ex-partner. The relevant provisions are found in section 1 of the [Abusive Behaviour and Sexual Harm \(Scotland\) Act 2016](#).

Finally, there are certain aggravations which allow it to be proved that the crime was connected to some other form of serious criminal activity such as:

- Terrorism ([Counter Terrorism Act 2008](#));
- Serious and organised crime ([Criminal Justice and Licensing \(Scotland\) Act 2010](#)); and
- Human trafficking ([Human Trafficking and Sexual Exploitation \(Scotland\) Act 2015](#)).

The requirements of each of these aggravations are different. Each is considered below together with a possible form of direction.

## **Law: offences aggravated by race, religion, disability, sexual orientation, transgender identity, or variations in sex characteristics**

### **Hate Crime and Public Order (Scotland) Act 2021**

*[This aggravation relates to offences committed on or after 1 April 2024. For offences committed before 1 April 2024 see the relevant aggravation listed in the Statutory Aggravations: Contents]*

Many of the statutory provisions that created aggravations relating to prejudice are repealed by the Hate Crime and Public Order (Scotland) Act 2021 which came into force on 1 April 2024. For offences committed before that date, the previous legislation will continue to apply.

The 2021 Act follows Lord Bracadale's review of Scotland's hate crime legislation and repeals the patchwork of legislation which provides for offences aggravated by racial or religious prejudice, by prejudice relating to disability or to sexual orientation or transgender identity. Section 1 brings together the aggravation of offences by prejudice in relation to seven characteristics: age; 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; and variations in sex characteristics. The characteristics are further explained in section 11.

The aggravation can apply where there is a specific victim but also where the offence is motivated by malice and ill-will towards a group of persons by reference to one of the characteristics. An offence can be aggravated by prejudice under section 1(1)(a) even where a victim does not possess one of the listed characteristics. This is because the aggravation can apply where an offender demonstrates malice and ill-will towards a person based on that person's "presumed membership" of a group defined by reference to one of the characteristics. "Presumed" means presumed by the offender (section 1(5)).

Cases decided under the former provisions may continue to be relevant to charges aggravated in terms of the 2021 Act. It is not necessary to prove that the accused is ideologically prejudiced in the particular way alleged. It is enough to prove that, at the time of the offence, the accused's behaviour was motivated in part by the particular prejudice: [Brown v HM Advocate 2000 SCCR 736](#). It is clear that the accused's motivation (or any malice or ill-will towards a particular group) can be inferred from what has been proved to have been said or done. For example, the use of a word such as 'Afro' could infer a racial motivation notwithstanding its ordinary reference to a hair style: [Sennels v McGowan 2011 SCCR 180](#). Similarly, the use of the

phrase 'Geordie bastard' would entitle a jury to conclude that the accused was motivated in whole or in part by malice and ill-will towards persons of English origin based on the complainer's membership of that group by reason of association with it and identified by the complainer's place of origin: [Moscrop v McClintock 2011 SCCR 621](#).

The Hate Crime and Public Order (Scotland) Act 2021 provides as follows:

### **Section 1: Aggravation of offences by prejudice**

"(1) An offence is aggravated by prejudice if—

(a) where there is a specific victim of the offence—

(i) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates malice and ill-will towards the victim, and

(ii) the malice and ill-will is based on the victim's membership or presumed membership of a group defined by reference to a characteristic mentioned in subsection (2), or

(b) whether or not there is a specific victim of the offence, the offence is motivated (wholly or partly) by malice and ill-will towards a group of persons based on the group being defined by reference to a characteristic mentioned in subsection (2).

(2) The characteristics are—

(a) age,

(b) disability,

(c) race, colour, nationality (including citizenship), or ethnic or national origins,

(d) religion or, in the case of a social or cultural group, perceived religious affiliation,

(e) sexual orientation,

(f) transgender identity,

(g) variations in sex characteristics.

(3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice.

(5) In this section—

“membership”, in relation to a group, includes association with members of that group,

“presumed” means presumed by the offender.

### **Section 11: Meaning on the characteristics**

(1) This section applies for the interpretation of sections 1, 4 and 9.

(2) A reference to age includes a reference to an age range.

(3) A disability is a physical or mental impairment of any kind.

(4) For the purposes of subsection (3) (but without prejudice to its generality), a medical condition which has, has had, or may have a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.

(5) A group defined by reference to religion is a group of persons defined by reference to—

(a) religious belief or lack of religious belief,

(b) membership of or adherence to a church or religious organisation,

(c) support for the culture or traditions of a church or religious organisation,

(d) participation in activities associated with such a culture or such traditions.

(6) A reference to sexual orientation is a reference to sexual orientation towards—

(a) persons of the same sex,

(b) persons of a different sex, or

(c) both persons of the same sex and persons of a different sex.

(7) A person is a member of a group defined by reference to transgender identity if the person is—

(a) a female-to-male transgender person,

(b) a male-to-female transgender person,

(c) a non-binary person,

(d) a person who cross-dresses,

and references to transgender identity are to be construed accordingly.

(8) A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither—

(a) those typically associated with males, nor

(b) those typically associated with females,

and references to variations in sex characteristics are to be construed accordingly.

## **Possible form of direction: offences aggravated by race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics**

### **Hate Crime and Public Order (Scotland) Act 2021**

*[This aggravation relates to offences committed on or after 1 April 2024. For offences committed before 1 April 2024 see the relevant aggravation listed in the Statutory Aggravations: Contents]*

“You will see that, at the end of the charge, it is said that the crime was aggravated by prejudice towards the [complainer/group of persons] by reference to [specify the characteristic]. If you are satisfied that the crime was committed by the accused, and was aggravated by [specify] prejudice, it becomes more serious.”

### **Where there is a specific victim of the offence**

“The aggravation applies if at the time of committing the offence, or immediately before or after it was committed, the accused shows malice and ill-will towards the complainer based on the complainer’s membership or presumed membership of a group defined by

*[select as appropriate:]*

- Age
- 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.”

### **Whether or not there is a specific victim of the offence**

“The aggravation applies whether or not there is a specific complainer, where the offence is motivated (wholly or partly) by malice and ill-will towards a group of persons based on the group being defined by:

*[Select as appropriate:]*

- Age
- 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.”

### **For all cases:**

““Membership” in relation to a group, includes association with members of that group.

“Presumed” means presumed by the accused.”

### **Take in relevant definitions from section 11 as appropriate:**

“A reference to age includes a reference to an **age** range.”

“A **disability** is a physical or mental impairment of any kind. For example, a medical condition which has, has had, or may have a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.”

“A group defined by reference to **religion** is a group of persons defined by reference to:

- (a) religious belief or lack of religious belief,
- (b) membership of or adherence to a church or religious organisation,
- (c) support for the culture or traditions of a church or religious organisation,
- (d) participation in activities associated with such a culture or such traditions.”

“A reference to **sexual orientation** is a reference to sexual orientation towards:

- (a) persons of the same sex,
- (b) persons of a different sex, or
- (c) both persons of the same sex and persons of a different sex.”

“A person is a member of a group defined by reference to transgender identity if the person is:

- (a) a female-to-male transgender person,
- (b) a male-to-female transgender person,
- (c) a non-binary person,
- (d) a person who cross-dresses,

and references to transgender identity are to be construed accordingly.”

“A person is a member of a group defined by reference to **variations in sex characteristics** if the person is born with physical and biological sex characteristics which, taken as a whole, are neither:

- (a) those typically associated with males, nor
- (b) those typically associated with females,

and references to variations in sex characteristics are to be construed accordingly.

“It is irrelevant whether the accused’s malice or ill-will is also based on another factor.”

### **No need for corroboration**

“Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.”

## Summary

“You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation.”

## Law: racial aggravation

### Crime and Disorder Act 1998

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

### Section 96 Offences racially aggravated.

“(1) The provisions of this section shall apply where it is—

- (a) libelled in an indictment; or
- (b) specified in a complaint, and, in either case, proved that an offence has been racially aggravated.

(2) An offence is racially aggravated for the purposes of this section if—

- (a) 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 racial group; or
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group,

and evidence from a single source shall be sufficient evidence to establish, for the purposes of this subsection, that an offence is racially aggravated.

(3) In subsection (2)(a) above—

- “membership”, in relation to a racial group, includes association with members of that group;

- “presumed” means presumed by the offender.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender’s malice and ill-will is also based, to any extent, on—

(a) the fact or presumption that any person or group of persons belongs to any religious group; or

(b) any other factor not mentioned in that paragraph.

(6) In this section “racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

## **Possible form of direction: racial aggravation**

### **Crime and Disorder Act 1988**

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

“You will see that, at the end of the charge, it is said that the crime was racially aggravated. If you are satisfied that the crime was committed by the accused and was racially aggravated the crime becomes more serious.

For the Crown to prove the aggravation, you must be satisfied that:

(a) Immediately before, at the time of, or after the offence was committed, the accused showed malice and ill-will to the *[name the complainer]* based on the complainer’s membership of a racial group. *[Where appropriate: It does not matter whether the complainer was actually a member of that racial group, or whether the accused simply presumed the complainer to be.]*”

**Or**

(b) The offence was wholly or partly motivated by malice and ill-will towards members of a racial group, based on their membership of that group.

It is irrelevant that the accused may also have had another reason for acting in the way alleged.

‘Racial group’ means any group of persons, defined by race, colour, nationality, citizenship, or ethnic or national origins. Membership of a racial group includes association with members of that group.

So, for example, things said by the accused before, during, or after the commission of the offence might satisfy you that the aggravation applies.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

## Summary

You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation."

## Law: religious aggravation

### Criminal Justice (Scotland) Act 2003

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

### Section 74 Offences aggravated by religious prejudice

"(1) This section applies where it is—

- (a) libelled in an indictment; or
- (b) specified in a complaint, and, in either case, proved that an offence has been aggravated by religious prejudice.

(2) For the purposes of this section, an offence is aggravated by religious prejudice if—

- (a) 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
- (b) 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.

(2A) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4A) The court must—

(a) state on conviction that the offence was aggravated by religious prejudice,

(b) record the conviction in a way that shows that the offence was so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state— (i) where the sentence in respect of the offence is different 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 (ii) otherwise, the reasons for there being no such difference.

(5) For the purposes of this section, evidence from a single source is sufficient to prove that an offence is aggravated by religious prejudice.

(6) In subsection (2)(a)—

- "membership" in relation to a group includes association with members of that group; and
- "presumed" means presumed by the offender.

(7) In this section, "religious group" means a group of persons defined by reference to their—

(a) religious belief or lack of religious belief;

(b) membership of or adherence to a church or religious organisation;

(c) support for the culture and traditions of a church or religious organisation; or (d) participation in activities associated with such a culture or such traditions."

## Possible form of direction: religious aggravation

### Criminal Justice (Scotland) Act 2003

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

“You will see that, at the end of the charge, it is said that the crime was aggravated by religious prejudice. If you are satisfied that the crime was committed by the accused and was aggravated by religious prejudice, the crime becomes more serious.

For the Crown to prove the aggravation, you must be satisfied that:

(a) Immediately before, at the time of, or after the offence was committed, the accused showed malice and ill-will to the *[name the complainer]*, based on the complainer’s membership of a religious group, or of a social or cultural group with a perceived religious affiliation *[Where appropriate: It does not matter whether the complainer was actually a member of that group, or whether the accused simply presumed the complainer to be].*

**or**

(b) The offence was wholly or partly motivated 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.

Membership of a group includes association with members of that group.

It is irrelevant that the accused may also have had another reason for acting in the way alleged.

‘Religious group’, means a group of persons defined by reference to:

- (a) their religious belief or lack of such belief, for example Christians, Muslims, atheists,
- (b) membership of or adherence to a church or religious organisation, for example Protestants, Catholics, Baptists, Mormons,
- (c) support for the culture of a church or religious organisation or
- (d) participation in activities associated with the culture or traditions of a church or religious organisation.

So, for example, things said by the accused before, during, or after the commission of the offence might satisfy you that the aggravation applies.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

## Summary

You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation."

## Law: disability aggravation

### Offences (Aggravation by Prejudice) (Scotland) Act 2009

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

#### Section 1 Prejudice relating to disability

"(1) This subsection applies where it is—

- (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to disability, and
- (b) proved that the offence is so aggravated.

(2) An offence is aggravated by prejudice relating to disability if—

- (a) 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
- (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have a disability or a particular disability.

(3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability.

(5) Where subsection (1) applies, the court must—

(a) state on conviction that the offence is aggravated by prejudice relating to disability,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) take the aggravation into account in determining the appropriate sentence, and

(d) state— (i) where the sentence in respect of the offence is different 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 (ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), “presumed” means presumed by the offender.

(7) In this section, reference to disability is reference to physical or mental impairment of any kind.

(8) For the purpose of subsection (7) (but without prejudice to its generality), a medical condition which has (or may have) a substantial or long-term effect, or is of a progressive nature, is to be regarded as amounting to an impairment.”

## **Possible form of direction: disability aggravation**

### **Offences (Aggravation by Prejudice) (Scotland) Act 2009**

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

“You will see that, at the end of the charge, it is said that the crime was aggravated by prejudice relating to disability. If you are satisfied that the crime was committed by the accused and was aggravated by prejudice relating to disability, the crime becomes more serious.

It is important to stress that simply because you decide that the accused committed the offence and the complainer happened to be disabled and thus vulnerable is not enough in itself to establish this aggravation.

For the Crown to prove the aggravation you must be satisfied that:

(a) Immediately before, at the time of, or after the offence was committed, the accused showed malice and ill-will to the [*name the complainer*] relating to a disability of the complainer [*Where appropriate: It does not matter whether the complainer actually had that/a disability or whether the accused simply presumed that the complainer did*].

**Or**

(b) The offence was wholly or partly motivated by malice and ill-will towards persons who have a disability or a particular disability.

It is irrelevant that the accused may also have had another reason for acting in the way it is alleged.

Disability refers to physical or mental impairment of any kind. A medical condition which has or may have a substantial or long-term effect, or is of a progressive nature, amounts to an impairment.

So, for example, things said by the accused before, during, or after the commission of the offence might satisfy you that the aggravation applies.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

### **Summary**

You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation."

## **Law: sexual orientation or transgender identity aggravation**

### **Offences (Aggravations by Prejudice) (Scotland) Act 2009**

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

## Section 2:

- (1) This subsection applies where it is—
  - (a) libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice relating to sexual orientation or transgender identity, and
  - (b) proved that the offence is so aggravated.
- (2) An offence is aggravated by prejudice relating to sexual orientation or transgender identity if—
  - (a) 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—
    - (i) the sexual orientation (or presumed sexual orientation) of the victim, or
    - (ii) the transgender identity (or presumed transgender identity) of the victim, or
  - (b) the offence is motivated (wholly or partly) by malice and ill-will towards persons who have—
    - (i) a particular sexual orientation, or
    - (ii) a transgender identity or a particular transgender identity.
- (3) It is immaterial whether or not the offender's malice and ill-will is also based (to any extent) on any other factor.
- (4) Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to sexual orientation or transgender identity.
- (5) Where subsection (1) applies, the court must—
  - (a) state on conviction that the offence is aggravated by prejudice relating to sexual orientation or transgender identity,
  - (b) record the conviction in a way that shows that the offence is so aggravated,
  - (c) take the aggravation into account in determining the appropriate sentence, and
  - (d) state— (i) where the sentence in respect of the offence is different 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 (ii) otherwise, the reasons for there being no such difference.

(6) In subsection (2)(a), “presumed” means presumed by the offender.

(7) In this section, reference to sexual orientation is reference to sexual orientation towards persons of the same sex or of the opposite sex or towards both.

(8) In this section, reference to transgender identity is reference to—

(a) transvestism, transsexualism, intersexuality or having, by virtue of the Gender Recognition Act 2004 (c. 7), changed gender, or

(b) any other gender identity that is not standard male or female gender identity.

## **Possible form of direction: sexual orientation or transgender identity aggravation**

### **Offences (Aggravation by Prejudice) (Scotland) Act 2009**

*[This aggravation relates to offences committed before 1 April 2024. For offences committed on or after 1 April 2024 see: Offences aggravated by age, race, religion, disability, sexual orientation, transgender identity or variations in sex characteristics]*

“You will see that, at the end of the charge, it is said that the crime was aggravated by prejudice relating to sexual orientation or transgender identity. If you are satisfied that the crime was committed by the accused and that the crime was aggravated by prejudice relating to sexual orientation or transgender identity, the crime becomes more serious.

For the Crown to prove the aggravation, you must be satisfied that:

(a) Immediately before, at the time of, or after the offence was committed, the accused showed malice and ill-will to the *[name the complainer]* relating to the complainer’s sexual orientation or transgender identity. It does not matter whether the complainer had the sexual orientation or transgender identity in question, it is enough that the accused presumed that they did.

**Or**

(b) The offence was wholly or partly motivated by malice and ill-will towards persons who have a particular sexual orientation or transgender identity.

It is irrelevant that the accused may also have had another reason for acting in the way alleged.

Sexual orientation means sexual orientation towards persons of the same sex, or of the opposite sex, or towards both.

Transgender identity means: transvestism, transsexualism, intersexuality, changed gender, or any other gender identity that is not standard male or female gender identity.

So, for example, things said by the accused before, during, or after the commission of the offence might satisfy you that the aggravation applies.

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.

## Summary

You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation."

## Law: domestic abuse aggravation

### Abusive Behaviour and Sexual Harm (Scotland) Act 2016

#### Section 1 Aggravation of offence where abuse of partner or ex-partner

(1) This subsection applies where it is—

(a) libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it, and

(b) proved that the offence is so aggravated.

(2) An offence is aggravated as described in subsection (1)(a) if in committing the offence—

(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, or

(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.

(3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated as described in subsection (1)(a).

[...]

(7) In this section—

- “cause” includes contribute to causing (and “causing” is to be construed accordingly),
- “psychological harm” includes fear, alarm or distress.

### **Section 1A Presumption as to the relationship**

(1) In proceedings for an offence that is aggravated as described in [section 1\(1\)\(a\)](#), the matter of a person being another person's partner or ex-partner is to be taken as established—

(a) according to the stating of the matter in the charge of the offence in the complaint or indictment, and

(b) unless the matter is challenged as provided for in subsection (2).

(2) The matter is challenged—

(a) in summary proceedings, by—

(i) preliminary objection before the plea is recorded, or

(ii) later objection as the court allows in special circumstances,

(b) in proceedings on indictment, by giving notice of a preliminary objection in accordance with [section 71\(2\)](#) or [72\(6\)\(b\)\(i\)](#) of the 1995 Act.

## Possible form of direction: domestic abuse aggravation

### Abusive Behaviour and Sexual Harm (Scotland) Act 2016

"You'll see that, at the end of the charge, it is said that the crime involved abuse by the accused of [his/her/their] partner or ex-partner. This is an aggravation of the charge. It means that, if the crime was committed and involved such abuse, it will be regarded as more serious.

For the aggravation to be established, you must be satisfied: (i) that the accused and complainer were partners or ex-partners on the date specified, and (ii) that, in committing the offence, the accused intended to cause the complainer to suffer physical or psychological harm or was reckless as to whether their conduct would have that result."

#### Nature of the relationship

*[One of the following directions should be given as appropriate:]*

- **Where it is not in dispute that the accused and complainer were, or had been, partners.**

"In this case, there has been no challenge, and so it is established, that the accused and the complainer were partners/ex-partners at the time specified."

- **Where it is in dispute that the accused and complainer were partners or ex-partners.**

"In this case, the accused does not accept that he/she/they and the complainer were partners or ex-partners."

*[Judges might refer, briefly, to the evidence in this connection]*

"The law defines partners as: spouses; civil partners; people living together as spouses; and people who are in an intimate relationship with each other. What is "intimate" will depend on all the circumstances, but a relationship need not be sexual for it to be intimate.

An ex-partner is someone who was previously in such a relationship with the accused but was not at the time specified.

You will need to decide whether you are satisfied that the accused and complainer were partners/ex-partners at the time specified."

## Harm

“You must [also] consider whether the accused intended to cause the complainer to suffer physical or psychological harm or was reckless as to whether their conduct would have that result.

Psychological harm includes fear, alarm or distress. It is not necessary that the complainer actually suffered such harm; it is enough that the accused intended to cause such harm, or was reckless as to whether such harm would be caused. And when I refer to *causing* physical or psychological harm, that includes contributing to the causing of such harm.

“Intended” refers to what the accused meant to do, what he/she/they was/were aiming to achieve.

A person is reckless as to whether [his/her/their] conduct would cause the complainer such harm if they failed to think about, or were indifferent to, whether the conduct would have that result.

Whether the accused acted intentionally or recklessly is something to be inferred from what is proved to have been said and/or done.”

## No need for corroboration

“Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.”

## Summary

“You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation.”

## **Law: terrorist connection aggravation**

### **Counter Terrorism Act 2008**

#### **Section 31 sentences for offences with a terrorist connection:**

“(1) This section applies where in Scotland, in relation to an offence within subsection (4A) or (4B)—

- (a) it is libelled in an indictment, and
- (b) proved,

that the offence has been aggravated by reason of having a terrorist connection.

(2) Where this section applies, the court must take the aggravation into account in determining the appropriate sentence.

(3) Where the sentence imposed by the court in respect of the offence is different from that which the court would have imposed if the offence had not been aggravated by reason of having a terrorist connection, the court must state the extent of, and the reasons for, the difference.

(4) For the purposes of this section, evidence from a single source is sufficient to prove that an offence has been aggravated by reason of having a terrorist connection.”

#### **92 Meaning of "terrorism"**

“In this Act "terrorism" has the same meaning as in the Terrorism Act 2000.”

#### **93 Meaning of offence having a "terrorist connection"**

“For the purposes of this Act an offence has a terrorist connection if the offence—

- (a) is, or takes place in the course of, an act of terrorism, or
- (b) is committed for the purposes of terrorism.”

#### **Possible form of direction: terrorist connection aggravation**

##### **(Counter Terrorism Act 2008)**

“You will see that, at the end of the charge, it is said that the crime was aggravated by a terrorist connection. If you are satisfied that the crime was committed by the accused and it has a terrorist connection, the crime becomes more serious.”

### **What do you need to be satisfied of if this aggravation is to apply?**

“An offence has a terrorist connection if the offence is an act of terrorism, or takes place in the course of an act of terrorism, or is committed for the purposes of terrorism.”

### **What constitutes terrorism?**

- “First, the use or threat of action anywhere which involves: serious violence against a person,
- serious damage to property,
- endangers a person’s life, other than that of the person committing the action,
- creates a serious risk to the health or safety of the public anywhere or a section of the public, or
- is designed seriously to interfere with or seriously to disrupt an electronic system.

Second, the use or threat of action must be designed to influence the government or an international governmental organisation, or to intimidate the public anywhere or a section of the public [*Note: If the use of firearms or explosives are involved, this factor is satisfied without any further evidence*].

And third, that use or threat must be made for the purpose of advancing a political, religious, racial or ideological cause.

Reference to “government” means any national government or the devolved governments in the United Kingdom and Northern Ireland.”

### **No need for corroboration**

“Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.”

### **Summary**

“You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you

are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation.”

## **Law: serious organised crime aggravation**

### **Criminal Justice and Licensing (Scotland) Act 2010**

#### **Section 29 Offences aggravated by connection with serious organised crimes**

(1) This subsection applies where it is—

- (a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with serious organised crime, and
- (b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with serious organised crime if the person committing the offence is motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

(3) It is immaterial whether or not in committing the offence the person in fact enables the person or another person to commit serious organised crime.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with serious organised crime.

Section 28 provides a definition of “serious organised crime” for the purposes of section 29:

*“serious organised crime” means* crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of serious offences,

*“serious offence” means* an indictable offence—

- (a) committed with the intention of obtaining a material benefit for any person, or
- (b) which is an act of violence committed or a threat made with the intention of obtaining such a benefit in the future, and

*“material benefit” means* a right or interest of any description in any property, whether heritable or moveable and whether corporeal or incorporeal.

## **Possible form of direction: serious organised crime aggravation**

“You will see that, at the end of the charge, it is said that the crime was aggravated by connection with serious organised crime. If you are satisfied that the crime was

committed by the accused, and was connected to serious organised crime, the crime becomes more serious.”

### **What do you need to be satisfied of if this aggravation is to apply?**

“For the Crown to prove this aggravation you must be satisfied that the person committing the offence was motivated (wholly or partly) by the objective of committing or conspiring to commit serious organised crime.

Serious organised crime is crime involving two or more people acting together for the principal (main) purpose of committing or conspiring to commit a serious offence or a series of serious offences.”

### **What qualifies as a serious offence?**

*[These directions should be adapted to the circumstances of the case.]*

“The offence must be committed either:

- (a) with the intention of obtaining a material benefit for anyone; or
- (b) must comprise a threat or violent act intended to obtain such a benefit at some future time. A benefit is material if it is a right or interest in property of any kind.

It is irrelevant that the offence actually enabled the accused or another to commit serious organised crime.”

### **No need for corroboration**

“Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.”

### **Summary**

“You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation.”

## Law: human trafficking aggravation

### Human Trafficking and Exploitation (Scotland) Act 2015

#### Section 5 General aggravation of offence

“(1) This subsection applies where it is—

- (a) libelled in an indictment or specified in a complaint that an offence is aggravated by a connection with human trafficking activity, and
- (b) proved that the offence is so aggravated.

(2) An offence is aggravated by a connection with human trafficking activity if the offender is motivated (wholly or partly) by the objective of committing or conspiring to commit the offence of human trafficking.

(3) It is immaterial whether or not in committing an offence the offender in fact enables the offender or another person to commit the offence of human trafficking.

(4) Evidence from a single source is sufficient to prove that an offence is aggravated by a connection with human trafficking activity.”

#### Possible form of direction: human trafficking aggravation

[To be adapted for aggravation involving a child/a public official]

“You will see that, at the end of the charge, it is said that the crime was aggravated by a connection with human trafficking. If you are satisfied that the crime was committed by the accused and had a connection with human trafficking activity, it becomes more serious.

An offence is aggravated by a connection with human trafficking activity if you are satisfied that the accused was motivated (wholly or partly) by the objective of committing or conspiring to commit the offence of human trafficking. It is irrelevant that the accused by committing the offence in fact enabled him/her/themselves or another to commit the offence of human trafficking.

The offence of human trafficking is defined as follows (*adapt the direction for section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015*).

Now what I said regarding corroboration generally does not apply to the aggravation of the charge so evidence from one source, if it satisfies you, is sufficient to prove the aggravation of the charge.”

## Summary

“You should consider this charge as follows. First, consider whether the offence was committed by the accused. If you are not satisfied of that, you would acquit the accused of the charge and you would not need to consider the aggravation. If, on the other hand, you are satisfied that the accused is guilty of the offence, you should then consider whether this aggravation has also been proved. If you are satisfied of that, then you would convict the accused of the offence **and** the aggravation. If you are **not** satisfied of that you would simply convict the accused of the offence and delete the aggravation.”