



The Attorney General

Falkland Islands Prosecution Service

AGG29

The Attorney General's Guidance on Hate Crime

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Contents

Introduction	3
Protected Characteristics	4
Offences of Stirring Up Hatred	5
Introduction	5
Intent to stir up hatred	5
Behaviour likely to stir up hatred	6
Possession of material likely to stir up hatred – section 529	6
Protection of freedom of expression	7
Defence of Private Conversation	8
Defence of Fair Journalistic Reporting	9
Protection for Performers	9
Defence of Reporting Proceedings in the Legislative Assembly or Courts	9
Consent to Prosecute	9
Offences Aggravated by Hostility	10
Introduction	10
Proof of Hostility	10
Multiple Offenders	12
Offences Involving Common Motivation	12
Charging Hostility	12
Alternative Verdicts	13
Increase in Sentence	14

Introduction

1. The term 'hate crime' is used to describe a range of criminal behaviours which are motivated by hostility, or which stir up hatred, towards a particular group of people.
2. The law protects people against hostility directed towards disability, race, religion, sexual orientation, transgender identity and variations in sex characteristics. These are aspects of a person's identity which are referred to as protected characteristics.
3. Hate crime is serious, it can cause additional harm to individual victims, create fear and anxiety amongst members of the targeted community and lead to community tension and division.
4. This guidance should be read in conjunction with 'AGG2 – The Attorney General's Code for Prosecutors'. The Code for Prosecutors sets out the approach that must be taken when deciding whether to charge a person with a criminal offence.
5. The Code for Prosecutors sets out the evidential test, the public interest test and the general principles to be applied in all cases.
6. When making a charging decision, prosecutors must consider each case on its own facts and on its own merits. The first stage is to consider whether there is sufficient evidence to provide a realistic prospect of conviction in relation to each allegation (the evidential test). If there is sufficient evidence, the prosecutor must then go on to consider whether a prosecution is in the public interest (the public interest test).
7. This guidance compliments the Code for Prosecutors by setting out the legal framework and identifying specific factors which are relevant to consider when making prosecution decisions in relation to hate crime.

Protected Characteristics

There are six protected characteristics:

Disability	includes a physical or mental impairment of any kind or a medical condition which has, has had, or may have a substantial or long-term effect, or is of a progressive nature.
Race	includes colour, nationality (including citizenship), or ethnic or national origins.
Religion	includes perceived religious affiliation and groups defined by reference to religious belief or lack of religious belief, membership of, or adherence to, a church or religious organisation, support for the culture or traditions of a church or religious organisation, or participation in activities associated with the culture or traditions of a church or religious organisation.
Sexual orientation	means sexual orientation towards persons of the same sex, persons of a different sex, or both persons of the same sex and persons of a different sex.
Transgender identity	means a person who is a female-to-male transgender person, a male-to-female transgender person, a non-binary person or a person who cross-dresses.
Variations in sex characteristics	means a person who was born with physical and biological sex characteristics which, taken as a whole, are neither those typically associated with males, nor those typically associated with females.

Offences of Stirring Up Hatred

Introduction

1. Under the Crimes Ordinance 2014 there are three offences which relate to stirring up hatred against a group of people based on the group being defined by reference to a protected characteristic:
 - (a) stirring up hatred with intent¹;
 - (b) behaviour likely to stir up hatred²;
 - (c) possession of material likely to stir up hatred³.
2. The maximum sentence for all three offences is imprisonment for 7 years or a fine, or both.
3. For the purposes of the offences:

“**behaviour**” means behaviour of any kind, including doing something, saying something, or communicating information or material of any kind;

“**communicating**” means to disseminate information or make it available in any way, including by displaying, publishing or distributing it, or giving, sending, showing or playing it; and

“**material**” means anything that is capable of being looked at, read, watched, or listened to (either directly in its current form, or after conversion from another form)⁴.

Intent to stir up hatred

4. It is an offence contrary to section 527 of the Crimes Ordinance 2014 to engage in behaviour with intent to stir up hatred against a group of people based on the group being defined by reference to a protected characteristic.
5. Examples of this type of offending include distributing leaflets and other hate material to the public, or creating websites which are intended to stir up hatred, or by making inflammatory public speeches.

¹ See section 527 of the Crimes Ordinance 2014.

² See section 528 of the Crimes Ordinance 2014.

³ See section 529 of the Crimes Ordinance 2014.

⁴ See section 526 of the Crimes Ordinance 2014.

6. An offender will intend their behaviour to stir up hatred if they act in order to bring about that outcome. It is immaterial whether hatred is actually stirred up by the behaviour and it does not matter whether an offender intends to stir up hatred in another country, or that in all the circumstances hatred is only likely to be stirred up in another country, because the focus of the offence is on the offender's intention.

Behaviour likely to stir up hatred

7. It is an offence contrary to section 528 of the Crimes Ordinance 2014 to engage in behaviour which is threatening or abusive and which is likely to stir up hatred against a group of people based on the group being defined by reference to a protected characteristic. The offender must know, or ought to have known, that their behaviour was threatening or abusive and was likely to stir up hatred against the defined group.
8. Examples of this type of offending include posting abusive material online or sending communications which threaten violence, or which call for violence, against a specific person or group of people based on a protected characteristic.
9. When considering whether behaviour was threatening or abusive the words "threatening or abusive" are to be given their ordinary meaning.
10. Hatred must be "likely" to be stirred up by the threatening or abusive behaviour. In the context of the offence "likely" does not mean that hatred was simply possible, it must be probable. Prosecutors will need to examine the context of any behaviour very carefully, in particular the likely audience, as this will be highly relevant. It is immaterial whether hatred is actually stirred up by the offender's behaviour because the focus of the offence is on the likelihood that hatred would be stirred up.
11. Careful regard must be had to all the circumstances in which the behaviour occurs and where the behaviour is part of the public performance of a dramatic, literary, artistic or journalistic work, this will include having regard to the work as a whole.
12. It does not matter whether an offender intends to stir up hatred in another country, or that in all the circumstances hatred is only likely to be stirred up in another country, because the focus of the offence is on the offender's intention.

Possession of material likely to stir up hatred – section 529

13. It is an offence contrary to section 529 of the Crimes Ordinance 2014 to possess material that is threatening or abusive and is likely to stir up hatred against a group of people based on the group being defined by reference to a protected characteristic where the material is possessed with the intention that it be used to stir up such hatred.
14. Examples of this type of offending include possession of threatening or abusive leaflets or other written materials that are likely to stir up hatred prior to their distribution to members of the public.

Protection of freedom of expression

15. When deciding whether behaviour or material is threatening or abusive, or intended or likely to stir up hatred, the law requires that particular regard must be had to the importance of the Constitutional right of freedom of expression⁵.
16. When undertaking public interest assessments for the purposes of charging decisions it is essential that prosecutors keep in mind that in a free, democratic and tolerant society, people are able to robustly exchange views, even when these views may cause offence. However, the rights of the individual to freedom of expression are not without limits and they must be balanced against the duty of the State to act proportionately in the interests of public safety, to prevent disorder and crime, and to protect the rights of others.
17. Behaviour or material is not to be taken to be threatening or abusive, or intended or likely to stir up hatred, solely because it is, or includes:
 - (a) discussion or the expression of views or opinions relating to any of the following:
 - (i) race;
 - (ii) cultural beliefs or practices (whether a particular belief or practice, the beliefs or practices of a particular culture, or cultural beliefs or practices generally);
 - (iii) the position of not holding cultural beliefs (whether a particular belief, the beliefs of a particular culture, or cultural beliefs generally);
 - (iv) a country, its political system or its government;
 - (v) immigration, citizenship or asylum;
 - (vi) disability;
 - (vii) religion (whether a particular religion, all religions, or religion generally);
 - (viii) religious beliefs or practices (whether a particular religious belief or practice, the beliefs and practices of a particular religion, or religious beliefs or practices generally);
 - (ix) the position of not holding religious beliefs (whether a particular religious belief or religious beliefs generally);
 - (x) sexual orientation;
 - (xi) transgender identity;
 - (xii) variations in sex characteristics;
 - (xiii) sexual behaviour or practices;
 - (xiv) marriage which concerns the sex of the parties to marriage;

⁵ See section 530 of the Crimes Ordinance 2014.

- (xv) the view that sex is binary and immutable and the use of language which expresses this;
 - (b) proselytising or promoting religious, cultural, or sexual beliefs, practices, or behaviours; or
 - (c) urging persons to cease holding, practising or engaging in, or to change, their religious, cultural, or sexual beliefs, practices or behaviours⁶.
- 18. The discussion or expression of views can include criticism and ridicule because the law does not require courtesy and speech does not lose protection just because the information or ideas that it conveys are offensive, disturbing or even shocking⁷.
- 19. The starting point for prosecutors is always the importance of the right to freedom of expression. The Constitution protects everyone, not just those holding the majority view.
- 20. There cannot be any universal test for deciding when behaviour goes beyond legitimate speech and becomes criminalised because each case must be assessed on its own facts. But even if, on the face of it, there is evidence that behaviour has crossed the line into criminality, it must still be proportionate to bring a prosecution.
- 21. This means that when making charging decisions prosecutors must strike the balance between protecting the right to free speech and the right of people, and the community as a whole, not to be subjected to behaviour which is intended, or likely, to stir up hatred.
- 22. Prosecutors must clearly record in the charging decision the Constitutional proportionality assessment which they have undertaken and the reasons for their conclusion.

Defence of Private Conversation

- 23. It is a defence to the stirring up hatred offences for behaviour or material to have only been intended for private conversation. A conversation is private if it is intended that the conversation will only be seen or heard by the parties to the conversation and where it is reasonable, in the circumstances, for the person to expect that it will only be seen or heard by them.
- 24. Private conversation can take place at any location and need not be physically private. The defence applies to any situation where a person intends their conversation to be private and it was reasonable to expect that it would be private.

⁶ See section 530 of the Crimes Ordinance 2014.

⁷ See *R v Casserly* [2024] EWCA Crim 25

Defence of Fair Journalistic Reporting

25. It is a defence to the stirring up hatred offences where behaviour was for the purpose of journalistic reporting about the behaviour engaged in by another party and the reporting fairly and accurately conveyed the other parties' behaviour or intention.
26. This defence is intended to protect fair journalistic reporting on incidents involving stirring up hatred.

Protection for Performers

27. It is a defence to the stirring up hatred offences where the behaviour is part of the public performance of a dramatic, literary, artistic or journalistic work and the person is involved solely as a performer, such as contributing to the content of the work or assisting in its production.
28. This defence is intended to protect performers from aiding, abetting, assisting or encouraging hate crime solely by reason of being a performer. The person may still commit an offence where it can be shown that they had a role in the work other than, or in addition to, being a performer.

Defence of Reporting Proceedings in the Legislative Assembly or Courts

29. It is a defence to the stirring up hatred offences where behaviour was for the purpose of fair and accurate reporting on the proceedings of the Legislative Assembly or the proceedings of a court or tribunal where the reporting is contemporaneous or is as near to contemporaneous as is reasonably practicable.
30. This defence is intended to protect fair reporting about issues relating to stirring up hatred where they form part of the proceedings of the Legislative Assembly or of a court or tribunal.
31. The contemporaneous reporting requirement in relation to court or tribunal proceedings safeguards against the 'reporting' of old cases being used as a cover by which to communicate material likely to stir up hatred.

Consent to Prosecute

32. Allegations of stirring up hatred are by their very nature highly sensitive. For this reason proceedings for an offence contrary to section 527 (stirring up hatred with intent), section 528 (using behaviour which was likely to stir up hatred), and section 529 (possession of material likely to stir up hatred) can only be commenced with the consent of the Attorney General⁸.

⁸ See section 535 of the Crimes Ordinance 2014.

Offences Aggravated by Hostility

Introduction

1. Criminal offences can be aggravated by hostility towards a person, or a group of people, based on the person or group being defined by reference to a protected characteristic⁹.
2. Examples of offences aggravated by hostility include:
 - (a) violent offences, for example where racial abuse is used during an assault, or a person is targeted with violence due to their religious belief;
 - (b) criminal damage, for example where a LGBTQ+ venue is targeted with homophobic graffiti;
 - (c) online offences, for example where a disabled person is targeted with abusive communications because of their disability.
3. Hostility is to be given its ordinary meaning and includes ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment and dislike.
4. An offence is aggravated by hostility where the offence is motivated (wholly or partly) by hostility towards a group of people based on the group being defined by reference to a protected characteristic. Hostility towards a group can be demonstrated by hostility towards a single member of that group.
5. If there is a specific victim, the offence can be aggravated by hostility at the time the offence is committed, or immediately before or afterwards, if the offender demonstrated hostility towards the victim, and the hostility was (wholly or partly) based on the victim's membership (or presumed membership) of a group of people defined by reference to a protected characteristic.
6. It is important to note that an offence is aggravated by hostility even where the offender wrongly presumes that the victim has a protected characteristic and is motivated by hostility on that basis. The focus is on the motivation of the offender and not whether the victim falls within the definition of a protected characteristic or not.
7. For example, a violent offence will still be aggravated where the offender is motivated by hostility towards transgender people and attacks the victim under the mistaken belief that they are a transgender person. The fact that the victim was not a transgender person and the offender's motivation was based on a mistaken presumption is irrelevant. The motivation remains the same irrespective of the fact that the attack was based on a mistaken assumption.

⁹ See section 536 of the Crimes Ordinance 2014.

8. Similarly, where the hostility is directed towards a specific victim, there does not need to be evidence that the offender is generally hostile towards the group to which the specific victim belongs. It is irrelevant that the offender may have abused anyone in the victim's place be reference to any obvious physical characteristic. The only relevant factor is that the offender chose to abuse the victim based on a protected characteristic.

Proof of Hostility

9. Proof of hostility can be established by evidence relating to what the offender may have said or done at the time, or on other occasions prior to the incident. In some cases, background evidence will be important to establish motive, for example membership or association with a hate group, or evidence of expressed hateful views in the past.
10. The following factors will be relevant when considering evidence of hostility:
 - (a) contemporaneous words used;
 - (b) other words used before or after the alleged offence;
 - (c) writings and other communications;
 - (d) social media postings;
 - (e) insignia and symbols;
 - (f) membership, association or interest in hate groups;
 - (g) presence with others promoting hostility or association with them;
 - (h) previous incidents demonstrating hostility;
 - (i) previous convictions for relevant offences.
11. The motivation based on hostility need not be the sole or main motivation for the offence and the offence may also be motivated by other reasons. For example, where an offender shouts threatening and racist abuse at the victim during an argument about a road traffic incident. The main motivation behind the abusive conduct may be anger connected to the road traffic incident but the use of racist terms demonstrates that the abuse is partly motivated by hostility.
12. It must be remembered, however, that it is not sufficient that the offence was simply committed against a person with a protected characteristic, the offence itself must be motivated, at least in some part, by hostility towards the protected characteristic.

13. The demonstration of hostility must be nearly contemporaneous to the conduct element of the offence (at the time of the offence or immediately before or after). This does not preclude evidence of previous behaviour being relied upon to establish hostility, but the demonstration of hostility must be closely connected to the offence itself.
14. The demonstration of hostility is likely, in many cases, to be something different from, and additional to, the conduct element of the offence. Evidence alone of the commission of the substantive offence against the victim is unlikely to be sufficient to establish hostility.

Multiple Offenders

15. In cases involving more than one offender, prosecutors will need to carefully analyse the facts of the case to determine whether a particular offender can be said to have participated in a demonstration of hostility. For example, the fact that one offender utters words of racial abuse during a violent attack may not aggravate the offence for all offenders.
16. However, an offender may demonstrate hostility by joining in the activities of a group of people where a sufficient number of members of the group are themselves demonstrating hostility and where the defendant's adherence to the group goes beyond mere presence and instead lends weight and support to the demonstration of hostility being expressed by the group as a whole.

Offences Involving Common Motivation

17. The motivation for the commission of some offences is common to all such offending. For example, the motivation for the commission of theft, robbery, sexual offending and drug offending is obvious.
18. Prosecutors must carefully assess cases to determine whether there is additional evidence of motivation, separate and distinct to the obvious common motivation and which justifies treating the offence as being an offence which is aggravated by hostility.
19. It is important not to confuse the targeting of a vulnerable person by the offender with motivation based on hostility. For example, an offender may commit an offence against a disabled person because they believe that the disabled person is less likely to report the offending. This is not the same as the offence being motivated by hostility towards the victim based on their protected characteristic.
20. Particular care must be taken in relation to cases of sexual offending. A feature of sexual offending can be the use of derogatory remarks by the offender during the offence. The presence of such remarks should not be treated as an automatic indication of hostility towards a protected characteristic. The evidence must be carefully assessed to determine whether hostility can be clearly established.

21. Sexual offences are complex and care must be taken before adding to that complexity by charging the additional element of hostility. Aggravation based on hostility should only be charged where there is clear evidence to establish that the motivation was based wholly or partly on hostility towards a protected characteristic.

Charging Hostility

22. Where it is appropriate to allege that an offence has been aggravated by hostility towards a protected characteristic this must be explicitly stated in the summons, charge or indictment. The prosecution is required to prove the element of hostility to the criminal standard¹⁰.
23. Where the alleged hostility relates generally to a group of people based on a protected characteristic the summons, charge or indictment should include the following form of words:

“...and at the time was motivated, wholly or partly, by hostility towards a group of persons based on their [disability] [race] [religion] [sexual orientation] [transgender identity] [variations in sex characteristics]”.

24. Where the alleged hostility relates to a specific individual the following form of words should be used:

“...and at the time, or immediately before or after doing so, demonstrated hostility towards [name of individual] based on [name of individual] membership, or presumed membership, of a group of persons defined by reference to a protected characteristic, namely their [disability] [race] [religion] [sexual orientation] [transgender identity] [variations in sex characteristics]”.

Alternative Verdicts

25. In accordance with section 14 of the Crimes Ordinance 2014, where a court finds a person not guilty of the offence specifically charged, but the allegation amounts to or includes (expressly or by implication) an allegation of another offence, the court may find the person guilty of that other offence.
26. This means that where an offence is charged as being aggravated by hostility, the court may return a verdict of guilty to the basic offence if it concludes that the hostility element has not been proven.
27. Section 14 of the Crimes Ordinance 2014 does not require the basic offence to be pleaded separately in the summons, charge or indictment. It is, however, good practice to include in the summons, charge or indictment an alternative count which alleges the basic offence.

¹⁰ See section 537 of the Crimes Ordinance 2014.

28. The inclusion of the alternative count clarifies the position at the outset and avoids confusion over whether an alternative verdict to the basic offence can be returned.
29. It should be explained to the court, the defence, and the victim why it is necessary to include the basic offence as an alternative on the summons, charge or indictment. It is not an admission of a weakness in the case, nor is it an indication that a plea of guilty to the basic offence is acceptable. It is a mechanism by which the options available to the court can be clearly set out on the face of the summons, charge or indictment.

Increase in Sentence

30. Where an offender is convicted of an offence aggravated by hostility the court, when sentencing the offender, must take the aggravation into account and increase the sentence as a result, unless there are exceptional circumstances which justify not doing so. The court must state the extent of the increase to the sentence or, if the sentence is not increased, the exceptional circumstances which justify not increasing the sentence.
31. The extent of the increase will be determined by the application of the appropriate sentencing guideline.

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