

Chapter 44: Racially Aggravated Offences

Introduction

Recommendation 12 of the Stephen Lawrence Inquiry Report by Sir William Macpherson states that "A racist incident is any incident which is perceived to be racist by the victim or any other person". This definition was formally adopted by the Scottish Executive. All complainers in racially aggravated offences should already have been referred to VIA. (See [VIA - Who Receives VIA Services](#)).

The Lord Advocate also accepted recommendation 33 from that Report which stated that there should be a rebuttable presumption that the public interest should be in favour of prosecution where evidence of racial motivation/aggravation exists. It is stated in the [Prosecution Code](#) "the public interest is likely to require prosecution wherever sufficient criminal behaviour was motivated by any form of discrimination against the victim's ethnic or national origin or religious beliefs". [Chapter 23.13 of the Book of Regulations](#) makes it clear that pleas of guilty should not be accepted which exclude available and admissible evidence of racial motivation.

The **Crime and Disorder Act 1998** created statutory offences of racially aggravated harassment and behaviour by inserting **Section 50A into the Criminal Law (Consolidation) (Scotland) Act 1995**. It also provided for any racial aggravation in an offence to be considered by the court in determining sentence.

[Crown Office Circular No.100/1998](#) (Racial Matters No. 1) details the offences and penalties and precognoscers should consider carefully its terms when dealing with a case where any of the offences are racially aggravated and when determining the appropriate charge or charges to libel. : That circular provides the following guidance:

Section 33 of the 1998 Act inserts **Section 50A into the Criminal Law (Consolidation) (Scotland) Act 1995**. This section creates statutory offences of racially aggravated harassment and racially aggravated behaviour.

Section 50A(1) provides that a person is guilty of an offence if he

a) pursues a racially aggravated course of conduct which amounts to harassment of a person and -

(i) is intended to amount to harassment of that person; or

(ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or

b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress

Definition of Racial Aggravation

Section 50A(2) defines racial aggravation for the purposes of Section 50A in the following terms:

A course of conduct or an action is racially aggravated if:

a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill will based on that person's membership (or presumed membership) of a racial group; or

b) the course of conduct or action is motivated (wholly or partly) by malice and ill will towards members of a racial group based on their membership of that group.

Section 50A(3) provides that for the purposes of Section 50A(2)(a):

"membership" includes association with members of a racial group

"presumed" means presumed by the offender

Section 50A(6) provides that for the purposes of Section 50A

"conduct" includes speech

"harassment" of a person includes causing the person alarm or distress

"racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins

"course of conduct" must involve conduct on at least two occasions.

By virtue of Section 50A(4) it is immaterial whether the offender's malice and ill-will is also based to any extent on religion or any other factor.

Definition of Racial Aggravation

Section 96(2) defines racial aggravation for the purposes of Section 96 in the following terms:-

An offence is racially aggravated 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.

Section 96(3) provides that for the purposes of Section 96(2)(a):

"membership" includes association with members of a racial group

"presumed" means presumed by the offender.

By virtue of Section 96(4) it is immaterial whether the offender's malice and ill-will is also based to any extent on religion or any other factor.

The racial aggravation must be libelled in the indictment or specified in the complaint for this section to apply (section 96(1)).

Evidence from one source is sufficient to establish the aggravation for the purpose of this section (section 96(2)).

The Act does not provide for a specific increase in sentence to be available to the court if the aggravation is proved, nor does it provide for the maximum sentence which it would be competent for the court to impose to be increased to take account of the aggravation. Procurators Fiscal should therefore give careful consideration to the existence of racial aggravation when selecting the appropriate forum for proceedings.

The Lord Advocate is committed to ensuring that all racially motivated crimes are treated seriously. Precognoscers are reminded that racial motivation must always be taken into account when deciding whether a prosecution is in the public interest.

In solemn cases Procurators Fiscal should have regard to the statutory penalty available to the court in making recommendations to Crown Counsel on the appropriate charge and forum.

Where racial aggravation in terms of Section 96(1) is libelled in a charge Procurators Fiscal, in selecting the appropriate forum, must have regard to the maximum sentencing power of the court to allow the court to take the aggravation into account in determining the appropriate sentence.

Where there is evidence that an offence was racially aggravated but that evidence comes only from a single source, that would be sufficient to establish the aggravation in terms of section 96 provided the aggravation is libelled in the indictment or specified in the complaint.

It will be important for the precognoscer, in determining the evidence of racially aggravated conduct and the appropriate charge to libel, to ascertain whether the incident was treated as racist. When precognosing victims and witnesses, it will be necessary to ascertain their perception of the motive. As the Lord Advocate's Guidelines to Chief Constables state, leading questions should not be asked and it would be appropriate simply for them to be asked for their views on why the incident happened.

Penalties

The maximum penalties for an offence under Section 50A(1) are,

On summary conviction 6 months imprisonments or a fine not exceeding the statutory maximum or both;

On conviction on indictment 7 years imprisonment or a fine or both;

Non-Harassment Orders.

On conviction for an offence involving racial harassment i.e. a contravention of Section 50A(1)(a), Procurators Fiscal may exercise discretion in seeking a non-harassment order under Section 234A of the Criminal Procedure (Scotland) Act 1995. The Lord Advocate has directed that a non-harassment order will be particularly appropriate in these circumstances. (See Crown Office Circular 55/1998 Protection from Harassment Act 1997 No 1(now withdrawn))

Offences Racially Aggravated

Section 96 of the 1998 Act provides that, where racial aggravation is libelled in a charge and proved in respect of any offence, the court shall, on conviction, take the aggravation into account in determining the appropriate sentence.

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