Addendum 1

Selected Legislation from non-European Countries treating bias-motivated violence against LGBTs as an aggravating circumstance in sentencing

1. While discussion of European states is persuasive, various countries outside of Europe have also recognized the significant vulnerability of LGBTs to violence and have in turn codified protections for sexual minorities against bias-motivated crimes. Laws aggravating sentences for bias-motivated violence against LGBTS have been enacted in countries throughout North and South America. This addendum offers information on the national legislation in Canada and the United States, along with brief analysis of the impact in each country.

Canada[1]

2. Canada's Criminal Code, amended in 1996, includes penalty enhancements for crimes exhibiting bias-motivation. Aggravating circumstances may apply to bias stemming from race, national origin, ethnicity, religion, sexual orientation, gender, disability, or other status.[2] Section 718.2(a)(i) allows a court to increase a sentence given the existence of aggravating factors, including "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, color, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor."[3] The element of bias motivation does not contribute to the determination of a defendant's guilt, but is only applied in consideration of his or her sentence.[4]

3. Numerous cases have been heard in Canadian courts in which homophobic motivations were identified as aggravating factors in sentencing. As early as 1978 (predating the formal codification of Section 718.2(a)(i) in 1996), the Ontario Court of Appeal increased the sentences of perpetrators in *R. v. Atkinson, Ing and Roberts* to reflect the bias motivations of an attack on three men in a public park. The sentencing judge had not initially considered the bias motivation an aggravating factor. Upon appeal, sentences for each perpetrator were raised from eight months imprisonment to two years less one day.[5]

4. In 2006, a Canadian provincial court found in *R. v. Amr* that the defendant had attacked his victim, striking him twice in the face with a beer bottle and puncturing his eyeball, solely because of his perception that the victim was a homosexual man of French nationality. Amr was sentenced to four years in custody. [6]

5. In the April 2010 case of *R. v. Kandola*, a Canadian Court found various elements of an attack on a homosexual man in British Colombia demonstrated the perpetrator's sexual

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[1] Canada has a common law system (except Quebec, which has a mixed common and civil law system).
[2] Criminal Code of Canada, R.S.C. 1985, c. C-46, §718.2(a)(2) (12 March 2010), *available at* http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html.
[3] *Ibid.*
[4] *Ibid.*
[5] *R. v. Atkinson, Ing and Roberts,* [1978] 43 C.C.C. (2d) 342 (O.C.A.) [Ontario Court of Appeal], p. 3, ¶11.
[6] *R. v. Amr*, [2006] A.J. No. 92 (Prov. Ct.) [Alberta Provincial Court], pp. 10-11, 13, ¶¶29, 31, 33.

orientation bias motivation, including his use of homophobic language. Kandola had "sucker punched" a gay man walking down the street with his male partner in the early morning hours after using anti-homosexual epithets. Bias motivation was proven beyond a reasonable doubt, and the perpetrator was sentenced to 17 months' imprisonment, one year probation, and 50 hours of community service.[7]

United States[8]

6. In September 1994, the Omnibus Crime Control and Safe Streets Act of 1968 was amended to make hate crimes illegal. The Violent Crime Control and Law Enforcement Act of 1994 (H.R.3355, Public Law No: 103-322) stated in Section 280003 'Direction to United States Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes,' that a hate crime is "a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[9] The Act allowed the U.S. Sentencing Commission to develop new guidelines and refine existing guidelines to "provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes."[10]

7. On October 28, 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, expanding U.S. federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity, or disability.[11] The prerequisite that the victim be engaging in a federally-protected activity was dropped.[12] The Act provided for imprisonment of sexual orientation bias-motivated offenders for up to ten years or, in the case of death, kidnapping, or aggravated sexual abuse, a sentence of life imprisonment.[13]

8. In addition to federal law, 30 states' laws and those of the District of Colombia punish bias crimes motivated by sexual orientation.[14] Several of these allow sexual orientation bias-motivation to be considered an aggravating factor in sentencing. In Arizona, for example, a court may consider as an aggravating circumstance "evidence that the defendant committed the crime out of malice toward a victim because of the victim's identity in a group listed in

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[7] *R. v. Kandola* [2010] B.C.J. No. 1160 (Brit. Col. Sup. Ct.), p. 2, *available at* http://www3.quicklaw.com/cgi-bin/LNC-prod/lnetdoc.pl?DOCNO=412.
[8] The United States has a common law system (excluding Louisiana).
[9] ''Violent Crime Control and Law Enforcement Act of 1994," H.R.3355, Public Law No: 103-322, at §280003.
[10] *Ibid.*
[11] The Matthew Shepard and James Byrd, Jr, Hate Crimes Prevention Act, Div. E of Pub. L. 111-84, § 4702, 123 Stat. 2836 (2009).
[12] Democratic Policy Committee. Amendment to S.1390, the National Defense Authorization Act for Fiscal Year 2010, at Prohibition of Certain Hate Crimes Acts, *available at* http://dpc.senate.gov/docs/lb-111-1-97.html.
[13] The Matthew Shepard and James Byrd, Jr, Hate Crimes Prevention Act, Div. E of Pub. L. 111-84, § 4707, 123 Stat. 2839 (2009).
[14] Anti-Defamation League, *Anti-Defamation League State Crime Statutory Provisions* (2008), *available at* http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf.

section 41-1750, subsection A, paragraph 3 or because of the defendant's perception of the victim's identity in a group listed in section 41-1750, subsection A, paragraph 3."[15] Section 41-1750 includes homosexuals as a protected group.[16]

9. Section 775.085 of the 2007 Florida Statutes provides for enhanced penalties if a felony or misdemeanor features prejudice based on race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim.[17]

10. A New York state law in effect since 2000 provides for a defendant's prosecution on hate crime charges when evidence suggests that the offense was based on a belief or perception about the race, color, national origin, ancestry, gender, religion, religious practices, age, disability, or sexual orientation of a person (regardless of the accuracy of that perception).[18]

[15] Ariz. Rev. Stat. Ann. §13-701 (2010), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/13/00701.htm&Title=13&DocType=ARS.
[16] Ariz. Rev. Stat. Ann. §41-1750 (2010), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/41/01750.htm&Title=41&DocType=ARS.
[17] Fla. Rev. Stat. Ann. 775.085 (2007), *available at* http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0775/SEC085.HTM&Title=-%3E2007-%3ECh0775-%3ESection%20085#0775.085.
[18] N.Y. Hate Crimes Act (2000) Art. 485, *available at* http://criminaljustice.state.ny.us/legalservices/ch107_hate_crimes_2000.htm; *See also* N.Y. Penal Code, Art. 149, *available at* http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$PEN485.10$$@TXPEN0485.10+&LIST=SEA6+&BROWSER=BROWSER+&TOKEN=04351026+&TARGET=VIEW.