

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill

Written submission from Andrew Tickell

Introduction

On its introduction to the Scottish Parliament in 2011, I did not support the Offensive Behaviour and Threatening Communications (Scotland) Act. I retain significant concerns, described below, about the legislation's logical structure and the scope of what it currently criminalises. However, the proposal to repeal the Act – with Lord Bracadale's comprehensive and independent review into hate crime legislation still ongoing¹ – is to take a sledgehammer to a task designed for the scalpel.

As the Appeal Court noted in 2013, section 1 of the Act creates “a criminal offence with an extremely long reach.”² This submission argues that this legislative overreach can be curbed by judicious amendments. Scottish Government ministers have suggested that repeal of the Act would “completely the wrong message” and threaten “to set us back as a country in our efforts to effectively combat prejudice, hate crime and sectarianism.”³ The merits of a criminal statute cannot solely be evaluated with reference to the “social message” it sends. Just as supporters of the Offensive Behaviour at Football Act must defend the *letter* of the law and not just its spirit, so too, critics of the Act ought to explain in detail why the law cannot be improved.

Sensibly amended, the section 1 offence of “offensive behaviour at football” can be transformed into a mainstream public order offence, conceptually of a piece with common law crimes and more modern statutory offences.⁴ This submission highlights three key problems with the offence of “offensive behaviour at football” as

¹ <http://www.gov.scot/About/Review/Hate-Crime-Legislation>.

² *Procurator Fiscal Dingwall v Cairns* 2013 HCJAC 73, para 11.

³ Minister for Community Safety Annabelle Ewing (2016) <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37835502>

⁴ Including, principally, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which created the offence of behaving in a “threatening or abusive manner” which “would be likely to cause a reasonable person to suffer fear or alarm”, with intent, or recklessness.

it is currently in force, and offers three simple solutions to improve the legislation short of repeal.

Accordingly, this submission focuses principally on the first part of the 2012 Act. However, the Act also has a second part, sometimes neglected in this debate. Section 6, dealing with “**threatening communications**,” represents two distinct offences – neither uniquely connected to behaviour at regulated football matches. “**Condition A**” section 6 offences are committed where an individual communicates material which is either (a) a threat or (b) an incitement of serious violent act,⁵ which is (c) likely to cause a reasonable person fear and alarm. While “Condition A” offences are arguably already criminalised by the common law crime of threats, the Act also includes a second way the crime may be committed.

This “**Condition B**” section 6 offence requires prosecutors to establish that the accused sent a “threatening” communication, and “intended by doing so to stir up hatred on religious grounds.”⁶ Whether or not you support the idea of criminalising incitements to religious hatred, existing common law crimes and statutory offences now applying in Scotland do not directly criminalise incitements to religious hatred. It cannot be assumed the offences will comprehensively criminalise such behaviour if this Act is simply repealed rather than pragmatically amended.⁷ The remaining balance of this submission will focus on the most controversial element of the Act – the offence of “offensive behaviour at football.”

B. Overview of section 1: offensive behaviour at football

To commit a section 1 offence, an individual must:

1. Engage in **prohibited behaviour**;
2. That behaviour must be “**likely to incite public disorder**”
3. And it must be, “**in relation to a regulated football match.**”

⁵ Defined in section 8(5) of the 2012 Act as “an act that would cause serious injury to, or the death of, a person.”

⁶ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 6(5)(b). Hereafter referred to as “the 2012 Act.”

⁷ Though it is conceivable that some instances of incitement to religious hatred might be covered by public order offences, aggravated by religious prejudice, depending on the context in which they are committed.

Section 1 identifies the following behaviour as falling within the offence:

- **Expressing**, or stirring up, **hatred** against (a) an **individual** or (b) a **group** of persons based on their membership (or presumed membership) of a (a) religious group or (b) a social or cultural group with perceived **religious** affiliations or (c) a group defined with reference to (i) **colour** (ii) **race** (iii) **nationality** (iv) **ethnic** or **national** origins (v) **sexual orientation** (vi) **transgender** identity or (vii) **disability**.

Also prohibited are behaviours which are:

- **Motivated** wholly or in part by hatred of one of these groups;
- **Threatening** behaviour; or
- Any behaviour that a **reasonable person** would be likely to consider **offensive**.

C. Defining “offensive” behaviour?

The first provision which could and should be amended is the Act’s definition of qualifying “offensive behaviour.” Section 1 is too broad. While concepts such as “threatening behaviour”, and criminalising expressions which “stir up hatred” for minority groups have been in use in UK criminal statutes for some considerable time,⁸ criminalising “behaviour the reasonable person would be likely to consider offensive” is problematic on a number of levels.⁹

Firstly, it is questionable whether causing bare “offence” is a legitimate basis to impose criminal liability. The concept is vague, broad, innately subjective. Given the very wide definition of what constitutes behaviour “likely to incite public disorder” under the Act, this breadth is liable to give rise to inconsistency, inequitable enforcement, and overcriminalisation.

It is also questionable whether behaviour which is not otherwise threatening or hateful should be criminalised simply because of the alleged *motivation* for this behaviour, as section 1(2)(c) of the Act currently permits. This section becomes

⁸ See Part 3 and 3 A of the Public Order Act 1986, as amended, which now criminalises the “stirring up of hatred” in England and Wales, on the basis of perceived racial, religious or sexual orientation. Only the Part 3 applies in Scotland.

⁹ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1(2)(e).

particularly problematic, when combined with the Act's expansive definition of what qualifies as "incitement to public disorder", discussed below.

However, these problems can readily be dealt with by measures short of comprehensive repeal. If the "motivations" and general "offensiveness" sections were eliminated,¹⁰ the Act would criminalise only (a) threatening behaviour or behaviour which either (b) expresses or (c) stirs up hatred based on the list of protected characteristics identified by the Act.

In combination with a more careful definition of incitement to public disorder, amendments of this kind would go a very long way to answering well-founded anxieties about the breadth of the Act's substantive sections. Indeed, they would transform the Act into a public order measure in the mainstream of UK public order statutes, rather than the unique and overreaching aberration the Act in some lights resembles. Such changes would not require primary legislation. Section 5 of the Act already empowers the Scottish Ministers to add, delete or modify the behaviours listed under section 1(2) by Order.

D. Incitement to public disorder?

A second element of the Act which could and should be reformed is the second test for a section 1 offence to be committed – that the prohibited behaviour is "likely to give rise to public disorder." The Act's provisions on incitement to public disorder are perverse. They were depicted by the Minister in charge of the Bill in July 2011 as a "safeguard" to limit the potentially expansive definition of offensive behaviour covered by the legislation. As the Court of Criminal Appeal has made clear, they do no such thing.¹¹ In trying a case under the Act, the sheriff must consider whether the offensive, threatening or hateful behaviour is "likely to incite public disorder." However, how the Act defines this phrase hollows out any safeguarding potential.

Section 1(5) of the Act provides that judges must disregard two facts in determining whether or not the prosecutor has proven the accused's offensive behaviour was "likely to give rise to public disorder" at the regulated match. The first is that the

¹⁰ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, sections 1(2)(c) & (e).

¹¹ See generally: *Procurator Fiscal Dingwall v Cairns* 2013 HCJAC 73.

potential disorder did not occur because of “measures” put in place to prevent it. This formulation is similar to the common law definition of breach of the peace, which provides that behaviour is criminal if it is “likely to threaten serious disturbance in the community”, whether or not such disturbance actually arises.¹²

In assessing whether or not the accused’s behaviour was likely to give rise to public disorder, the Act also instructs judges to disregard the fact that “persons likely to be incited to public disorder are not present or are not present in sufficient numbers.”¹³ This approach is categorically different from the idea that an individual who commits a breach of the peace should not have their behaviour excused, because experienced police officers were not significantly perturbed by their behaviour. Wrongdoers should not benefit from the stoicism of their victims, but nor should the criminal law try individuals on the basis of the hypothetical touchiness of fictional (and indeed, absent) incitees.

Defenders of the Act characteristically complain that some forms of behaviour are problematic “in the context” of football matches. Whether or not you agree with that analysis, it is clear that the 2012 Act instructs judges to ignore the actual context of the accused’s behaviour, and to focus instead on the hypothetical reactions of fictional persons who are not present at the locus. As the Appeal Court observed in *Cairns*, “the actual context within which the behaviour occurs is not determinative” of whether public disorder is deemed “likely” to arise for the purpose of offences under section 1.¹⁴ This rule – effectively – invites judges *not* to consider the circumstances in which allegedly offensive behaviour arose, but instead, to fill football stadiums with fictional incitees, who might have responded with violence to the accused’s behaviour.

As the Court of Criminal Appeal has also made clear, the Act does not even require that the disorder these fictional incitees might have been provoked into by the accused’s behaviour is in any sense reasonable, or proportionate. As Lady Paton wrote in the case of *Joseph Cairns*:

¹² *Smith v Donnelly* 2001 SLT 1007.

¹³ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1(5)(b).

¹⁴ *Procurator Fiscal Dingwall v Cairns* 2013 HCJAC 73, para 12.

“it may be that a person likely to be incited to public disorder is of a more volatile temperament than a reasonable person or, to use the language of the sheriff, an uninitiated member of the public. The person likely to be incited to public disorder may have particular interests and particular knowledge. He may have particular views about the two songs in question or those who sing them.”¹⁵

The incitees the Act invites judges to invent are not only fictional – but also potentially hypersensitive souls with nerves on a hair trigger. In stark contrast to the remarks of the Minister in defence of the Bill, this is no safeguard at all.

However, this section of the Act too could easily be amended to provide that section 1 behaviour is only criminal if is it **likely to incite public disorder in the context in which the behaviour actually takes place, whether or not any public disorder actually arises**. Section 5 of the Act also empowers the Scottish Ministers to disapply the “persons likely to be incited to public disorder are not present or are not present in sufficient numbers” provision by Order. This would have substantively the same effect.

E. “In relation” to a regulated football match?

A third concern is the Act’s definition of what behaviour falls within its ambit. The Act’s provisions capture behaviour if it occurs (a) in the ground of the regulated match on the day it is held (b) while the person is entering or leaving the ground or (c) if they are on a journey to the match or if their behaviour is directed towards, or is engaged with together with, another person who is at, entering, leaving, or travelling to the regulated match.¹⁶ The Act also extends to anyone who is at, entering, going to, or leaving a public place where the match is being televised,¹⁷ or indeed, where the behaviour is “directed towards, or is engaged in together with” anyone else who is at, entering, leaving, or going to a public place where a regulated match is being televised.

¹⁵ *Procurator Fiscal Dingwall v Cairns* 2013 HCJAC 73, para 12.

¹⁶ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 2(2)(a).

¹⁷ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 2(3).

The Act's definition of what constitutes a "journey to a regulated football match" has echoes of the pronouncements of a Zen mystic. An individual is to be taken to be travelling to a regulated football match (a) whether or not they attended or (b) even intended to attend a regulated match, or some other public place televising such a match.¹⁸ Section 2 also makes clear that that this journey "includes breaks", including "overnight" breaks.¹⁹

On the face of it, this definition may appear absurd. It has absurd potential. It is a violence to language and logic to suggest that the intention to attend a football match or a place televising it is not of the essence in identifying whether an individual is objectively on a journey to a football match, or to a public place broadcasting a regulated game.

This provision illustrates what happens when criminal legislation is drafted with a view to capturing every potential offender, rather than maintaining an eye on ensuring that new offences represent a proportionate restriction on a more limited basis. When combined with the vague and potentially illiberal definition of offensive behaviour and the Act's expansive definition of what constitutes a likelihood of inciting public disorder, the wide net cast by section 2 is problematic.

One way in which this might be limited would be to restrict the section 1 offence to behaviour which takes place at, around, or in relation to actual journeys to or from regulated football matches, rather than engaging in expansive intellectual contortions to reclassify "journeys" which may have nothing to do with football as falling within the Act's scope. Combined with reform of section 1's definition of "offensive behaviour", and a more restrictive "likely to incite public disorder" test, amendments of this kind could considerably improve the 2012 Act, eliminating its paradoxes and substantially mitigating its illiberal potential.

F. Conclusion

This submission has identified a series of problems with the Offensive Behaviour at Football Act as currently in force. Its problems are formidable – but not insuperable. I

¹⁸ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 2(4)(a).

¹⁹ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 2(4)(b).

would encourage the Committee seriously to consider the advantages of the thoughtful amendment of this legislation, instead of resorting to the blunt instrument of repeal. If, however, you determine that the Offensive Behaviour Act has become a statutory vehicle without credibility, there is a powerful case to revisit these issues comprehensively, in the light of Lord Bracadale's findings.

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