



Law Society
of Scotland

Written Evidence

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

18 August 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee (the Committee) welcomes the opportunity to consider and respond to the Justice Committee of the Scottish Parliament's call for written evidence on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill. In answer to the questions contained in the Justice Committee's call for written evidence, the Committee has the following comments to put forward for consideration.

Comments

1. Do you agree with the proposal in the Bill to repeal the 2012 Act? What are your reasons for coming to this view?

The question of whether the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act") should be repealed is a matter for the Scottish Parliament.

2. Did you support the original legislation?

We provided written and oral evidence to the Justice Committee during the consideration of the Offensive Behaviour and Threatening Communications (Scotland) Bill 2011.¹ At that time, we commended the intent of the bill to address the serious issues of offensive behaviour at football matches and threatening communications. However, we were concerned about a number of aspects of the 2012 Act. We continue to be concerned about aspects of the Act which are discussed below.

3. Do you consider that other existing provisions of criminal law are sufficient to prosecute offensive behaviour related to football which leads to public disorder?

¹[http://www.parliament.scot/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20\(Scotland\)%20Bill/BBV170_final-rev.pdf](http://www.parliament.scot/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20(Scotland)%20Bill/BBV170_final-rev.pdf)

If so, could you specify the criminal law provisions? Or does repeal of section 1 risk creating a gap in the criminal law?

We remain of the view that offensive behaviour related to public disorder is likely to be caught by the substantive criminal law which was in existence prior to the 2012 Act and remains in force now. In 2015-2016, 287 charges were brought under Section 1 of the 2012 Act and we are of the view that all of them could have been prosecuted under pre-existing legislation or at common law.²

For example, in Mark Harris v HMA [2009] HCJAC 80 the appellate court held that a breach of the peace only requires a serious disturbance to the community or Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which addresses the situation where a person behaves in a threatening or abusive manner and such behaviour would be likely to cause a reasonable person to suffer fear or alarm where it is the intention so to cause fear or alarm or one is reckless as to whether behaviour would cause fear or alarm.³ These examples demonstrate the ability of the criminal law to address the types of behaviour that the 2012 Act has sought to address.

We do not believe that the Section 1 offence has improved the common law breach of the peace or Section 38 of the 2010 Act and are not of the view that its repeal will leave a gap in the criminal law.

We note that there have been a number of cases which have sought to clarify the terms and application of the 2012 Act. The cases imply that the Act may have caused some confusion with particular reference to what type of behaviour is now considered offensive and unacceptable, and which behaviour is caught by the broad definition of “regulated football match”.⁴

In the case of Macdonald v Cairns [2013] HCJAC 73, the High Court of Appeal stated that *in enacting S1(1) the Parliament created a criminal offence with an extremely long reach*. The behaviour under Section 1(1) must be such that a reasonable person would be likely to consider it offensive, and it must be either likely to incite public disorder or would be likely to incite public disorder. The Court explained that ...

the actual context within which the behaviour occurs is not determinative. Where behaviour falls within any of the categories specified in Section 1(2) it is sufficient for conviction that persons likely to be incited to public disorder by the particular behaviour, whether or not they were present in sufficient numbers and whether or not they were subject to measures put in place to prevent public disorder. As it does not matter whether persons likely to be incited to public disorder are there in sufficient numbers or are there are all it cannot matter whether or not the persons who are present

² [“Charges under the ‘Offensive behaviour at Football and Threatening Communications \(Scotland\) Act 2012’](#)

³ [Harris v HMA \[2009\] HCJAC 80](#) ; [Criminal Justice and Licensing \(Scotland\) Act 2010](#)

⁴ [See letter from COPFS to James Kelly MSP dated 21st October 2016 in response to the Consultation entitled “Proposed IFootball Act \(Repeal\) \(Scotland\) Bill](#)

(whether likely to be incited to public disorder or otherwise) actually become aware of the relevant behaviour.⁵

Further clarification was provided by the High Court in the case of William Donnelly and Martin Walsh v Procurator Fiscal, Edinburgh [2015] HCJAC 35 which upheld the convictions of the appellants who were convicted of singing the “Roll of Honour” at a football match in Edinburgh. The court stated that “There is no need for proof of knowledge that the particular supporter was aware of the law or the status of the song. The appellants were well aware of what they were engaging in.

If the 2012 Act is not repealed, it is likely that we will see further cases in the appeal courts clarifying the reach of the Act and the definitions contained within the Act.

4. Do you have a view on the focus of section 1 of the 2012 Act, which criminalises behaviour surrounding watching, attending or travelling to or from football matches, which may not be criminalised in other settings?

The definition of “regulated football match” includes the application by reference to journeys to and from football matches. Section 2(3) of the Act applies to any match which is televised at any place (other than domestic premises). This would cover pubs, outdoor arenas, hospital day rooms and also mobile TV receivers and computers – such a variety of broadcast possibilities underlines how difficult this provision is to enforce.

The Scottish Government report highlights that “There has yet to be an Appeal Court judgment of whether their behaviour also needs to be in relation to the regulated football match, or whether it is enough that they engaged in some way with those who are on that journey.”⁶ This is likely to be an area for further appeal court jurisprudence.

In the circumstances, we remain concerned with regard to the definition and meaning of behaviour in relation to a regulated football match for the purposes of Section 1 and how this is proved, particularly with reference to matches either being played or watched on television abroad. We question whether Section 2 can be practically enforced extra -territorially, in that, for the purposes of Section 1, offensive behaviour at regulated football matches extends to football matches played outside Scotland involving either a national team appointed to represent Scotland or a team representing a club that is a member of a football association or league based in Scotland. Section 2(3) appears to cover any place anywhere, including a situation where matches are being screened worldwide.

5. Do you consider that other existing provisions of criminal law are sufficient to prosecute threats made with the intent of causing a person or persons fear or

⁵ Macdonald v Cairns [2013] HCJAC 73

⁶ [An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications \(S\) Act 2012, at page 15](#)

alarm or inciting religious hatred? If so, could you specify the criminal law provisions? Or does repeal of section 6 risk creating a gap in the criminal law?

Section 6 provides for an offence of making threatening communications. It is an offence where the material consists of an image which depicts or implies the carrying out of a seriously violent act against a person or against persons of a particular description, and a reasonable person would be likely to consider that the image implies the carrying out of a seriously violent act against an actual person, or against actual persons of a particular description, the image may be taken to imply a threat or incitement (Condition A); and an offence where the material is threatening, and that the person communicating it intends to stir up hatred on religious grounds, but not any other protected characteristics (Condition B). Section 6 of the 2012 Act may be tried on summary complaint or on indictment.

There are a number of provisions which may apply in respect of making threatening communications. The provisions available to the police and/or the Crown Office and Procurator Fiscal Service include:-

- common law breach of the peace and uttering threats, triable both on summary complaint and indictment;
- the offence under Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 of threatening or abusive behaviours, triable both on summary complaint and indictment;
- the offences of Part 3 of the Public Order Act 1986 of incitement of racial hatred;
- Section 74 of the Criminal Justice (Scotland) Act 2003 provides for aggravation by religious prejudice to be libelled with an offence on indictment, or specified on a summary complaint;
- Section 96 of the Crime and Disorder Act 1998 provides of aggravation by racial prejudice or be libelled with an offence on indictment, or specified on a summary complaint; and
- Section 127 of the Communications Act 2003 which criminalises “improper use of a public and electronic communications network”. However, this may only be tried summarily.

We do not believe that the Section 6 offence has improved upon the common law and laws based in statute to address this type of behaviour and are not of the view that its repeal will leave a gap in the criminal law. The law in this area is contained in a variety of sources from both the UK and Scottish Parliaments and common law. It would assist with identification of the relevant offence and protections afforded if the law were consolidated in one place.

6. Do you have a view on the proposed transitional arrangements in the Bill: that there should be no further convictions for section 1 and 6 offences from the date on which the repeal of those offences takes effect; and that the police will cease issuing fixed penalty notices at least from the point at which the Bill is passed?

We believe that, if enacted, then the transitional arrangements should be a matter for the Scottish Parliament.

7. To what extent do you consider that the 2012 Act has assisted in tackling sectarianism?

If all charges brought under the 2012 Act could have been charged under the existing common law or various existing statutory provisions then it follows that the 2012 Act has not been fundamental to tackling sectarianism. In terms of its efficacy, the Scottish Government report on the Section 1 offence of the 2012 Act stated that *broader crime trends make it extremely difficult to make judgement about the impact of the Act. Both Police recorded, and crime survey figures show sustained falls in most of the relevant crime categories, both before and after the introduction of the Act.*⁷ Furthermore, the Scottish Government report on the Section 6 offence of the 2012 Act stated that *the relatively low number of charges makes it difficult to provide generalised research findings about patterns of reported offending.*⁸ The question of whether the 2012 Act has assisted in public messaging and/or in promoting a change in culture is a separate question and one which others would be best placed to answer.

⁷ [An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications \(S\) Act 2012](#), at page 75

⁸ [An evaluation of Section 6 of the Offensive Behaviour at Football and Threatening Communications \(Scotland\) Act 2012](#), at page 3