Stage 3 proceedings on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill ("the Bill") are expected to take place before the end of 2011.

This briefing considers some of the key recommendations made by the Parliament’s Justice Committee following consideration of the Bill as introduced, the Scottish Government’s response to those recommendations and a number of key amendments at stage 2.
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EXECUTIVE SUMMARY

The Scottish Government introduced the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill in the Parliament on 16 June 2011.

The purpose of the Bill is to tackle offensive and threatening behaviour connected to football matches and, more widely, behaviour related to incitement to violence and religious hatred.

The Bill seeks to introduce two new criminal offences:

1. Offensive behaviour at regulated football matches - this offence aims to criminalise offensive and threatening behaviour, including sectarian behaviour, at or in connection with such football matches

2. Threatening communications - this offence aims to criminalise behaviour which threatens or incites serious violence and threats which incite religious hatred

The Scottish Government originally intended the Bill to be treated as an emergency bill, which would typically result in all three stages being taken on the same day, so restricting the time available for debate and amendment. However, following the Stage 1 debate, the First Minister offered to extend the timetable for consideration of the Bill at Stages 2 and 3 with the aim of allowing the Bill to complete its passage through Parliament by the end of the year. The Parliament consequently approved the general principles of the Bill at Stage 1.

The key issues which arose during Stages 1 and 2 were:

- whether in relation to the new offence of ‘offensive behaviour at football’, there was a need for such an offence given that a number of current offences could be used to prosecute such behaviour including, in certain circumstances, the common law offence of breach of the peace, or the offence of threatening and abusive behaviour provided by section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. A majority of the Justice Committee accepted the Government’s argument that there were gaps in the law in this area and supported the proposed new offence

- also, in relation to the offence of offensive behaviour at football, whether section 1(2)(e), which provides that a person commits an offence if they engage in behaviour that is likely to incite public disorder or which would be likely to incite public disorder, and the behaviour is that which “a reasonable person would be likely to consider offensive”, was too wide in scope. However, this provision remains in the Bill as amended at stage 2

- whether in relation to the new offence of ‘threatening communications’ there should be a specific freedom of expression provision on the face of the Bill which makes it clear that Condition B (which provides that a person commits an offence if the person communicates material to another person, and the material is threatening, and the person communicating it intends by doing so to stir up hatred on religious grounds) does not prohibit or restrict certain behaviours that would be protected under existing rights to freedom of expression. The Bill was amended at Stage 2 to include such a provision
During the Justice Committee meeting to consider amendments at Stage 2, James Kelly MSP declared that Labour Party members would abstain on all substantive amendments, arguing that the Government had failed to build a consensus in the Parliament on the best way forward. Alison McInnes, Liberal Democrat MSP, adopted a similar position stating that she would only vote on one substantive amendment and would abstain on all others, arguing that the Bill raised so many concerns it would be impossible to amend it effectively.

INTRODUCTION

The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill was introduced in the Scottish Parliament on 16 June 2011. It seeks to introduce two new criminal offences: one which will criminalise offensive and threatening behaviour, including sectarian behaviour at, or in connection with football matches; and an offence of “threatening communications” which criminalises threatening communications which contain threats of serious violence or which contain threats intended to incite religious hatred. Further information on the proposed new offences is set out below and also in the earlier SPICe briefing Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (Ross 2011).

The Parliament’s Justice Committee was designated as lead committee for parliamentary consideration of the Bill. The Bill has a somewhat unusual procedural history to date and this is explained below.

PROCEDURAL HISTORY

The Scottish Government initially intended to fast-track the Bill through Parliament so that it could become law in time for the new football season in late July 2011. To do this, it proposed that it should be treated as an emergency Bill, although it also proposed a gap between Stage 1 (to be taken on 23 June) and Stages 2 and 3 (to be taken on 29 June). Under the Parliament’s standing orders, the ordinary position for emergency Bills is that the Parliament takes all three Stages on the same day.

The Justice Committee took evidence on the Bill from five panels of witnesses on 21 June 2011 and 22 June 2011. The Committee did so in the knowledge that it would not have time to produce a report on the Bill in time for the Stage 1 debate (as would normally be the case). The Committee’s intention was to take as much evidence as possible in the limited time available so as to help inform that debate and any future debates on amendments to the Bill. The Committee also issued a call for written evidence on the Bill (necessarily with a very short deadline for responses) targeted at key stakeholders.

On 23 June, the Parliament first debated a motion to treat the Bill as an emergency Bill. This was agreed to after a division. The Parliament then agreed by division to consider the Bill according to the timetable set out above. Following this, the Parliament debated the Bill at Stage 1.

Shortly after the debate, and just before the Parliament was to vote on whether to approve the general principles of the Bill at Stage 1, the First Minister announced that, if the Parliament agreed to the general principles, he would propose an extended timetable for consideration of the Bill at Stages 2 and 3. He indicated that this would, whilst allowing more scrutiny, enable the Bill to be passed by the end of the year. He said he hoped that providing more time for evidence-taking on the Bill would increase the likelihood of the
Parliament and wider Scottish society achieving consensus on the issues raised.

Following the First Minister’s comments, the Parliament went on to approve the general principles of the Bill at Stage 1 (by a majority of 103 to 5, with 15 abstaining). On 29 June, the Parliament agreed, without division, a motion not to take the remainder of the Bill as an emergency Bill; that the Justice Committee be the lead Committee on the Bill; and that Stage 2 be completed by 11 November. This enabled the Committee to extend the deadline for written submissions to Friday 26 August 2011. The Justice Committee’s report on the Bill prior to consideration of amendments at Stage 2 was published on 6 October 2011 and consideration of amendments at Stage 2 took place on Tuesday 22 November 2011 (see below).

OFFENCES CREATED BY THE BILL

Offensive behaviour at football

The Policy Memorandum to the Bill states that, although there are a number of criminal offences which could be applied to disorderly and offensive behaviour at football matches, there is concern that some such behaviour is not explicitly caught by the current law.

Examples of existing offences include prosecution under the common law offence of breach of the peace, or using the offence of threatening and abusive behaviour at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”). Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. In addition, section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986 provide statutory aggravations on grounds of religious or racial hatred.

However, the Policy Memorandum argues that the current offences may not be sufficient. The Bill therefore, introduces a new offence of offensive behaviour at regulated football matches\(^1\). The intention of the Bill is to put beyond doubt that behaviour related to football matches which is likely to incite public disorder and which would be offensive to any reasonable person, is a criminal offence. It is pointed out that there is no evidence to suggest a significant problem with disorder or sectarian or other offensive behaviour associated with other sports in Scotland and the Bill therefore provides that the new offence should apply in respect of football matches only.

The new offence (referred to in the rest of this briefing as “the section 1 offence”) will not only apply to offensive behaviour which occurs inside football stadia. Such behaviour occurring outside stadia, on the way to and from matches (including on public transport) and in public places where matches are being televised, will also be caught by the offence. This includes pubs and supporters clubs, the only express exemption being domestic premises.

Threatening communications

As with the new offence of offensive behaviour at football matches, there are a number of legal sanctions which may currently apply in respect of making threatening communications. These include the common law offences of breach of the peace and

\(^1\) The definition of a regulated football match is the same as that used in respect of football banning orders as set out in the Police, Public Order and Criminal Justice (Scotland) Act 2006.
uttering threats, the offence of threatening and abusive behaviour at section 38 of the 2010 Act (see above), and the offences at Part III of the Public Order Act 1986 (incitement of racial hatred). Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred respectively, might also be relevant. Where communications are electronic in nature, section 127 of the Communications Act 2003 criminalises the improper use of a public electronic communications network, specifically the sending of a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character.

The Scottish Government has stated that although these sanctions are available, they are not always easily applied to the behaviour associated with making threatening communications. The Policy Memorandum to the Bill states:

“The requirement for a ‘public element’ can make a charge of breach of the peace difficult to bring in some cases. It can also be difficult to establish that someone actually intended to carry out a threat or incite someone else to commit a crime in relation to the common law offences of uttering threats and incitement. While the offence of ‘threatening and abusive behaviour’ does not require a public element, it does require that the behaviour must be of a threatening and abusive manner and could not necessarily be used to prosecute threats made with the intent of inciting religious hatred. Finally, in relation to electronic communications, case law has left some doubt about whether the Communications Act offence can be used to prosecute people who create offensive websites or ‘groups’ on social networks, as opposed to sending threatening emails or other communications.

A further potential gap in our law is highlighted by the fact that England and Wales, Northern Ireland and the Irish Republic have all legislated to provide for specific offences relating to inciting religious hatred. Scotland is, therefore, the only part of the UK without a specific offence relating to inciting religious hatred. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may be appropriate but inciting religious hatred without a racial element is not currently a specific offence in Scotland.” (para 34)

The Scottish Government believes that a specific offence will bring clarity to the law in this area and so

“the Bill proposes an offence to address two classes of threat: threats of serious violence and threats intended to stir up religious hatred, whether or not they involve threats of serious violence. The Bill does not confine the threatening communications offence to football, nor to ‘sectarian’ incidents. The Policy Memorandum to the Bill points out that “threatening communications are a serious concern, regardless of whether they are, or can be proven to be, ‘sectarian’ or connected to football.” (para 32)

The new offence (referred to in the rest of this briefing as “the section 5 offence”) criminalises any communication with at least one other person which threatens a person with serious violence or death, or incites others to kill or commit a seriously violent act against a person, or which implies such a threat. It is important to point out that the offence does not apply to “live speech”. This was an issue which the Scottish Government considered in drawing up the proposals contained within the Bill. The Policy Memorandum states:

“A particular issue which we considered very carefully is whether the threatening communications offence should be extended to catch ‘live’ speech as well as recorded speech. A distinction can be made on the basis that recorded threats, like written threats, may indicate not only a stronger expression of such views than
everyday speech but also a more serious intention to carry out such threats. Our view, however, was that it is not a significant enough distinction to justify their exclusion from this legislation. A primary consideration in reaching a conclusion on this issue is that the criminalising offensive behaviour related to football will cover verbal threats and the expression or inciting of religious hatred at, or on the way to and from, a regulated football match at any public place where such matches are televised where those threats are likely to lead to public disorder. The most significant consideration, however, is that verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour which gave rise to the need for this Bill and the wider implications of such an extension deserve fuller consideration.” (para 55)

The offence is committed where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear or alarm, or was reckless as to whether the communication of the material would cause such fear or alarm. The offence will apply to text, images, video and recorded sound, communicated by any means (by post, on leaflets or posters or posted on the internet). The requirement that any material communicated must be intended to cause fear or alarm (or is communicated with recklessness as to whether fear or alarm is caused) for an offence to be committed, is intended to ensure that depictions of death or injury in art, literature, the theatre, film, video games, or similar cultural and dramatic contexts, and threats made in jest that no reasonable person would find alarming, are not caught by the offence.

JUSTICE COMMITTEE RECOMMENDATIONS AND THE SCOTTISH GOVERNMENT RESPONSE

Following detailed consideration of the Bill, the Justice Committee published its Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2 on 6 October 2011 (Scottish Parliament Justice Committee 2011). This section of the briefing examines the key recommendations made by the Committee and the Scottish Government’s response to those recommendations. Key Stage 2 amendments are considered in the next section.

The section 1 offence and the current law

One of the key debates during consideration of the Bill was whether there was a need for the new offence of offensive behaviour at football given that there were already a number of offences which could be used to tackle such behaviour. A number of witnesses, and a minority of Committee members (see below), argued that such behaviour was already adequately covered by existing offences such as breach of the peace and the offence of threatening and abusive behaviour at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. For example, in its written submission on the Bill, the Law Society of Scotland’s criminal justice committee commented:

“The Committee is of the view that the offence, under Section 1 does not improve on common law breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Rather than result in clarity, the new offences may cause confusion with particular reference to what type of behaviour is to be considered unacceptable at regulated football matches.” (Law Society of Scotland 2011)

However, in his evidence to the Committee, the Lord Advocate stated:
“(…) the definition of breach of the peace requires the conduct to be ‘severe enough to cause alarm to ordinary people and threaten serious disturbance to the community’ and ‘genuinely alarming and disturbing, in its context, to any reasonable person’. Under that definition of breach of the peace, there have been cases (…) in which a sheriff has ruled that supporters shouting racist abuse at a black player, or another supporter grunting in an ape-like fashion and shouting racist abuse at a black player, did not amount to breach of the peace. The view was taken that ‘the conduct was over very quickly’, that it was not ‘flagrant’, that it took place ‘in the midst of the cauldron of sound which emanates from any large sports crowd’, and that it could not ‘be interpreted as (…) conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances of the football match’. In cases involving conduct at football matches, defences have been run that no fear and alarm is caused by offensive chanting and singing and that at the end of the match it was clear that no public disorder resulted.” (Scottish Parliament Justice Committee 2011a, para 118)

A majority\(^2\) of the Justice Committee believed that the Government had made the case that there were gaps in the law in this area and supported the proposed new offence of offensive behaviour at football. A minority\(^3\) however, did not accept this was the case and believed that a more proportionate response to dealing with the problems around Scottish football would be to give greater consideration to the use of existing laws combined with non-legislative measures.

In its report at Stage 2, the Committee asked for clarification from the Lord Advocate as to whether section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 was currently being used to prosecute cases of offensive behaviour at football matches. In response, the Lord Advocate stated that reports had been submitted to the Crown Office and Procurator Fiscal Service (COPFS) by the police libelling offences of breach of the peace with religious aggravations and section 38 of the 2010 Act. However, he went on to say:

“The charge libelled is dependent on the facts and circumstances of each case. As previously advised s38 has certain limitations that can cause difficulties. In particular the offence requires that a person behaves in a threatening or abusive manner which is likely to cause fear or alarm to a reasonable person, and which the person intends to cause fear or alarm or is reckless as to whether it causes fear and alarm. Whether the behaviour is likely to cause fear or alarm to a reasonable person is an objective test and evidence of factual fear and alarm is necessary to proof of these offences. This is an additional hurdle that is not required in the proposed section 1 offence and in the particular setting of a football match this requirement can cause evidential difficulties.

In cases involving conduct at football matches, defences have been run that the Crown has failed to prove that the conduct caused fear and alarm or that the conduct was intended to cause such fear and alarm. In addition, section 38 requires conduct of a threatening and abusive nature which is more limited that the envisaged conduct of an offensive or disorderly nature. Further, it does not link the behaviour with the likelihood of inciting public disorder, which is the behaviour that the Bill is seeking to address. It is of note that the terms of section 38 have yet to be tested by the court and it is by no means certain that the courts will hold that conduct that the new offence will cover will be held to constitute an offence under section 38.

The introduction of a bespoke offence designed to specifically deal with such conduct will allow legal certainty and avoid the need for COPFS to ‘shoe horn’ offending behaviour into the requirements of existing law.” (Crown Office and Procurator Fiscal Service 2011)

\(^2\) Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; and Humza Yousaf MSP.

\(^3\) James Kelly MSP; John Lamont MSP; Alison McInnes MSP; and Graeme Pearson MSP.
The Committee noted a general view amongst some witnesses that aspects of the section 1 offence remained unclear and emphasised the importance of ensuring that the legislation was robust. In response, the Government noted the concerns of the Committee and pledged to bring forward a number of amendments in order to provide further clarification on a number of the Bill’s provisions (see below). The Government also stressed that the Lord Advocate’s guidelines on the proposed legislation would be updated to reflect any amendments which were made to the Bill.

Groups coming within the ambit of the section 1 offence

The Committee was supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. The Bill provides a list of further characteristics other than religion by which a group may be defined, and in respect of which it is an offence to express or stir up hatred. These are: colour; race; nationality; ethnic or national origins; sexual orientation; transgender identity; and disability. However, the Committee invited the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.

In response, the Government noted the detailed consideration by both the previous Equal Opportunities and Justice Committees on the same issue in the context of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. The Government stated that:

“Given the complex arguments presented in the course of the consideration of the 2009 Act, the Government will bring forward an amendment to allow for the extension of the offence to cover additional characteristics including age and gender at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.” (Scottish Government 2011)

“Catch-all” aspect of the section 1 offence

The Committee also invited the Government to reflect on the apparent “catch-all” test for offensive behaviour as set out in section 1(2)(e) of the Bill as introduced. Section 1(2)(e) provides that a person commits an offence if they engage in behaviour which is likely to incite public disorder or would be likely to incite public disorder and the behaviour is that which “a reasonable person would be likely to consider offensive”. The Committee asked the Government to respond to concerns that the provision may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights (ECHR).

The Government responded by saying that it remained firmly of the view that the relevant provisions in the Bill were proportionate, justified and in compliance with ECHR, and that the freedom of speech of law-abiding football fans remained protected.

Television matches

With regard to offensive behaviour occurring at venues where football matches are televised (e.g. pubs), the Committee acknowledged that such behaviour was unacceptable and that it was appropriate that the proposed legislation should cover televised matches. However, the Committee urged the Government to consider whether the parameters of the offence in relation to televised matches needed to be made clearer.
In response, the Government stated that it recognised the need to assist the public in understanding the scope of the offence and that it would seek to ensure that there was greater clarity as the Bill was taken forward.

**Travel to and from a match**

The Committee accepted that some of the worst manifestations of offensive behaviour can occur when fans are travelling to and from matches (whether or not they intend to go to the stadium to watch the match) and that appropriate provision should be made for this. Again, however, the Committee asked the Government whether there was scope to provide more clarity on the relevant provisions.

The Government responded by stating that a situation should not arise where someone – with no intention of going to a match or even aware that a match was taking place – could hurl sectarian abuse at groups of supporters, or could willingly join in with such abuse and not be arrested. The Government pledged to bring forward an amendment that would make clear that the provisions in the Bill apply to those who join in such unacceptable behaviour, as well as those who choose to provoke people going to or from a football match (Scottish Government 2011).

**The section 5 offence**

Whilst the Committee supported efforts to prevent hateful and inflammatory communications online, not all members of the Committee\(^4\) were wholly convinced that the Scottish Government had made a clear case that there were gaps in the existing law in this area, particularly in view of recent successful prosecutions under the current law. However, a majority\(^5\) of the Committee were prepared to support the proposal for a new offence of threatening communications noting that the creation of the new offence may provide greater certainty to online users particularly, about what is and is not legally acceptable under Scots law. (para 20)

The Government responded by saying that it remained of the view that the Bill clarified and strengthened existing law and, in addition, conveyed the strongest possible message that the use of threatening communications is wholly unacceptable.

**Freedom of speech**

During consideration of the Bill, concerns had been expressed that the proposed legislation did not contain an explicit provision protecting freedom of speech in relation to the section 5 offence. In its report, the Committee noted that the Scottish Government was open to considering the inclusion of such a provision to provide assurance that the section 5 offence would not inhibit “the free, open and, perhaps at times, offensive expression of views on religious matters”. (para 23)

The Government indicated that assurances had already been given that the Bill as introduced would not infringe legitimate freedom of expression but stated that it had no objection in principle to the incorporation of an explicit freedom of expression clause. Given that the Committee had indicated that such a provision would be welcome, the Government confirmed that an amendment to that end would be brought forward at Stage 2.

\(^4\) James Kelly MSP; John Lamont MSP; Alison McInnes MSP; and Graeme Pearson MSP.

\(^5\) Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; and Humza Yousaf MSP.
KEY AMENDMENTS AT STAGE 2

The Justice Committee considered amendments to the Bill at Stage 2 on 22 November 2011. During that meeting, James Kelly MSP set out the Labour party’s position in relation to substantive amendments which had been brought forward at Stage 2. He stated:

“The Labour position on all substantive amendments will be to abstain. It seems to me that, when the Scottish Government paused back in June, which was welcomed by all, the process was frozen. It also seems to me that the Scottish Government has not interacted with the process, has not listened to the concerns that have come through in the evidence and has, therefore, adopted a take-it-or-leave-it approach on the bill.

I think that everyone agrees that we must support all practical attempts to oppose sectarianism. We must support the authorities and the existing legislation, including the Criminal Justice and Licensing (Scotland) Act 2010, under section 38 of which there have been 99 prosecutions, even though it came into force only recently.

I firmly believe that the Government has failed to build a consensus in the Parliament and in the country. Therefore, even at this late stage, I appeal to the Government to put the bill on hold, to work with the other parties and with groups in the country to support practical measures to tackle sectarianism and, if it genuinely feels that there remains a case for introducing legislation, to make that case and to build support for it. If that case is proven, we will certainly be prepared to look at it, after a period of reflection.” (Scottish Parliament Justice Committee 2011a, col 477)

Alison McInnes MSP for the Liberal Democrats set out a similar position:

“(…) during stage 1, I gave serious consideration to whether it would be possible to lodge amendments that would fix the bill. I came to the conclusion that the bill raised so many concerns that it would be impossible to amend it effectively. The minister’s amendments are broadly cosmetic and she has not addressed some of the deep-seated criticisms that have been made of the bill. The bill is so deeply flawed that any attempt to amend it would compound the problem. Some of the more complicated amendments that we will look at today raise further issues to do with consultation.” (Scottish Parliament Justice Committee 2011a, col 478)

Alison McInnes went on to say that she intended to abstain on all but one of the amendments which had been lodged.

“Hatred” and “ill-will”

Patrick Harvie MSP brought forward an amendment which sought to replace throughout the Bill, the term “hatred” with the term “malice and ill-will”. He pointed out that when he worked with Government ministers prior to the introduction of the Offences (Aggravation by Prejudice) (Scotland) Bill (see above), they considered at some length the various terms which might be used to properly convey the type of behaviour being expressed. He stated that “malice and ill-will” was the term used throughout other pieces of hate crime legislation. He hoped that Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs (“the Minister”) would be able to explain whether the two different terms had different meanings in practice. He explained that if there was no difference in meaning, it was difficult to see why a different term was being used in the Bill.

Roderick Campbell MSP noted:
“I have some sympathy for Patrick Harvie’s views, but the bill is directed at offensive
behaviour at football, so I think that it should be consistent with the part of the Police,
Public Order and Criminal Justice (Scotland) Act 2006 that introduced football banning
orders, which used the term ‘hatred’.” (Scottish Parliament Justice Committee 2011a, col
478)

The Minister stated that she was aware that the term “malice and ill-will” had been used in other
pieces of legislation concerning statutory aggravations, such as the Offences (Aggravation by
Prejudice) (Scotland) Act 2009 and section 74 of the Criminal Justice (Scotland) Act 2003,
which provides for an aggravation by religious prejudice. However, echoing Roderick
Campbell’s observation, she went on to say that:

“(…) the drafting of the bill reflects the football banning order provisions in the Police,
Public Order and Criminal Justice (Scotland) Act 2006, which also use the term ‘stirring
up hatred’. The use of the same term in the bill means that the two pieces of legislation
are aligned. There is little difference in meaning between the terms ‘hatred’ and ‘malice
and ill-will’ but, in the context of the bill, we think that it is more appropriate to follow the
plainer approach of the football banning order provisions, which we are trying to be
consistent with in other respects.” (Scottish Parliament Justice Committee 2011a, col
481)

The Minister went on to assure Patrick Harvie that the difference in wording would not have any
adverse read-across for the operation of the statutory aggravations mentioned above and hoped
that this assurance would persuade him to withdraw the amendment. Patrick Harvie stated:

“Many aspects of the bill, particularly the provisions on incitement to hatred, seem closer
in character to existing hate crime legislation than to legislation governing football and,
specifically, football banning orders. There seems to be a case for saying that we should
be using hate crime legislation as the template and as the source of language and
definitions. I recognise that that might not be the committee’s view, but I press
amendment 22, simply so that the matter is on the record.” (Scottish Parliament Justice
Committee 2011a, col 482)

Following a division, the amendment was disagreed to.

**Section 1(2)(e)**

The Lord Advocate’s draft guidelines on the Bill indicate that section 1(2)(e) (i.e. behaviour that
a reasonable person would find offensive) will encompass “songs/lyrics in support of terrorist
organisations” and “songs/lyrics which glorifies or celebrates events involving the loss of life or
serious injury”.

David McLetchie MSP brought forward an amendment which sought to incorporate a specific
provision within the Bill (alongside the religious hatred provisions) which would define terrorism
and terrorist groups by reference to organisations which are on a proscribed list in the Terrorism
Act 2000. The amendment also sought to remove section 1(2)(e) from the Bill entirely. In
moving the amendment he stated:

“The problem with the statutory aggravation that the Parliament enacted in section 74 of
the Criminal Justice (Scotland) Act 2003 is that it is one-sided, in that it focuses solely on
religious hatred rather than on wider forms of sectarian behaviour and, as such, has been
rightly resented as an unbalanced piece of legislation. We risk making exactly the same
mistake in the bill. It will not be sufficient to throw a catch-all section into the bill and leave
the definition of behaviour that will or will not be prosecuted to the Lord Advocate’s
guidelines.
If one is going to take that approach, logically all unacceptable behaviour could be covered by the generalised offences of paragraphs (d) and (e) of section 1(2), leaving all specifications—including those relating to religious and other hatreds—to the guidelines for prosecutors issued by the Lord Advocate.

What we have at present is a half-and-half approach to the problem. It is likely to satisfy no one, and it has been born of an unwillingness and reluctance to firmly grasp the sectarian nettle.” (Scottish Parliament Justice Committee 2011a, col 483)

In response, the Minister stated that the proposed amendment seeking to delete section 1(2)(e) would narrow the coverage of offensive behaviour at football matches and would mean that the offence would no longer catch “other behaviour that a reasonable person would find offensive”. In opposing the amendment she stated:

“I cannot agree with the view that the existing section is too wide or is unclear. The notion that it is too wide fails to take account of the fact that the offence applies only where there is a risk of public disorder. A failure to note the link to public disorder has characterised the debate all the way through. We should keep that in mind.

The ‘reasonable person’ test is well known and understood, in both civil and criminal law. It is not sufficient simply for an individual or individuals to be, or claim to be, offended. The behaviour would have to be deemed offensive by a reasonable person, and it must risk causing public disorder. That is spelled out in the Lord Advocate’s draft guidelines on the bill.

The Lord Advocate’s guidelines also provide examples of behaviour that might fall into the category of other offensive behaviour. The guidelines make very clear that it will cover the behaviour provided for in amendment 16, including support for terrorism. The Government’s position is therefore that amendment 16 is unnecessary, as it would narrow the bill’s coverage of other offensive behaviour, and because the provisions that it seeks to add to the bill are already covered.” (Scottish Parliament Justice Committee 2011a, col 484)

The Minister pointed out that David McLetchie had also raised concerns with regard to other possible acts of offensive behaviour, such as displaying certain banners or wearing t-shirts displaying offensive material and pointed out that these may be issues for the Lord Advocate to consider when he finalised his guidelines on the legislation. The Minister stated that she was happy to give an undertaking that the Government would continue dialogue with Mr McLetchie and the Lord Advocate on the points he had raised and actively consider those before Stage 3 of the Bill. Welcoming the Minister’s comments, Mr McLetchie withdrew his amendment.

Journeys to and from football matches

David McLetchie also brought forward amendments which sought to remove journeys to or from a regulated football match from the environments in which an offence under section 1 could be committed. He explained that these were exploratory amendments which sought further clarification from the Government in light of concerns raised by the Law Society of Scotland with regard to existing legislation. He argued that it would be preferable to rely on existing laws in relation to breach of the peace and public disorder for acts committed in the circumstances in question, rather than providing for a specific offence as outlined in the Bill:

“That would avoid our getting tangled up in knots as to whether such acts can be brought within the terms of the specific offence.

The problem is that, in such circumstances, it will be far easier to gain a conviction for breach of the peace than a conviction under section 1, so for safety’s sake, the
prosecution will libel both offences but still have to spend a great deal of time and energy trying to secure a conviction under the new provision, whereas a guilty plea may well have been tendered to a simple breach of the peace charge. For that reason, I would welcome a further explanation from the minister of why the offence is essential, in view of the practical difficulties that it may occasion. I move amendment 18." (Scottish Parliament Justice Committee 2011a, col 488)

In response, the Minister stated that the Government’s view was that the Bill should apply to any sectarian abuse or other offensive behaviour related to football that is likely to incite public disorder, including in relation to journeys to or from a football match:

“For our part, the bill’s provisions again relate to journeys reflecting the drafting of section 51(8) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which relates to football banning orders. The football banning order provision has been law for a number of years and I am not aware that the police, prosecutors or the courts have had any difficulty in applying the definition. We believe that the same will be true of the bill.” (Scottish Parliament Justice Committee 2011a, col 489)

Mr McLetchie went on to press the amendment which was, following a division, disagreed to.

**Televised matches**

With regard to televised matches, a number of amendments were brought forward which sought, amongst other things, to seek clarification from the Government on the exact scope of the section 1 offence as it applies to televised matches and also on the definition of “televised” in relation to emerging media.

David McLetchie brought forward ‘exploratory’ amendments which sought explanation from the Government as to why it thought that further clarification of the relevant provisions was not necessary (the Government did not bring forward any specific amendments on this part of the Bill). David McLetchie’s amendments would also have removed televised matches from the scope of the offensive behaviour at regulated football matches offence. In response, the Minister stated:

“The Scottish Government is trying to remove unacceptable songs, chants and other behaviour from football in Scotland where those cause, or are likely to cause, public disorder. We know that that type of behaviour takes place not only in football stadiums, but in pubs, clubs and elsewhere that matches are broadcast. We know from recent experience that matches that are broadcast in public places can cause real problems.

However, amendments 19 and 21 would give individuals the freedom to take their poisonous singing and chanting into pubs and clubs across the country when there are football broadcasts. That cannot be tolerated. Chanting and other offensive behaviour that are likely to incite public disorder are unacceptable at the match, watching it in the local pub or, indeed, on a screen in the centre of Manchester. I urge the committee to resist amendments 19 and 21.” (Scottish Parliament Justice Committee 2011a, col 494)

Following a division, amendment 19 was disagreed to and amendment 21 was not moved.

Patrick Harvie also brought forward an amendment in relation to televised matches which sought to alter the definition of “televised” as provided in the Bill. Section 4(4) of the Bill as introduced provided that a televised match is one that is “shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise”. Patrick Harvie argued that this definition was extremely broad and would cover situations such as where someone could show a clip of a match on a mobile telephone which was being
streamed live over the internet. He suggested that the definition of “televised” should be restricted to “by means of the broadcast transmission of pictures”, arguing that:

“Over the next few years, particularly once 4G networks and public wi-fi are much more available in towns and cities, we will see a proliferation of such devices. Under the bill, a park or a train in which a small group of fans gather round to watch a clip or a live broadcast on a mobile device would become venues in which everyone would be subject to the provisions, regardless of whether they were aware that the clip was being broadcast. It seems to me that the offender or the person who is committing the behaviour that would be regarded as an offence would not even need to be aware that a transmission was being shown on a screen, and that the owner of the premises or the organiser of the event would not need to be taking responsibility for the screening for the provision to kick in.” (Scottish Parliament Justice Committee 2011a, col 492)

He went on to say that restricting the provision to the “broadcast transmission of pictures” would:

“(…) catch most situations that people would, according to common sense, think ought to be covered, but exclude many other situations that will become increasing likely in years to come.” (Scottish Parliament Justice Committee 2011a, col 493)

In response, the Minister stated that the proposed amendment would narrow the definition of “televised” and explained that the inclusion of a reference to matches being televised other than by means of broadcast transmission in the Bill as introduced, is intended to put beyond doubt that matches which are televised using new technologies (such as internet streaming) are televised matches for the purpose of the offence:

“We do not want to be in a position whereby the offence is rendered ineffective because technological changes mean that televised matches can no longer be said to be ‘broadcast’ in the traditional sense.” (Scottish Parliament Justice Committee 2011a, col 494)

Following a division, the amendment was disagreed to.

**Order-making power to modify and add groups**

The Scottish Government brought forward an amendment at Stage 2 which sought to create an order-making power to modify and add groups against whom it is an offence to express hatred under the section 1 offence (see above). The Minister noted the Justice Committee’s support for the inclusion of categories beyond sectarian hate in relation to the section 1 offence, and the invitation to consider the inclusion of age and gender as categories to be included. It was also noted that the Committee had concluded that the threatening communications offence should not be widened without prior consultation:

“Given the committee’s views and the complex arguments that were presented in consideration of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, we need to take a middle course. I have therefore lodged amendment 9 to allow for the extension of the bill to cover additional characteristics at a later date. That will permit proper consultation and full consideration of the evidence. The fact that the power will be subject to affirmative procedure will mean that any changes will happen only after proper consultation and if Parliament votes in favour of them. I urge the committee to support the amendment.” (Scottish Parliament Justice Committee 2011a, col 497)

Alison McInnes MSP stated that while she understood the Minister’s reasoning which appeared to be well intentioned, she still felt some disquiet about the amendment as it would allow
Ministers to add or remove any behaviour or vary the description of behaviours outlined in the Bill as introduced. The Minister was keen to emphasise that any such changes would only be made by using the affirmative procedure which requires the Parliament to agree to any proposed changes. Following a division, the amendment to create the order-making power was agreed to.

(The Scottish Government’s proposals for the introduction of an order-making power were also examined by the Parliament’s Subordinate Legislation Committee at its meeting on 29 November 2011.)

“Fear or alarm” test in section 5

Patrick Harvie brought forward amendments regarding the test in relation to threatening communications in sections 5(2)(b) and (c) of the Bill. The test in the Bill as introduced was that “the material or the communication of it would be likely to cause a reasonable person fear or alarm, and the person communicating the material is reckless as to whether the communication of the material would cause fear or alarm”. Mr Harvie said that:

“My concern is that that is not a tough enough test and not a high enough bar. It could be—I suggest it is—subject to fairly loose interpretation. I can say that from experience of the one time that I was charged with breach of the peace following a demonstration at Faslane, when two great big burly police officers testified that they were caused great fear and alarm by the fact that I was sitting quietly in the road.

‘Fear and alarm’ is often used in a loose way and I am concerned that this will happen in relation to this offence. We are talking about a serious offence that can attract a sentence of up to five years in prison. For an offence of such seriousness we should be making it clear that we are talking about serious and credible threat, not something trivial, unintentional or, perhaps, something that is said in jest.” (Scottish Parliament Justice Committee 2011a, col 499)

In response, the Minister stated:

“As Patrick Harvie said, amendments 28, 29 and 31 would remove from condition A of the threatening communications offence the requirement that a communication ‘would be likely to cause a reasonable person to suffer fear or alarm’, and replace it with a requirement that the prosecution prove that a reasonable person would believe that the threat ‘was likely to be carried out’.

That would significantly raise the threshold for an offence to be committed. I accept that, in a sense, that is what Patrick Harvie wants to do, but it does not pay regard to the fact that a threat of serious violence can cause real fear and alarm to a victim without the victim having to believe that it is likely that it would be carried out. I am unclear as to how a victim would be able to make that assessment, anyway. If we proceeded in that way and it was then proved that it was never intended that the threat be carried out, I wonder whether the fear and alarm would be dismissed.” (Scottish Parliament Justice Committee 2011a, col 501)

The Minister went on to say that a drawback of existing legislation was the requirement to prove that it was intended that a threat be carried out and that care should be taken not to exclude from the new offence people whose behaviour is unacceptable. Patrick Harvie reiterated that his intention in this regard was to “raise the bar” and to exclude certain behaviour from the ambit of the offence as proposed:

“The minister says that real fear and alarm can be caused without a realistic expectation that the threat would be carried out. I do not doubt that and I am sure that it can be. The
question is whether that is serious enough to attract a penalty of up to five years in prison. I do not think that it is. There is no doubt that some of the behaviour that my amendments would exclude from the offence is bad behaviour and not very nice, but the question is whether it is serious enough to be covered by the criminal offence.” (Scottish Parliament Justice Committee 2011a, col 501)

Following a division, amendment 28 was disagreed to and amendments 29 and 31 were not moved.

Widening the scope of Condition B in section 5

Patrick Harvie lodged amendments which sought to widen the scope of Condition B of the threatening communications offence. (Condition B requires that material which is communicated is threatening and that the person communicating it intends by doing so to stir up religious hatred):

“The first sections on offensive behaviour relate to general hate crime grounds and include a wide range of categories of hate crime. Condition A, in section 5, on threatening communications, also relates to a wide range of characteristics that can be grounds for hatred. I am puzzled about why condition B in relation to threatening communications—the incitement to hatred aspect—is limited to religion alone.

Amendment 34 expands condition B to include a list that is the same as the list elsewhere in the bill—my other amendments in the group are consequential on amendment 34. The amendment leaves religion in, so the religious hatred aspects are still included in the legislation, but it broadens out the provision to include the other categories.

I am not entirely convinced that a provision on incitement to hatred is the right way to respond to those problems of behaviour, some of which I would be the first person to find unacceptable and to view as needing some kind of response. However, if incitement to hatred is the way that the Government is going, I am unclear about why the provision is limited to incitement to hatred on one ground and does not include others.” (Scottish Parliament Justice Committee 2011a, col 505)

In response, the Minister stated that a Government amendment would allow for additional groups to be added to the scope of the threatening communications offence. The Minister added that this amendment was brought forward in direct response to the recommendation in the Justice Committee’s report on the Bill which suggested that any widening of the threatening communications offence to cover hatred of other groups should proceed on the basis of wide engagement and consultation:

“I note that the Justice Committee’s discussion during its consideration of the bill focused overwhelmingly on religious hatred and sectarianism. We therefore agree with the committee’s recommendation that, if we were to go down the road that Patrick Harvie suggests, we would require to hold a proper consultation and to take proper evidence on any extensions.

We are not convinced that sufficient evidence has been presented to justify widening the scope of condition B, but we do not preclude that from happening in future. With that in mind, we lodged amendment 13, which will, should sufficient evidence be presented, give us the power to extend by affirmative order condition B to include threats that are intended to stir up hatred against other groups.” (Scottish Parliament Justice Committee 2011a, col 507)
Responding to the Minister, Patrick Harvie reiterated his concern that legislation which seeks to create offences relating to incitement to hatred or the stirring up of religious hatred requires detailed consideration to be given to the issues involved and was not convinced that the Bill under discussion had been given such consideration:

“I am afraid that the discussion of my amendments in the group has reinforced my view that a strong case has not been made for including provision on incitement to hatred in the bill. I will come back at stage 3 with an amendment to remove such provision altogether. On that basis, I seek the committee’s permission to withdraw amendment 32.”

(Scottish Parliament Justice Committee 2011a, col 509)

Amendment 32 was, by agreement withdrawn and amendment 13 was agreed to without division.

**Theatrical or artistic performance defence**

Patrick Harvie lodged an amendment which sought to add an additional defence to the threatening communications offence. Section 5(6) of the Bill as introduced provided that it is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable. In seeking to add to that defence, Patrick Harvie lodged the following amendment:

“It is a defence for a person charged with an offence under subsection (1) by virtue of Condition A being satisfied to show that communication of the material took place in the course of a theatrical or other artistic performance or a rehearsal for such a performance”.

He stated that it would be useful to have on record the Minister’s thoughts as to whether the defence in the Bill as introduced would be broad enough to cover such circumstances.

The Minister stated that the circumstances outlined by Patrick Harvie had been taken into account when drafting the original defence and that it would be part and parcel of a reasonableness defence that the act was undertaken in the context of artistic expression, which goes wider than theatrical performance. It was the Government’s view that the additional defence would not provide any additional protection. Having considered the Minister’s response, Patrick Harvie withdrew the relevant amendment.

**Freedom of speech**

As stated above, the Government indicated that assurances had already been given that the Bill as introduced would not infringe legitimate freedom of expression but stated that it had no objection in principle to the incorporation of an explicit freedom of expression clause. Given that the Committee had indicated that such a provision would be welcome, the Government confirmed that an amendment to that end would be brought forward at Stage 2. The relevant Government amendment (amendment 11) sought to explicitly provide that the threatening communications offence does not adversely impact on the rights of individuals to discuss and debate religion and religious beliefs. It is important to point out that the Government amendment only provides an explicit freedom of speech clause in relation to Condition B of the section 5 offence. Condition B is that the material which is communicated is threatening and the person communicating it intends by doing so to stir up hatred on religious grounds.

Patrick Harvie also brought forward an amendment in this area (amendment 11A) which sought to extend the freedom of speech provisions to cover the section 1 offence of offensive behaviour at football.
The Minister pointed out that any legislation brought before the Parliament must comply with the European Convention on Human Rights and that the Government was clear that the Bill under discussion was compliant. However, given the Committee’s recommendation that an explicit freedom of speech clause should be included in the Bill (a position that was also adopted by a number of organisations who had commented on the Bill), the Government had agreed to simply restate the position on the face of the Bill. The Minister pointed out:

“The intention of the offence is not to prevent legitimate religious discussion and debate but to prevent the kind of communications that we saw during the last football season when individuals were threatened with serious harm. It is important to remember what the provisions are about. Given that the amendment responds to the committee’s recommendations, I urge members to support it and accept that the Government is responding to real concerns that have been expressed outside Parliament.

Amendment 11A seeks to extend the provisions in amendment 11, which provides assurance that ‘discussion or criticism of religions or the beliefs or practices of adherents of religions, (...) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters, (...) proselytising, or (...) urging of adherents of religions to cease practising their religions’ are protected in relation to condition B in section 5, to cover both offensive behaviour at football under section 1 and threats of serious harm under section 5(2).

We do not believe that such a measure is necessary. We have not been made aware of any concern that the offences in section 1 are capable of being read in such a way as to interfere with the rights of persons participating in discussion or criticism of religion, even in harsh or offensive terms, and we would resist the amendment on those grounds. Accordingly, I urge the committee to resist amendment 11A and to accept amendment 11.” (Scottish Parliament Justice Committee 2011a, col 512)

In response, Patrick Harvie stated:

“I find it odd that, if a free speech defence is required for condition B behaviour in section 5, we will not apply the same defence in relation to section 1, which deals with very similar behaviour, albeit in different circumstances. The minister will point out that section 1 deals with the likelihood of public disorder and not the actuality of it, but the same behaviour is identified as the source of an offence. If the same behaviour is identified, it would be reasonable to have the same defences available. I also take issue with the minister’s suggestion that regulated football matches are not places where criticism or discussion of religion—‘expressions of antipathy, dislike, ridicule, insult or abuse (...) proselytising, or (...) urging of adherents of religions to cease practising their religions’—are likely to happen. I think that they can happen there, and the same defence ought to exist in relation to that behaviour as exists in other circumstances. I therefore think that it is important to use amendment 11A to broaden out the defence to cover the whole bill.” (Scottish Parliament Justice Committee 2011a, col 513)

David McLetchie commented that both amendments were interesting in their broadening of freedom of expression:

“The minister suggests that the proposed section is, arguably, unnecessary because all our legislation is governed by the European convention on human rights. If that is the case, the convention will apply equally to the section 1 offence and the section 5 offence. We must therefore ask ourselves whether section 5 is a broader expression of freedom of speech than is provided for in the ECHR or whether it is simply a statement of the same. If it is simply a statement of what is encompassed by the ECHR, it will apply to an offence under section 1 as well. Patrick Harvie says that ‘expressions of antipathy, dislike, ridicule, insult or abuse’
towards adherents of a particular religion may take place at football matches in Scotland. They certainly do take place at football matches in Scotland, as we are all well aware. That raises an interesting issue. If the proposed section simply states in full what is encompassed by the ECHR, section 1 becomes virtually a dead letter." (Scottish Parliament Justice Committee 2011a, col 513)

He went on to say:

“Section 1 is all about hatred. Most expressions of hatred that I have heard, in 40-odd years of watching football matches in Scotland, have taken the form of ‘expressions of antipathy, dislike, ridicule, insult or abuse’. That is what one hears. However, if that is now a statable ECHR defence, does it not undermine the validity of section 1 in the first place? If not, why does the freedom of expression provision not extend to cover section 1, as Patrick Harvie suggests? That raises some fundamental issues about the offences that we are in the process of creating.” (Scottish Parliament Justice Committee 2011a, col 513)

The Minister reiterated the point that for the offence of offensive behaviour at football to be committed it is not enough that a person simply expresses hatred of a person based on their membership of a religious group; the behaviour must be such that it is likely, or would be likely to incite public disorder:

“Our view is that it is perfectly legitimate to seek to prevent the expression of hateful views in the context of a football match where there is a risk of public disorder.

If committee members care to look at the European convention on human rights, they will see that that is precisely the extent to which the freedom of expression right is limited—the public disorder issue is precisely the qualification used in the European convention.” (Scottish Parliament Justice Committee 2011a, col 514)

Following division, amendment 11 in the Government’s name was agreed to and amendment 11A brought forward by Patrick Harvie was disagreed to.

The review clause

The Government, in response to a recommendation in the Justice Committee’s report brought forward an amendment to provide a review clause on the face of the Bill, the intention being to review the legislation following the completion of two full football seasons from the commencement of the legislation. David McLetchie lodged amendments which sought to clarify the exact scope of such a review. Speaking on the amendments lodged by David McLetchie, the Minister stated:

“Amendments 14A and 14B seek to make it a statutory requirement that any review of the legislation’s operation sets out the objectives intended to be achieved by the legislation, the extent to which those objectives have been achieved and whether and to what extent those objectives remain appropriate. I feel that those amendments do no more than state the obvious with regard to what a review of the legislation’s operation would involve. As a result, I do not think that they are necessary. I am happy to give a commitment that a review of the legislation’s operation will consider the extent to which it has been effective in addressing football-related disorder and will not simply be a statistical bulletin detailing the number of people arrested and convicted. I urge the committee to reject amendments 14A and 14B.” (Scottish Parliament Justice Committee 2011a, col 516)
In response, David McLetchie stated that such reports should be more than statistical bulletins showing charges, prosecutions and convictions in relation to the offences that the Bill creates and that the operation of the legislation should be reviewed in the wider context of standards of behaviour at football matches and related environments:

“Although I accept that another construction is not intended by either the minister or the Government, and I welcome the minister’s assurances in that respect, I think that if the bill contained a wider requirement it would be improved for the benefit of both the present Government and Parliament and future Governments and Parliaments, which will be looking at the legislation for many years to come. I move amendment 14A.” (Scottish Parliament Justice Committee 2011a, col 517)

Following division, amendment 14 was agreed to, amendment 14A was disagreed to and amendment 14B was not moved.

**SOURCES**

*Offensive Behaviour at Football and Threatening Communications (Scotland) Bill [as introduced]*


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