Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from the Equality Network

1. The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network’s policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us. We welcome the opportunity to submit evidence on this bill.

2. We welcome the policy intention of the Scottish Government to address the problem of the expression and stirring up of sectarian and other hatred, in relation to football, and to address incitement to violence and hatred through online and other communication.

3. However, we are very concerned that the speed at which this legislation is being dealt with is preventing proper consultation and consideration and will result in less effective law. We have particularly strong concerns about this in relation to the ‘Condition B’ version of the section 5 offence, on stirring up religious hatred, and, given the very short time available, this is where we have focussed our main attention.

Legislative timetable

4. The Equality Network believes that the standard process for Scottish Parliament legislation is effective because it includes at least one phase of public pre-legislative consultation on detailed proposals, followed by Parliamentary scrutiny at stage 1 that is open, detailed and consultative, and then by a stage 2 procedure that allows MSPs to consider amendments carefully in consultation with interested parties.

5. There has been no pre-legislative consultation on this bill. The bill covers issues explicitly related to sexual orientation and transgender identity, but the first opportunity that Scotland’s national LGBT organisations had to see the proposals was on June 17th, only 9 working days before the date on which we understand the Scottish Government wishes the bill to be finally passed by the Parliament.

6. We note that in the cases of the two previous substantial changes to hate crime law – section 74 of the Criminal Justice (Scotland) Act 2003, and the Offences (Aggravation by Prejudice) (Scotland) Act 2009 – there was lengthy public pre-legislative consultation, involving the Scottish Executive’s Cross-Party Working Group on Religious Hatred (2002-3) and Working Group on Hate Crime (2003-4), respectively.

7. We appreciate the efforts of the Justice Committee to allow the maximum possible time, given the circumstances, of one week for evidence to be submitted. This is of course much shorter than would usually be allowed at stage 1, and far shorter than the standard three months for Government pre-legislative consultation. We also note
that two of the three Justice Committee meetings considering the bill take place well before that week is up, in fact within 3 and 4 working days of the first publication of the proposals in the bill. We have therefore prepared this evidence as a matter of urgency, so that the Committee has it available at those meetings, but in doing so we have of course been unable to consult with LGBT people and groups, or to gather evidence, in the way that we would usually do.

8. In short, the process proposed for the bill does not allow proper public scrutiny or consultation, and, in our view, also provides insufficient time for a fully effective Parliamentary scrutiny. Such a process can only be justified for an emergency bill, and we are not convinced that the current circumstances constitute a true emergency.

Content of the bill

9. The Equality Network agrees with the overall policy aim of dealing more effectively with sectarian and other hatred and other behaviour likely to incite public disorder, at football matches, and with threatening communications. The issue is whether the detailed solutions proposed are the right ones.

10. We note that both the Scottish Executive’s Working Group on Hate Crime (2003-4), and the Scottish Parliament’s Justice Committee and Equal Opportunities Committee, at stage 1 consideration of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, consulted publicly with a wide range of organisations. A consensus was reached that hate crime legislation in Scotland should cover crime motivated by prejudice on grounds of race, religion, disability, sexual orientation and transgender identity. All of these kinds of hate crime are a problem in Scotland, and all of these kinds of prejudice are expressed at football matches.

Section 1 offence

11. Sectarian behaviour at football matches is unacceptable and all too common. As paragraph 12 of the Policy Memorandum for the bill recognises, so is homophobic / transphobic behaviour. We therefore welcome the fact that the proposed offence of behaviour at football matches that is likely to incite public disorder, by expressing hatred, stirring up hatred, or which is motivated by hatred, covers hatred on the same grounds as the existing hate crime legislation, namely religion, race, disability, sexual orientation and transgender identity.

12. The definition of “transgender identity” provided in section 4(3) of the bill is identical to that in the existing legislation (section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009), and we welcome this.

Section 5 offence

13. The ‘Condition A’ version of the section 5 offence covers the communication of a threat or incitement to carry out a seriously violent act, against a person, or against persons of a particular description. We welcome the breadth of the phrase “persons of a particular description”, which would cover the threat or incitement of serious violence against LGBT people, and against other groups.
14. We note that where the offence was motivated by hatred, that like any other offence it could be charged together with a statutory aggravation of racial, religious, homophobic, transphobic or disability-related prejudice. We welcome the availability of these aggravations in relation to this offence.

15. The ‘Condition B’ version of the section 5 offence covers communication of any threats intended to stir up religious hatred. We have a number of specific concerns about this proposal.

16. Paragraph 40 of the Policy Memorandum states that this new offence would bring Scotland into line with England and Wales, and with Northern Ireland and the Republic of Ireland. This is not the case. In all of those jurisdictions, and for good reason, the stirring up hatred offence covers hatred on grounds of sexual orientation, as well as on grounds of religion (in England and Wales this is in Part 3A of the Public Order Act 1986).

17. The stirring up of homophobic and transphobic hatred through threats does happen, and takes a similar form to the stirring up of religious hatred. For example, earlier this month, an openly gay actor in a well-known British soap opera, was told publicly on Twitter “I hope you get AIDS and die you freak” (we have not been able to check whether in this example the tweet originated in Scotland or was retweeted by anyone in Scotland).

18. We are very concerned that the proposed new offence departs from the scope of Scotland’s existing hate crime legislation, decided previously after lengthy consultation and debate, by dealing only with religious hatred and not hatred on grounds of sexual orientation, transgender identity or disability.

19. Our other concerns about the proposed new offence apply to the offence as proposed, and would also apply to a broader version of the offence, covering the stirring up of hatred on other grounds.

20. There is already an offence in Scotland of stirring up racial hatred, in Part 3 of the Public Order Act 1986. That offence is significantly different from the proposed new offence. It is wider, including not just threatening communication, but also abusive and insulting communication, and not just communication that is intended to stir up racial hatred, but also communication that is likely to do so. There may well be good reasons for comparatively restricting the scope of the new offence, but the appropriate scope should be subject to proper consultation and debate.

21. The Scottish Executive’s Cross-Party Working Group on Religious Hatred (2002) considered the introduction of an offence of incitement to religious hatred, and rejected it, on grounds of free speech (http://www.scotland.gov.uk/Publications/2002/12/15892/14531 paragraphs 5.06 and 5.07). Section 5(6) of the bill provides a “reasonableness” defence, but this is very different in form from the free speech defence in the corresponding English legislation, in section 29J of the Public Order Act 1986. That defence specifically protects a number of forms of criticism of religions and their practices, as well as
proselytising, in a way which the reasonableness defence in section 5(6) does not. We think that the issue of freedom of speech needs further consideration.

22. Finally, we note that the corresponding English legislation covers threatening communication intended to stir up hatred which is made in the form of unrecorded speech (outwith domestic premises). The offence proposed in the bill does not cover unrecorded speech. We understand that the English offence could catch a speech made to an audience that intentionally stirred up, for example, anti-Semitic, anti-Islamic or homophobic hatred using threats. If the members of the audience were of like mind with the speaker, such a speech might not currently be an offence in Scotland, as it might not be considered a breach of the peace. Should the proposed new offence therefore cover unrecorded speech?

23. In our view therefore, there are several important unresolved issues about the proposed offence of stirring up religious hatred, and we think that these should be considered through full public consultation and the normal legislative procedure. In England and Wales, the stirring up religious hatred offence was the subject of a full bill (which became the Racial and Religious Hatred Act 2006). That bill underwent several months of Parliamentary scrutiny and debate, resulting in amendments such as the free speech defence referred to above. While there is perhaps an argument for sections 1 to 4 of the current bill to be in place for the start of the football season, since they relate directly to football matches, that does not apply in the same way to the rest of the bill.

Summary

24. In summary, although we welcome the general aims of the policy behind this bill, we are very concerned that:

• The legislative process for an emergency bill is being used for something that is not a true emergency. As a result there is insufficient time for consultation on and consideration of the legislation.

• This is particularly the case with the ‘Condition B’ offence in section 5, of stirring up religious hatred. There are several important open questions in regard to this proposed offence, including:
  o most importantly, why it only covers only religious hatred and not other forms of hatred such as sexual orientation hatred. A broader offence would be more in line with section 1 of the bill, with existing Scottish hate crime legislation, and with the corresponding stirring up hatred legislation in England & Wales, Northern Ireland and the Republic of Ireland.
  o whether the scope of the offence, covering threatening behaviour intended to stir up hatred, is right, given that it is narrower than the existing Scottish offence of stirring up racial hatred.
  o whether the reasonableness defence will properly guarantee free speech, especially in the light of the much more explicit free speech defence in the corresponding English legislation.
  o whether the offence should cover the stirring up of hatred by threats made in unrecorded speech (outwith domestic premises).
25. If the bill is to be rushed through the Parliament in the next two weeks, we therefore strongly believe that the stirring up religious hatred offence (Section 5, Condition B) should be removed from the bill, and considered and consulted on fully, with a view to legislating over the following months.