Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from the Equality and Human Rights Commission Scotland

1 Introduction
The Equality and Human Rights Commission (the Commission) was established in statute in the Equality Act 2006 and came into being on 1st October 2007. The Commission champions equality and human rights for all, working to eliminate discrimination, reduce inequality, protect human rights and build good relations, ensuring that everyone has a fair chance to participate in society.

We welcome the Scottish Government’s commitment to challenging sectarianism in Scotland. The Commission shares the Government’s concern about the detrimental impact that football related sectarianism is causing to Scottish citizens and to Scotland’s international reputation.

However, the Commission is concerned that this Bill is being dealt with as an ‘emergency’ procedure unnecessarily. The Commission feels that the standard parliamentary procedures have served Scotland well and have resulted in the introduction of well drafted and effective legislation. The Commission also believes that this Bill would benefit significantly from having wide ranging consultation, scrutiny and debate.

Without due regard for the normal parliamentary procedures, there is a risk that the final Act will not be fit for purpose and will not provide the powers required to address the concerns of the public and police. There is also a risk that the Act would be open to challenge in the future.

This submission also reminds Scottish Ministers of the statutory obligation on the Scottish Ministers set out in the public sector equality duty, and considers the benefits of compliance with that duty and whether the emergency procedure being used jeopardises compliance with the general duty.

The Commission believes that addressing sectarianism requires a broad response from across civic society. We acknowledge the good work that the voluntary sector, Church groups, Police and Councils (amongst others) have undertaken to build good relations in Scottish communities. The Commission recognise that there is a particular problem with sectarian related violence and aggression at football games. We agree with the Government that this is unacceptable and requires urgent attention.

The Commission would like to see greater reflection on current criminal law that deals with sectarian behaviour. A thorough analysis of the legislation available should be dealt with in a Regulatory Impact Assessment which has not been undertaken in relation to this Bill. The Commission is also disappointed that an Equality Impact Assessment of the Bill is suggested in the policy memorandum but has not been made available.
Given the extremely short period for consultation, the Commission has not had adequate time to fully examine the Bill in detail or had an opportunity to discuss this with our own stakeholders.

2 Public Sector Equality Duty

The public sector equality duty (the general duty) set out in s149 Equality Act 2010 requires Scottish Ministers to pay due regard to the need to:

- Eliminate discrimination, victimisation and harassment or other unlawful conduct that is prohibited under the Equality Act 2010
- Advance equality of opportunity between people who share a characteristic and those who do not
- Foster good relations between people who share a relevant protected characteristic and those who do not.

These three requirements apply across the ‘protected characteristics’ of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

In order to demonstrate that the general duty has been met, the Scottish Ministers must be able to demonstrate that impact on the protected characteristics were considered with rigour and an open mind, and should be able to demonstrate how this consideration influenced the final product.

‘Due regard’ requires a proportionate and relevant response which allows that the weight given to equality should be proportionate to how relevant equality is to the particular function being carried out. Given the nature of the legislation introduced, it is clear that there is a need to demonstrate compliance with the general duty, most particularly the need to foster good relations.

Demonstrating due regard for the duty can be achieved by either assessing impact\(^1\) by systematically considering relevant evidence in order to determine whether particular groups may be disproportionately affected by decisions, or whether more could be done to advance equality and good relations. This systematic approach enables policymakers to consider the impact of the policy on a strand-by-strand basis: look at relevant evidence, ensure actions are appropriate for each strand and, where necessary, identify steps that will be taken to mitigate negative impacts. This evidence-based approach ensures that the impact on various groups are thought through and result in proposals that will make a real difference and help to get things right the first time.

The Commission also recommends\(^2\) that consultation and involvement of key stakeholders, particularly those from groups affected by the policy, will enable

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\(^2\) Equality and Human Rights Commission *Meeting the public sector equality duty in Scotland – Interim guidance for Scottish public authorities on meeting the general duty*, April 2011: 10
Ministers to demonstrate that they have met the general duty with regard to proposed legislation.

We note that the policy memorandum for the bill states that an Equality Impact Assessment (EIA) will accompany the Bill. This is to be welcomed as an EIA would have provided the Commission and the broader stakeholder community with an overview of the consideration that the Minister has given to equality issues in the development of this legislation. However, we also note that as of the 23rd June 2011 an EIA has not yet been published. Given the fast-track process being used, we find this disappointing as it fails to provide stakeholders with the opportunity to comment on the EIA.

Whilst we would welcome an EIA as evidence that the duty has been met, we have broader concerns that the haste of the emergency legislative procedure seriously limits the ability of the Minister to demonstrate due regard in this instance. Both offences created by the Bill cover the protected characteristic of religion, but the section 1 offence extends beyond religion and includes colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. All are protected characteristics within the Equality Act 2010 and all are therefore covered by the general duty. We share the concerns of many other stakeholders that the one week consultation window has serious ramifications on the ability of Ministers to adequately consult with groups affected by the legislation.

The Commission also has concerns about the good relations element of this Bill. In terms of the Equality Act 2010, good relations is understood to mean tackling prejudice and promoting understanding between people from different groups. We understand that this piece of legislation is just the first step in a number of measures that will be taken to tackle sectarianism in football. We also understand the intention of the Bill is to tackle the manifestations of sectarianism, rather than deal with the deeply embedded causes of sectarianism in Scotland. Whilst we agree that this Bill will only tackle obvious manifestations of sectarianism, there is a danger that adopting this legislation without appropriate scrutiny and without a broader strategy in place could worsen rather than improve relations between groups. Eliminating sectarianism in Scotland requires a robust evidence base that identifies the underlying causes of the violent behaviour (including issues outwith sectarianism such as alcohol misuse) and responds with a strategy that takes a multilateral approach, and engages all of civic society to address these causes. The blunt legislative response currently being proposed removes responsibility from society (in particular the football clubs and the SFA) and places it solely within the criminal justice sphere. This purely criminal justice response risks increasing division and hatred between groups rather than tackle prejudice and promote understanding. It does not appear that the Scottish Government have considered this possibility and we would urge the Committee to question the Government on what thought they have given to their good relations duty, and whether they have considered the negative consequences that such proposals could have on relations between groups.

As the regulator responsible for the enforcement of the Equality Act, we must advise the Committee that the use of emergency procedure powers in this instance may put the Scottish Ministers in breach of the general duty, making the legislation vulnerable
to legal challenge on these grounds. Any person, including the Commission, can apply to the Court of Session for judicial review of a public body that they felt was failing to comply with the general duty.

3 Existing Legislation
As mentioned in the policy memorandum and the SPICe briefing that accompany the Bill, there are a number of relevant pieces of legislation passed in Scotland in recent years which are directly relevant to the policy aims of the Bill:

- Section 74 of the Criminal Justice (Scotland) Act 2003 introduced statutory aggravations for offences motivated by religious prejudice and requires courts to take any aggravating factors into account when passing sentence.
- Part 2, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 allows for football banning orders of varying lengths to be applied to offences of violence, disorder and stirring up hatred towards a range of protected characteristics.
- Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 introduces a new offence of threatening or abusive behaviour, punishable on conviction on indictment to up to five years in prison, or on summary conviction to up to 12 months and/or a fine. The offence has been in force since October 2010.

Therefore, given that there is currently a range of responses available in Scots criminal law, and that previous changes in the law in this area have come at the end of extensive consultation and scrutiny, it is important that the Scottish Parliament is satisfied that the further provisions proposed in the Bill are necessary – as well as lawful and proportionate – means of achieving a legitimate end.

4 The Substance of the Bill
The truncated consultation period for this legislation has meant that we have not had the time to undertake proper scrutiny of the proposed legislation. As such, we are only able to make a few brief points in relation to the two offences, but stress we have been unable to fully examine the offences and consider the consequences.

4.1 Section 1 Offence: Offensive behaviour at regulated football matches
The intention of the offence is to be welcomed, particularly the recognition that sectarianism is not the only source of threats or offensive behaviour that occurs at football matches. As such, we welcome that the offence covers not just religion but also colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability.

We note that gender or ‘sex’ is not included in the list at s1(4). The exclusion of sex seems at odds with how broadly the provision has been drawn. The Commission would like to understand why the decision was taken to exclude gender from this offence.

Whilst we recognise that the Government wishes to tackle a specific concern, we feel that a debate on the widest application of the principles would consider the need to address sectarian behaviour in non-football related environments. This would make the legislation more rounded. To achieve this, a larger and more inclusive public consultation will be necessary.
4.2 Section 5 offence: Threatening communications

Section 5 is a much broader offence that goes beyond the scope of a football match. This makes it hard to justify why the offence needs to be in place for the beginning of the football season.

Condition B of section 5 introduces into Scotland the crime of inciting religious hatred. We note the inconsistency in sentencing between the incitement to racial hatred, which is subject to a maximum sentence of seven years, and this new offence of incitement to religious hatred which is subject to a maximum sentence of five years. The consequence is that the choice of one word could result in a two year sentencing difference. We would question whether this is the Government's intention, and if so, what the rationale for such a difference would be.

The Racial and Religious Hatred Act 2006 in England, which was subjected to the usual scrutiny processes by Westminster, chose to list the different circumstances in which a communication would not be considered incitement in order to protect freedom of expression (Schedule 3, paragraph 29J). The Commission would like the Government to explain why it has instead elected to use a reasonable person test for this Bill, and whether this is the right choice given the concerns about freedom of expression that this Bill raises.

We note that Condition B relates only to material that is threatening and intended to 'stir up religious hatred'. We find this at odds with existing Scottish legislation on statutory aggravations which covers not just religious but also racial, homophobic, transphobic or disability-related prejudice. It is also in contrast to Offence 1 of the act which is broadly drawn to cover these aspects of prejudice and harassment. We would expect further explanation of why this has been confined to religious only hatred. Again an EIA would assist consultees to understand the government's intention with regard to this issue.

The Commission would also like clarification on whether s74 of the Criminal Justice (Scotland) Act 2003 (offences aggravated by religious prejudice) would be applied where an individual is found guilty of inciting religious hatred set out in Condition B of this legislation.

5 Conclusion

In summary, we emphasise our concern at the use of emergency legislation procedures with regard to this piece of legislation. The time frame has meant that the issue of sectarianism, violence and football has not been subjected to a broader consultation process. A more inclusive process would have resulted in a better evidence base and suggested a wider range of options with better defined parameters for this piece of legislation, as well as more options for solving the problems such as considering the role of those within the Scottish Football sector and the responsibility that Football Clubs have for the behaviour of fans.

The Commission regrets that it has not had more time to prepare the response that this issue deserves, and remains concerned that the proposed legislation may not achieve the desired objectives of Scottish Ministers nor secure the best outcome for Scotland.
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