

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland Bill)

Written submission from the Law Society of Scotland

INTRODUCTION

The Criminal Law Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to comment upon the general principles of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill introduced into the Scottish Parliament on 17 June 2011 and should like to respond as follows.

GENERAL COMMENTS

The Committee believes that the policy objective of the Bill to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred is entirely laudable. The Committee is deeply concerned, however that there was no proper consultation prior to the Bill being introduced into the Scottish Parliament on 16 June 2011 nor is the Parliamentary process which is to be applied to this Bill sufficient. The Committee believes that this process sets a bad precedent.

SPECIFIC COMMENTS

The Committee has the following comments:-

Section 1 – Offensive behaviour at regulated football matches

The Committee notes that this section creates a statutory offence of engaging in offensive behaviour which is either likely to incite public disorder or would be likely to incite public disorder and Section 1 (2) lists the five kinds of behaviour which trigger the offence at subsection 1.

The policy memorandum states that objective of this section is “to provide the police with powers to deal with offensive or threatening behaviour which is liable to incite public disorder at football matches”.

With particular reference to paragraph 21 of the policy memorandum, the Committee does not share the concerns that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law:-

1. Mark Harris v HMA [2009] HCJAC 80, the Appeal Court held that breach of the peace simply requires some serious disturbance to the community.

2. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 covers a situation where a person behaves in a threatening or abusive manner and such behaviour would be likely to cause a reasonable person to suffer fear or alarm where it is the intention so to cause fear or alarm or one is reckless as to whether the behaviour would cause fear or alarm.

The Committee is of the view that the offence, under Section 1 does not improve in common law breach of the peace or section 38 of the 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.

The Committee is also concerned by section 1(5)(b) of the Bill in that there does not require to be anyone present to be incited to public disorder.

Section 2: Regulated football match: definition and meaning of behaviour” in relation to match

The Committee questions whether section 2 can be legitimately enforced extra territorially, in that, for the purposes of section 1, offensive behaviour at regulated football matches extends to football matches played outside Scotland involving either a national team appointed to represent Scotland or a team representing a club that is a member of a football association or league based in Scotland.

Section 2(1)(b)(ii) apparently widens the definition of “regulated football match” by extending it to all Scottish football teams playing outside Scotland whereas only Scottish Premier League or Scottish Football League teams play in “regulated football matches” for the purposes of section 55 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. Clarification of the Government’s intention in this respect would be welcome.

Section 2(2)(c) of the Bill applies the offence as outlined at section 1 to a person’s behaviour which occurs on a journey to or from a regulated football match and appears to cover travellers who are not actually going to the match in terms of section 2(4)(e) of the Bill. The terms of section 2(4) are inspecific. By way of practical example, is it intended to cover a situation where a journey *has* to include either to or from the ground where the match is being held for the offence to be committed regardless of whether or not the person attends the match or intended to attend the match?

The Committee expresses serious concern about section 2(3) of the Bill in that it appears to apply to any match which is televised at any place (other than domestic premises). This would appear to cover pubs, outdoor arenas, hospital day rooms and TV sales outlets and also mobile TV receivers and computers – such a variety of broadcast possibilities underlines how difficult this provision will be to enforce.

Section 2(3) appears to cover any place anywhere including a situation where matches are being screened worldwide.

In all the circumstances, the Committee is concerned with regard to the definition and meaning of behaviour in relation to a regulated football match for the purposes of section 1 can be proved, particularly with reference to matches either being played or watched on television abroad and, moreover, how the provisions at section 1 are to be enforced.

Section 3 – Fixed Penalties

The Committee is concerned that the police are to be given powers to deal with complex offences carrying potential penalties on summary conviction of twelve months' imprisonment by way of a fixed penalty.

Section 4 - Sections 1 and 2: Interpretation

With particular reference to section 4(4) of the Bill at which "televised" is defined, the Committee questions whether this is to be restricted to live broadcasts or extended to include recorded broadcasts such as edited highlights of regulated football matches and recorded coverage of regulated football matches on news programmes, etc shown at any time after the match has been played.

Section 5 – Threatening Communications

The Committee notes (policy memorandum paragraph 33) that there are a number of offence provisions which may currently apply in respect of making threatening communications notably breach of the peace and uttering threats, the new offence at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 as referred to above of threatening and abusive behaviour, the offences at part 3 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.

The Committee also notes section 127 of the Communications Act 2003 which criminalises "improper use of a public and electronic communications network."

The Committee questions the interpretation that can be placed on either condition A or condition B in section 5(1)(b) of the Bill. In particular, the offence seems to cover a situation where the threat is simply to intend fear as opposed to threaten to carry out the act. The Committee would welcome clarification as to how this provision extends the terms of breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (Threatening or Abusive Behaviour) in that to threaten with the intent of stirring up religious hatred, as referred to in section 5(5) of the Bill, could be adequately covered in terms of section 38.

The Committee also questions the circumstances in which the defence, as outlined at section 5(6) of the Bill, could be applied.

With regard to condition A as outlined at section 5(2) of the Bill, the committee questions why the material consists of, contains or implies a threat, or an incitement,

to carry out a seriously violent act. What is the distinction between a seriously violent act and a violent act and why is that distinction applied in the Bill?

Section 6 – Section 5: interpretation

The Committee notes the definition of “communicates” at section 6(2) of the Bill as being very broad but an offence is created only after the communication is recorded. Why are oral threats excluded?

Section 7 – Sections 1(1) and 5(1): offences outside Scotland

The Committee reiterates its concerns as outlined above with regard to legislative competence in that these new offences are also to apply to anything done outside Scotland by inter alia British citizens and also section 5(1) is to apply to anyone anywhere in the world on the basis that the person intends the material communicated to be read, looked at, watched or listened to primarily in Scotland. This provision, at section 7(2) is unprovable and is unlikely ever to result in a successful prosecution.

Financial memorandum

The Committee refers to paragraph 45 of the financial memorandum where it states that “it is crucial to the estimates that follow that much of the behaviour that the provisions cover is already criminal and therefore liable to prosecution”. The Committee questions whether these proposed measures do in fact bring clarity and strengthen the law.

With particular reference to paragraphs 65 to 67 of the financial memorandum, the Committee is concerned that “these new measures will lead to relatively small additional numbers of the most serious cases being prosecuted in the sheriff courts under solemn procedure” at paragraph 65 where it is estimated that between 5 and 10 additional cases would be tried each year in the sheriff solemn court.

With regard to summary cases at paragraph 66 of the financial memorandum, the Committee is concerned that the Scottish Government considers a realistic estimate of new prosecutions would lie between 50 and 100 additional cases per annum and at paragraph 67 (Direct Measures) it is anticipated that between 200 and 500 fixed penalty notices might be issued directly by the police each year. Against this background, the Committee remains concerned that this proposed legislation is being considered without adequate consultation.

Sunset clause

The Committee note that there have been a number of concerns raised by both Parliamentarians and various stakeholders including the Law Society with regard to the length of consultation and would welcome an appropriate sunset clause and review mechanism on the face of the Bill.