

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from Dr John Kelly

As someone engaged in research in this field, I wanted to express my support for the government's determination to tackle ethno-religious bigotry in Scotland and for its action in drafting legislation to tackle this problem. In doing so, may I also make a few points regarding the proposed new Bill? I hope these will be received in the helpful spirit in which they are proposed.

It is extremely helpful that the Bill explicitly acknowledges the rights of people to have a 'sectarian' identity without fear of hatred. So, for example, it is a major leap forward to specify that ethnic and national origins are to be protected from the all too common assaults from those who seek to demonise and ridicule the felt national/ethnic identity of others (and often of minority Others). This should help all groups in Scotland realise that just because *they* do not feel Ulster-Scottish or Irish-Scottish or indeed Polish/Italian/Asian-Scottish that others may, and that others are legally and morally entitled to feel this way. Unfortunately, we still have many people in positions of authority who appear unaware or insensitive to this reality. Hopefully the lawful implementation will help educate them. It is also excellent that the proposed Bill protects the additional identities such as disability, transgender, sexual orientation, 'race' and colour. For too long, football has been an environment that has accepted intolerance and hatred of these minority groups, helping to create and nurture a culture of prejudice.

I fully applaud the wise decision not to include the polysemous term 'sectarian/ism' on the proposed Bill and I am confident that this will enable every stakeholder to begin discussing these issues in the correct context and to reduce misinformation and confusion, thus facilitating equality. As noted above, the proposed Bill correctly protects 'sectarian' identities, which are often completely legitimate. In watching media coverage and commentary of this proposed Bill, however, I am struck by some important points that continue being missed. Commentators and politicians insist on using the word 'sectarian/ism' and this contributes to the continued inability of police, media, politicians and the public to actually know what it is exactly that is being outlawed. Carelessly allowing this vague term to muddy the waters adds to the problem. For example, on the Politics Scotland show (BBC1, 19/6/11) Roseanna Cunningham, and the police spokesman, were unable to explicitly specify what the police would arrest someone for in relation to the Bill. They and others keep repeating the useless and confusing soundbite that we will stop 'sectarianism', thus giving the false impression that having a 'sectarian' identity itself is to be made illegal. This is simply not true and not expressed in the Bill. The Bill writers appear to be aware of this distinction and I suspect this is why the word 'sectarian' does not appear on the proposed Bill once. Rather, it explicitly states "expressing hatred" (in relation to the identities of Others).

I have two further points of clarity that I wish to call for. First, by including "offensive behaviour" in the title, the proposed Bill is misleading the public and making it difficult for everyone to actually differentiate what is going to be allowed and prohibited. *Causing offence* per se is not and cannot be made illegal and therefore I cannot understand why this phrase appears in the title. It is likely to cause confusion and reduce the proposed Bill's effectiveness in the long run. As we are all aware, the necessary condition to make 'causing offence' illegal lies in the nature of the offence. The Bill is explicit about this in sections 1(2) and 1(4). It clearly states that it is illegal if the cause of the offence is the *expressing of hatred* towards the identities already noted. It is not illegal to celebrate one's own identity. Only if one's identity is based on hatred of the Other should one worry. By including "offensive behaviour" in the title, there is an inescapable inevitability that confusion and disagreement will flourish. The legislation is in fact tackling hatred, so why doesn't the proposed Bill simply state this? It could be called the Hate Crime at Football and Threatening Communications Bill. I do realise that there are other offensive behaviours that the government would like to see disappear and that it may be impractical and unrealistic to legally prohibit these. But a confusing and ultimately unworkable Bill is unlikely to do this better than grown up debate and dialogue with the offenders.

The biggest problem with the proposed Bill is the equivocal Section 1(2)(e) ("behaviour that a reasonable person would be likely to consider offensive"). Whilst the proposed Bill is explicit in this same section, noting the necessity of "expressing hatred" to be present 1(2)(a)(i)(ii)(iii) as a necessary condition for it to be deemed illegal, clause 1(2)(e) is surely too broad and conceptually inaccurate. For example, as I've noted above, causing offence cannot and should not be outlawed in a democratic and free society. Expressing hatred towards someone else due to her/his identity is actually what is being targeted and therefore this should be explicitly stated. The type of offence that is outlined elsewhere on the Bill requires hatred towards the Other based on religion, 'race', nationality, ethnicity, gender, sexuality, disability. If clause 1(2)(e) is left as this ambiguous phrase, I fear that we will have numerous accusations of 'reasonable' people being 'offended' and calling for 5-year jail sentences for what cannot actually be classified as illegal in any court worth its title. Additionally, we have seen time and again - from media, politicians and police commentators - that 'reasonable' people are not always aware of the subtleties of prejudice, racism and bigotry, and are sometimes unable to differentiate legitimate identities from bigoted behaviour. Kenny MacAskill's League Cup comments about it being a "wonderful advert" and Les Gray's unfortunate comments about pictures of the Pope in people's homes reveal these inadvertent realities all too well. Indeed, these are unremarkable outcomes from within a society that experiences ethnic and religious relations, and this type of misunderstanding is well recognised in studies on racism and bigotry. Reasonable people are not always aware of the subtleties of bigotry, particularly (though not exclusively) when they are not part of the target group. Therefore, arbiters deemed by some to be 'reasonable' cannot be charged with upholding laws that are governed by such subjective and contested terms, symbols and interpretations. The law must be explicit and unequivocal here!

I believe that those who will undoubtedly try to take advantage of this broad and ill-defined term ("reasonable person likely to be offended") in 1(2)(e) by claiming offence at anything Irish-Catholic or Ulster-Protestant are likely to have to prove that the offence involved the offender expressing hatred towards his/her identity. This whole issue is characterized by groups 'being offended' by the Other. However, any good student of race/ethnic/religious relations knows that offence itself is often inflamed by prejudiced belief structures rather than genuine inequality. Therefore, rather than waste tax revenue and valuable police/ court time on misguided, mischievous and potentially bigoted accusers, why can't the proposed Bill be unequivocal in its entirety?

In summary, may I suggest?

1. In accordance with the proposed Bill, all official discussion avoids using the confusing term 'sectarian'. The true demon to be slain is hatred of the Other based on the Other's identity (not least because a. sectarian identities per se are often legitimate; b. there are numerous non-sectarian identities included in the Bill).
2. Change the Bill's title from "offensive behaviour" to "hatred". We all know you cannot criminalise causing offence per se, so say what you really mean. These are hate crimes.
3. Omit 1(2)(e) ("behaviour that a reasonable person would be likely to consider offensive") or re-word to be universally understood, conceptually accurate/specific and legally workable! I would suggest if it is re-worded, it becomes "behaviour that can be considered offensive hatred".

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21 June 2011