

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of our functions. The Commission mandate is to promote and protect human rights for everyone in Scotland. The Commission is one of three national human rights institutions in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit evidence to the Justice Committee on this Bill. The Commission welcomes the policy objective that underlines this Bill of preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. While the Commission agrees that this is a particular problem within the Scottish society, it considers that there is also a need to address sectarian behaviour in non-football related environments.

The Commission is of the view that there are areas where the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill should be improved. The Commission's main concern is that the Bill is drafted too broadly, lacking legal precision as to the scope of the new offences such that it may not be considered to comply with the principle of legal certainty¹ and the requirement of lawfulness under the European Convention on Human Rights (the Convention). This submission will provide some examples of these provisions. It is also relevant that the Committee realises that any interference with a fundamental human right such as the right to freedom of expression has to be justified and properly considered in order to be legitimate as well as striking the right balance with other human rights under the Convention.

The Commission welcomes the Scottish Government's decision to no longer treat the Bill as an emergency legislation. This will provide a robust and appropriate space for debate and scrutiny, leading to better legislation. The Commission believes that the use of expedited or emergency procedures limits the existing short timeframes making proper scrutiny of legislation even more challenging.²

¹ i.e. legal clarity and foreseeability.

² The Commission raised concerns about the use of emergency procedures in the last session of Parliament, most recently in the context of the legislation which followed the *Cadder* decision. See for example: <http://www.scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment>

Legal Framework

In making its response, the Commission's draws particular attention to the following (human rights) standards:

- The European Convention of Human Rights (ECHR)
- The International Covenant of Civil and Political Rights (ICCPR)
- The Scotland Act 1998
- The Human Rights Act 1998

The following articles of ECHR are particularly relevant:

- Article 5 Right to liberty and security
- Article 7 No punishment without law
- Article 8 Right to private and family life
- Article 9 Right to freedom of thought, conscience and religion
- Article 10 Right to freedom of expression
- Article 11 Freedom of peaceful assembly and association

Restrictions to the right to freedom of expression

From the outset the Commission would like to stress the fundamental importance of the right to freedom of expression. In the context of effective political democracy and respect for human rights, freedom of expression is not only important in its own right, but also it plays a central part in the protection of other rights under the Convention such as freedom of assembly. The European Court of Human Rights (ECtHR) has repeatedly stated that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment.³ The right to freedom of expression extends not just to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb.⁴

As the Committee is aware, the right to freedom of expression is not absolute, it is a qualified right. As Article 10(2) provides:

*"the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of public disorder or crime..."*⁵. Any interference with the exercise of this right must be:

- i) prescribed by law,
- ii) pursue a legitimate aim (such as the prevention of public disorder), and
- iii) be necessary in a democratic society.

³ *Lingens v. Austria*, 1986; *Sener v. Turkey*, 2000; *Thoma v. Luxembourg*, 2001; *Maronek v. Slovakia*, 2001; *Dichand and Others v. Austria*, 2002

⁴ *Handyside v UK*, 1976, para 49

⁵ As such there is a balance between the right to freedom of expression and other human rights including the right to respect for private life, and to be free from discrimination.

The ECtHR has established rules of strict interpretation of the possible restrictions provided for in paragraph 2 of Article 10.⁶ Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by the parliamentary debates and vote.⁷ The Scottish Parliament must decide whether or not such a restriction should be possible.

The Committee may find useful a brief description of the (three) requirements for a legitimate interference with the exercise of freedom of expression mentioned above: in relation to the first requirement, the ECtHR has constantly expressed that is not sufficient that the interference is prescribed by law. The law itself, adopted by the Parliament, has to be public, accessible, predictable and foreseeable.⁸

The second requirement refers to the list of the possible grounds for restricting the freedom of expression, which is an exhaustive inventory. The test for whether any particular interference is “necessary in a democratic society” (third requirement) involves consideration of whether it is justified by a pressing social need and the application of the principle of proportionality,⁹ meaning; ‘were the means proportionate to the aim pursued?’ In addition, the interference must be the minimum necessary to achieve the aim pursued.¹⁰ It is not sufficient that the measure is ‘useful’, ‘reasonable’ or ‘desirable’.¹¹ Similarly, there must be ‘relevant and sufficient reasons’ for the restriction.

Every restriction on the right to freedom of expression should be carefully considered in the light of the above conditions. It is, therefore, important that the Parliament is assured that all three requirements are fulfilled, so the interference with the right to freedom of expression will be considered legitimate.

Legal certainty and the Bill

Core principles of the rule of law, legality and predictability of the law, are given expression in Article 7 of the ECHR, which provides that:

*“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”*¹²

Its purposes have been described by the ECtHR as to prevent arbitrary prosecution, conviction or punishment.¹³ To achieve this purpose, Article 7, amongst other elements provides that criminal law must comply with the principles of reasonable

⁶ See *Sunday Times v. UK* (1979)

⁷ Human Rights handbooks, No. 2. *Freedom of Expression*. Directorate General of Human Rights, Council of Europe, 2004, p. 31

⁸ *Sunday Times v UK* 1979

⁹ *Observer and Guardian v UK* 1995.

¹⁰ *R v Shayler* [2003] 1 AC 247 and *R v Home Secretary (ex parte Simms)* [2000] 2 AC 115

¹¹ See *Dudgeon v UK* (1981) 4 EHRR 149

¹² Article 7 of the Convention is a near word for word repetition of Article 11(2) of the Universal Declaration of Human Rights.

¹³ *S.W. & C.R. v United Kingdom*, (1995) 21 EHHR 363

certainty and foreseeability.¹⁴ The criminal law must not be extensively construed to the detriment of an accused person (i.e. by analogy).¹⁵ As the ECtHR has stated:

*“an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable.”*¹⁶ The Grand Chamber of the ECtHR has found violation of Article 7 where the applicable law was not formulated with sufficient precision.¹⁷

It is equally important to note that compliance with this principle will facilitate the work of the police, the prosecutor and the courts to enforce and implement the Bill.

Deprivation of liberty and the requirement of lawfulness

It is important that Committee Members, as part of their consideration of the Bill, give thought to the requirements for deprivation of liberty under Article 5(1). Deprivation of liberty requires two key elements:

- a) a clear legal basis - in this case the ECtHR refers back essentially to national law;¹⁸
- b) must meet one of six sets of circumstances set out in paragraphs 5(1) (a) to (f).

In addition to compliance with national law, any deprivation of liberty must be in accordance with the Convention itself in order to protect the individual against arbitrariness.¹⁹ The requirement of lawfulness under Article 5 has been interpreted as referring to both procedural and substantial rules of law.²⁰ The lawfulness requirement refers, *inter alia*, to the quality of national law, meaning that this should be: *“sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”*.²¹

In light of the general nature of a number of the provisions of the current Bill, as noted below the Commission considers that there is a strong likelihood that the Bill as currently drafted would be open to challenge on the basis of the principle of legal certainty and requirement of lawfulness.

Provisions of the Bill

The Commission is concerned at how broadly *Section 1: Offensive Behaviour at regulated football matches* is drafted. Definitions must be neither over-inclusive nor under-inclusive regarding the aims of the Bill and must be applicable insofar as possible to all individuals equally. Examples of this type of provisions are:

¹⁴ Ibid. also *Rotaru v Romania, ECtHR*, Application no. 28341/95

¹⁵ *Kokkinakis v Greece*, Judgment of 25 May 1993, Ser. A. no. 260-A, p 22, para 52.

¹⁶ Ibid.

¹⁷ *Kafkaris v Cyprus*, Judgment of 12 February 2008, para 139.

¹⁸ See *Ocalan v Turkey, ECtHR*, Application no. 46221/99

¹⁹ See *Kurt v Turkey* [1998] ECHR 44

²⁰ See *Ocalan v Turkey, ECtHR*, Application no. 46221/99

²¹ *JÉČius v Lithuania, ECtHR*, Application no. 34578/97

- Section 1(2)(e) which covers:
“*other behaviour that a reasonable person would be likely to consider offensive*”
- Section 1(5)(b) which covers:
“*Persons likely to be incited to public disorder are not present or are not present in sufficient numbers.*”

As expressed above, the law needs to be clear and ascertainable. While the Scottish Government argues that “people know what is reasonable,”²² the proper question is whether people know what is offensive. The level of public and media debate over the provisions of this Bill bring into question whether the provision as currently drafted is precise and clear enough to allow a person to know what the law is and what is being criminalised. The Commission is concerned that catch-all provisions may fail to achieve the principle of legal certainty required and may fail to strike the proper balance with the right to freedom of expression.

The Commission notes that gender or ‘sex’ is not included in the list of section 1(4). This provision has clearly been drawn recognising that sectarianism is not the only source of threats or offensive behaviour that occurs at football matches. However, gender as personal characteristic/status has not been included. The Commission considers that it is not appropriate to describe the personal characteristics listed in s.1(4) as “things”.

The Commission has similar concerns to those explored above in relation to section 2: *Regulated football match: definition and meaning of behaviour “in relation to” match*. In particular, the Commission is concerned at how broadly section 2(4) (a) is drafted. This section 2(4) (a) covers:

“*A person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match.*”

The Commission is unsure what situation intends to be covered and considers that clarification of the Government’s intention in this provision would be welcome.

In addition, from an operational angle the Commission questions whether section 2(1) (b) (ii) [match outside Scotland] can be legitimately enforced extra-territorially for the purposes of section 1.²³ To be effective, legislation should be simple, clear and enforceable (in order to facilitate the work of police forces in Scotland). In the same vein, section 2(3), which includes “*any place (other than a domestic premises) at which a match is televised*”, stresses how difficult this provision will be to enforce.

Conclusion

The Commission welcomes the policy intention that underlines the Bill. However, the Commission urges the Committee to consider whether the provisions of this Bill are in conformity with the Convention, and especially are clear, precise and foreseeable in its application. It is important that the Bill strikes the right balance between the protection of public order and human rights such as the freedom of expression in our

²² Policy Memorandum to the Bill, para 6. Available at <http://www.scotland.gov.uk/Resource/Doc/925/0118334.pdf>

²³ See also *Section 7 – Sections 1(1) and 5(1): offences outside Scotland* (which may be unlikely to result in a successful prosecution)

society. These provisions must also be considered in terms of whether they are necessary and proportionate to the aim of preventing offensive behaviour in relation to football matches.

In particular, Members of the Committee should consider:

- Whether the provisions of this Bill are sufficiently **clear and precise** so as to enable people to understand exactly what type of behaviour is being criminalised;
- Whether the provisions of this Bill are **necessary and proportionate** to the aim of stopping offensive behaviour at certain football matches;
- Whether there is a **pressing social need** to introduce new offences and **relevant and sufficient reasons** for the restriction; finally
- Whether the provisions under section 1 **improve the existing** common law breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

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24 August 2011