

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from James P. Connolly

The following submission is in response to the call by the Scottish Parliament's Justice Committee for views on The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, introduced by Kenny MacAskill MSP on 16 June 2011.

1. In line with the guidelines, I will make this submission brief as there appears to me to have been much criticism of this Bill already, from others who have submitted and, implicitly, in the Justice Committee's scrutiny so far.
2. What this Bill tries to do is in two parts. Firstly, it seeks to create an offence which can be charged summarily or on indictment, which deals specifically with behaviour of football fans connected to a match, whether going to or from a match or to a public place where a match is shown. There would be an offence if such persons are likely to cause disorder by expressing hatred or stirring up hatred towards a presumed member of another group which (somehow) can be defined by religion, race ethnicity or colour. Secondly, and separately, the Bill seeks to make it an offence to communicate threats of serious violence so as to cause fear and alarm, or if the communication is intended to stir up religious hatred.
3. In effect the first proposed offence would be a new thing that might be called a 'football match hate breach'. It would hinge upon the same likelihood of public disorder that the common law offence of breach of the peace currently does. However, it ventures into the highly problematic area of 'hate speech', despite there being an extensive literature around the world on the difficulties with this concept. The malignity of hate crimes is generally argued to be that they target communities within communities and as such are more destructive than 'regular' crime. Hate crimes are discriminatory and especially pernicious. Difficulties are especially numerous for hate crimes related to expression, but I will confine my self to a few observations. Firstly, there is the human right to freedom of speech, which others have discussed in submissions. Secondly there is the incoherence problem - hatred is an emotional state and not a completed action. Thirdly, hatred is not an objective moral wrong, as there may be perfectly justifiable grounds for hatred, such as by a concentration camp survivor for a guard. Fourthly, hate crimes have a way of creating a 'victimization veto' that may be itself unfair and can lead to escalation of the type of hate it seeks to deter. Leaving aside the significant difficulties with hate speech and legal interpretation, and the classification of a crime for football supporters as a subset of society, there is the obvious difficulty that even singing or chanting of the vilest nature by thousands upon thousands of fans can not be effectively policed in a democracy. What some see as vile, others may see as legitimate expression, and even the Soviet Union had eventually to bow to the Estonians who were said to have sung their way to freedom. A law which is flouted and treated with impunity because it can not be applied fairly is enough reason

to reject it, as it undermines the rule of law itself. This problem is compounded in the Bill, as the Bill does not simply confine itself to expressions of hatred that would be likely to incite public disorder, but in its paragraph 1(2)(e) would criminalize behaviour likely to cause public disorder where “a reasonable person would be likely to consider the behaviour offensive.” This test of offensiveness is a test of manners not law. Offensiveness in my view would become in reality a subjective test for an arresting officer to interpret as he wills, masquerading as an objective one. This sort of thing was not unknown in the law relating to breach of the peace at common law, but this common law vagueness and uncertainty has been ruled unacceptable under human rights law. There are also the same fundamental issues of free speech at stake as in other difficult cases – persons do not have a right not to be offended. Free speech is not determined by whether someone might punch you in the face for it.

4. There is a further difficulty in the context of Scottish football which is the issue of religion and perceived ethno-religious allegiances owed to certain teams, notably Celtic and Rangers. Again, these allegiances are well documented and essentially have their roots in British and Irish history going back generations. These differences sit layer upon layer through history, but within the context of modern football, where such teams are as likely to have more foreign players as British or Irish ones, it seems outdated to focus on ethnic or religious hatreds. That is to misread the real subtlety and multi-faceted cultures and sub-cultures that attach to football in modern Scotland. The entire political landscape has also changed in just over a decade, with the Scottish Parliament, the ‘Good Friday’ agreement, decommissioning of weapons by paramilitaries in Northern Ireland, and now power sharing in the Northern Ireland Assembly as examples. The major clubs themselves can not simply be said to be Catholic/Irish or Protestant/Scottish, even if a substantial number of their fans might think that. It seems strange for a legal response to tensions surrounding football rivalries to focus on speech related to religion or ethnicity in 2011, which the clubs themselves do not accept as exclusive identifiers. Certainly where bigotry is an exacerbation of a crime, we do currently have s.74 of the Criminal Justice (Scotland) Act 2003, which makes ‘religious prejudice’ an aggravation. There have been challenges for the courts in determining whether football chants fall into this category, but regrettably the Bill does not help at all in saying anything new on that matter.

5. However well intentioned the Bill might be on such points, the issues of ugly and widespread divisions in Scottish society, which are in essence bigotry, and that find concentrated expression in the spectacle surrounding Scottish football are too difficult in a democracy to legislate away in the manner proposed. The most effective way of dealing with these problems is by the regulation of football associations themselves, as we have already seen in the case of UEFA, who have imposed sanctions specifically on Rangers three times since 2006 for the behaviour of their supporters. UEFA however do not have the same constraints as a democratic government observing the rule of law. Beyond this, the matter is one of education. As Thomas Jefferson said: “Bigotry is the disease of ignorance, of morbid minds; enthusiasm of the free and buoyant, education and free discussion are the antidotes of both”.

6. The most serious matters that arose last season were undoubtedly the well documented sending of bullets and viable explosive devices to persons associated with Celtic - to the manager, to players, to an MSP, and a QC. These are all matters that existing criminal law can deal with. However, if there was a gap in the law on these matters it strikes me that the Terrorism Act 2000 is where the gap is. In that Act "terrorism" means a threat which is designed to "... intimidate the public or a section of the public" (which might have been Celtic supporters), but the Act continues "... and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause." There is nothing about terror in intimidating a sporting institution's participation in sporting competition.

7. When discussing the second proposed offence of threatening communications before the Justice Committee, the Lord Advocate indicated that there might be a problem with what communication means under the Communications Act 2003. The issue is in the context modern social media, such as blogging, or of Facebook pages, such as we saw last season with the page called "I Hope Neil Lennon Gets Shot". It is not at all clear to me that the Bill would fix that problem, if it exists. "Communication" is still required by the Bill, with no better definition to solve the problem of whether a Facebook site is "communicated". In recent weeks, however, there have been prosecutions using the offence of "threatening and abusive behaviour" under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 for messages put on social networks. This offence seems as wide as any we had seen before under the common law of breach of the peace, and we must await the views of the higher courts on its applicability. If it is generally applicable to the sort of postings on social networks that we saw last football season, then there would be no need for a new law doing the same.

8. The Bill seems to me to be deeply flawed on the question of legal clarity, freedoms of speech, and necessity. It would be marvelous to outlaw bigoted attitudes and they then vanished. I made my own private attempts recently to attempt to devise an alternative Bill, which would have criminalized bigoted attitudes addressed to others by producing multiple and instructive definitions of bigoted expression, but concluded we might all have been criminalized sooner or later, despite the safeguards I attempted to build in.. The point is made in one submission of whether it would be offensive to call Donald Trump a stupid American (leaving aside the 'causing disorder' matter for a second). That could arguably be a bigoted remark based on an unfair generalization about Americans. Yet no legal system that values freedom of speech could criminalize that, even if Donald Trump's supporters might create havoc because of such a slight. The statement might even be a fair opinion and of fact, and we have the law of defamation for that. I suggest seeking amendments to the Terrorism Act, focusing on education about attitudes, and allowing the football authorities to sanction clubs. I do not think that it would be good for Scots Law if this bill were to become law.

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