

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from Dr Kay Goodall

Summary

I will try here to add to what others have said, rather than to duplicate their comments.

The decision to create new legislation, even where it overlaps with existing law, can be justified. Creating specific named offences can aid public discussion and encourage public support. Doing this also makes it easier in practice to monitor reporting, recording, prosecution and conviction of the offences.

It is also justifiable for the Scottish Government to decide not to include the term “sectarianism” nor to define it. The Northern Ireland Assembly recently wrestled with this, but even after much debate came up with a definition that would not be suited to Scots law. Sectarian in Scotland is not a unitary phenomenon. As an alternative, it has been argued that the Bill should include a list of what amounts to sectarian behaviour. Again, it was a good decision to leave this out. Creating such a list is not practicable and the Government is entitled to refuse to include it.

However, there are many elements of the Bill that it seems to me need to be changed.

The structure of the Bill: this is difficult to follow and it would be helpful if it was split into several offences rather than just two. This anyway would better reflect the range of offences that the Bill in fact creates.

Limits on the scope of the statute: The Scottish Government has stated that it does not aim to criminalise behaviour which was not criminal before. It expects however that the scope of the offences in the Bill will be limited, not by clear statutory language, but by official guidance (not yet in existence) for police, prosecutors and courts.

The decision to limit the legislation in this way is illiberal, and it surely places an unwarranted burden on police officers, defence and fiscals, not to say the courts of first instance. The suggestion that a sunset clause be included is not a suitable way to overcome this.

In addition, Parliament may not be aware that when a statute is clear, it is to be interpreted to achieve its purpose. This is true of criminal statutes, not just civil ones. This can tie the hands of judges. The common belief that criminal statutes are necessarily to be construed strictly is misleading.

Section 1: The section 1 offence I believe creates (in certain circumstances) a very broad offence of incitement to hatred, in all but name. One element of the section

appears as an incitement to disorder offence, but in practice it criminalises inciting hatred, with the proviso only that the effect of the hatred is likely to incite public disorder, whether or not the offender intended disorder to result. It seems to me that this can fall within the species of incitement to hatred offences. If so, it needs anxious consideration, particularly given that it can apply to incitement to religious hatred.

The section 1 offence also includes expressing hatred, which is wider than stirring up hatred.

Section 5: this section does expressly include an offence of incitement to religious hatred. That offence could do with more definition, perhaps of the kind provided in the sister English provisions. Although this assistance in the legislation itself is not necessary in law, without it the public and criminal justice officials will find it difficult to see what the limits of the offence are.

Another problem is that this offence applies only to recorded communications, based on the hope that it will only catch more serious acts. Merely excluding live speech, though, seems arbitrary and it is not clear why this alone will achieve the aim of limiting the scope of the offence.

“Persons of a particular description” is not defined. This is presumably an omission (understandable given the rush to write the Bill) that will be corrected. Likewise, the territorial breadth of section 7 seems to be intended for section 1 and so linked to Scottish football. Section 5 goes beyond Scottish football. Section 7 should not apply to section 5.

Observations on the broad thrust of the policy proposals

1. Creating more legislation can be justified, even though much of what these problems involve is already covered by Scots law. Research suggests that the public may be more likely to hold favourable views of the criminal justice system when they are more informed about offences and patterns of sentencing. Even just a public discussion which provides more information about sentencing may prove useful. It matters that the public feel positive toward the criminal justice system; not least because it is they who report crimes and support the prosecution process throughout.

2. As regards the policy objective of the Bill, few would object to it, particularly in the light of the admirable plan to embed it in a much wider engagement with civil society. I also think that it is understandable that the legislation is not designed to capture every form of criminal behaviour that has been displayed in recent months. As long as it is clear to the public and to criminal justice professionals what the Bill does cover, and as long as there is some basic logic to this selection of offences, this decision to legislate seems reasonable.

The structure of the offences

3. The Bill is divided into two umbrella offences. I did find this hard to follow and (assuming that there are no policy reasons to restrict it to two) I wonder if it might be

easier for the lay reader, the legal professional and the drafter for these to be split into several offences. I realise a revision of this extent might require that the Bill be withdrawn and presented anew. Nonetheless, it seems likely that the body of critics' comments on the totality of the legislation may necessitate that anyway.

A definition of sectarianism

4. Although the Bill encompasses much more than problems of sectarianism, sectarianism is nevertheless a major target. The Policy Memorandum and other documents make it clear that there is no intention to define Scottish sectarianism. I think this is appropriate. There is little agreement about what it appears to be and what it is a proxy for (religious conflict; racism; tribalism; the hidden injuries of class) and how deep it runs (history; life chances; demography). Perhaps, some say, it might be deemed ethno-religious. But, however plausible that might be as regards some "Protestant" offenders, should we assume an ethno-religious motivation for "Catholic" offenders? It is not clear that the nature of the problem is the same on both sides.

5. An underlying problem for Scots law is that Scottish sectarianism is not a unitary phenomenon. Unlike Northern Ireland, Scotland has pockets of football rivalry where supporters sing and yell sectarian insults, knowing that these are damaging and are banned, but barely grasping the cultural differences from which these originate.

6. Perhaps the best example of the difference between the two nations is the recent attempt at a legislative definition of sectarian in Northern Ireland. The definition of sectarian chanting proposed by the NI Human Rights Commission, and accepted by the NI Executive, was that "it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's religious belief *or political opinion* or against an individual as a member of such a group". The definition had cross-party support and failed to become law only because it was opposed by the Ulster Unionist Party.

7. In Scotland, sectarian loyalties are not typically demarcated by political loyalty. Religious prejudice, it seems, was not read across to include political taunts in one case where football supporters sang songs about the IRA - even though a religious aggravation in Scots law can extend even to an offence motivated by malice and ill-will "against a social or cultural group with a perceived religious affiliation, based on their membership of that group". Reference to a political organisation, whatever its meaning in the Northern Irish context, could not by itself be seen in Scotland to amount to religious prejudice. I therefore support the decision not to provide (at the moment) a statutory definition of sectarianism.

The aim of clarifying the law

8. There are some arguments in favour of creating new legislation even where it mostly duplicates existing law. At present it is easier for police and prosecutors to monitor complaints and convictions as regards a named offence: it is difficult to try to keep track of a wide body of general offences in the hope of recording those where a specific finding has simply been made by the sheriff. It is easily forgotten that before the introduction of police monitoring of racist incidents in Scotland,

commentators were fond of announcing that Scots were too busy being sectarian to engage in something as un-Scottish as racism.

9. Although more new legislation can be an expensive and bureaucratic way to prove there is a problem, research also suggests that law can influence people to reduce overt prejudice, and can even change attitudes through changing their behaviour. As regards incitement to hatred in particular, there is evidence that the incitement to racial provisions in Part 3 of the Public Order Act 1986 have been more successful than many assume in limiting the impact of extremist activities in the UK. It is also worth noting that when a “hate” crime is carried out in search of a thrill, some previous experiments have concluded that a policy of tackling bigotry in society may not be all that productive. These educational approaches sometimes need the support of the criminal law.

Fair labelling

10. Relating to this is the question of fair labelling, both for the offender and the victim. It can for instance feel like an insult to victims to treat acts of religious hatred as “mere” religiously aggravated breach of the peace. It may also be unhelpful to classify such acts as simply the offence of “threatening and abusive behaviour” in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 – a concern which the Policy Memorandum recognises. A clear descriptive name can be more fair.

The specific offences

11. Comments by others discuss human rights issues and whether some of the offences should be created at all. Rather than repeat the content of some very good arguments elsewhere, I will assume that the Scottish Government will want to enact some version of the Bill.

12. I have particular concern about the wording of the offences relating to incitement to hatred. There appear to be two distinct offences relating to this topic in the Bill:

- An offence with an element of incitement to hatred related to a regulated football match (section 1(2)(a) and (b))
- A general offence of incitement to religious hatred by most forms of expression, with the express exclusion of unrecorded speech (section 5(5))

13. The paramount question is whether these provisions are worded appropriately so as to achieve the policy objective without unduly exceeding it.

Section 1: offensive behaviour with a hatred element

14. This goes far further than bringing the law into line with England and Wales.

15. For instance, we could consider how this applies to religious hatred. As I read this, section 1 extends to:

- engaging in behaviour during travel to, or in the public vicinity of, a football match, or a place where the football match is on television (see section 2)

- that would be seen by a reasonable person as behaviour that expresses or stirs up religious hatred, or is offensive even if the offender did not intend to be offensive
- or that the reasonable person would see as likely to express or stir up religious hatred, or be offensive even if the offender did not intend to be offensive
- and be behaviour that the reasonable
- person would see as likely to incite public disorder
- or that the reasonable person would see as behaviour that would have been likely to incite public disorder, but for the fact that the police were there
- or that the reasonable person would see as behaviour that would have been likely to incite public disorder, but for the fact that not enough people who were likely to be incited were there
- even if the offender did not intend to incite public disorder anyway
- allowing (I assume) that the offence will under general principles of criminal law exclude certain circumstances such as reasonable excuse or the more general lack of basic mens rea.

16. I must confess to getting quite lost at this point. To make myself clearer (I hope) I will continue to use the example of inciting religious hatred, because this is an offence that caused so much controversy during bill debates in the UK Parliament.

A wholly new offence of “expressing hatred”?

17. To begin with, it is important to break apart subsection 1(2) so that it separates “expressing” hatred from “stirring up” hatred: they are two different beasts. Expressing hatred covers much more than inciting others and it should not be part of subsection (2). “Expressing” is even wider than the concepts of “glorifying” or “encouraging” used in the terrorism offences in section 1 of the Terrorism Act 2006 - two terms which were also the subject of much criticism in the UK Parliament.

Specific intention to commit a crime

18. For several reasons, I feel that section 1 is not merely an incitement to disorder offence: it is effectively an incitement to hatred offence (at the very least).

19. First, in Scots law, inciting others to commit a crime usually requires that the person doing the inciting intended that that crime would result. The section 1 provision does not require this. In practice, this can mean that a person who expresses hatred commits an offence, not because he intends to incite others to disorder, but merely because this is likely to happen – or even that this would have been likely to happen, had circumstances had been different.

20. This not only broadens Scots law; it goes beyond new English statute on incitement to a crime, for instance in the Serious Crime Act 2007 ss.44-46, which requires intention. It is little comfort that section 1 refers only to football-related behaviour, or that we are to assume that keeping control of prosecutions can be safely left to the procurator fiscal (see below).

Specific intention as regards inciting hatred

21. If it is accepted that this can in certain circumstances be an incitement to hatred offence, the provision is broader than the much-maligned English provisions on incitement to religious hatred in Part 3A of the Public Order Act 1986.

22. If so, Parliament must be made aware of this. The definition of this section 1 offence (albeit that it is restricted to football-related acts) is different from the definition of incitement to hatred on religious or sexual orientation grounds in Part 3A of the Public Order Act 1986 (which is not part of Scots law, although it is capable of affecting acts done in Scotland). The English offence can only be committed intentionally.

23. Proving intention is of course particularly difficult in sectarian hatred incidents, which are the problems that sparked this Bill. Sectarianism in Scotland is distinctive because there are no powerful extremist organisations who engage in politics with an explicit manifesto. Hence, the evidence that might prove someone has expressed or incited sectarian hatred is usually going to be ambiguous. Nonetheless, we must not try to overcome this problem by wording the statute so that it sweeps up dolphins in a tuna net.

“Any other factor”

24. Furthermore, subsection 1(3) allows the hatred to be based not solely on hatred related to a protected group. The offence may also be based to any extent on any other factor. This formulation is a familiar one, found as standard in Scots and English statutory aggravation provisions. They serve a useful purpose there. However, the “any other factor” formulation should not be exported to incitement provisions without full discussion.

25. The words “to any other extent” can mean that hatred could be a minor part of the offence. Thus, given subsection (2)(e) in particular, it does not even require that the offender’s main intention was to express religious hatred (to take my example): it would be enough if his main concern was something else.

The “but for” provision

26. In addition, the offence is not greatly narrowed simply by the requirement that it is or would be likely to incite public disorder (and this need not be violent disorder; merely disorder).

27. Section 1(5) makes clear that the offence covers behaviour even when public disorder is unlikely because measures are in place to prevent that, or because there are too few people present who might be incited. The aim, the Policy Memorandum says, is to capture circumstances such as where football supporters are among like-minded persons, or where the police and stewards have the situation under control.

28. So:

- the offender need not mainly intend to express religious hatred

- he need not intend what he says to incite others to commit disorder
- indeed, the people who would be likely to be incited need not even be there.

29. This seems to me to fall within the species of incitement to hatred offences, regardless of what it is called in this Bill. All that is added is a prescription as regards the outcome. The test as regards that outcome is objective: the offender need not necessarily have desired nor foreseen it.

30. Offences which have the effect of criminalising hate speech by itself are an attack on freedom of expression. There are circumstances in which (I believe) they are needed, but they require to be drafted with particular care, having regard to (among other things) the stipulation in Article 10(2) of the ECHR that the law go no further than what is necessary in a democratic society.

31. It may be worth noting that even the much-criticised offence of encouragement or glorification of terrorism (in section 1 of the 2006 Act) specifically states that it applies only where “members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.” In other words, the persons who might be influenced actually have to *be* influenced to emulate the conduct, and there are constraints too on when and where they might do it.

32. Furthermore, as regards both intention and result, section 1 is also wider than section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which deals only with threatening or abusive behaviour, and expressly requires that the offender intends to cause fear and alarm, or is reckless as to whether he does. It also applies only where his behaviour would be likely to cause a reasonable person fear or alarm. No such limitations are provided for expressly in section 1 of this Bill - and nor does it seem to me that rules of statutory construction require that in every circumstance a judge be compelled to read them in.

33. If my understanding is correct, this element of the section 1 offence is not just a new way of describing incitement to public disorder. It is much wider than that.

In particular, it is not acceptable to include “expressing” hatred in this offence.

Ways of committing the offence: divining objective and subjective tests

34. This section appears to specify three modes of committing the offence as related to hatred:

- Expressing hatred of a person or a group on the ground of their presumed membership of a protected group (subsections 1(2)(a) and (b))
- Stirring up hatred toward such a person or group (subsections 1(2)(a) and (b))
- Engaging in behaviour motivated wholly or partly by hatred of that group (subsection 1(2)(c))

35. The third mode (engaging in behaviour motivated by the hatred) is presumably to be governed by a subjective test of the offender’s motivation. This seems clear from the wording of the provision.

As noted above, there is no guidance stipulating that the first two are to be assessed by this subjective test, rather than by an objective test.

36. Section 1 also appears to specify two modes of committing the offence when it is related to threatening or offensive behaviour, i.e.:

- Behaviour that is threatening (subsection 1(2)(d))
- Other behaviour that is likely to be regarded by the reasonable person as offensive (subsection 1(2)(e))

37. Although the test of the offensive behaviour is an expressly objective one of reasonableness and the other makes no such provision, both are probably to be assessed by an objective test.

38. Indeed, apart from the behaviour motivated by hatred (subsection 1(2)(c)), one interpretation of subsection (2)(e) would sweep all these other modes into the objective test.

To avoid this, it seems to me that the subsection would need to separate “other behaviour”, which would usually be interpreted within the context of the whole subsection, from the stipulation “that a reasonable person would...”. Then, the latter would need to be treated as referring to a test only of what constitutes the behaviour in subsection 1(2)(e). I presume that that is what is intended. But given that the hatred may also be based on “any other factor”, “to any other extent”, I feel this should be made more clear.

39. Behaviour that is likely to be regarded offensive is the broadest of the five modes. Although one might argue that its limits are to be understood by reference to the other offences in this section, because the section heading refers to “offensive behaviour”, it may be that this will be interpreted in the ordinary language sense. That range of meaning tends of course to the expansive.

Whether “protected group” applies to the offence in all its manifestations

40. Not all of the offence appears to apply only to a protected group as listed in subsections 1(2)(a)-(c). Subsections (2)(d) and (e) appear to extend beyond these groups. This is reinforced by subsection 1(3), which applies only to subsections 2(a) and (b). If so, this offence is a very general provision and the Bill should be debated in Parliament in that light.

41. Also as regards a protected group: section 1(4) lists the groups defined by reference to a protected set of things and the contents of the list are not new to Scots law, but it should be emphasised that religious affiliation has a cultural content which is not an essence of the others. For that reason (again returning to the example I chose) the UK Parliament scrutinised the offence of incitement to religious hatred particularly anxiously. If the section 1 offence does in fact encroach on the territory of incitement to religious hatred, then we should be equally cautious in our scrutiny.

Contemporaneity

42. If the legislation is going to be so broad, this section would benefit from (among other things) at least some sort of contemporaneity clause. The Scots statutory aggravation provisions for instance require that the aggravation of an offence be shown to have taken place “at the time of committing the offence, or immediately before or after”.

43. It should be remembered that the purpose of provisions of this kind is not to sweep up all outpourings of hostility and hatred, however egregious. The Crown must prove that the hatred etc. of the protected group was connected to that particular offence. A requirement of contemporaneity is only one example: the general principle should be that the limits of these offences are made as explicit as is reasonably possible, and there are terms which could be used for this purpose in other statute.

How the scope of these very broad offences is to be limited

44. The Explanatory Notes make the extraordinary statement that the new offences would have “very wide potential scope ... [t]he potential costs of enforcing all such instances of the offences would be unsustainable.” These two surely very serious problems are, the Notes say, to be addressed not by more narrowly drafting the provisions, but by the expectation that with official extra-legislative guidance, the police will select the suitable cases and prosecutors and courts will prefer to use existing offences. This, it is said, will ensure that only a handful more cases will be prosecuted than before.

45. However, the references to providing a “strengthened response” do not sufficiently consider (albeit that this is mentioned briefly towards the end of the Policy Memorandum) the need to balance controlling such behaviour with the need to design offences which make it clear what is not criminal, and which do not interfere with liberty more than is necessary to achieve the policy objective. I am concerned that the balance is not where it should be.

46. Quite apart from the illiberal nature of such proposals - a problem which will be raised repeatedly by critics – the “wide potential scope” surely places an unwarranted burden on police officers, defence and fiscals, not to say the courts of first instance.

47. This also seems at odds with the later statement, regarding the offensive behaviour offences, that the Government “anticipates that the new measures set out in the Bill will in large part be used in place of existing offences including breach of the peace. It may be that what is intended is again that the new offences will be used to tackle much the same behaviour as the existing law does. The Notes also state that “the primary intent of the measures is to bring clarity and strengthen the law, and not criminalise behaviour that is not already likely to be prosecuted”. The wording of the Bill however does little to ensure this.

Sections 2 and 3

48. I have no comments to make on these that would not be better made by others with more knowledge.

Section 4: interpretation of terms in sections 1 and 2

Should there be a list of banned behaviours, e.g. providing examples of sectarian songs?

49. There has been dispute over how to specify examples of behaviour that would fall within these provisions. However, it is not reasonable to expect this of the Bill. There is no realistic substitute for prosecutorial discretion and judicial judgment.

50. Examples of how this works can be found in English precedent regarding racially aggravated offences. In practice, down South, the racial element is usually proved by the offender's speech together with behaviour. It is not necessary for the racial words to be themselves offensive: even an (apparently) neutral descriptive term such as "African" or a mildly alienating word such as "foreigner" may be enough. This "broad non-technical" interpretation attracts flak, but it is important to remember that the purpose of such a provision is to focus on the offender's impressions and prejudices about what a protected racial group is, not on some artificial entity of a "race" that he must identify in the real world.

51. What is crucial is that such words do not of course amount to racial aggravation by themselves. More must be shown: it must be proved that in the circumstances of the case, there is evidence beyond reasonable doubt that there is an offence which has been committed, and that it has been racially aggravated. This is hard for people not versed in the law to grasp, and it will be mischievously misinterpreted, but the Government is right to refuse to provide a list. This however makes it all the more important that the legislation is drafted with all due precision.

Course of conduct

52. Section 4(1)(b) states that "behaviour" can be a single act or a course of conduct. This formulation is familiar from provisions such as racially aggravated harassment in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. I am not familiar with how these provisions are applied in practice. Can behaviours which are sub-criminal in themselves together amount to a criminal course of conduct? If so, what effect would this have when applied to the over-broad section 1?

Section 5 offences: Threatening communications

53. This appears to comprise two offences:

- Intentionally or recklessly communicating material which threatens (in several possible ways), or incites, a seriously violent act which would be likely to cause fear or alarm to the person or group targeted
- Communicating to another person threatening material which is intended to stir up religious hatred

54. This offence goes beyond behaviour related to a regulated football match, or indeed anything to do with football. It should also be noted that the incitement to hatred offence in the Condition B option (communicating material intended to stir up religious hatred) is not restricted to sectarianism: religious hatred can cover such things as Islamophobia or anti-semitism.

55. It is particularly important therefore to consider carefully what other circumstances it may cover.

As before, it is clear from the Policy Memorandum and other statements what the government would like the provisions to refer to. But the question for the principle of liberty from unnecessary criminal sanction is what other actions the legislation might *also* be applied to.

Condition A: Persons “of a particular description”

56. It is not clear what the phrase “persons of a particular description” is to mean. Where in the statute is this defined? Section 5(2)(a) does not refer expressly back to the lists in section 1(2) and (4), nor is the term included in the relevant interpretation section 6.

57. The phrase itself can be a good choice of words. Legislation in Victoria, Australia has used the phrase “a group of people with common characteristics” (subsection 5(2)(daaa) of the Sentencing Act 1991). There has been a proposal there to make it clear that a victim has an “identified” characteristic. This emphasises that what counts as the “group” is in the mind of the offender.

There has also been a proposal there to create a new offence of new offence of “promoting community animosity”. No term would be perfect. Persons “of a particular description” is fine if it is defined.

Condition B: Communications intended to stir up religious hatred

I commented above in general on offences of incitement to religious hatred. I have a few more observations about the offence in section 5.

58. This is a general offence which covers a wide arena, not only the football-related behaviour of the section 1 offence. It is also wider than the threat to violence provision, because (being an incitement offence) it covers a gamut of threats, not only those which threaten serious violence.

59. It is in another respect narrower, though, because it requires specific intention, not mere recklessness. And of course it refers only to religious hatred (as defined in the very comprehensive formulation contained in section 6(4)).

60. Nonetheless, a speech offence must be scrutinised carefully. Like the section 1 offence, there is no requirement that it in fact incites hatred or is likely to. Also, although its general scope seems similar to that of its sister English offence, it is

much less detailed: several important specifications and qualifications are missed out.

Banter and stirring up hatred

61. Considering the topic of football behaviour, I note the Policy Memorandum at paragraph 41 states that the legislation is worded in such a way that it would not capture comedians and satirists. Elsewhere at paragraph 12, it distinguishes passion and banter from behaviour which is provoking, antagonising, threatening or offending. One problem in football, though, surely is ill-thought out and spontaneous banter, which is rather more difficult to assess in the context of a sporting culture where banter is welcomed. Most banter will be provocative.

62. Scots precedent regarding breach of the peace provides that the context of a football match is not in itself a reason to conclude that worse behaviour is acceptable than it would be elsewhere. My point is not that football supporters should be given more lenient treatment, but rather that teasing out the hatred from the banter will be a lot harder than it looks, given the subtle layers of symbolism which can be (and are) developed by these groups of football supporters who encounter each other regularly, for significant periods of time, and who can therefore move far beyond crude communications which would be easily deciphered by outsiders.

Protecting freedom of expression

63. The protection of freedom of expression is not made manifest. Section 5(6) provides the defence that the communication of the material was, in the particular circumstances, reasonable. This is far from the explicit saving introduced for the benefit of clarity in the English offence of incitement to hatred on religious grounds. Section 29J of the Public Order Act 1986, "Protection of freedom of expression", states:

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."

64. As long as the section 5 offence in this Bill is interpreted as it is required to be (in the light of human rights such as freedom of expression), such a clause may not be necessary for interpretative purposes. Given Scottish football supporter traditions, though, if the Government intends that the law be clarified for the public, it needs to insert a clause such as this.

65. It is not made sufficiently clear to the non-specialist where the line is to be drawn. Assistant Chief Constable Campbell Corrigan in his evidence to the Justice Committee said that if a case of mere joking was referred for prosecution inappropriately, "[i]t might be recommended that disciplinary proceedings be initiated against the officers." Is this really what we want?

Unrecorded speech

66. “Communicates” has a special meaning which excludes unrecorded speech (section 6(2)). This distinguishes it from the section 1 offence. The Policy Memorandum states at paragraph 55 that “verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour” which gave rise to the need for the Bill. So, it argues, these should be treated separately and given deeper consideration. Hence, the reason to exclude “live” speech is, it says, that other forms may indicate a stronger expression of such views or a more serious intention to carry out such threats.

67. This division surely needs to be justified. I do not find the distinction between “live” speech and other forms of expression compelling: it is not clear that this alone makes them qualitatively different. The Government’s aim may well be to introduce an offence of incitement to religious hatred to combat only one particularly serious problem – for instance messages of sectarian hate posted on a Facebook page. However, in drafting it must consider all the unanticipated cases to which the provision may in the future apply. Simply excluding unrecorded speech is not enough to ensure that the provision is applied only to the unacceptable behaviour the Government has in mind.

Penal drafting and the proposal to insert a sunset clause

68. Nor do I feel that some critics’ suggestion of a sunset clause is a suitable way to address this. Bad legislation later revised to be better legislation is not a fair way to treat those captured under the bad legislation merely because their actions happened to fall within that unfortunate period of time.

69. The Policy Memorandum states at paragraph 63 that the Government is engaging in dialogue with human rights specialists to ensure that the new offences do not restrict legitimate freedom of expression. This should be completed before the legislation is redrafted, not afterwards. After enactment, the only advice that would be used to limit the Bill’s application would be government guidance which has not been through the parliamentary process (and which would only very indirectly be enforceable in a court).

70. Furthermore, it is often supposed that criminal statutes are to be construed strictly. In fact it is not the job of the court to approach a clear statute with the presumption that the defendant is to be set free if at all possible. Parliament needs to be made aware that where a statute is clear, it is to be interpreted to achieve its purpose, and this is as true of criminal statutes as it is of civil ones. A statutory provision with penal effect is to be interpreted narrowly only if there is real doubt over what it means.

So, if a penal bill is to be construed by judges strictly, the drafters need to word that bill so that it directs the judges to do so.

Section 6: Interpretation of terms in section 5

71. I have no other comments to make about this.

Section 7: Territorial extent

72. Section 7 purports to cover territorial extent outwith Scotland. As this applies to the section 5 offence, it seems to cover more than is intended. Section 1 ties back to Scottish events through its being restricted to behaviour in connection with a regulated football match. Section 5 does not however expressly tie into events within Scotland, or aimed at persons connected to Scotland. Might it be that the section was drafted with only section 1 in mind? Regardless of whether a judge should construct this as implicitly restricted in this way, I think it might be helpful to separate the two offences here.

73. Also, note could be taken of the English decision regarding incitement to racial hatred in *R v Sheppard*. The appellants had published racially inflammatory material online. They argued that a publication on the internet is only cognisable in the jurisdiction where the web server on which it is hosted is located. The Court of Appeal held that jurisdiction is governed by a “substantial measure” principle: the court had jurisdiction to try offenders for conduct amounting to incitement to racial hatred where a substantial measure of the activities constituting the crime had taken place in England.

This is a very ambitious Bill which the drafters undertook to write under enormous pressure of time. I hope, now that there is a chance to revise it, that some of these comments here may be found helpful.

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26 August 2011