Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from CARE for Scotland

Introduction to CARE

CARE is a Christian public affairs charity that campaigns and provides resources to Christian communities. We have 30,000 supporters throughout the UK and about 3,000 supporters drawn from all Christian denominations in Scotland. We seek to influence legislation and policy on matters which affect religious liberty. In that context, we sought to input into the UK Parliament’s consideration of the Racial and Religious Hatred Bill in 2006. We are pleased to submit this paper to the Justice Committee and would welcome the opportunity to give oral evidence.

Timescale and Parliamentary Scrutiny

CARE was concerned by the initial timescale of the legislation which we viewed as being unduly rushed and providing inadequate time for proper scrutiny of the content of the Bill. We were also concerned by some of the content of the Bill. For those reasons, in June CARE and the Christian Institute proposed to take a joint action against the Scottish Government and the Scottish Parliament at the Court of Session. We are pleased, therefore, that the Scottish Government and the Scottish Parliament agreed to extend the timetable for the Bill. We ask the Justice Committee to use this opportunity to give full and detailed scrutiny to the contents of the Bill. In particular, we ask the Committee to consider the potential implications of the legislation for religious liberty and freedom of speech. We are concerned that the Bill may contravene Articles 9, 10 and 11 of the European Convention on Human Rights.

Offensive Behaviour

Clause 1 would create an offence of offensive behaviour likely to incite public disorder. This includes threatening behaviour or stirring up hatred against a person or a group of persons on account of their membership of a religious group, or a group defined by reference to other factors, such as sexual orientation and/or transgender identity. This offence is, on the face of it, constrained by reference to football matches. However, there are several worrying factors:

- There is no clause protecting free speech.

The right of people to share the gospel or to proselytise for other religions views in the context of football matches, should be protected.

- The offence can be committed even if the hatred is also based (to any extent) on any other protected characteristic (e.g. age, race, sexual orientation etc.).
This raises concerns that preachers and evangelists might fall foul of the legislation if they make comments on matters relating to sexual sin.

- Although the offence purports to be one of inciting public disorder, the phrase “would be likely to incite public disorder” applies even if measures are in place to prevent public disorder or “persons likely to be incited to public disorder are not present” or no public disorder occurs.

The criteria proposed here seems to be unduly subjective and very wide in scope.

- The offence can be committed on a journey to a football match, except that “a person may be regarded as having been on a journey to or from a football match whether or not the person attended or intended to attend the match”.

The danger is that people who have no intention to attend, or even interest in football or related sectarianism, may be caught up by this provision.

- The offence can be committed outside Scotland by any British citizen.

This provision may be beyond the legislative competence of the Scottish Parliament.

CARE is concerned that the proposals in the Bill relating to public disorder may be used by over-zealous police officers to limit religious liberty. In particular, the scenario where someone at, or outside, at football match distributing religious tracts or preaching might be considered to be acting in a way likely to stir up public disorder. The intent of the individual concerned might be purely evangelistic and his motivation benign. Nevertheless the possible adverse response by recipients of the tracts or his hearers might be considered by the police as a matter which justified an arrest and charge under the provisions contained in this legislation.

We are mindful of the possibility of legislation being interpreted more broadly by the police and the courts than was originally intended by the Scottish Parliament. In 2003, the Scottish Parliament passed Section 74 of the Criminal Justice (Scotland) Act. This provision introduced an aggravating factor on grounds of religion which can be taken into consideration by the courts when someone has been charged with another offence. The aim of this provision was to help to tackle sectarianism. However, its use has been extended beyond the area of Protestant/Catholic sectarianism to include any religiously motivated criminal activity. For example, we are aware of one case when Section 74 was been used to prosecute a street preacher who had made comments about Islam. Without commenting on the justification of that prosecution, we would point out that it was not envisaged at the time Parliament debated Section 74 that this clause would be used beyond the context of Catholic/Protestant ‘sectarianism’ or to prosecute street preachers. It is important, therefore, that the Scottish Parliament is specific about the circumstances within which the legislation is intended to apply. This concern is
pertinent, in particular, as the proposed legislation impinges upon freedom of speech and religious liberty.

We are conscious also of the temptation for police officers to be over-zealous in the application of the legislation even in cases where no prosecution is pursued or conviction obtained. We are aware that similar legislation relating to public order offences has been applied over-zealously by the police in England on a number of occasions. Examples of such include a street preacher who was arrested and charged with a public order offence for saying that homosexual behaviour was a sin, two evangelists who were instructed by a Police Community Support Officer to stop handing out religious tracts in a predominantly Muslim area or risk facing arrest and two hoteliers who were prosecuted after discussing religion with a Muslim guest. The latter case was dismissed by the court after the judge ruled that the main prosecution witness was not credible.

### Threatening Communications

The second offence of making threatening communications can take place in any context and need not be related to football. There are two conditions which have to apply before this offence would be committed. The first condition relates to incitement to carry out a seriously violent act. The second condition is that the communicated material must be ‘threatening’ and that the perpetrator intends to stir up religious hatred. There is a reasonableness defence. However, there are some real concerns. These include the fact that the scope of this provision is very wide. Any communications by any means (except unrecorded speech) are covered. This includes podcasts of sermons and written communications. It should be noted that sending ‘threatening’ material is different to making threats. For example, quoting some verses of Scripture could be considered to fall foul of this provision.

CARE is concerned that the threatening communications provision could effectively create a ‘complainant’s charter’ where people who take offence at something published will be able to involve the police to intimidate those with whom they disagree. Any diatribe or even mildly critical analysis of a religion might be argued to ‘stir up religious hatred’. For the offence to be committed, the comment would also have to be ‘threatening’. However, this term is not defined in the Bill. Similar legislation in other countries has led to unjustified prosecutions of Christians. For example, in an Australian case two Christian missionaries who spoke at a seminar on evangelism among Muslims were prosecuted under the country’s hate crimes law after a complaint was made to the police by some people present in the audience.

CARE believes that it is appropriate on those occasions when there is a genuine attempt to stir up hatred and/or to threaten people that the criminal law should be able to intervene. However, we are concerned that the proposals in this Bill may inadvertently criminalise innocuous comments and the expression of disagreements on matters of religious or ideological belief. It is possible that members of some religions would regard any criticism of their religion as threatening to them, especially if they are
a minority group. Although a defence of reasonableness is allowed, it is unclear as to how this will be interpreted, who will decide what is reasonable and how the courts' understanding of what is reasonable may alter over time. For example, if someone described another religion as being idolatrous or as posing a threat to Western culture, would these statements be deemed to be grounds for prosecution under the proposed legislation? Such comments might be viewed by some as stirring up hatred of that religion and being ‘threatening’, in the sense that they might be viewed as being likely to cause hotheads who read the criticism to attack adherents of that religion. Similarly if a politician makes a comment criticising Israel for its military actions in Gaza and in doing so refers to “the Jewish state”, would that comment fall foul of this legislation?

Conclusion

Our aim in this evidence is not to comment upon the rights and wrongs of any specific case, but rather to highlight the potential for legislation to be used in ways which are not envisaged at the time it is drafted and in a heavy-handed manner. The criminal law is a blunt instrument and it should be used sparingly, particularly in relation to matters which infringe civil liberties. On issues of genuine disagreement over religious beliefs and/or sexual practice, the Justice Committee must ask whether it is appropriate for the criminal law to become involved. This should occur only on those occasions where there is a real threat of violence and objective evidence to show that this is the case. In the normal course of religious discourse, subjective interpretations of religious texts or the misrepresentation of the content of religious texts by opponents are not matters on which, in our view, it is appropriate for the criminal law to be engaged. As a minimum, the Bill should include a conscience clause to defend freedom of religion and the right to articulate and manifest belief. In addition, we suggest that a clear definition of the term ‘threatening’ would be of assistance.

Dr Gordon Macdonald
Parliamentary Officer, CARE for Scotland
26 August 2011