

Justice Committee

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submission from the Human Rights Consortium Scotland

The Human Rights Consortium Scotland (HRCS) is pleased that the Justice Committee now has the opportunity to carefully consider the Bill and its implications. Sectarianism is one example of intolerance in our society which breaches human rights. Intolerance is manifest in many ways and is evidenced by State statistics as well as the work of NGOs in addressing e.g. violence against women, discrimination against migrants and refugees, attacks on disabled people and the demonisation of young people. The HRCS firmly believes that by explicitly adopting and proactively delivering a human rights culture, a range of problems would be addressed in Scotland. A human rights culture provides the framework for policy, practice and services and is rooted in the principles of fairness, respect, equality, dignity and autonomy.

The HRCS believes that the Bill, as currently drafted, requires to be rigorously assessed and we believe that will result in substantial amendments. It is important that the Bill has all party support and commands the respect of those who share the Scottish Government's objective of tackling intolerance and violence in our society.

About the HRCS

The HRCS is a network of 36 civil society organisations working to address the gap in knowledge of human rights within our sector and to build capacity on applying human rights principles and standards to the delivery of publicly funded services. This submission has been approved by the Steering Group.

General Issues

1. The HRCS is pleased to have the opportunity to take part in the consultation process. We welcome the announcement of the First Minister in June 2011 to slow the pace and change the timetable of the Bill which we expect will lead to a thorough analysis of the Bill and better understanding of its implications for people's human rights across Scotland. In particular, we look forward to understanding the Scottish Government's evidence on the impact of this Bill on human rights and whether the Bill meets the criteria:

- That the interference is legal
- That it will achieve a legitimate aim
- That the interference is proportionate i.e. the minimum necessary interference to achieve the legitimate aim

2. We note the legal opinion on the Bill commissioned by and posted on the Christian Institute website, along with a subsequent legal opinion¹. We welcome this initiative to make such information available to everyone and believe it has served an educational role as well as providing a detailed analysis of the issues particularly

¹ Legal Opinion by Aidan O'Neill QC of 21 June 2011 and Supplementary Advice by Aidan O'Neill QC of 21st July 2011

relating to the competence of the Bill, the problems that arise by the failure to define 'sectarianism' and the criteria for balancing Articles 9, 10, 11 and 17 of the ECHR. Importantly, the opinion compensates for the lack of a detailed human rights analysis of the Bill either from the Scottish Government or from the lawyers of the Scottish Parliament who have judged the Bill to be competent under Section 29 of the Scotland Act. It is a matter of regret that the Scottish Parliament has, as yet, failed to develop a transparent system for the consideration of the human rights implications of its business e.g. there is standard phraseology in Policy Memorandums and Explanatory Notes about human rights which are quite insufficient to enable informed debate on individual issues.

In May and June 2011, the HRCS called for the establishment of a dedicated human rights committee at the Scottish Parliament and when that failed to happen called for the appointment of a human rights rapporteur on each Committee. We hope this call will be heeded by each Committee so that the impact of human rights on law, policy, practice and funding will be correctly understood.

3. The HRCS agrees that the Scottish Government does have a legal duty to positively comply with the ECHR as well as ratified human rights treaties (e.g. in S57 of the Scotland Act 1998). International human rights law obliges States to ensure that everyone understands human rights standards, understands their obligations and there is a duty on the State to ensure equal enjoyment of those human rights. Undoubtedly the drive by the Scottish Government to address sectarianism is one of the State's human rights obligations. The HRCS accepts that the Scottish Government's actions are in pursuit of a legitimate aim. What we may disagree about is tactics on how that can best be achieved.

4. The HRCS urges the Justice Committee to undertake a proactive inquiry into sectarianism and identify the best way to tackle sectarianism using law, policy and services. We are pleased to note that the Scottish Government has a twin tracked approach of working on this Bill at the same time as developing a long term strategy on sectarianism.

5. The HRCS notes that the Scottish Government has *"... sought to ensure that the Bill is tightly drawn to tackle specific issues rather than ranging more widely to cover other issues relating to sectarianism or other forms of hatred which may be equally offensive and equally deserving of a firm legislative response but which were not part of the specific impetus for this Bill. The Government is clear that Bill covering a much wider range of attitudes and behaviours and introducing a wider range of measures would not have been justified without fuller consultation and engagement."*

Given that we now have a longer period for consultation and engagement, we urge the Justice Committee to consider how to deal with the acknowledged problems with attitudes and behaviours in Scotland.

6. The Scottish Government states that there is no need for a 'Business and Regulatory Impact Assessment'. The HRCS disagrees as we believe that ICT companies, pubs, clubs, restaurants, public transport e.g. ticket collectors on ScotRail will all be impacted by this Bill. In addition football clubs generally will be affected as sectarianism may afflict matches beyond those known as 'old firm'.

ALOs, established by local authorities, may also be affected if, for example, supporters congregate in the premises or in the car parks of Leisure Trusts.

7. The HRCS is perplexed that there has been no children's rights impact assessment undertaken on this Bill as the proposed offences relate to people rather than to adults – which are defined by the UN Convention on the Rights of the Child as those aged 18 years and over. The model prepared by SCCYP is ideal for this process. <http://www.sccyp.org.uk/publications/adults/cria>

Specific Issues

8. The HRCS believes the Justice Committee needs to address each of the concerns articulated in the legal opinion on the Bill. The HRCS cannot add to this robust legal opinion and so we have focused on other matters.

9. Although the timetable for the Bill has changed, a problem remains that the Bill is not the product of consultation and engagement rather we are being consulted and engaged after the text is published.

This is not the process envisaged when the Scottish Parliament was set up. It is useful to reflect on the work of the 'Scottish Consultative Steering Group' on the policy development process of the Scottish Parliament:

“Consultation, in the form of inviting comments on specific legislative proposals for example, would not meet our aspirations for a participative policy development process. We have noted elsewhere that there is a perception among those we consulted (and within our own group) that once detailed legislative proposals have been published, in whatever form, it is extremely difficult for outside organisations to influence changes to those proposals to any great extent. What is desired is an earlier involvement of relevant bodies from the outset - identifying issues which need to be addressed, contributing to the policy-making process and the preparation of legislation.”²

The role of the voluntary sector in developing policy is acknowledged and longstanding. According to SCVO “The Scottish Compact is an agreement between the Voluntary Sector and the Scottish Government, its Agencies and Non-Departmental Public Bodies (NDPBs) that sets out clear principles for working in partnership. Its aim is to develop robust relationships for the wider public good.”³ The Scottish Compact of 1998/99 and of 2003⁴ formalises existing practice including:

- *‘The Executive acknowledges its obligation to facilitate access for the voluntary sector to its processes. The Executive will ... provide access and support, including the provision of information, to enable voluntary organisations to contribute to the policy development process...’* (pg 5)

² “Report of the Consultative Steering Group on the Scottish Parliament” pub 1998 by the Scottish Office, Section 3.5, para 4 The Legislative Process <http://www.scotland.gov.uk/library/documents-w5/rcsg-00.htm>

³ <http://www.scvo.org.uk/policy/scottish-government/the-scottish-compact/>

⁴ Launched 23rd February 2004

- *'In encouraging good practice and co-operative methods of decision-making, the Scottish Executive undertakes to ... work collaboratively with the sector to develop policy and practice ...; (pg 6)*

10. The HRCS believes the purpose clause should ensure clarity. The HRCS understands the legitimate aim of tackling sectarianism and intolerant behaviour. Despite what the Scottish Government has said, the Policy Memorandum makes clear that the purpose of the Bill goes beyond sectarianism and therefore changes the focus of the consultation and analysis of this Bill.

*"We intend that these measures will cover all offensive or threatening behaviour at football matches, regardless of whether it is "sectarian". This means offensive or threatening behaviour likely to incite public disorder, whether that is through songs and chants, displaying banners or otherwise. In terms of threatening communications, the focus is on threatening or inciting serious harm intended to cause fear and alarm or threats that incite religious hatred, regardless of whether such communications are of a "sectarian" character or not."*⁵

11. The HRCS wishes to see more detailed evidence that the current law on threatening communications is inadequate. We need to understand if the problem is with the law or its application in Scotland.

The HRCS shares the Scottish Government's concern about the "*less positive aspects of our society, expressed in violent and bigoted attitudes and behaviours which are incompatible with those values and which have no place in the Scotland we aspire to be. This Bill seeks to strengthen our established laws to ensure that we can root out these violent and bigoted attitudes and behaviours from Scottish society and make our communities safer.*"⁶ So far, there is insufficient evidence to demonstrate that the law is inadequate. For example Section 127 of the Communications Act 2003 provides that it would be an offence if a person sends "a message or other matter" which is "grossly offensive or of an indecent, obscene or menacing character" by means of a "public electronic communications network". Commentators have argued that this law is being interpreted in such a way as "means that the offence has a worryingly low and fluid threshold."⁷

12. The HRCS believes the Justice Committee needs to understand this Bill in light of human rights developments that impact on the Scottish Government's obligations. We draw the Committee's attention to three developments.

- On 28th July, the UN Human Rights Committee issued its General Comment 34 on the interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees "freedoms of opinion and expression" but does permit the right to be restricted if "provided by law and are necessary".⁸ General comment 34 asserts that "prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy

⁵ Policy Memorandum para 4

⁶ Para 5. Policy Memorandum on the Bill

⁷ *New Statesman* Article by David Allen Green is legal correspondent of the *New Statesman* pub 17th Nov 2010. He is also head of media law at Preiskel & Co LLP..

⁸ <http://www2.ohchr.org/english/law/ccpr.htm>

laws, are incompatible with the covenant." According to the Open Society Justice Initiative: *'The standards are in many areas stronger than protections offered by the European Convention on Human Rights – particularly on blasphemy. General Comment 34 has authoritative legal credibility that will carry strong weight before courts and tribunals, and will substantially influence the development of legal norms globally.'*⁹ Importantly Scottish Government Ministers must positively comply with international ratified Treaties such as the ICCPR e.g. under S57 of the Scotland Act 1998. Restrictions on speech may be justified in specific circumstances under article 20(2) of the ICCPR, which states "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

- *UK Bill of Rights Consultation "Do we need a UK Bill of Rights?"* seeks to gather the views of the public in the UK and of organisations. What are the implications of this Scottish specific Bill? The deadline for responding to this initial phase is 11th November 2011
- UN agreed to operationalise the 'Respect, Protect and Remedy Framework', which sets out the human rights responsibilities of business, in June 2011. Developments in technology potentially impact on human rights: ICT is the vehicle for 'threatening communications' and so we need to understand better what the industry thinks and is doing to uphold human rights. See for example "Applying the UN Guiding Principles on Business and Human Rights to the ICT Industry" A Briefing Paper From BSR¹⁰

13. The Bill should contain a 'free speech clause' to ensure compliance with international and domestic human rights law.

14. The Bill should be confined to adult behaviour which is consistent with our obligations under the UN Convention on the Rights of the Child (UNCRC) which also extend to the responsibilities of children to each other.

The HRCS does not wish to see children and young people, who have learned language and behaviour from adults, to be covered by the legislation. However sectarianism or intolerant behaviour may be grounds for referral to a children's hearing. The HRCS recognises that the Scottish Government has a specific strategy on bullying and we believe detailed consideration is needed about the impact of this Bill on that strategy e.g. cyber bullying.

15. If the Bill proceeds in its current format, we believe the Bill must uphold the existing equality duties and extend the list of groups defined by S1(4) to include "age" and extend that broader definition to the offence of 'threatening communications' S5(2).

Equality law treats the six prohibited grounds of discrimination – age, disability, race, religion, sex (including transgender status) and sexual orientation – as being of equal weight. As there is no hierarchy among these grounds, all should be included. Furthermore, to maintain the current logic of the Bill, the groups protected should be consistently defined.

⁹ http://www.soros.org/initiatives/justice/articles_publications/publications/unhrd-gc14-20110725

¹⁰ Version 1.0, published August 2011,

http://www.bsr.org/reports/BSR_UN_Guiding_Principles_and_ICT.final.pdf

16. The UN's Human Rights Treaty review process has flagged up a number of problems about how our State protects minorities and vulnerable groups and it is disappointing that so little attention has been given to the solutions proposed. We urge the Committee to take evidence from the Scottish Government on how it plans to give effect to the UN's recommendations which fall within its competence.

Recent examples demonstrate the role and influence of the press and media:

UN Committee on Elimination of Racial Discrimination 2003 *"The Committee is concerned about the increasing racial prejudice against ethnic minorities, asylum-seekers and immigrants reflected in the media and the reported lack of effectiveness of the Press Complaints Commission in dealing with this issue. The Committee recommends that the State party consider further how the Press Complaints Commission can be made more effective and can be further empowered to consider complaints received from the Commission for Racial Equality as well as other groups or organizations working in the field of race relations". (Para 13)*

UN Committee on the Rights of the Child 2008 *"The Committee is also concerned at the general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media, and may be often the underlying cause of further infringements of their rights." (Para 24) "The Committee recommends that the State party ensure full protection against discrimination on any grounds, including by: a) taking urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including the media..." (Para 25)*

UN Committee on the Elimination of Discrimination against Women 2008

"The Committee notes with concern the stereotyped media portrayals of women and of women's roles in the family and in society, which contribute to women's disadvantaged position in a number of areas, including in the labour market and in access to decision-making positions, and affect women's choices in their studies and professions. The Committee also notes the lack of positive media portrayals of ethnic and minority women, elderly women and women with disabilities." (Para 274)

"The Committee recommends that policies be strengthened and programmes implemented, including awareness-raising and educational campaigns directed at women and men, and specifically at media and advertising agencies, to help ensure the elimination of stereotypes regarding the roles of women and men in society and in the family, in accordance with articles 2 (f) and 5 (a) of the Convention. It also recommends that the media be encouraged to project a positive image of women, including ethnic and minority women, elderly women and women with disabilities, and to promote the value of gender equality for society as a whole. It calls upon the State party to review periodically the measures taken in order to assess their impact, to take appropriate action and to report thereon to the Committee in its next periodic report." (Para 275)

Conclusion

The Scottish Government's wider work to tackle sectarianism will require sustained and strategic action to acknowledge and eradicate intolerant attitudes and behaviour.

We commend the Scottish Government for exercising leadership and look forward to the deliberations of the Justice Committee which we expect will lead to better legislation.

Carole Ewart
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30 August 2011.