

# **Subordinate Legislation Committee**

## **18th Report, 2011 (Session 4)**

### **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as amended at Stage 2**

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The Scottish Parliament  
Pàrlamaid na h-Alba

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Published by the Scottish Parliament on 6 December 2011





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## Subordinate Legislation Committee

### Remit and membership

#### Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

#### Membership:

Chic Brodie  
Nigel Don (Convener)

James Dornan (Deputy Convener)  
Kezia Dugdale  
Mike MacKenzie  
John Scott  
Drew Smith

**Committee Clerking Team:**

**Clerk to the Committee**  
Irene Fleming

**Assistant Clerk**  
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**Support Manager**  
Lori Gray



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## Subordinate Legislation Committee

18th Report, 2011 (Session 4)

### Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as amended at Stage 2

The Committee reports to the Parliament as follows—

1. At its meetings on 29 November and 6 December 2011, the Subordinate Legislation Committee considered the delegated powers provisions in the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. As introduced, the Bill contained no delegated powers. As such, the Committee did not consider the Bill at introduction. At stage 2 amendments were agreed to which would enable sections 1, 4, 5(5)(b) and 6 of the Bill to be modified by way of order. An amendment was also agreed to which makes provision for a commencement power at section 8(2).
3. The Scottish Government provided the Parliament with a supplementary delegated powers memorandum on these new provisions in the Bill (“the supplementary DPM”). The Committee took evidence from the Scottish Government on the powers in section 4A, power to modify sections 1 and 4, and section 6A, power to modify sections 5(5)(b) and 6. The Committee’s consideration of these powers is set out below.
4. The Committee was content with the power at section 8(2).

#### Delegated powers

**Section 4A - Power to modify section 1 (offence relating to offensive behaviour at regulated football matches) and section 4 (interpretation of sections 1 and 2), and to make consequential, transitional, transitory or saving provision**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order**

**Parliamentary procedure: the affirmative procedure**

5. Section 1 makes it an offence to behave in an offensive and disorderly manner in relation to a regulated football match. The term “regulated football match” is defined in the Bill. Behaviour is defined very broadly in the Bill to include things said or communicated as well as things done.

6. Section 1(2) of the Bill describes what will be treated as offensive. Section 1(2)(a)-(c) read with 1(4) relate to expressions or stirring up hatred against a variety of groups. These include hatred based on colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. Threatening behaviour and other behaviour which a reasonable person would be likely to consider offensive is also caught. In any case the behaviour must be likely to incite or be public disorder. Section 4 defines various terms used in sections 1 and 2.

7. The power in section 4A to modify the criminal offence set out in section 1 comprises three elements. Firstly, it enables the Scottish Ministers to modify section 1. It can do so in regard to a number of matters. In particular it can do so to add, remove or vary a description of behaviour to or from those presently listed in subsection (2). The power also enables similar amendment to be made to the list of things relevant to behaviour which expresses hatred of a group as presently set out in subsection (4), ie colour, race, sexual orientation, etc.

8. Secondly, it enables the Scottish Ministers to modify section 4. They can do so to add, remove or vary a definition mentioned in subsections (2) or (3). These cover such matters as what “membership”, in relation to a group, includes. It also enables amendment to be made to the definitions of such terms as “religious group” and “disability”.

9. Thirdly, an order modifying sections 1 or 4 can also make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate. Where making consequential provision such an order can in addition modify the new Act itself.

10. In short this power is capable of altering the scope of offensive behaviour caught by the section 1 offence in a wide variety of ways. It does not affect the need for public disorder or threatened public disorder before the offence is committed.

11. Any order under section 4A is subject to the affirmative procedure.

12. The supplementary DPM notes that three factors were taken into account when determining to deal with this by means of subordinate legislation.

13. Firstly, it was considered that subordinate legislation struck the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation.

14. Secondly, it ensured that proper use was made of valuable Parliamentary time.

15. And thirdly, it responded to the recommendations contained in the Justice Committee's report that consideration should be given to widening the offensive behaviour at football offence to cover hatred based on a person's age or gender, and that, following consultation, consideration should be given to whether the offence concerning threats intended to stir up religious hatred should be widened to cover hatred on other grounds.

16. In oral evidence, the Scottish Government confirmed that it considered the power at section 4A was the appropriate way to respond to the Justice Committee's recommendation with regard to widening the offensive behaviour at football offence to cover hatred based on a person's age or gender. This approach, the Scottish Government indicated, would enable there to be consultation on the widening of the offence as recommended by the Justice Committee.

17. In the supplementary DPM the Scottish Government contend that leaving this provision to subordinate legislation—

“...would avoid the need for Parliament to consider entirely new primary legislation whose sole purpose was to add a new group to the list at section 1(4) and make any necessary consequential changes. We do not envisage that the adding of age or gender to the list at section 1(4), if following consultation, it was considered appropriate, would raise any issues which could not adequately be considered by the Parliament under the affirmative procedure.”<sup>1</sup>

18. In oral evidence, the Committee raised questions about the wide nature of these powers. Scottish Government officials contended that this was not a wide power as offences under section 1 only applied in the context of regulated football matches and as such any changes to the offence could also only relate to such matches.

19. The Committee also questioned whether the use of order making powers was a rushed response to the Justice Committee's recommendations, given that it did not specifically recommend the use of order making powers, and whether it would have been preferable to either have halted the progress of the Bill to consult on these recommendations or to make provision for further primary legislation in this regard following consultation. Scottish Government officials, however, asserted that this was not a rushed response. On the contrary, the officials intimated that this approach was a considered one which allowed for proper consultation on widening the terms of the offence. Moreover the matters to which the Justice Committee's recommendations related still pertained to offensive behaviour at regulated football matches and as such, the officials asserted that this was the appropriate place to make provision for them.

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<sup>1</sup> [Supplementary Delegated Powers Memorandum](#)

20. **A majority of the members of the Committee found the reasoning provided for using order making powers in this instance to be justifiable. The Committee considers that the use of order making powers in this instance is appropriate.**

21. **However, a minority of members of the Committee considered that it would have been preferable to either have halted the progress of the Bill to consult on the Justice Committee's recommendations or to make provision for further primary legislation in this regard following consultation.**

22. As previously noted, orders under section 4A will be subject to the affirmative procedure and as such subject to approval by the Parliament.

23. In oral evidence, the Committee asked the Scottish Government, given the significance of the modifications to the Bill orders under section 4A could make, whether it considered affirmative procedure would provide for sufficient scrutiny of these orders. In particular, the Committee enquired whether any consideration had been given to applying a super-affirmative procedure to orders under section 4A, so as to allow for a period of consultation prior to laying the order.

24. In evidence, Scottish Government officials noted that although no provision was made for a super-affirmative procedure on the face of the Bill, the Minister for Community Safety had made a commitment in oral evidence to the Justice Committee to consult on orders under this section.<sup>2</sup>

25. It was further explained by the Scottish Government officials in evidence that the requirement for a super-affirmative procedure under this section was not considered appropriate as some orders would be of a technical nature and in these instances consultation would result in an unnecessary delay. Where, however, consultation was considered appropriate, as committed to by the Minister, there would be a period of consultation before an order was laid, but it was acknowledged that this would not be binding.

26. **The Committee recognises that the order making powers at section 4A are significant and that in some cases orders under this power should be subject to consultation. The Committee welcomes the Minister for Community Safety's commitment to consult in these instances. At the same time, the Committee understands that some orders under this section will be of a technical nature and consultation externally in the form which a super-affirmative procedure would entail in these instances would be unnecessary.**

27. **With that in mind, the Committee considers the affirmative procedure is the appropriate power to be applied in this instance, ensuring that orders under section 4A must be approved by the Parliament in order to have effect. Imposing a universal requirement for consultation on all orders under this section on the face of the Bill would in the view of the Committee be unnecessary and the Committee notes that the Minister for Community Safety will ensure that consultation will be undertaken where it is appropriate.**

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<sup>2</sup> [Scottish Parliament Justice Committee. Official Report 22 September 2011, Col 497](#)

28. During the course of its scrutiny of the Bill the Justice Committee considered matters in relation to the European Convention on Human Rights (ECHR) and invited the Scottish Government “to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights.”<sup>3</sup>

29. The Committee questioned whether an order making power subject to the affirmative procedure would necessarily enable satisfactory consideration be given to ECHR issues. Key definitions and key elements of behaviour which, if engaged in, may result in an offence being committed could be changed and the time to consider orders in terms of compliance with ECHR would necessarily be less.

30. Scottish Government officials advised the Committee that in order for any Bill to receive a certificate of competence it must be compliant with ECHR and that this Bill had been given such a certificate. Furthermore, they noted that any order would need to comply with ECHR requirements.

**31. The Committee notes that any order laid under this Bill would be considered by it in the usual manner and would require to comply with ECHR requirements.**

32. The Bill makes provision for the creation of two new criminal offences at sections 1 and 5. Sections 4A and 6A enable the Scottish Ministers to alter the terms of these offences. Given the potential significance of these order making powers, the Committee invited the Scottish Government officials to provide comparable examples within recent legislation of a power to make significant alterations, with respect to criminal offences, by way of subordinate legislation.

33. Amongst other examples, the Scottish Government officials drew the Committee’s attention to section 43(8) of the Sexual Offences (Scotland) Act 2009 which allows Ministers, by order, to amend section 43 to add, delete or amend a condition which, if satisfied, would mean that a person was in a position of trust and could commit the offence of sexual abuse of trust in section 42 of that Act.

34. Attention was also drawn to section 8 of the Emergency Workers (Scotland) Act 2005 which gives Ministers the power, by Order, to amend sections 1(3), 2(3) and 5(3) of that Act to add to the list of emergency workers whom it is an offence to assault, obstruct or hinder in various situations.

35. The Committee notes that sections 4A and 6A give the Scottish Ministers the power to change the two core provisions in this Bill and therefore these examples are perhaps not strictly analogous as they alter aspects of the offences in the Bill rather than the key provisions and do so at an advanced stage in the Bill process.

**36. However, they do provide examples of orders being used to amend criminal offences and as such the Committee notes that while use of order making powers in this regard might be rare and perhaps even rarer where order making powers are used to amend criminal offences at the core of the**

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<sup>3</sup> [Supplementary Delegated Powers Memorandum](#)

**Bill's purpose at such an advanced stage in the process, they are not unprecedented.**

37. In the course of oral evidence, Scottish Government officials were asked whether the order-making power at section 4A of the Bill, which provides a power to amend sections 1(2), 1(4) and 4 of the Bill could be used to make an order to add a list of 'proscribed songs' to the Bill. Officials were unable to provide a response at the meeting, but committed to providing a response in writing.

38. In its response, attached as an annex to this report, the Scottish Government acknowledged the power could be used to provide a list of proscribed songs, subject to the limits of describing a "behaviour" that could to a reasonable person appear offensive.

39. It further noted, that in framing the power it was not the Scottish Government's intention to either allow or preclude such a use.

40. The Scottish Government indicated, however, that it did not consider creating a list of proscribed songs to be an effective means of dealing with offensive and disorderly behaviour at football matches. To that end, the response notes that the Scottish Government does not consider this to be an appropriate use of the power.

**41. The Committee notes the response from the Scottish Government.**

**Section 6A – Power to modify sections 5(5)(b) (person communicating threatening material intending by doing so to stir up hatred on religious grounds) and 6 (interpretation of section 5 provisions relating to threatening communications)**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: order**

**Parliamentary procedure: the affirmative procedure**

42. Section 5 of the Bill sets out the other criminal offence contained within the Bill, relating to threatening communications. Under section 5(1), an offence is committed if a person communicates material to another person, and either Condition A or Condition B (as set out elsewhere in section 5) is satisfied. Condition A describes material which would represent a threatening communication. Condition B is set out at section 5(5). Section 5(5)(a) provides that the material must be threatening and, in addition, section 5(5)(b) requires that the person communicating it intends by doing so to stir up hatred on religious grounds.

43. Section 6 defines expressions which are used in section 5. These include definitions of "communicates", "material", and "hatred on religious grounds".

44. Section 6A(1)(a) provides the Scottish Ministers with a power to modify section 5(5)(b) of the Bill so as to add or remove a ground of hatred to or from those for the time being listed in that section, or to vary a ground of hatred for the time being mentioned in that section. Section 6A(1)(b) provides a power to modify section 6 so as to add, remove or vary a definition to or from those for the time

being mentioned in that section in consequence of a change made using the power at section 6A(1)(a). Section 6A(2) provides that an order under section 6A(1) may specify grounds of hatred by reference to hatred against groups of persons or individuals of specified descriptions and that it may specify such descriptions by reference to specified personal characteristics. Section 6A(2)(c) provides that, in relation to any ground added by the order, the order may modify the Act so as to make such provision for the same or similar purposes as that in section 5A (*Protection of freedom of expression*) as the Scottish Ministers consider necessary or appropriate.

45. The supplementary DPM notes that the power would enable, for example, an amendment to be made to section 5(5)(b) to add threats intended to incite hatred on the grounds of sexual orientation or disability to that section. The supplementary DPM further states that the power has been drafted so as to enable consequential amendments to be made to section 6 concerning definitions of terms used in any amendment to section 5(5)(b) and to enable any provision considered necessary to ensure protection of freedom of expression in consequence of the changes to the extent of section 5(5)(b) to be made. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. Such powers may be required to ensure that any modification of sections 5 or 6 does not affect any prosecution for something done before the modification.

46. The supplementary DPM notes that the same tests in terms of the appropriateness of using order making powers as applied to section 4A, and as set out at paragraphs 12 and 13 of this report, were applied in relation to the decision to make use of order making powers in this regard.

47. The supplementary DPM notes that the adoption of the power, as with its provision in relation to section 4A, was considered a proportionate response to a recommendation by the Justice Committee.

48. In its Stage 2 report, the Justice Committee noted that there were differing views on whether section 5 should be widened to cover other categories of people and acknowledged that “this is an issue that would require more consideration.” Some who gave evidence to the Justice Committee considered there to be a strong case for extending section 5(5)(b) to cover threats intended to stir up hatred of persons on the grounds of their sexual orientation, disability or transgender status. The Committee therefore recommended “that the Scottish Government consult on widening section 5 at an appropriate point should the Bill be passed.”<sup>4</sup>

49. In its response to the Justice Committee’s report, the Scottish Government committed to bringing forward an amendment which would allow for the terms of section 5 to be widened subject to consultation. The supplementary DPM notes that the Government considered that the appropriate means of meeting the commitment given to the Justice Committee was to amend the Bill to provide an order-making power to amend section 5(5)(b) to enable additional grounds of hatred to be added to the scope of this offence. It was considered that this was preferable to requiring entirely new primary legislation to be brought before the

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<sup>4</sup> [Supplementary Delegated Powers Memorandum](#)

Scottish Parliament to make changes to the list of groups covered by the offence concerning threats intended to incite hatred as many of the issues concerning the framing of an offence of threats intended to stir up hatred are the same, irrespective of the grounds on which hatred is being stirred up and the Scottish Government did not consider it an effective use of Parliamentary time to require entirely new primary legislation to add new “grounds” of hatred to this offence.

50. In oral evidence to the Justice Committee the Minister for Community Safety noted that the case for widening the scope of section 5(5)(b) had yet to be made, but that this amendment would allow for it to be so on the basis of consultation.

51. In the context of questioning on the powers under section 4A, Members highlighted the same points about the powers under section 6A, questioning the appropriateness of using order making powers in this context, enquiring about the width of these powers and querying whether the approach has been rushed.

52. The responses from the Scottish Government on section 6A echoed those given on section 4A.

**53. A majority of Members were again content with the responses given and the justifications made for using order making powers. The Committee considers that the use of order making powers in section 6A is appropriate.**

54. The Committee enquired whether the procedural requirements on the exercise of this power were sufficient to enable effective scrutiny.

55. Exercise of the power under section 6A is subject to the affirmative procedure. Subordinate legislation brought forward under section 6A would in consequence be subject to full scrutiny by the Parliament, and would require to be approved by it before being brought into force.

56. However, as with the power in section 4A, the Committee considered whether the affirmative procedure would be likely to afford adequate time to investigate the effect of changes which might be made by subordinate legislation to the nature of the offence.

57. The supplementary DPM notes that the affirmative procedure was adopted in this case as—

“This power can be used to widen Condition B of the threatening communications offence so as to criminalise threats made with the intention of stirring up hatred of other groups of people (e.g. by reason of their race, sexuality or disability).”<sup>5</sup>

**58. The Committee is content that the affirmative procedure will impose sufficient control on the exercise of the power at section 6A.**

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<sup>5</sup> [Supplementary Delegated Powers Memorandum](#)

## **ANNEX**

### **Correspondence from the Scottish Government dated 1 December 2011**

We undertook to write to the Committee following the session of 29 November taking evidence from officials concerning the order-making powers contained in the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. The Committee have asked whether the order-making power at section 4A of the Bill, which provides a power to amend sections 1(2), 1(4) and 4 of the Bill could be used to make an order to add a list of 'proscribed songs' to the Bill.

The Government's view is that, for the reasons outlined at paragraph 51 of the Policy Memorandum, the creation of lists of proscribed songs is not an effective means of dealing with offensive and disorderly behaviour at football matches. In short, the problems with constructing a proscribed list which is definitive, the difficulty in keeping such a list up to date to account for any new songs and chants and the potential for "loopholes" being created, possibly by even the most minor adjustment to existing songs and chants, means that the creation of such a list in legislation would not only be cumbersome but would be ineffective.

Accordingly, it was not the Government's intention, in framing the power at section 4A, specifically to allow or preclude such a use. The power allows new descriptions of behaviour to be added or existing behaviours listed there to be modified. Proscribing specific songs could only be done within those constraints. The Government's view is that would not be an appropriate use of the power.

I hope that this information is helpful to the Committee in its consideration of the order-making powers contained in the Bill.



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Printed in Scotland by APS Group Scotland

ISBN 978-1-4061-7974-3

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