Justice Committee

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill

Written submission from Christopher Judson

1 Do you agree with the proposal in the Bill to repeal the 2012 Act? What are your reasons for coming to this view?

In my view the 2012 Act is flawed and I agree with the proposal in the Bill to repeal it. My reasons are -

- the offences created by the 2012 Act overlap with others which are provided for elsewhere (see the answers to Questions 3 and 5 below);

- the wording of the 2012 Act is in some instances – for example, terms such as ‘offensive’ and ‘threatening’ - too broad and open to interpretation;

- there have been concerns over conflict with the European Convention on Human Rights, especially Articles 9 and 10 (see the Policy Memorandum which accompanies the repeal Bill (‘the PM’), paragraphs 47-48);

- the 2012 Act’s narrow focus on football is arguably discriminatory (see the answer to Question 4 below). This could be corrected by amendment to, rather than repeal of, the Act but this would aggravate the problem of overlap with other legislation mentioned above; and

- in my view the repeal of the 2012 Act would have benefits for policing and the justice system, for football clubs and fans, and for society as a whole (see the answers to Questions 4 and 7 below).

2 Did you support the original legislation?

No. As reported in the PM (paragraph 5), the 2012 Act seems to have been a hasty response to serious football-related incidents perceived as sectarian but without adequate consideration of how the Act should fit in with other legislation.

3 Do you consider that other existing provisions of criminal law are sufficient to prosecute offensive behaviour related to football which leads to public disorder? If so, could you specify the criminal law provisions? Or does repeal of section 1 risk creating a gap in the criminal law?
As reported in the PM (paragraph 15) the Scottish Government, when presenting to the Parliament the Bill which became the 2012 Act, asserted that much of the relevant behaviour was ‘not explicitly caught by’ or ‘might not satisfy the strict criteria’ of certain existing legal provisions. However, paragraph 16 of the PM lists several existing provisions (including provisions not specifically cited in the Scottish Government’s statement quoted above) under which prosecutions might reasonably be brought for the behaviours which are the subject of Section 1 of the 2012 Act. In this context it is worth noting that Section 1 is not just concerned with sectarian behaviour but also with misbehaviour related to colour, race, disability, etc – misbehaviours which are explicitly covered by other legal provisions.

Accordingly, I doubt that repeal would in practice create a gap in the law. Indeed, repeal would have the benefit of clarifying the overlap in legal provisions already mentioned.

4 Do you have a view on the focus of section 1 of the 2012 Act, which criminalises behaviour surrounding watching, attending or travelling to or from football matches, which may not be criminalised in other settings?

Section 1 of the 2012 Act may be considered to be discriminatory insofar as it (a) creates offences which would not be prosecuted under the 2012 Act in other contexts, and (b) disproportionately affects a particular group of people. If certain behaviours are judged to be worthy of criminal prosecution then it should not matter in what setting they occur. The fact that the 2012 Act was a consequence of football-related misbehaviour does not make Section 1’s focus on football any more logical.

A further consequence of the focus in law on ‘sectarian misbehaviour’ at football matches is, paradoxically, that it makes it easier for football clubs to focus simply on urging fans to adhere to the law on sectarian behaviour and thus distance themselves from the wider responsibility for discouraging offensive behaviour of all kinds. And the fact that football fans may see themselves as ‘victimised’ by the Act does not assist clubs, nor official supporters’ groups, in seeking to encourage more acceptable behaviour in general. Repeal of the 2012 Act would align sectarianism with other discriminatory and/or disorderly behaviour which civil society wishes to discourage in all settings (see also the answer to Question 7 below). There may even be tacit acceptance of this in the Scottish Government’s announcement of a review of ‘hate-crime’ legislation (see the PM, paragraph 38).

5 Do you consider that other existing provisions of criminal law are sufficient to prosecute threats made with the intent of causing a person or persons fear
or alarm or inciting religious hatred? If so, could you specify the criminal law provisions? Or does repeal of section 6 risk creating a gap in the criminal law?

This issue is addressed in paragraphs 21-26 of the PM. It is noteworthy that while, when presenting to the Parliament the Bill which became the 2012 Act, the Scottish Government asserted that existing legislation was ‘not always easily applied’ to ‘threatening communications’ (paragraph 23) and that Scotland lacked ‘a specific offence relating to inciting religious hatred’ (paragraph 24), by the time it published an evaluation of Section 6 in 2015 the Scottish Government felt able to say that ‘existing legislation … would remain appropriate for the majority of cases involving threatening communications’ (paragraph 25). In this context the Scottish Government specifically cited the Communications Act 2003 (S. 127) and the Criminal Justice and Licensing (Scotland) Act 2010 (S. 38). Other relevant legal provisions are listed in paragraph 22 of the current PM.

It is also worth noting that there appears to have been a relatively small number of prosecutions under Section 6 of the 2012 Act (a total of 17 up to 2015-16, according to the table in paragraph 42 of the Financial Memorandum accompanying the repeal Bill). Paragraphs 47-48 of the Financial Memorandum seem to indicate that most of these prosecutions resulted in a conviction. However, I have not seen information which differentiates convictions for football-related offences from other offences; nor which distinguishes between prosecutions brought under ‘Category B’, which refers explicitly to religious hatred, and ‘Category A’, which does not; nor on instances where a charge was made but prosecution not pursued. It is therefore quite possible that the number of convictions for football-related sectarian offences under Section 6 has been very small indeed.

6 Do you have a view on the proposed transitional arrangements in the Bill: that there should be no further convictions for section 1 and 6 offences from the date on which the repeal of those offences takes effect; and that the police will cease issuing fixed penalty notices at least from the point at which the Bill is passed?

In my view, to minimise the potential for further charges under the 2012 Act, the Bill should come into force as soon as, or very soon after, it has become an Act. Thereafter it would not be possible for the police to issue fixed penalty notices, or for a person to be arrested and charged ab initio, under the 2012 Act.

The question of whether there should be no further convictions is, I think, more debateable. The Bill itself does in fact make provision for the possibility of further convictions in certain limited circumstances (see the PM, paragraphs 58-59). More generally, I think it can be argued that it would be wrong for cases already ‘in the system’ to be set aside by the happenstance of the date of commencement of the
repeal Act. I am inclined to think that, in the general interests of justice, any charge dating from before the repeal has taken effect should be allowed to proceed to prosecution if the Procurators Fiscal believe this to be in the public interest. Accordingly I do not agree with the Bill’s proposal that ‘no further prosecutions would be brought, and … ongoing prosecutions would be abandoned’ (PM, paragraph 57). While I sympathise with Mr Kelly’s general aims I doubt that his ‘priority … to bring to an end what he regards as the injustices of the 2012 Act as quickly as possible’ (PM, paragraph 57) is sufficient of itself to warrant the discontinuation of cases initiated during the time when the 2012 Act was in force as part of the law of the land.

7 To what extent do you consider that the 2012 Act has assisted in tackling sectarianism?

I am not engaged in work or research in this area but my general impression is that football-related sectarian behaviour is now broadly less prevalent, and its consequences less severe, than in the 1970s and 1980s when ‘football hooliganism’ and associated violence and disorder were widespread. However, even if this impression is correct, it is a long-term trend and, moreover, a trend which I suspect has been influenced more by the prohibitions on alcohol at and around football matches than by anything else.

Against this background, it is difficult to assess whether there have been even any marginal incremental improvements in behaviour which may be attributable to the 2012 Act. In any case it is impossible to know whether any such improvements would have accrued anyway as the result of prosecution of offenders under other legislation and/or of wider societal changes.

Whatever view one takes of the effects of the 2012 Act on sectarian behaviour, it does not necessarily follow that the Act has assisted in tackling sectarianism per se. The latter, like other discriminatory attitudes, has deep historical and cultural roots which society as a whole is (on the long view) only just beginning to dig up. Further progress depends primarily on attitudinal change promoted by the educational system, politicians, church leaders, parents and (in the football context) football clubs and supporters’ groups. One may feel that the law is, by contrast, on the periphery of these long-term processes. Nevertheless my feeling is that repeal of the 2012 Act would assist long-term change by aligning sectarianism more closely with other forms of prejudice and discrimination; by encouraging football supporters to see sectarianism as one of a range of cultural outlooks which civil society as a whole wishes to discourage; and by providing a clearer and more defensible framework within which the justice system as a whole can operate.

Christopher Judson
17 August 2017