Justice Committee

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

Written submission from the Equality Network

The Equality Network is a national charity working for lesbian, gay, bisexual, trans and intersex (LGBTI) equality in Scotland. We welcome the opportunity to submit evidence on this bill – our evidence relates to our work on hate crime, and on LGBTI inclusion in sport, which are priorities for us.

All our policy work is based on consultation with diverse LGBTI people across Scotland. We surveyed LGBT people about the 2012 Act when it was a bill in 2011. We conducted a major survey on homophobia and transphobia in sport in 2012, and we have recently conducted a survey on LGBTI people’s experiences of hate crime, including questions specifically about football and the 2012 Act.

1. Do you agree with the proposal to repeal the 2012 Act and why?

We are very concerned about the potential effects of repealing the Act without other clear measures being implemented in its place. Those measures could include non-legislative policies and practices, for example by government, police, footballing authorities and clubs, and might also include more appropriate legislation.

Without such measures being introduced promptly, there is a risk that repeal would indicate to some that prejudice-based abuse at football matches is being decriminalised, and is therefore acceptable. We think the large majority of people consider such abuse to be unacceptable, and that it is vital that there is clear acknowledgement of the problem, and consideration given to what actions could address it, as part of the process of considering repeal.

We agree that it is appropriate to rethink the 2012 Act. There is a review ongoing of hate crime law, including the Act, led by Lord Bracadale. We understand that that review will shortly start a public consultation, and will report next spring. We think that it makes sense to review the 2012 Act in the context of hate crime more generally, since a significant proportion of charges under it have been for prejudice-related acts. We therefore suggest that decisions on the future of the 2012 Act might be best taken after Lord Bracadale’s review reports.

Findings from our Scottish LGBTI Hate Crime Report, to be published in September, include that 67% of 459 survey respondents who watch football have witnessed homophobic, biphobic or transphobic hate or hate-motivated behaviour at or outside a football match, or travelling to or from a football match, or at a venue where a football match was being shown on TV. 51% witnessed this abuse directed at someone else (including for example a player or match official), and an additional 16% experienced such behaviour targeted at themselves.
We also asked survey respondents their view on the proposal to repeal the 2012 Act, and 247 LGBTI people who watch football responded to this question. There was a significant divide in responses, with 153 respondents opposing repeal, 47 supporting repeal, and 47 giving neutral responses. Many of those who expressed opposition or support for repeal did so quite strongly – there are clearly strong feelings about this either way.

Reasons given in the survey by the 153 respondents who opposed repeal included variously that repeal is a backwards step, that it would encourage abuse and would be dangerous, that homophobia and sectarianism are common at football and need to be dealt with, that the Act protects people, that it sends a message that abuse is unacceptable, that it is changing football, that the Act should be retained and enforced more, and that it should be replaced or amended rather than repealed.

Reasons given in the survey by the 47 respondents who supported repeal included variously that it is unfair to target football supporters with specific laws, that the legislation is illiberal and undermines free speech, it is not effective or enforceable, it is not enforced for anti-LGBTI abuse, that enforcement is over-zealous and gives the police too much power which they misuse, and that other measures, such as work with football clubs, would be more effective.

2. Did you support the original legislation?

We gave written and oral evidence to the Justice Committee on the original bill in 2011. We expressed great concern about the lack of proper pre-legislative and stage 1 consultation on the bill, and the original plan to deal with the bill as emergency legislation. We believe then and now that fuller consultation would likely have led to a different bill and perhaps one on which there was greater consensus.

In our 2011 evidence we also noted:

- There is a major overlap between the section 1 offence and other existing offences. However, we noted that focused, specific legislation can have value, even if there is such overlap.
- We welcomed that section 1(2)(a)-(c) covers all of the hate crime protected characteristics equally.
- We expressed concern that the section 6 condition B offence departs from the scope of Scotland’s existing hate crime legislation, by addressing religious hatred only, and not hatred on the grounds of sexual orientation, transgender identity or disability. It could therefore be said to create a “hierarchy of discrimination”.

3. Do you consider that the other existing provisions of the criminal law are sufficient?
The Policy Memorandum for the bill suggests (paragraph 16) a list of existing offences. Some of these are not offences as such, but are aggravations that apply to any offence where the offence was motivated by prejudice on various grounds (the same grounds mentioned in section 1(2)(a) of the 2012 Act). The key general offences that might apply in place of section 1 of the 2012 Act are section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and common law breach of the peace. Any of the “hate crime” aggravations can be applied to these offences where relevant.

We note that there are different views amongst lawyers about whether the scope of the section 1 offence is completely covered by section 38 and breach of the peace.

Section 1(5) of the 2012 Act somewhat extends the scope of the public disorder test, which appears to make it broader than the scope for breach of the peace or section 38. Section 10 introduces an element of extra-territoriality for section 1 offences, to cover actions by a resident of Scotland at football matches outwith Scotland, and this also appears to extend the law beyond that covered by other existing offences.

It seems therefore that the large majority of, but perhaps not all, behaviour that is an offence under section 1 of the 2012 Act could alternatively be charged as a section 38 offence or a breach of the peace, including where appropriate a statutory aggravation of prejudice.

It is not unusual for offences to overlap of course, and, as we noted in our evidence in 2011, it can be useful to have focussed offences that deal with identified harms. The potential values of this include creating concrete and specific offences that ‘do what they say on the tin’, discouraging particular kinds of crime, and encouraging targeted and appropriate attention by police and others, including on crime prevention. The potential risks include treating the same behaviour differently in different contexts, without clear justification.

4. Do you have a view on the focus of section 1 of the 2012 Act?

From our survey work, we know that homophobia, biphobia and transphobia are a significant problem at football. A short survey we conducted at the time of the original bill in 2011 found that 56% of 176 respondents in Scotland (60% of whom were LGBT), had witnessed or experienced homophobic, biphobic or transphobic behaviour at football matches or associated with football matches. The majority of those experiences were as a football supporter at a match itself (60%), or as a football supporter watching or listening to a match in a public venue, such as a pub (56%). A typical response was: “Homophobic insults are a regular occurrence and are ignored by bystanders in a way that racist comments would not be”. By comparison, 28% of respondents had experienced such behaviour in the context of all other sports put together.
In 2012 we conducted further research into homophobia and transphobia in Scottish sport. It was the most comprehensive research of its kind in Scotland, and was published in our report Out for Sport [Out for Sport (2012) Smith, M., Cuthbertson, S. and Gale, N (http://www.equality-network.org/wp-content/uploads/2013/03/Out-for-Sport-Report.pdf)]. Key findings from this research included:

- 62% of LGBT respondents had witnessed or experienced homophobia or transphobia in sport.
- 79% of respondents thought there was a problem with homophobia in sport.
- 66% of respondents thought there was a problem with transphobia in sport.

Asked which sports have the greatest problem with homophobia or transphobia, almost all respondents (1,335 out of 1,382) identified football, followed by rugby (identified by 564 respondents).

As noted above, our most recent hate crime survey, to be published shortly as the Scottish LGBTI Hate Crime Report, found that two thirds of the 459 survey respondents who watch football have witnessed football-related homophobic, biphobic or transphobic hate or hate-motivated behaviour.

Our own findings are reflected in a survey reported in the Scottish Government's evaluation of section 1 of the 2012 Act, which indicates that negative behaviour at football matches related to a person's sexual orientation is witnessed at two thirds the prevalence of negative behaviour related to a person's religious background, and at similar prevalence to racist behaviour. Negative behaviour related to a person’s sexual orientation was witnessed by 19% of home supporters, and 22% of away supporters [An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (2015) ScotCen Social Research, pp. 69-70].

There is clearly a very significant problem with homophobia, biphobia and transphobia associated with football.

We have no specific view about the form of law which would be best to address the problem of prejudice-related behaviour at football, but we believe that the overall review of hate crime law by Lord Bracadale, followed by further consultation and parliamentary consideration, would be the best context to consider that.

5. Do you consider that other existing provisions are sufficient to prosecute threats made with the intent of causing fear or alarm or inciting religious hatred?

Stirring up racial hatred is a specific offence under Part III of the Public Order Act 1986. In England and Wales, the legislation has subsequently been extended to cover stirring up of religious hatred or hatred on grounds of sexual orientation.
Section 6 of the 2012 Act introduced an offence of stirring up religious hatred, which is similar, but different in significant ways, to the stirring up racial hatred offence. In our evidence to the Justice Committee in 2011, we and others expressed the view that hate crime laws should be kept consistent across the protected characteristics. As a result of those concerns, the Scottish Government added what became section 9 of the Act, to allow additional protected characteristics to be added to this offence by affirmative order. The power has not been used.

There are on average only 3 or 4 reports to Procurators Fiscal for stirring up racial hatred per year in Scotland, representing around one thousandth of the total number of reports for racist hate crime. The number of reports for stirring up religious hatred under section 6 of the 2012 Act appears to be similarly small.

The (then) Scottish Executive’s Hate Crime Working Group in 2003-4 considered whether the offence of stirring up racial hatred should be extended to other protected characteristics, but concluded that that might not be needed so long as statutory hate crime aggravations were introduced consistently for a range of protected characteristics (as has now been done). The reasoning was that existing offences could then be used together with the statutory aggravations as appropriate.

However, the context of communications is now very different from 2003-4. Use of the internet and social media has increased hugely, and there is clear concern about abusive and threatening communications online, including abuse on grounds of several protected characteristics.

In our recent survey on LGBTI hate crime, online abuse (via email, social media, etc.) is the fourth most prevalent type of hate crime reported, with 21% of LGBTI respondents reporting they have experienced such abuse.


We remain concerned at the differential treatment of different protected characteristics by the stirring up hatred offences including section 6, and by the level of homophobic, biphobic and transphobic and other abuse online. We welcome that Lord Bracadale’s review is considering what the law should be in this area.

It seems to us that many of the criticisms that have been made of the 2012 Act apply to section 1 in particular, and not in the same way to section 6.

6. Do you have a view on the proposed transitional arrangements?
We have no view on the specific transitional arrangements proposed in relation to prosecutions under the 2012 Act.

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

There has been a significant number of prosecutions under the Act, and there is no way of knowing how many of those incidents would otherwise have been prosecuted as other offences. A significant proportion of the prosecutions have related to hatred on grounds of religion, and much of the publicity around the use of the Act has focussed on sectarianism. It could be argued that highlighting the problem is itself beneficial.

Given the evidence cited above that sexual orientation related abuse is common at football matches, we are surprised at the small number of charges under the Act for homophobic behaviour. There were 5 charges in 2015-16 (and only one in the previous three years together), compared to 63 religion-related charges and 14 race-related charges in 2015-16. Consideration needs to be given to why this is – it may be that enforcement attention has tended to focus specifically on sectarianism.

In summary, we think that there is a significant risk that repealing the Act without considering what other measures should be in place could undermine work to tackle sectarianism and other abusive behaviour at football, by generating a message that some of that behaviour has been decriminalised and is therefore acceptable. If the Act is to be repealed, it will be vital to mitigate this risk by sending a very strong message that such behaviour remains unacceptable, and will remain criminal, as a prejudice-aggravated breach of the peace or section 38 offence, for example.

In that context, we suggest that it could be appropriate to delay repealing the Act until Lord Bracadale’s review has reported, and to move forward then with legislative change and other measures.

Equality Network
18 August 2017