Justice Committee

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

Written submission from BEMIS

BEMIS is the national Ethnic Minorities led umbrella body supporting the development of the Ethnic Minorities Voluntary Sector in Scotland and the communities that this sector represents. Our vision is of a Scotland that is equal, inclusive and responsive: A society where:

- people from the diverse communities are valued, treated with dignity and respect,
- have equal citizenship, opportunities and equality of life,
- and who actively participate in civic society.

Hate Crime in Scotland:

BEMIS Scotland in our role as strategic partners to the Scottish Government in the development, engagement and implementation of strategies and policies which look to identify and challenge trends in relation to prejudice and discrimination take a zero tolerance approach to Hate Crime.
We have been key partners in various anti-hate crime initiatives, including the One Scotland campaign, the Commonwealth Games 2014 anti-discrimination campaign and more recently the ‘Community Cohesion and Safety’ aspects of the Race Equality Framework for Scotland 2016-30.

In the coming parliamentary cycle we look forward to progressing alongside multiple stakeholders critical aspects of the Race Equality Framework aimed at progressing substantive, tangible change for communities and individuals who continue to face significant disadvantage due to their ‘colour, nationality or ethnic or national origins’.

It is concerning to note that racially aggravated hate crime in Scotland continues to constitute the overwhelming majority of cases.

Of the 3,349 racially aggravated charges brought in Scotland in 2016/17 - 6 charges, 0.1% were progressed utilising the Offensive Behaviour at Football and Threatening Communications Act (Scotland) 2012.

BEMIS remain deeply sceptical that the Act has contributed to challenging hate crime.

On the contrary the Act virtue of its creation of a new statutory power via ‘Section 1’ covering “sectarianism” and the “full range of offensive behaviours” acknowledged

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2 In 2016/17 Racially Aggravated Hate Crime constituted 3,349 charges – 44% of all Hate Crime charges.
“as not being defined in Scots Law” has catalysed a further confusion within and between individual citizens and key public bodies such as Police Scotland as to what is criminalised by the Act.

The ambiguity inherent in Section 1 of the Act has posed additional human rights challenges within the public discourse surrounding the acts scope and application.

For example while Donnelly and Walsh vs Procurator Fiscal clarified the assessment of a conviction predicated on the specifics (a song) of a Section 1(e) conviction via an Article 7 ECHR breach it did not assess the use of ‘Section 1’ in its entirety. This proved to be confusing for the esteemed Law Lords involved in the case.

Furthermore, some sheriffs articulated in the Scottish Governments 2015 “review” of the act that the implementation of section 1 ‘creates extraordinary restrictions on freedom of thought and expression’. While it is true to say that some sheriffs supported the reach of the law it remains a vulnerability that statutes are subjected to polarising debate within the judiciary, particularly those seeking to precipitate social change. The justiciability of the 2012 Act therefore has witnessed significant variations in interpretation across sheriffdoms and within the specifics of cases.

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4 OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL – Policy Memorandum
5 Liberty’s briefing on the Proposed Football Act (Repeal) (Scotland) Bill
6 STATED CASES BY WILLIAM DONNELLY AND MARTIN WALSH AGAINST PROCURATOR FICAL, EDINBURGH - https://www.scotcourts.gov.uk/search-judgments/judgment?id=e84dd2a6-8980-69d2-b500-ff0000d74aa7
7 ‘the court had some difficulty in grasping the essence of the complaint and how the point might be formulated’ available at: https://www.scotcourts.gov.uk/search-judgments/judgment?id=e84dd2a6-8980-69d2-b500-ff0000d74aa7
8 An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 Pg. 44
In reading the variations of judgements across shirefdoms two require additional comment to illustrate this ambiguity.

Sheriff Norman Ritchie QC in response to the case of ‘Richmond vs Procurator Fiscal’ who had been charged with a section 1 offense for singing the line; “f*** the pope and f*** the queen” found defendant Richmond guilty under the provisions of the act but subsequently fully admonished with the accompanying rationale;

“You are not the sort of person who creates the problem and needs this legislation.”

In contrast, Lord Carloway in his authoritative decision in the high court of the judiciary appeal case of Donnelly and Walsh vs. Procurator Fiscal outlined;

‘The short point here is that it is firmly established in law, and incidentally very well-known, that singing songs of a sectarian nature at football matches is likely to be a criminal act’.

The case of Richmond pre-dates Donnelly and Walsh by two years. Messrs Donnelly and Walsh would be entitled to privately question the variations in judgement and more broadly we should consider what is it about the characteristics of Donnelly and Walsh which deemed them relevant to the legislation when Richmond was not. In both cases it has been clearly identified by the court that each defendant has been found guilty of a “sectarian” crime yet only 2/3rds of the defendants across two cases

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9 Scottish Daily Record – 19th January 2014
require an additional criminal record and punitive measures administered by the state.

In short, the Act has not provided a transparent, accessible or balanced remedy. It has had a negligible to non-existent impact on race hate crime, including homophobia, disability or religious hatred while the reporting procedure of grouping characteristic aggravations alongside ‘breach of the peace’ charges devoid of additional ‘hate crime’ elements fuses two serious yet distinct issues undermining our ability to track trends of, challenge and robustly identify the nature of hate crime in Scotland.

‘The offences set out in the Act extend the reach of the criminal law too far into the realm of free expression without offering meaningful additional protection’

The Repeal Bill

BEMIS support the bill submitted by Mr James Kelly MSP to repeal the Offensive Behaviour at Football and Threatening Communications Act (Scotland) 2012.

The legal ambiguities inherent in the variation of judgements across shirefdoms allied with the ‘breath-taking expansion of power’ identified by leading human rights advocates Liberty indicates that the Act has failed in the purpose that it set out to achieve.

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10 See No. 5 – Point 1. Pg. 3.
11 Liberty’s Stage 3 briefing of OFBA (2012) Scotland , paragraph 2
Simultaneous to the implementation of the ‘Act’ the Scottish Government commissioned ‘Independent Advisory Committee on challenging Sectarianism’ and ‘Independent Advisory Committee on Tackling Hate Crime’ both chaired by Dr. Duncan Morrow have made a series of helpful recommendations and observations which pertain directly to the effectiveness, appropriateness and balance of the ‘Acts’ intent.

This includes a working definition as to what “sectarianism” is;

“Sectarianism in Scotland is a complex of perceptions, attitudes, beliefs, actions and structures, at personal and communal levels, which originate in religious difference and can involve a negative mixing of religion with politics, sporting allegiance and national identifications. It arises from a distorted expression of identity and belonging. It is expressed in destructive patterns of relating, which segregate, exclude, discriminate against or are violent towards a specified religious other, with significant personal and social consequences”\(^{12}\).

The policy memorandum which accompanied the 2012 Act acknowledged that “sectarianism” is a ‘contested’ social concept with ‘no legal character in Scots law’. In light of this it appears to be an unintended contradiction to create an offense with such broad reach which remains a ‘contested’ issue. Furthermore the policy memorandum accompanying the 2012 Act identifies that;

‘These measures are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society’\textsuperscript{13}

Over the lifetime of the Act (2012-2017) 72\% \textsuperscript{14} of section 1 charges have been attributed to citizens under the age of 30 years old. The comparative figure for Section 74 charges with an additional religious aggravation between 2012 – 2017 is 44\% \textsuperscript{15}.

The initial Equality Impact assessment in relation to the 2012 Act acknowledged that children and young people may be disproportionately affected by the Act\textsuperscript{16}.

The significant differentiations between pre-exiting statutory offenses and the ‘long reach’ of the 2012 Act appears to have enveloped significant numbers of young people into the realm of the Criminal Justice System who otherwise would have little or no formal interaction with it.

Given the contested nature of the concept of ‘sectarianism’ and the significant increase of young people charged and prosecuted under the act it is unclear as to how the 2012 has substantively ‘tackled[ing] inequalities in Scottish Society’.

\textsuperscript{13} See Note 4 – Pg. 1
\textsuperscript{14} Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2016-17 (table 4 – Pg. 12)
\textsuperscript{15} Religiously Aggravated Offending in Scotland 2016-17 – Table 2 – Pg.9
\textsuperscript{16} Equality Impact Assessment (EQIA) Offensive Behaviour at Football And Threatening Communications (Scotland) Bill
**Existing legislation:**

Beyond the 2012 Act provisions exist across a suite of “hate crime” focussed legislative tools to deal with prejudiced based aggravations. The statutory criminal aggravations are: (a) racial aggravation in terms of s.96 of the Crime and Disorder Act 1998; (b) religiously aggravated offences are defined as charges that include an aggravation of religiously motivated behaviour in terms of s.74 of the Criminal Justice (Scotland) Act 2003; (c) disability aggravated offences are defined as charges that include an aggravation of prejudice relating to disability in terms of s.1 of the Offences (Aggravated by Prejudice) (Scotland) Act 2009; (d) sexual orientation aggravated offences are defined as charges that include an aggravation of prejudice relating to sexual orientation in terms of s.2 of the Offences (Aggravated by Prejudice) (Scotland) Act 2009; and (e) transgender identity aggravated offences are defined as charges that include an aggravation of prejudice relating to transgender identity in terms of s.2 of the Offences (Aggravated by Prejudice) (Scotland) Act 2009.

**Alternative Approaches:**

BEMIS Scotland considers there has been a constricting conflation of hate crime issues with the criminal law for over a decade in Scotland; with this most clearly illustrated by the only public reporting around hate crime being the annual publication of thinly disaggregated statistics.

BEMIS Scotland considers that Scotland is at a crossroads on hate crime: does it maintain the status quo or does it, as we suspect and have recommended to The
Scottish Government, need to go beyond it in terms of developing an anti-hate crime strategy. This would include but not at all be dominated by the criminal law, so it would bring in issues of prevention, rehabilitation, and community relations. The hate crime review initiated by Lord Bracadale will play a pivotal role in bringing clarity and cohesion to the suite of pre-existing hate crime legislation. It may also enable us to continue to engage strategically with The Scottish Government and institutions, such as Police Scotland, the COPFS, and those working with hate crime survivors, to advise towards Scotland developing an exemplar approach to hate crime that integrates the best in criminal law and positive equality and human rights duties in legislation; the rehabilitation of offenders and community relations in policy.

As a practical example in the context of the 2012 Act BEMIS adopted this approach in responding to a request received via the dedicated FOCUS football unit in relation to the centenary celebrations covering for example, but not confined to the 1916 Easter Rising and commemorations with regards the Battle of the Somme. It had been pre-identified that celebrations of the ‘decade of centenaries’ may take place within various Scottish Football stadiums.

BEMIS provided the following written recommendations;

- celebrations which pertain to 1916 or any relevant commemorations in connection to the ‘decade of centennials’ (http://www.decadeofcentenaries.com/about/) should not be the focus of Police intervention, where a hate crime is not committed (based upon prejudice towards protected characteristics), as these reflect the nature of

- BEMIS identify that implementation of ‘Section 1 of Offensive Behaviour Act’ in relation to decade of centennials may be intersection where issues arise. Individual officers may not be aware of the historical context of songs/banners and unintentionally make arrests based upon misunderstandings. This in turn has potential to undermine community cohesion and place strain on relationship between specific communities/groups and Police Scotland.

To the best of our knowledge while acknowledgement of such events took place within football stadia in Scotland they did so without controversy or the need for Police intervention.

Additionally, directly in relation to the 2012 Act BEMIS have outlined verbally and in writing to Scottish ministers that;

- We are of the view that celebrating an Irish, Scottish or British cultural or political identity does not in itself constitute ‘sectarianism’ or ‘offensiveness’ worthy of criminal proceedings unless there is an unambiguous negative reference to an individual or communities ethnic or religious identity.
Conclusion

BEMIS Scotland acknowledge the principle behind the ‘Offensive Behaviour at Football and Threatening Communications Act (Scotland) 2012’ however we maintain our position articulated throughout the Acts implementation that it is the wrong approach to tackling hate crime in Scotland.

Furthermore we appeal to all concerned stakeholders that virtue of disagreeing with the scope, wording and extent of the acts provisions does not make any given actor ‘pro-sectarian’. This is a rationale we have observed within the public discourse surrounding the Acts assessment and Mr. James Kelly MSP’s current repeal bill.

We share a common aspiration with all political parties, community organisations, football clubs, Police Scotland and the COPFS to help nurture a ‘Scotland that is equal, inclusive and responsive’

We look forward to progressing these policy dimensions with colleagues in the coming months and year.

For the legal, social and human rights based assessment of the 2012 Acts implementation we support James Kelly MSP’s repeal bill and look forward to working with Lord Bracadale’s review to bring clarity and continuity to legislation designed to tackle hate crime in the coming parliamentary period.

BEMIS
18 August 2017