Justice Committee

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

Written submission from the Crown Office and Procurator Fiscal Service (COPFS)

This letter is to serve as a written response on behalf of the Crown Office and Procurator Fiscal Service (COPFS) to the Justice Committee’s call for written evidence on the Offensive Behaviour at Football and Threatening Communications (Repeal)(Scotland) Bill.

COPFS previously provided factual information relating to prosecutions under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2010 (the Act) to inform consideration of issues raised in Mr James Kelly MSP’s consultation document. A copy of that letter is attached at Annex A for reference.

As was observed in that letter, the question of whether or not the Act should be repealed is a matter for the Scottish Parliament, and it would not be appropriate for COPFS to engage with all of the policy issues which arise. This response is supplementary to those set out in the letter at Annex A and comments on some of the issues raised by the Policy Memorandum and the Financial Memorandum in order to inform consideration of the Bill.

Policy Memorandum

Section 1 offences

The Policy Memorandum focuses on section 1(2)(e) of the Act and states that “the terms of this section do not differentiate between the specific behaviour it is targeted at (i.e. those involved in offensive behaviour at football) and a wider category of behaviour that people should be free to engage in (i.e. what may be considered to be offensive to some but would not be so to others)”. The Memorandum also states that this “is liable to be unfair and arbitrary in its application”.

COPFS does not agree that the legislation is applied arbitrarily or unfairly. The legislation itself sets out the legal test which requires to be met before an offence is committed. Section 1(1) of the offence contains a two part test. Firstly, the behaviour must be one of the five different types at section 1(2) and secondly, the behaviour must also incite, or be likely to incite, public disorder (an element of the test which requires to be considered in light of section 1(5)). Both elements in this two-part test must be satisfied before any prosecution can be commenced. A charge cannot be
pursued on the basis that there is behaviour which would be offensive to a reasonable person unless that behaviour is also likely to, or would be likely to, incite public disorder.

COPFS has prosecuted criminality in connection with regulated football matches involving violence, mass disorder, vandalism, threatening behaviour, and hate crime. Most relevant cases which are prosecuted do not rely on the terms of section 1(2)(e). In 2016/17 such cases made up just 10% of all relevant charges reported to COPFS. Prosecutions are much more likely to relate to behaviour which is threatening under section 1(2)(d), such as some of the behaviour witnessed at the Scottish Cup Final in May 2016. 79% of the relevant charges reported to COPFS in 2016/17 related to such threatening behaviour.

The legislation does not particularise the “behaviour that a reasonable person would be likely to consider offensive”. It is not unusual for legislation to contain a test in relatively broad terms, which requires to be applied to the particular circumstances of each case. Examples include section 2 of the Road Traffic Act 1988 (dangerous driving); and section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening and abusive behaviour likely to cause a reasonable person fear and alarm).

In William Donnelly and Martin Walsh v Procurator Fiscal, Edinburgh [2015] HCJAC 35 (which concerned the singing of the song “the Roll of Honour”), the Appeal court rejected the argument that the legislation does not provide sufficient clarity to accused regarding the type of behaviour which is criminal under this section, in the following terms:

“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. In this case the song celebrates activities of members of proscribed terrorist groups. It cannot come as a surprise that the singing of such a song by a significant group of fans at a match will be regarded by a reasonable person as being both threatening and offensive or that, but for the fact that football fans in Scotland are, as noted above, relatively inured to this type of conduct, likely to incite public disorder. There is no need for proof or knowledge that the particular supporter was aware of the law or the status of the song. The appellants were well aware of what they were engaging in.”

The reasonable person test in section 1(2)(e) is an objective rather than a subjective test, and involves an assessment, by a judge or jury, as to whether a reasonable person would be likely to find the behaviour in question offensive. An objective test which relies on the concept of a reasonable person is used in other areas of the law (e.g. section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, supra).
It is irrelevant to the assessment of sufficiency of evidence whether the person accused of the crime is a ‘football fan’. Section 1 of the Act is used to prosecute individuals who engage in criminal behaviour where football is simply the context for the behaviour - whether that is in a football stadium or elsewhere. It is used to address criminal behaviour which has a negative impact on genuine football fans and on any person who witnesses or is subject to it whether that is in the stadium, on a train or outside their home.

The criminal justice system imposes a number of checks to ensure that legislation is not applied arbitrarily or unfairly. Police Scotland enforces the legislation subject to the Lord Advocate’s guidelines. Prosecutors, on receipt of a report from the police, give careful consideration to each case and assess whether there is a sufficiency of evidence to meet the statutory test and whether it is in the public interest to prosecute. Ultimately, an independent judge or jury assesses the evidence and applies the terms of the legislation. The first instance decision may be appealed to an appellate court.

**Section 6 offences**

Section 6 creates an offence of threatening communications which does not require the offending behaviour to be committed at, or in connection with, a football match. Section 6 has been used successfully to prosecute individuals who have made serious threats of violence against members of the public, including threats of murder, and individuals who have made threats towards Jewish, Muslim and Catholic communities designed to stir up hatred on the basis of religious grounds. It has also been used successfully to prosecute accused who have used social media to post threatening material designed to stir up religious hatred and which referenced the proscribed terrorist organisation ISIS.

Repeal of Section 6 may leave prosecutors less able in future to secure convictions in respect of the type of threatening behaviour described in the preceding paragraph. There has been a conviction for a Section 6 offence which, given the evidence available and due to the extraterritorial aspect of the Act, would not have been capable of prosecution using any other existing common law or statutory offence. Further, the principal potential alternative offence to section 6 – a charge under section 127 of the Communications Act 2003 – is not capable of being prosecuted on indictment.

**Tackling sectarianism**

The extent to which the legislation has assisted in tackling sectarianism is not an issue upon which COPFS can comment; other than to observe that an assessment
of that question cannot be based solely on statistical data relating to prosecutions under this section. Only a small proportion of the charges reported under Section 1 in 2016/17 involved sectarianism; the Act has, since its enactment, enabled the prosecution of a range of criminal behaviour.

Availability of other charges

The Policy Memorandum states, as one of its arguments for repeal, that the Act was not needed as “existing laws already made it possible for offenders to be brought to justice.” COPFS agrees that there are various other potentially relevant offences which may apply to behaviour which is currently prosecuted under Section 1 of the Act. However, as noted in the letter at Annex A, there is some behaviour which may be prosecuted under Section 1 of the Act which would not be capable, or would not be securely capable, of being prosecuted under any other provision. In particular, the Act has extraterritoriality provisions which differentiate it from the existing law. Other potentially relevant provisions contain different evidential tests. For example, the offences of breach of the peace or a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 require the prosecutor to demonstrate that the conduct would cause fear and alarm or would cause a reasonable person fear and alarm - which is not an element in the test which falls to be met under section 1. As the former Lord Advocate observed prior to the enactment of the legislation, there is a benefit in not having to “shoehorn” cases into the existing law.

Further, even where the same behaviour could potentially be prosecuted using another statutory offence, the maximum sentence available to the courts on conviction would not necessarily be the same. Offences currently prosecuted using Section 6 and involving the sending of threatening messages by text or the use of social media, could, if the Act were repealed, potentially be prosecuted in whole or in part using section 127 of the Communications Act 2003. However, section 127 offences carry a maximum sentence of 12 months imprisonment whilst section 6 offences carry a maximum sentence of five years imprisonment. The Crown has successfully prosecuted a case under section 6 which resulted in a sentence of 16 months imprisonment, reduced from 24 months, to take account of an early plea.

It is not uncommon for a new statutory offence to be created notwithstanding that the same offending behaviour could be prosecuted, in whole or in part, using existing offences. For example the Emergency Workers (Scotland) Act 2005 introduced a number of new offences including assaulting, obstructing or hindering health workers in hospital premises, which would, in most if not all instances, have been capable of prosecution using the existing common law (principally the common law of assault and breach of the peace). The enactment of new legislation and the repeal of existing legislation is a matter for Parliament but this example is mentioned to show that an overlap between existing law and a new statutory offence is not something which is unique to the Act currently being considered for repeal.
Financial Memorandum

The Financial Memorandum states (at paragraph 10) that “it is not possible to say definitively what savings will result from the repeal of the 2012 Act; however it is possible to set out an estimate of the costs that have been incurred in implementing the 2012 Act since it came in to force”. However, as we have observed above, there are other potentially relevant offences which may be applicable; and, to the extent that cases currently prosecuted under the 2012 Act would have been prosecuted by reference to other offences, costs incurred in implementing the 2012 Act would have been incurred in any event even if the Act had not been available. No additional costs have been incurred by COPFS as a result of existing members of staff taking on responsibilities as Football Liaison Prosecutors.

Repeal of the 2012 Act would have a one off cost not captured in the Financial Memorandum – namely the cost of reviewing pending cases brought under the 2012 Act, in order to assess whether or not the case may and should continue to be prosecuted by reference to another offence. It is not anticipated that this cost will be significant.

Crown Office and Procurator Fiscal Service
25 August 2017

Annex A – letter to James Kelly MSP – attached on next page
Dear Mr Kelly,

This letter is to serve as a written response on behalf the Crown Office and Procurator Fiscal Service (COPFS) to the Consultation entitled “Proposed Football Act (Repeal) (Scotland) Bill”, dated August 2016. The purpose of this response is to provide some factual information relating to prosecutions under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the Act) with a view to informing consideration of the issues raised in the Consultation document.

The Scottish Government statistics record that in the last reporting year (2015/16) 287 charges were reported to COPFS under section 1 of the Act. These charges related to 169 separate incidents. Since the Act came in to force, in March 2012, there had, by the end of the last reporting year, been, in aggregate, 1,083 charges arising from 607 incidents in over four full seasons of football.

These charges have included behaviour such as engaging in large scale organised violence in public places, abusing or attacking football fans or those employed at matches and chanting or singing offensive terms. 188 (66%) of the charges reported under section 1 in 2015-16 related to ‘threatening behaviour’, where “the accused threatened another person/people; it involved the accused acting in a disorderly or aggressive manner, making threats or challenging others to fight, or where they engaged in fighting.”
The offences prosecuted under the Act have not been restricted to football grounds. 47% of the charges reported in 2015-16 were for offending taking place on ‘main streets’ or on ‘public transport’ as opposed to inside a football ground – conduct which is liable to have affected people going about their daily lives. The Act also covers people who have no intention of attending a football match but target those who are on their way to, or on their way home from, a game.

The statistics perhaps do not present the full picture in relation to the sentences imposed on people convicted under the legislation. This is because the statistical reports represent only the main disposal or outcome in a case. It is very common that, in addition to the main disposal, a Football Banning Order (FBO), preventing the offender from attending games, will be imposed by the Court in addition to the main disposal. Many of these FBOs are not reflected in the numbers published; but the imposition of these orders nevertheless play a role in deterrence, preventing reoffending and providing a safe atmosphere in which people can travel and support their team.

When a case is reported to COPFS, it will be considered on the basis of the Scottish Prosecution Code. The prosecutor must address whether there is sufficient evidence and whether a prosecution is in the public interest. Prosecutors will consider all the relevant factors in any given case, including the nature of the offence, the potential sentencing options and the circumstances of the accused before making any decision about whether action is appropriate and, if so, whether that action should be prosecution.

When the Act was passed the previous Lord Advocate published Guidelines. There are some features of that Guidance which are worth highlighting to help explain the approach taken by police and prosecutors.

- The offence under section 1 does not refer specifically to sectarian behaviour – which is a term not defined in Scots law. The offence instead refers to behaviour which expresses, or is motivated by religious or other hatred, behaviour which is threatening, and behaviour which a reasonable person would be likely to find offensive and is inciting, or would be likely to incite, public disorder.
• It is a matter for the judgement of a police officer at the time of the commission of the offence, having regard to the nature and words of the song, including any non-standard lyrics or "add-ons", the surrounding circumstances and the context in which it is being sung, to determine whether a song or lyrics are threatening or expressing hatred.

• In order for a criminal offence to be committed it is not sufficient that an individual or individuals are (or claim to be) offended by a song or other behaviour; the behaviour must be of a character which a reasonable person would be likely to consider offensive. Officers should have regard to proportionality, legitimate football rivalry and common sense when assessing whether the conduct would cause offence to the reasonable person.

The Scottish courts have had an opportunity to consider and test the legislation and its application by police and prosecutors in a number of key written judgements on the legislation;

(A) In the case of Procurator Fiscal, Dingwall v Joseph Cairns [2013] HCJAC 73, Lady Paton, Lord Brodie and Lord Philip considered an appeal taken by the Crown against a decision by a Sheriff that there was no case to answer where an individual had sung the songs “the Roll of Honour” and “Boys of the Old Brigade”. The accused claimed that there was no possibility that the singing of those songs would be likely to cause public disorder in the circumstances of the case. The Crown appeal was upheld with the decision being overturned. The Court clarified that “where behaviour falls within any of the categories specified in section 1(2) it is sufficient for conviction that persons likely to be incited to public disorder would be likely to be incited to public disorder by the particular behaviour, whether or not they were present in sufficient numbers and whether or not they were subject to measures put in place to prevent public disorder.”

(B) In the case of William Donnelly and Martin Walsh v Procurator Fiscal, Edinburgh [2015] HCJAC 35 the then Lord Justice Clerk (Lord Carloway), Lord Bracadale and Lord Boyd of Duncansby considered an appeal by two individuals who had been convicted of singing “the Roll of Honour”. The appeal was based on an argument that the Act was not sufficiently clear and that prosecuting the individuals infringed their rights under Article 7 of the European Convention on Human Rights (ECHR).
The Appeal Court was firm in its rejection of the argument that the Act was unclear and did not meet the required standards set by the ECHR. The Court stated: “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. In this case the song celebrates activities of members of proscribed terrorist groups. It cannot come as a surprise that the singing of such a song by a significant group of fans at a match will be regarded by a reasonable person as being both threatening and offensive or that, but for the fact that football fans in Scotland are, as noted above, relatively inured to this type of conduct, likely to incite public disorder. There is no need for proof of knowledge that the particular supporter was aware of the law or the status of the song. The appellants were well aware of what they were engaging in.”

(C) The same song, “the Roll of Honour”, was sung by the accused in the case of Gary Moore PF v Procurator Fiscal, Dundee [2014] HCJAC. He was convicted under the Act. Both the Sheriff at trial and the Appeal Court concluded that in singing the song he had engaged in conduct which was likely to cause disorder and was provocative. He was banned from attending football matches for one year as a result.

(D) The extraterritorial effect of the legislation was considered in the case of Procurator Fiscal, Glasgow v Jordan Robertson. This case involved one of four individuals who were reported to COPFS for offences under section 1 which took place during a Berwick Rangers v Rangers match in February 2013, outside Scottish territorial jurisdiction. There was widespread coverage of the incident at the time, particularly as offensive singing was heard on the live television broadcast of the match. The Crown relied on section 10(1) of the Act to establish given that the accused was habitually resident in Scotland. In his written determination the Sheriff confirmed that the extraterritorial power in the Act was not outside the legislative competence of the Scottish Parliament and was not contrary to the Scotland Act 1998.

It is worth observing that had the Act not been in force or had it not included section 10(1), the behaviour in that case could not have been prosecuted in Scotland because offences such as breach of the peace and section 38 of the
Criminal Justice and Licensing (Scotland) Act 2010 do not have extraterritorial effect.

There have not been any published decisions commenting on the terms of section 6 of the Act but this provision also benefits from an extra territorial provision which allows prosecutors to address behaviour which other offences would not be able to capture.

In the period since the Act has been in force there has been considerable Parliamentary scrutiny of the way it has operated. The Justice Committee looked carefully at the Operation of the legislation on a number of occasions in 2013 and 2014, taking evidence from the Cabinet Secretary. The Committee wrote twice to the previous Lord Advocate and he provided detailed replies to those requests in May and November 2013.

On the 12th June 2015 the Scottish Government published a Report on the Operation of the Offences as required by the terms of the Act. Accompanying that report was a 90 page evaluation document compiled by academics from the University of Stirling, ScotCen Social Research and University of Glasgow on the section 1 offence, and a 36 page evaluation document on the section 6 offence. These documents were based on input from criminal justice practitioners and football fans.

Most recently, in January 2016 the Justice Committee considered the terms of a petition requesting a full and comprehensive review of the legislation and received written information from Police Scotland and the Scottish Government.

Cases continue to be reported to prosecutors across Scotland on a weekly basis during the football season and, where the prosecution test is met, charges under the Act are brought. As has been mentioned above, there are various sources of information from people involved in the criminal justice system which can help to explain what offending this Act is used to prosecute, where it takes place, who might be subjected to it, how prosecutors and the judiciary interpret the terms of the legislation and the way that challenges to the terms of the legislation have been considered and answered in the Appeal Court. COPFS continually reviews and
updates guidance and practice in relation to all offences, and this legislation is no different.

The question of whether or not the Act should or should not be amended or repealed would, if the Consultation were to be taken forward to a Bill, be a matter for the Scottish Parliament; and it would not be appropriate for COPFS to engage in detail with the policy questions raised by the Consultation. However there is value in making the following points;

First, the Act has been successfully used to prosecute a variety of criminal behaviour and the Courts have handed down sentences which reflect the gravity of individual offences, including, where cases merit it, sentences of imprisonment. Secondly, the Consultation correctly observes that there are various other potentially relevant offences. Others will no doubt form a view as to whether there are, nevertheless, benefits in having a specifically targeted offence, and disadvantages in repealing that offence. There is, though, some behaviour which may be prosecuted under section 1 which would not be capable, or would not be securely capable, of being prosecuted under any other provision. Reference has been made above to the extraterritorial effect of the legislation. It is also possible to envisage behaviour which would be offensive to the reasonable person and which would cause or risk public disorder such as to fall within section 1 of the Act, but which might not constitute a breach of the peace or fall within section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The previous Lord Advocate, in his evidence to the Justice Committee, referred to the benefit of not having to “shoe horn” cases into the existing law. Fourthly, although the number of prosecutions under section 6 of the Act has been small, this should be considered separately from section 1. The principal potential alternative to a charge under section 6 would be a charge under section 127 of the Communications Act 2003, but that offence is triable only on summary complaint, whereas a charge under section 6 may be prosecuted on indictment if the circumstances are sufficiently serious.

Hopefully the information included is helpful in the consideration of the Consultation responses and for assistance the main documents referred to above have also been provided.
Yours faithfully,

Catriona Dalrymple  
Head of Policy and Engagement Division  
Crown Office and Procurator Fiscal Service