



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

Written evidence to the Justice Committee

Scottish Human Rights Commission

November 2017

Introduction

1. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit evidence to the Justice Committee on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Bill) at stage 1.
2. The Commission is supportive of the overall policy objective of the Act, namely preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. Tackling behaviour that incites hate and violence is an important element in the drive towards creating a society in Scotland where people live together respecting one another.
3. Two major UN human rights instruments,¹ oblige contracting parties to prohibit hate speech. Consequently, governments have the obligation to interfere with a person's freedom of expression if related to inciting hatred and hostility on the basis of a distinction between social classes, ethnicities and religions. However, "every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued."²
4. The European Court of Human Rights recognises that bias-motivated crimes are 'particularly destructive of fundamental rights' and should be investigated and prosecuted accordingly.³ The European Convention on Human Rights (ECHR) protects freedom of expression and there is a substantial body of jurisprudence regarding this fundamental right. The Court has described freedom of expression as "one of the basic conditions for the progress of democratic societies and for the development of each individual."⁴ The ECHR is directly enforceable in Scots law by virtue of the Human Rights Act 1998 and under the Scotland Act 1998. The UK has ratified a number of other international human rights treaties,

¹ ICCPR Article 20: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" ; and ICERD Article 4.

² *Handyside v. the United Kingdom*, judgment of 7 December 1976, para 49.

³ *Intentional and Others v. Georgia*, ECtHR 12 May 2015 (Application no. 73235/12)

⁴ *Ibid* footnote 2

although not directly enforceable, the Scottish Ministers are obliged to implement them.⁵

5. The Commission submitted evidence to the Justice Committee in August 2011, setting out particular concerns around the then Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, in particular the legal certainty and foreseeability of some of its provisions. Those concerns remain relevant today.

Freedom of Expression

6. The Act raises important considerations around the right to freedom of expression. The right to freedom of expression, protected by Article 10 of the ECHR, is of fundamental importance. The European Court of Human Rights (the “ECtHR”) has repeatedly stated that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual’s self-fulfilment.⁶ Freedom of expression is not only vital in its own right; it also plays a crucial role in the protection of other rights such as freedom of assembly. The right to freedom of expression extends not just to information or ideas that are favourably received or regarded as inoffensive, but also those that offend, shock or disturb.⁷
7. The right to freedom of expression is not absolute. Interferences with the exercise of freedom of expression can be acceptable provided they: are prescribed by law; pursue a legitimate aim (such as the prevention of public disorder); and are necessary in a democratic society.⁸
8. Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by parliamentary debates and votes.⁹ In a democratic nation as ours, it would be for the Scottish Parliament to address these questions of balance and legitimacy.
9. The Committee may find a brief description of the three requirements for a legitimate interference with the exercise of freedom of expression mentioned above useful. In relation to the first requirement, the ECtHR has consistently expressed that is not sufficient that the interference is prescribed by law. The law itself, adopted by the Parliament, has to be public, accessible, predictable and foreseeable.¹⁰

⁵ paragraph 7 of schedule 5 of the Scotland Act 1998

⁶ *Lingens v. Austria*, 1986; *Sener v. Turkey*, 2000; *Thoma v. Luxembourg*, 2001; *Maronek v. Slovakia*, 2001; *Dichand and Others v. Austria*, 2002

⁷ *Handyside v UK*, ECHR 1976, para 49

⁸ Article 10(2) ECHR: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

⁹ Human Rights handbooks, No. 2. *Freedom of Expression*. Directorate General of Human Rights, Council of Europe, 2004, p. 31

¹⁰ *Sunday Times v UK*, ECHR 1979

10. The second requirement refers to the list of the possible grounds for restricting the freedom of expression, which is an exhaustive inventory set down in Article 10(2) of the ECHR. The test for whether any particular interference is “necessary in a democratic society” (the third requirement) involves consideration of whether it is justified by a pressing social need and the application of the principle of proportionality,¹¹ meaning; ‘were the means proportionate to the aim pursued?’ In addition, the interference must be the minimum necessary to achieve the aim pursued.¹² It is not sufficient that the measure is ‘useful’, ‘reasonable’ or ‘desirable’.¹³ Similarly, there must be ‘relevant and sufficient reasons’ for the restriction.
11. Every restriction on the right to freedom of expression should be carefully considered in the light of the above conditions. It is important that the Parliament is assured that all three requirements are fulfilled, so the interference with the right to freedom of expression will be considered legitimate.
12. Limitations to this right can also emerge from Article 17 of the ECHR, which prohibits the abuse of any Convention right to undermine other rights set out in the Convention. The Convention cannot therefore be used to protect speech which strikes at the very heart of Convention’s underlying values.¹⁴

Provisions of the Act

13. The Commission is concerned at how broadly Section 1 “*Offensive Behaviour at regulated football matches*” has been drafted. To provide legal certainty, and in considering the specific aim of this Act in particular, definitions must be neither over-inclusive nor under-inclusive and must be applicable insofar as possible to all individuals equally.
14. The Commission is concerned with this type of provisions in the Act:
- Section 1(2)(e) which covers “*other behaviour that a reasonable person would be likely to consider offensive*”.
 - Section 1(5)(b) which provides that “*behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that persons likely to be incited to public disorder are not present or are not present*”
15. The Commission is concerned at how broadly Section 2 “*Regulated football match: definition and meaning of behaviour “in relation to” match*” is drafted. In particular, section 2(4) (a), which states:
- “*A person may be regarded as having been on a journey to or from a*

¹¹ *Observer and Guardian v UK*, ECHR 26 Nov 1991

¹² *R v Shayler* [2003] 1 AC 247 and *R v Home Secretary (ex parte Simms)* [2000] 2 AC 115

¹³ See *Dudgeon v UK* (1981) 4 EHRR 149

¹⁴ Amongst others: Justice, non-discrimination, tolerance and peace. See also: *M’Bala M’Bala v. France* ECHR 354 (2015)

regulated football match whether or not the person attended or intended to attend the match.”

16. The law on this needs to be clear and ascertainable. While the Scottish Government argued that “people know what is reasonable,”¹⁵ and the commission agrees with it, the proper question around this area is whether people know what is offensive? The level of public and media debate over the Act brings into question whether the Act as currently drafted is precise and clear enough to allow a person to know what the law is and what is being criminalised.
17. The evidence presented to this Committee during its consideration of the present Bill only serves to demonstrate this further. The Commission is concerned that catch-all provisions may fail to achieve the principle of legal certainty required and may fail to strike the proper balance with the right to freedom of expression.

Legal Certainty

18. The core principles of the rule of law, legality and predictability of the law, are embodied in Article 7 of the ECHR. Article 7 reads:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

19. The ECtHR has described the purposes of Article 7 as being to prevent arbitrary prosecution, conviction or punishment.¹⁶ To achieve this, Article 7 provides that criminal law must comply with the principles of reasonable certainty and foreseeability.¹⁷ The ECtHR has stated:

*“an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable”.*¹⁸

20. The Grand Chamber of the ECtHR has found a violation of Article 7 where the applicable law was not formulated with sufficient precision.¹⁹ It is equally important to note that compliance with this principle facilitates the work of the Police Scotland, COPFS and the Scottish courts to enforce and implement this legislation.

The Requirement of Clear Legal Basis and Deprivation of Liberty

¹⁵ Policy Memorandum to the Act, para 6

¹⁶ *S.W. & C.R. v United Kingdom* (1995) 21 EHHR 363

¹⁷ *Ibid.* See also *Rotaru v Romania*, Application no. 28341/95

¹⁸ *Kokkinakis v Greece*, 1993 ECHR 20

¹⁹ *Kafkaris v Cyprus*, Judgment of 12 February 2008, para. 139

21. Proper consideration should be given to Article 5 of the ECHR, which protects the right to liberty and security. Under Article 5(1), deprivation of liberty requires two key elements:

- A clear legal basis – in this case the ECtHR refers back essentially to national law.²⁰
- Must meet one of six sets of circumstances set out in paragraphs 5(1) (a) to (f).

22. In addition to compliance with national law, any deprivation of liberty must be in accordance with the Convention itself in order to protect the individual against arbitrariness.²¹ The requirement of lawfulness under Article 5 has been interpreted as referring to both procedural and substantial rules of law.²² The lawfulness requirement refers, *inter alia*, to the quality of national law, meaning that this should be “*sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*”²³

Conclusion

23. At the time of the Act’s original passage through Parliament, the Commission welcomed the Act’s policy intention, and the Commission is still supportive of the overall policy intent. However, in light of the general nature of a number of sections contained in the Act as set out above, the Commission considers there is a strong likelihood that key provisions of the Act fall short of the principle of legal certainty and the requirement of lawfulness.

24. The Commission urges the Committee to consider fully whether the provisions of the Act are in conformity with the ECHR, and particularly that they are clear, precise and foreseeable in their practical application.

25. It is important that the Act strikes the right balance between the protection of public order and equality in one hand and freedom of expression on the other. The provisions of the Act must also be considered in terms of whether they are necessary and proportionate to the aim of prevention of offensive behaviour in relation to football matches.

About the Commission: *The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.*

²⁰ See *Ocalan v Turkey*, ECtHR, Application no. 46221/99

²¹ See *Kurt v Turkey* [1998] ECHR 44

²² See *Ocalan v Turkey*, ECtHR, Application no. 46221/99

²³ *JÉČius v Lithuania*, ECtHR, Application no. 34578/97