

This document relates to the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (SP Bill 19) as introduced in the Scottish Parliament on 21 June 2017

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

Explanatory notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, introduced in the Scottish Parliament on 21 June 2017. They have been prepared by the Non-Government Bills Unit on behalf of James Kelly, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 19–LC);
- a Financial Memorandum (SP Bill 19–FM);
- a Policy Memorandum (SP Bill 19–PM).

3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

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The Bill

4. The purpose of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (“the Bill”) is, as the name suggests, to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“the 2012 Act”).

5. The Bill is in seven sections. The repeal itself is in section 1. Section 2 deals with the effect of repeal on the ability of the courts to convict people for offences under the 2012 Act. Section 3 makes transitional provision in respect of people alleged to have committed such offences but not convicted at the time of repeal, and saves the 2012 Act for a number of purposes, including sentencing of those convicted before repeal, and appeals. Section 4 repeals a provision relating to fixed penalties that was inserted by the 2012 Act into the Antisocial Behaviour etc. (Scotland) Act 2004. Section 5 provides definitions of key terms, while sections 6 and 7 deal with commencement and short title.

Commentary on sections

Section 1

6. Section 1 repeals the 2012 Act in its entirety, with effect from the day after the Bill, if passed, receives Royal Assent (see section 6).

Section 2

Subsection (1) – no further convictions after relevant date

7. Under subsection (1) there are to be no further convictions for a “relevant offence” (that is, an offence under section 1 or section 6 of the 2012 Act – see section 5 of the Bill) on or after the “relevant date” (i.e. the day after Royal Assent – see sections 5 and 6).

8. This involves some departure from the default provision that is set out in section 17 of the Interpretation and Legislative Reform (Scotland) Act 2010. Section 17 states that repeal of an Act of the Scottish Parliament does not affect liability to a penalty for an offence committed prior to repeal, and that the repealed Act continues to have effect for the purpose of investigating an offence, bringing or completing proceedings and imposing a penalty.

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9. Under the default (section 17) arrangements, in other words, it would continue to be possible to convict people for a 2012 Act offence for an indefinite period after the Act was repealed, so long as the behaviour that constituted the offence took place before the date of its repeal. Under section 2(1), by contrast, a person who carried out behaviour of the sort criminalised by the 2012 Act can, from the date the repeal takes effect, no longer be convicted of a 2012 Act offence. (This does not, however, prevent the person being convicted of another offence constituted by the same behaviour, such as a breach of the peace.)

10. Section 2(1) is subject to subsection (3), which allows for specific exceptions related to appeals. These are explained further below.

Subsection (2) – application to new prosecutions brought following appeal

11. The main application of subsection (1) is to cases arising from pre-repeal behaviour which have not yet been disposed of by the relevant date. However, subsection (2) makes clear that it also applies to new prosecutions brought (further to an appeal) either before the relevant date, on that date or after it, under either section 119 (in solemn cases, prosecuted on indictment) or 185 (in summary cases) of the Criminal Procedure (Scotland) Act 1995.

12. A new prosecution under section 119 may result from the High Court disposing of an appeal against conviction by quashing the conviction given by the trial court and granting the Crown authority to bring a new prosecution (under section 118 of the 1995 Act). It may also result from the High Court disposing of an appeal against acquittal by quashing the acquittal on the basis that it was wrong in law, but granting the Crown leave to bring a new prosecution charging the accused with the same offence or with a similar offence arising out of the same facts (under section 107E of the 1995 Act).

13. Similarly, section 185 of the 1995 Act allows a new prosecution to be brought when the Sheriff Appeal Court disposes of a “stated case” by setting aside the verdict of the inferior court and grants authority for a new prosecution.

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14. Accordingly, if a person is convicted (or acquitted) of a 2012 Act offence before the “relevant date” (i.e. the date on which the 2012 Act is repealed), the convicted person (or the Crown) appeals and the appeal court, in disposing of the appeal, grants authority for a new prosecution, then any such new prosecution – whether it is brought before, on or after the relevant date – cannot result in the person being convicted (on or after the relevant date) of the 2012 Act offence.

Subsection (3) – continued possibility of conviction following Crown appeal against acquittal

15. As noted above, subsection (1) is subject to subsection (3). This provides that a person can still, on or after the relevant date, be convicted of, or found to have committed, a 2012 Act offence in certain specific circumstances arising from an appeal against an acquittal (where that acquittal was made prior to the relevant date).

16. By virtue of subsection (3)(a), the appeal court (the High Court or the Sheriff Appeal Court – see section 5) may still dispose of that appeal by convicting the person, on or after the relevant date, of a 2012 Act offence, or by making a finding, on or after that date, that the person committed the offence.

17. By virtue of subsection (3)(b), where the appeal court disposes of the appeal by remitting the case to an inferior court with an opinion, direction or instruction, the inferior court may still convict the person, on or after the relevant date of a 2012 Act offence, or make a finding, on or after the relevant date, that the person committed the offence.

Subsection (4) – limitation of subsection (3) to pre-repeal acquittals

18. Subsection (4) makes clear that – as noted in paragraph 15 above – a post-repeal conviction following an appeal against acquittal is permitted by subsection (3) only if the acquittal was made prior to the relevant date.

Section 3

19. Subsection (1) makes clear that the Bill does not remove the liability of a person convicted of a 2012 Act offence to a penalty for that offence, provided that the conviction either took place before the relevant date, or by

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virtue of section 2(3) (i.e. a post-repeal conviction following an appeal against acquittal).

20. Subsection (2)(a) “saves” the 2012 Act for the specific purpose of allowing a person convicted of a 2012 Act offence (before the relevant date, or under section 2(3)) to be sentenced for that offence (after that date).

21. Similarly, subsection (2)(b) saves the 2012 Act for the purposes of an appeal. The saving allows new appeals to be brought (and disposed of) on or after the relevant date; it also allows appeals that were brought before that date to be disposed of on or after it.

22. Subsection (2)(c) saves the 2012 Act for the purpose of maintaining the right of a person to petition the *nobile officium* in respect of a 2012 Act offence. This is an equitable jurisdiction of the High Court that allows it to mitigate the harshness of the law or provide a remedy where none exists, and includes the ability to avoid what would otherwise be an oppressive or excessive sentence.

23. Subsection (3) makes clear that the saving provisions set out in this section are not to provide a back-door route to further convictions for 2012 Act offences on or after the relevant date. The only circumstances, therefore, in which further convictions are permitted (on or after the relevant date) are those expressly provided for in section 2(3).

Section 4

24. Section 3 of the 2012 Act inserted a reference to offences under section 1 of that Act into the table of fixed penalty offences in section 128 of the Antisocial Behaviour etc. (Scotland) Act 2004. The effect of this was to allow section 1 offences to be dealt with by the issuing of a fixed penalty notice, payment of which discharges the person’s liability to prosecution. Under section 131 of the 2004 Act, a person given a fixed penalty notice who, within a period of 28 days, neither pays the penalty (currently £40) nor opts to be tried for the offence becomes liable to a sum of one and a half times the original penalty (i.e. £60).

25. The Bill, by repealing the 2012 Act, removes (from the relevant date) the ability to issue any further fixed penalty notices for 2012 Act offences.

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Section 4 is a consequential provision to repeal the entry in section 128 of the 2004 Act.

Section 5

26. The definition of “High Court” adopts that used in the Criminal Procedure (Scotland) Act 1995 (section 307). Accordingly, it means “High Court of Justiciary” and includes any court held by the Lords Commissioners of Justiciary, or any of them.

27. The definition of “relevant offence” includes both an offence under section 1 of the 2012 Act (offensive behaviour at a regulated football match) and an offence under section 6 (threatening communication).

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