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Liberty's briefing on the Proposed Football Act (Repeal) (Scotland) Bill

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Introduction

1. Liberty welcomes the opportunity to respond to this consultation, led by MSP for Glasgow James Kelly, on a draft proposal for a bill to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the Act"). We submitted two briefings on the Act during its passage through Parliament, one at Stage 2 and one at Stage 3 of committee proceedings (November and December 2011). We still believe, as we did then, that the Act poses a threat to human rights. Liberty recognises the importance of protecting individuals from violence and criminality motivated by discrimination and hate, but the criminal law provides numerous responses to such deplorable and damaging conduct without the offences set out in the Act. The common law offence of breaching the peace, Public Order Act offences relating to the incitement of racial hatred,[1] offences of pursuing a racially-aggravated course of conduct which amounts to harassment[2] and offences aggravated by religious prejudice[3] are part of this strong criminal law response. The offences set out in the Act, however, extend the reach of the criminal law too far into the realm of free expression without offering meaningful additional protection.

2. The draft proposal lodged by Mr Kelly – the Proposed Football Act (Repeal) (Scotland) Bill – aims to repeal the Act and with it get rid of the two criminal offences of "*offensive behaviour at regulated football matches*" (section 1) and "*threatening communications*" (section 6).[4] In our 2011 briefings, we expressed concern at the nature and scope of these two offences. We noted the chilling effect that both offences – as formulated in the Act - would have on free speech, whether on the freedom to sing an age-old anthem or express and exchange new ideas.[5] We were particularly critical of the introduction by amendment of sections 5 and 9 of the Act (at the time, clauses 4A and 6A of the Bill), allowing for the conduct element of the offences to be varied by statutory instrument, which we described as a "*breathtaking expansion of power*".[6] We proposed amendments to tighten up the drafting of both offences and address our concerns. These amendments were not adopted when the Bill was passed.

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1 Part III of the Public Order Act 1986 (sections 18 to 23).
2 Section 33 of the Crime and Disorder Act 1998.
3 Section 74 of the Criminal Justice (Scotland) Act 2003.
4 James Kelly MSP, *Proposed Football Act (Repeal) (Scotland) Bill: A proposal for a Bill to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012*, 27 July 2016.
5 *Liberty's Stage 3 briefing on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill*, December 2011, paragraph 4.
6 *Liberty's Stage 3 briefing*, paragraph 2.

3. The narrow margin by which the Bill was passed (by 64 votes to 57), and the fact that all parties apart from the SNP voted against it, reflect the unpopular nature of the Act and the dangers it poses for freedom of expression. As Mr Kelly points out in his consultation paper, the Act has received negative attention from a wide spread of civil society, including legal practitioners, academics and football supporters, both before and after coming into force.[7]

4. The concerns that we expressed in our previous briefings still stand, and are expressed again below. Moreover, the way that the Act is being applied in practice shows that the fears we expressed in 2011 were justified. Minimising violence at football matches or otherwise is of course an important and laudable objective, but this Act was an ill-thought through response to a turbulent 2010/11 football season.[8]

The section 1 offence (sections 1 to 5 of the Act)

5. The section 1 offence criminalises behaviour if it is likely, or would be likely, to incite public disorder where that behaviour relates to a regulated football match involving a Scottish football team.[9] The offence is punishable by up to five years in prison.[10]

6. The conduct element of the offence can be constituted by an act or thing said or otherwise communicated (e.g. on a t-shirt or banner) as a single act or course of conduct.[11] Behaviour will fall within the offence provisions if disorder would be likely to occur but for the fact that there are measures in place to prevent it, and even where people would be likely to be incited but are not actually present or are not present in sufficient numbers.[12] The offence targets behaviour which:

- expresses hatred about or stirs up hatred against an individual, or a group of people, because they are a member of or are presumed (by the person expressing the hatred or stirring up hatred) to be a member of:

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7 Kelly, *Proposed Football Act (Repeal) (Scotland) Bill: A proposal*, pages 13 to 15.

8 Mr Kelly points out in his consultation paper that "*the time-scale for the Bill's passage did not allow adequate time for proper scrutiny and for civic Scotland to be properly consulted*" (page 7).

9 A "*regulated football match*" is defined in section 2 to include matches in Scotland or involving Scottish teams within the UK (as defined in section 55 of the Public Order and Criminal Justice (Scotland) Act 2006) and any match overseas involving a Scottish representative team or a club which is a member of a football association or league based in Scotland.

10 A person guilty of the offence could face up to five years imprisonment and/or a fine for conviction on indictment, and up to 12 months and/or a fine for summary conviction (section 1(6)).

11 Section 4(1).

12 Section 1(5).

- a religious group, social or cultural group with perceived religious affiliation, or someone who associates but is not a member of that group;[13] or
- a group with a protected characteristic including colour, race, nationality, ethnicity, sexual orientation, transgender identity or disability;[14]

- is motivated in whole or in part by hatred of any of these groups;[15]
- is threatening;[16] or
- constitutes "*other behaviour*" a reasonable person would be likely to consider offensive.[17]

7. In terms of location, behaviour will fall within the scope of the offence[18] if it:

- occurs in the ground where a football match is being held on the day of the match;
- occurs while the person is entering or leaving such a ground or intending to do so;
- occurs on a journey to or from the football match (including journeys with overnight breaks and whether or not the person attended or intended to attend the match[19]);[20] or
- occurs when a person is in or going to any place, other than domestic premises, where the match is being televised;[21] or
- is directed towards, or engaged in together with, another person to whom one of the above applies (i.e. he/she is in a ground, entering or leaving a ground etc.).[22]

[13] Sections 1(2)(a)(i) & (ii), 1(2)(b) and 4(2)(a).
[14] Sections 1(2)(a)(iii), 1(2)(b) and 1(4). It is irrelevant that the behaviour might be motivated by any other factor, such as the player's football playing style (section 1(3) and paragraph 8 of the Scottish Government's Revised Explanatory Notes). For definitions of "*religious group*" and the protected characteristics, see sections 4(2)(c) and 4(3).
[15] Section 1(2)(c).
[16] Section 1(2)(d).
[17] Section 1(2)(e).
[18] That is, it will be considered "*in relation to*" a regulated football match, as required under section 1 and defined by section 2.
[19] Revised Explanatory Notes, paragraph 16.
[20] Section 2(2)(a).
[21] Section 2(3).
[22] Section 2(2)(b).

8. We have two specific concerns with the section 1 offence, which we set out in our 2011 briefings and which remain a reality now that the Act is in force: first, the unclear and broad definition of the behaviour element of the offence; and second, the lack of a requirement for intention to incite public disorder.[23]

9. There is no clear message from the legislation as to when behaviour crosses the threshold to become offensive.[24] The term "*stirring up hatred*" is not defined in the Act and cannot therefore be objectively assessed. As a result, police officers are having to exercise their subjective discretion to make the determination as to whether behaviour is offensive or hateful. This has already led to misapplication and misuse. The 2015 Government-commissioned evaluation of the section 1 offence reports how a frequent complaint in response to fan surveys was that inexperienced police officers are making erroneous and/or inconsistent judgments as to what is offensive under the Act, acting in effect as the "*reasonable person*" in section 1(2)(e).[25] Sheriffs who were interviewed for the same evaluation were likewise concerned about the lack of clarity in the statutory wording of the offence. One sheriff, for example, expressed concern about how to know when "bad sentiment" becomes actual "hatred".[26] It is clear from this that non-violent football fans may find themselves inadvertently falling within the remit of the criminal law for simply singing a chant intended to antagonize the opposition and express pride in a football side but without intending to trigger violence.

10. The section 1 offence is unacceptably broad in further ways. First, section 1(2)(e) acts as a catchall provision, shoehorning into the offence innumerable behaviors on the basis that a reasonable person would feel "offended". It is notable that one of the sheriffs interviewed for the Government-commissioned evaluation expressed strong objection to section 1(2)(e), stating that it "*creates extraordinary restrictions on freedom of thought and expression*". The sheriff was particularly concerned because, he said, section 1(2)(e) was being used to prosecute more often than sections 1(2)(a)-(d).[27] Evidence from England shows that criminalising behaviour that others might consider offensive does indeed stifle freedom of expression. An example of this is the arrest of a young man (who Liberty advised) who was threatened with prosecution under English public order

[23] *Liberty's Stage 3 briefing*, paragraphs 8-10 and pages 8-11 ("*Proposed amendments to the clause 1 offence*").
[24] Mr Kelly discusses in his consultation paper how the Act is being inconsistently applied. He notes how one man was cleared of inciting public disorder for singing the song "Roll of Honour", while two others were convicted for singing the same song (page 14).
[25] Niall Hamilton-Smith et. al, University of Stirling, ScotCen Social Research, University of Glasgow, *An evaluation of section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012*, June 2015, paragraph 3.11, page 35.
[26] Niall Hamilton-Smith et. al, *An evaluation of section 1*, page 43.
[27] Niall Hamilton-Smith et. al, *An evaluation of section 1*, page 44.

legislation[28] for peacefully holding a placard that read "*Scientology is not a religion it is a dangerous cult*".[29] No prosecution ultimately went forward, but the fact that a peaceful protestor who was merely expressing his opinion could be threatened with prosecution demonstrates the danger of this type of offence. And the fact that section 1(2)(e) is being relied on to prosecute over other parts only reinforces the threat that this offence poses to freedom of expression in Scotland.

11. Second, the way that the Appeal Court has interpreted the requirement that conduct "*would be likely to incite disorder*"[30] is incredibly wide. Already, a requirement that conduct only needs to "*be likely*" to incite disorder, and does not actually need to incite that disorder, is a low threshold. The Appeal Court, however, has ruled that it is not necessary for anyone likely to be incited to disorder to be present for an offence to be committed.[31] The Court held that an offence could be committed even if particular persons in a football ground could not actually hear the words being sung. The Court stated that "*the actual context within which the behaviour occurs is not determinative*".[32] As a result of this interpretation, the section 1 offence now criminalises behaviour regardless of whether anyone is actually likely to be incited to disorder; in other words, the very act of expressing an offensive sentiment is, of itself, wrong and unlawful. Indeed, feedback from police officers shows that this is their understanding of the offence.[33] This is an unacceptable affront to the right to free expression. Football fans face the prospect of prosecution for speech deemed offensive even if they know no violence will ensue because nobody likely to be incited can hear them.

12. It is extremely worrying that there is no need for an individual to intend to incite public disorder to be guilty of the section 1 offence. The criminal law of incitement had previously always been dependent on individual intention; a person had to intend that, as a consequence of their words or actions, another would commit an offence. By removing the intention requirement for the section 1 offence, the Act criminalises behaviour previously protected as part of a person's freedom of expression. The Lord Advocate states in his guidelines on the Act that singing songs and displaying banners, when

[28] Under section 5 of the Public Order Act 1986, which provides for an offence to be committed where a person, with or without any intention, uses any "*threatening, abusive or insulting*" words or behaviour or displays any writing, posters or signs to that effect which is likely to result in another person feeling "*harassed, alarmed or distressed*".

[29] The Telegraph, "*Scientology arrest makes a mockery of the law*", 21 May 2008, available at http://www.telegraph.co.uk/comment/3558604/Scientology-arrest-makes-a-mockery-of-the-law.html.

[30] Section 1(b)(ii).

[31] *MacDonald v Cairns* [2013] HCJAJ 73, available at https://www.scotcourts.gov.uk/search-judgments/judgment?id=113686a6-8980-69d2-b500-ff0000d74aa7.

[32] *MacDonald v Cairns*, paragraph 12.

[33] Niall Hamilton-Smith et. al, *An evaluation of section 1*, pages 33 to 34.

motivated by hate, is "*unacceptable and has no place at a football match*".[34] Similarly, the Policy Memorandum that accompanied the Bill through Parliament stated that "*we can no longer afford to think that football matches are contexts within which anyone has the right to say and do as they please*".[35] These statements ignore the fact that the criminal statute book is bursting with public order, violent and property offences directed at those who strive to promote violence and other criminality.[36]

The section 6 offence (sections 6 to 9 of the Act)

13. Like the section 1 offence, the section 6 offence is punishable by up to five years in prison.[37] The offence does not specifically relate to football. It criminalises communications which either:

- contain or imply a threat or incitement to carry out a seriously violent act[38] against a person or persons, which would cause a reasonable person to suffer fear or alarm, and where the person communicating the material intends to cause fear or alarm or is reckless as to whether that is the case ("Condition A");[39] or
- are threatening and are communicated with the intention of stirring up religious hatred ("Condition B").[40]

14. Condition A encompasses images depicting or implying the carrying out of a seriously violent act (whether actual or fictitious) against a person (whether dead, actual or fictitious) in circumstances where a reasonable person would likely consider that is what the image implies.[41] The offence will not cover unrecorded speech, but will include communication by any other means and related expressions.[42] Accordingly, it will cover posting on the internet, emails, printed media, etc. A communicator can defend their action by showing that the communication of the image or words was reasonable, for example if they were communicating a threat that had been made to the police.[43]

15. The offence applies to conduct outside of Scotland by a British citizen or person habitually resident in Scotland (this is the same for the section 1 offence).[44] The offence

[34] *Lord Advocate's Guidelines on the Offensive Behaviour At Football and Threatening Communications (Scotland) Act 2012*, August 2015, page 4.
[35] Scottish Government's Policy Memorandum, paragraph 12.
[36] See Mr Kelly's list of offences on page 15 of his consultation paper.
[37] A person guilty of the offence could face up to five years imprisonment and/or a fine for conviction on indictment, and up to 12 months and/or a fine for summary conviction (section 6(7)).
[38] Defined as an act that would cause serious injury to, or the death, of a person (section 8(5)).
[39] Sections 6(2)(a) to (c).
[40] Section 6(5).
[41] Section 6(3).
[42] Section 8(2).
[43] Section 6(6) and paragraph 30 of the Revised Explanatory Notes.
[44] Section 10(1).

also applies to a communication made by a person outside of Scotland if the person intends the communication to be read, looked at, watched or listed to primarily in Scotland.[45]

16. Our key concerns with the section 6 offence (which we set out in our 2011 briefings) broadly mirror our section 1 offence concerns: namely, that elements of the offence are too loosely and widely framed, and that there is no requirement for intent (if a person is guilty of the offence under Condition A). In addition to these key concerns, the offence is extremely broad in its jurisdictional reach, covering offences outside the jurisdiction that have an impact in Scotland.

17. There is no requirement, in either Condition A or Condition B, for the target group or individual to feel threatened. In Condition A, all that is required is that a "*reasonable person*" would be likely to suffer fear or alarm. However, it is Condition B that is particularly problematic, since there is no need for even a reasonable person to suffer fear or alarm. That is, the communication only has to be "*threatening*" and the communicator has to intend to "*stir up hatred on religious grounds*". Again, neither of these phrases is defined in the Act. The reach of this offence, which will encompass internet posting, tweets and blogs, as well as more traditional modes of communication and communication from overseas, is consequently enormous.

18. The Lord Advocate says in his guidelines that threats made in jest that no reasonable person would find alarming will not fall within the purview of the offence.[46] However, we have seen that that is not the case with similar offences in England. For example, a man who tweeted his frustration about an airport closure was convicted for being a menace under section 127 Communications Act 2003;[47] this was despite the fact that he had no intention to carry out what he threatened or to incite others to do so.[48] That this conviction was ultimately quashed by the High Court demonstrates the problems caused by nebulously worded speech offences.[49]

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[45] Section 10(2). The prosecution of such a person may take place in any sheriff court district in which the person is apprehended or in custody, or in such sheriff court district as the Lord Advocate may direct, as if the offence had been committed in that district (section 10(3)).

[46] *Lord Advocate's Guidelines*, page 8.

[47] Under section 127, a person is guilty of an offence if he sends by means of a public electronic communications network a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character, or causes such message or matter to be sent.

[48] Paul Chambers was convicted of sending a menacing communication in 2010 after sending a tweet to his 600 followers which said ""Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together, otherwise I'm blowing the airport sky high!!". See http://www.bbc.co.uk/news/uk-england-south-yorkshire-11736785.

[49] See, BBC News, "Robin Hood Tweet Airport Tweet Bomb Joke Man Wins Case, http://www.bbc.co.uk/news/uk-england-19009344.

19. Section 7 of the Act purports to protect freedom of expression by listing what the section 6 offence does not prohibit or restrict, such as expressing antipathy, dislike, ridicule, insult or abuse of religions or adherents of religion. However, as Mr Kelly notes in his consultation paper, the boundary between behaviour that is prohibited by section 6 because it is deemed to stir up religious hatred, and behaviour that is not prohibited because it is thought to be simply an expression of antipathy, is unclear and uncertain.[50] In response to the 2015 Government-commissioned evaluation of the section 6 offence, representatives of the Crown Office and Procurator Fiscal Service (i.e. justice system practitioners) said that they were satisfied that section 7 and "*common sense*" would guard against prosecutions curtailing freedom of expression.[51] However, "*common sense*" is not an adequate procedural safeguard where the prospect of prosecution and lengthy imprisonment exists.

20. The way Condition A is worded means that a person commits the offence if they are only reckless as to whether their communication causes fear and alarm; they do not need to intend that it does so. Requiring such a low threshold of recklessness undoubtedly has a chilling effect on communication, particularly as it will be immaterial to the commission of an offence that a person is caused fear and alarm. It will also be irrelevant whether anyone was in fact incited to carry out a seriously violent act against a person. By criminalising behaviour where there is no intent, Condition A goes much further than criminal law relating to incitement used to, before the Act. It is true that recklessness is an element of some criminal offences, but it is usually applied to actions that are already within the realm of criminality, such as common assault, criminal damage and battery. The rationale for this is that if you hit someone, for example, it is appropriate for a jury to be able to convict you of an offence even if you did not intend the consequences of your actions. But speech does not naturally reside within the realm of criminality, and for that reason should only be criminalised where there is the element of intent.

21. It is noteworthy that in his consultation paper, Mr Kelly quotes figures to show that football supporters believe that the section 6 offence has made no difference to the frequency of incidents of threats of violence and incitement of religious hatred.[52] To add to Mr Kelly's figures, 25% of those responding to the same ScotCen survey said that offensive comments had actually become *more* frequent since the Act was introduced.[53]

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[50] Kelly, *Proposed Football Act (Repeal) (Scotland) Bill: A proposal*, page 18.
[51] Neil Davidson, Justice Analytical Services of the Scottish Government, *An evaluation of section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012*, June 2015, paragraph 49, page 18.
[52] Kelly, *Proposed Football Act (Repeal) (Scotland) Bill: A proposal*, page 12.
[53] Davidson, *An evaluation of section 6*, page 5.

Ministerial power to modify the offences

22. It is worth drawing attention to the particularly troubling provisions in sections 5 and 9 of the Act, which give the Government the power to amend the Act's two criminal offences by statutory instrument. These provisions were introduced in an unprecedented move during Stage 2 committee proceedings.[54] Section 5 allows Ministers to amend by order the section 1 offence by adding or removing a criminal behaviour under section 1(2) or varying the description of the behaviour.[55] Ministers can also add or remove a protected group against which expressing hatred is an offence under section 1, or vary the description of the group.[56] Section 9 allows, by order, for the variation, addition or removal of a ground of hatred in Condition B of the section 6 offence.[57] In its order, the Government can specify grounds of hatred by reference to hatred of a group of persons of specified description or specified personal characteristics.[58] In so doing, the Government would also modify section 7 of the Act (which purports to protect freedom of expression).[59]

23. While any statutory instrument that amends the section 1 and section 6 offences will be subject to an affirmative parliamentary procedure,[60] there will not be the proper and full parliamentary scrutiny that there should be. For example, the committee in charge of reporting on the instrument will only be permitted 90 minutes to debate the Government's approval motion in respect of the instrument.[61] Further, the committee can only approve or reject the instrument in its entirety; it cannot make any amendments to the wording of the instrument.[62] If the committee approves the instrument and it goes before Parliament, the only persons permitted to take part in the debate are the member moving the motion, (if different) the member of the Scottish Executive or junior Scottish Minister in charge of the instrument, and one speaker against the motion; and each person is only allowed to speak for up to three minutes.[63] Expanding criminal offences like the section 1 and section 6 offences that have such ramifications for civil liberties should only take place following a

[54] See the *Official Report of the Subordinate Legislation Committee*, 29 November 2011, where committee member John Scott MSP referred to "*the unusual nature of this introduction of subordinate legislation at stage 2, for which there seems to be little or no precedent – certainly in Scottish Parliament legislation*" (column 171).
[55] Sections 5(1)(a)(i) & (ii).
[56] Section 5(1)(a)(iii) & (iv).
[57] Section 9(1)(a).
[58] Sections 9(2)(a) & (b).
[59] Sections 9(2)(c) & (d).
[60] Section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 requires that all statutory instruments be laid before, and approved by resolution of, the Scottish Parliament.
[61] Rule 10.6.3 of Chapter 10 of the Standing Orders of the Scottish Parliament (5th Edition), September 2016, available at http://www.parliament.scot/Parliamentaryprocedureandguidance/SOEd05Rev01201609.pdf
[62] Rule 10.6.1 of Chapter 10 of the Standing Orders.
[63] Rule 10.6.5 of Chapter 10 of the Standing Orders.

full scrutiny procedure. This is especially the case when the introduction of the offences was so strongly opposed in the first place. It is clear that the subordinate legislation procedure will not provide that scrutiny.

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