



Law Society  
of Scotland

# Stage 1 Briefing

## Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill Stage 1

23 January 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We provide the following comments in relation to the Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill, which we hope will assist the Parliament's scrutiny at the Stage 1 Debate scheduled for 25 January 2018.

### Comments

We note when taking evidence that the Justice Committee covered the following issues<sup>1</sup>:

- Witnesses' views on repeal of the 2012 Act, and what outcomes would arise from repeal or retention
- The efficacy of the section 1 offence and its use by police and prosecutors
- The efficacy of the section 6 offence and its use by police and prosecutors
- Whether repeal would create a gap in the law
- How Lord Bracadale's review of hate crime legislation would interact with the legislation, whether or not it is repealed and
- Whether the 2012 Act had tackled sectarianism

We refer to our written evidence provided on 18 August 2017<sup>2</sup> and to our oral evidence<sup>3</sup> provided on 7 November 2017. Overall, we believe that whether or not the 2012 Act should be repealed is a matter for the Scottish Parliament. Its repeal, we maintain, would not leave a gap in the criminal law and there are concerns around the scope of section 1, particularly around what constitutes a 'regulated football match.' In the current review of hate crime legislation, led by Lord Bracadale, there will be the opportunity to consider

<sup>1</sup> Paragraph 55 of the Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (<https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/1/18/Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications-Repeal---Scotland-Bill/JS052018R2.pdf>)

<sup>2</sup> <https://www.lawscot.org.uk/media/9663/crim-briefing-offensive-behaviour-at-football-and-threatening-communications-scotland-act-2012-november-2016-submitted.pdf>

<sup>3</sup> [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf)

the law in this area more widely, and if not repealing the 2012 Act, revising its provisions in light of the forthcoming recommendations of that review.

## Repeal of the Bill

We would repeat our earlier position supported by both oral and written evidence referred to above, that the question whether the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (2012 Act) should be repealed is a matter for the Scottish Parliament. We understand that the Scottish Government may also consider as an alternative that there may be an opportunity to bring forward amendments to section 1 of the 2012 Act. Similarly, we consider that the issue of any amendments to the 2012 Act would be a matter for the Scottish Parliament.

We were supportive of the parliamentary intention that lay behind the consideration of the original Offensive Behaviour and Threatening Communications (Scotland) Bill 2011 (2011 Bill).<sup>4</sup> That Bill sought to deal with the issues surrounding offensive behaviour at football matches which needed to be addressed. In our oral evidence to the Justice Committee, we summarised the challenges faced when considering the question of any repeal of the 2012 Act.

*'There is a view that repealing the 2012 Act could send out the wrong message. I contend... that the 2012 Act is not just hate crime legislation, albeit that its scope is subject to Lord Bracadale's review. However... that would have to be weighed against the content of the Act and how it is working at present in terms of how the courts interpret it and how it can be enforced'.*

The reference to Lord Bracadale's review<sup>5</sup> is, we consider, important. That review does provide an opportunity to address a number of the policy issues that were foremost at the time, when the 2011 Bill was being considered. We note that the remit of the review is wider in scope than that of the 2012 Act, as indicated by Professor Fiona Leverick's evidence<sup>6</sup> during the Stage 1 debate:

*'Not everything in the 2012 Act is a hate crime provision; a lot of it relates to hate crime, but not all of it. Some parts are about straightforward public order offences that have no connection to hate crime whatever. At least part of the Section 6 criminal offence is not a hate crime related provision. I said that we should hang on and wait to see what Lord Bracadale says, but that will take us only so far because there are parts of the 2012 Act that do not relate to hate crime. Section 6 criminal offences is not a hate crime related provision'.*

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[http://www.parliament.scot/S4\\_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20\(Scotland\)%20Bill/b1s4-introd.pdf](http://www.parliament.scot/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20(Scotland)%20Bill/b1s4-introd.pdf)

5 <http://www.gov.scot/About/Review/Hate-Crime-Legislation>

6 Paragraph 115 of the Paragraph 55 of the Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (<https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/1/18/Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications--Repeal---Scotland--Bill/JS052018R2.pdf>)

That review is expected to report in spring 2018. That does and will provide an opportunity to consider the important question of hate crime. We understand why the Justice Committee considers that it would not be appropriate to delay consideration of the Bill while Lord Bracadale concludes that review. That review will however continue to be of *'great interest and importance'*<sup>7</sup>.

We also consider that the offending behaviour which the 2012 Act was designed to address is still fully covered by the substantive criminal law existing now and before the 2012 Act came into being. This position is supported by Professor Fiona Leverick when agreeing with our evidence that:

*'We are of the view that the common-law crime of breach of the peace, Section 38 and a number of statutory aggravations are in place and continue to be, and that offensive behaviour at football matches could be dealt with under pre-2012 legislation'*.<sup>8</sup>

A number of concerns remain about the effectiveness of section 1 and 6 of the 2012 Act which were fully discussed in the debate.

## Section 1 of the 2012 Act

We consider that section 1 of the 2012 Act did not improve the definitions of either of the existing offences at common law of breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Repeal of section 1 alone or as part of a package of other amendments to the 2012 Act will, in our view, not leave any gap in the criminal law, as existing measures will capture any relevant offending behaviour. In considering if the 2012 Act has been effective, we support the view indicated by Professor Fiona Leverick's evidence, that it is virtually impossible to tell conclusively, as improvements in offending behaviour may have come about as a result of a number of factors. There may have been enhanced publicity surrounding the implementation of the 2012 Act or a reduction in offending behaviour. She indicated:

*'I point to the official evaluation of the Act that was undertaken by Niall Hamilton-Smith and some other colleagues, which was referred to in a previous evidence session. The evaluation concluded that there certainly had been a reduction in offensive chanting in football grounds since the Act came into force, but that it was impossible to tell whether that was because of the Act. I do not think that we will ever solve that conundrum, because so many other factors could have had an effect—*

<sup>7</sup> Page 56 Report – Committee's recommendations

<sup>8</sup> Paragraph 158 of Paragraph 55 of the Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (<https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/1/18/Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications--Repeal---Scotland--Bill/JS052018R2.pdf>)

*changes in social attitude or policing strategies and so on. It will always be extremely difficult to attribute improvements to the Act<sup>9</sup>.*

That leads onto the discussion surrounding the need for education which was highlighted by a number of witnesses during the debate. Danny Boyle, of BEMIS,<sup>10</sup> called ‘for an educational and universal approach to taking forward the strategy for tackling hate crime’ while Colin Macfarlane, of Stonewall Scotland, said that ‘education is key, but again, it is part of the jigsaw puzzle and just one element in our armoury for tackling the issue.’<sup>11</sup> That is relevant whether dealing with any potential amendments or repeal of the 2012 Act. A message must be sent out regarding potential prosecution for offending behaviour, emphasising that such behaviour will be effectively covered by any amendment to the 2012 Act or by the raft of existing legislative measures.

We do have concerns about continuing with the section 1 offence as unamended, which relate to its scope. We<sup>12</sup> identified the issues when commenting on the definition of ‘regulated football match’:

*‘That is where the offence becomes a special capacity offence, because it has to take place in relation to a regulated football match, which is defined in section 55(2) of the Police, Public Order and Criminal Justice (Scotland) Act 2006. I appreciate that, as I understand it, there has not been any judicial interpretation of “regulated football match”, but I understand that it would not cover, for example, Scottish Junior Football Association games or a football match between clubs from two foreign countries that was taking place in Scotland. Hampden Park has held the European Cup Final, the champions league final and the UEFA Cup Final, and such matches would not be covered.*

We highlight ambiguity remains about what constitutes the actual section 1 criminal offence. Clarification of the definition of ‘behaviour’ is still required, especially with reference to matches being played or watched on television. Where there is opportunity to address the issues, then there would seem to be a need for them to be addressed, however the Scottish Parliament feels is appropriate.

## Section 6 of the 2012 Act

Section 6 provides an offence of making threatening communications. However, we do not consider that creation of the section 6 offence to be an improvement on the existing common law and various statutory

<sup>9</sup> Source: Justice Committee, Official Report 7 November 2017, col. 47

<sup>10</sup> <https://bemis.org.uk/>

<sup>11</sup> Paragraph 182 of the of the Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (<https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2018/1/18/Stage-1-report-on-the-Offensive-Behaviour-at-Football-and-Threatening-Communications--Repeal---Scotland--Bill/JS052018R2.pdf>)

<sup>12</sup> Source: Justice Committee, Official Report 7 November 2017, col. 45

provisions that were previously available. This is what we indicated in our earlier written evidence<sup>13</sup> when considering how best to address the offence of making threatening communications. We therefore do not consider that any repeal will leave any gap in the criminal law.

We recognise that there has not been wide use of section 6 offences since the 2012 Act came into force. We understand that there have been only 17 cases in five years. That is because we understand that the threshold of the evidentiary considerations is too high. As a result, the police and prosecutors tend to use section 127 of the Communications Act 2003 (2003 Act) as an alternative, to address the relevant offending behaviour. That reduces the options in respect of sentencing, as the potential penalties under the 2012 Act are much greater (allowing for indictment prosecution) than they would be under the 2003 Act.

Furthermore, we note that the Justice Committee believes that, were the 2012 Act to be repealed and in light of the forthcoming recommendations from Lord Bracadale's Review of hate crime legislation, it may be appropriate for the Scottish Government to consider how the provisions within section 6 could be dealt with. They could be updated as part of a wider revision of hate crime legislation, though that can take some time. Offending behaviour could continue to be prosecuted under the 2003 legislation.

There does seem to be a tacit recognition that there are a number of problems with the drafting of section 6 which consequently has led to its limited use and low number of convictions.

There are always concerns about dealing with similar offending behaviour in different places such as at a '*regulated*' football matches or in the street under different legislation. There needs to be consistency as well as ensuring the sanctions that can be applied are similar, leaving aggravations up to the judge on which to sentence on conviction appropriately. There must also be clarity for the public on what the legislation does and does not cover. That is a matter of fairness and transparency.

In conclusion, we consider the matters of how to address the 2012 Act remains a matter on which the Scottish Parliament needs to decide.

We hope that this is helpful for your purposes. If you should have any questions, we would be happy to answer them.

<sup>13</sup> [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf)



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**For further information, please contact:**

Gillian Mawdsley

Policy Executive

Law Society of Scotland

DD: 0131476 8206

[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)