



Law Society
of Scotland

Stage 3 Briefing

Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill Stage 3

13 March 2018



Introduction

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 Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill (the Bill) which we trust will assist the Scottish Parliament's scrutiny at the Stage 3 Debate scheduled for 15 March 2018.

Comments

The Bill proposes to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (2012 Act). Our earlier evidence indicated that that the question of any repeal of the 2012 Act was a matter for the Scottish Parliament. We refer to our written evidence on 18 August 2017¹, oral evidence on 7 November 2017² and Stage 1 Briefing on 23 January 2018.³

In our previous submissions we recognised that issues had arisen over the interpretation principally of the offences set out in sections 1 and 6 of the 2012 Act and the 2012 Act's overall effectiveness. These issues have now been fully considered in the course of the various parliamentary debates. There have been questions too about how widely the 2012 Act has been actually used in respect of prosecutions. It appears that the conviction rate under the 2012 Act has fallen to its lowest level in three years. Of the 229 cases brought to court in 2016/2017, it is understood that just 157 resulted in a conviction.⁴

The Society fully supported the objectives of the 2012 Act when it was introduced:

'to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. These

¹http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf

² http://www.parliament.scot/S5_JusticeCommittee/Inquiries/OBR117-LawSociety.pdf

³ <https://www.lawscof.org.uk/media/359493/offensive-behaviour-at-football-response-23-january-2018-stage-1-briefing.pdf>

⁴ <http://www.scottishlegal.com/2018/03/12/offensive-behaviour-act-conviction-rate-falls-lowest-three-years>

*measures are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society.*⁵

We consider that the offending behaviour which the 2012 Act was designed to address was and remains fully covered by the substantive and existing criminal law. The Bill, if passed, will not leave any gap in the criminal law as existing measures, both statutory and at common law, will allow for the prosecution of any relevant offending behaviour provided that sufficient admissible evidence exists. Such prosecutions will not of course then take place under the 2012 Act once its repeal is fully effective. The Bill does also contain detailed transitional arrangements for any prosecutions that are under way at the time of repeal.

As the Stage 3 debate is reached, the discussions have moved on.

We always considered that amending the 2012 Act could have been somewhat challenging. However, we think that it is important to remember the background to the 2012 Act. There is further opportunity to consider the policy considerations that were behind the original intentions of the Bill as we understand that the review by Lord Bracadale's on hate crime is due to report in spring 2018.

If the 2012 Act is repealed, there will be need to stress certain messages consistently following any repeal which should include that:

- Where circumstances arise in relation to any relevant offending behaviour, such incidents will be reported and considered for prosecution. Where there is evidence of criminal offending, they will be subject to prosecution.
- Those found guilty of such offences after due criminal process will face the consequences of their actions.

These messages lie alongside the need for education in relation to the wider issue of hate crime which we have highlighted previously. Making those offending aware that they will continue to be prosecuted is vital.

These views were emphasised by Danny Boyle of BEMIS stating that '*the most sensible thing is to create a universal approach to tackling hate crime that is preventative and rooted in education but which also has a strong legal remedy when necessary.*'⁶ Colin Macfarlane of Stonewall Scotland also indicated that '*education is key but again it is part of the jigsaw puzzle and just one element in our armoury for tackling the issue.*'⁷

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

⁶ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11144>

⁷ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11144>

Stage 3 Amendments

The Scottish Government is proposing certain amendments at Stage 3 to the Bill. These relate to the question of timing of the actual repeal of the various offences. What is being proposed is a staggered implementation of the repeals:

- The repeal of Sections 1- 5 of the 2012 Act would come into effect at the end of the period of two months from the day of Royal Assent.
- The repeal of remainder of the 2012 Act, in effect the section 6 provisions, would not come into effect until the end of the period of 12 months from the day of Royal Assent.

Section 6 offences could therefore continue to be prosecuted for some time.

A number of the Bill's provisions deal with the complex transitional arrangements for offences currently being prosecuted as well as various appeals that may be ongoing at the time when the repeal(s) come into effect. These essentially preserve the position to allow for prosecutions to take place under existing legislation. These would apply for longer if the Scottish Government's amendments are accepted.

The reasons for the staggered implementation of the repeal were fully debated at Stage 2.

Repeal of the Section 1 Offence: The Scottish Government's view was that it was standard practice to provide for two months before actual commencement. That was because the date on which Royal Assent would be given was uncertain. This period of two months according to Annabelle Ewing MSP, Minister for Community Safety and Legal Affairs would provide:

*'greater predictability as to the date of commencement, which, in turn, provides certainty and time for all those affected by the bill to take account of its provisions and make all reasonable adjustments that are required of them before the date on which the new legislation comes into force.'*⁸

The basis of opposition to this amendment was that it was unnecessary as that timing would bring the repeal to the end of the football season. His argument was that:

*'[the 2012 Act] had been discredited. It has been argued against not only by supporters but by legal experts. ... therefore sought to repeal it as quickly as possible.'*⁹

That still provides time for prosecutors and the police to carry out any preparatory work that might be required before the repeal was effective.

⁸ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11386&mode=pdf>

⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11386&mode=pdf>

Section 6 offence: The Scottish Government's view was that seeking a 12 months' continuity of protection was entirely reasonable. This time period was necessary '*to come up with an alternative legislative provision to deal with the circumstances covered by section 6 of the 2012 Act*'.¹⁰

Preserving section 6 offences meantime may well merely provide a means of possible prosecution more in theory than practice. This may also allow for the policy considerations in relation to section 6 offences to be considered along with the 'yet unknown' conclusions from Lord Bracadale's review. The timescale of twelve months could also be seen merely to complicate what might otherwise comprise a straightforward repeal of the 2012 Act.

There is always merit in clarity, simplicity and consistency of the law. This would be provided if the 2012 Act is repealed in its entirety at one time. The repeal of the 2012 Act will, we suspect, attract much publicity. The general view will be that the 2012 Act has been repealed. There might be some concern to find that prosecutions under section 6 continued for a further period.

Continuing these provisions is not required as the transitional arrangements will take account and provide safeguards for any existing prosecutions. As we stressed previously, we understand that there have been few prosecutions under section 6 as the threshold for prosecution had been set too high. The police and prosecutors have tended to use section 127 of the Communications Act 2003 as an alternative to address the relevant offending behaviour. That would not seem to present any reason to stagger the implementation of that section's repeal.

In conclusion, we consider that the decision of the repeal of the 2012 Act and any timing of its implementation to be matters for the Scottish Parliament.

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

¹⁰ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11386&mode=pdf>



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