

# **OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL**

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## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.10.7 of the Parliament's Standing Orders, in relation to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions inserted into the Bill at Stage 2 and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### **Outline of Bill provisions**

2. The Bill provides for two new criminal offences. The offence of 'Offensive behaviour at regulated football matches' criminalises offensive or threatening behaviour likely to incite public disorder at certain football matches. The offence of 'Threatening communications' provides for a criminal offence concerning the sending of communications which contain threats of serious violence or which contain threats intended to incite religious hatred.

### **Rationale for subordinate legislation**

3. The Bill contains two main delegated powers provisions, added by amendment at Stage 2, which are explained in more detail below. In deciding whether the provision should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to—

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- make proper use of valuable Parliamentary time; and
- respond to the recommendations contained in the Justice Committee's report that consideration should be given to widening the offensive behaviour at football offence to cover hatred based on a person's age or gender, and that, following consultation, consideration should be given to whether the offence concerning threats intended to stir up religious hatred should be widened to cover hatred on other grounds.

## **SUBORDINATE LEGISLATIVE POWERS - DETAIL**

### **Delegated powers**

#### **Section 4A– Power to modify sections 1 and 4**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** affirmative procedure

#### *Provision*

4. Section 1(2) of the Bill lists behaviour which constitutes the offence of ‘offensive behaviour at regulated football matches’ where it occurs in relation to a regulated football match and is or would be likely to incite public disorder. Section 1(4) provides a list of groups of persons in relation to whom it is an offence under section 1(2)(a)-(c) to express hatred of or stir up hatred against, in addition to those mentioned in s 1(2)(a)(i) and (ii). These are colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. Section 4 defines various terms used in sections 1 and 2.

5. Section 4A(1)(a) provides the Scottish Ministers with a power to modify section 1(2) so as to add, remove or vary a description of a behaviour for the time being listed in that subsection and to modify section 1(4) so as to add or remove a thing listed for the time being at section 1(4) or vary the description of a thing listed at section 1(4). Section 4A(1)(b) provides a power to modify section 4 so as to add or remove a definition from subsection (2) or (3) of that section, or vary a definition for the time being mentioned in either of those subsections.

6. The power could be used to add ‘gender’ or ‘age’ to the list of groups in section 1(4). If it is considered appropriate or necessary to do so, the power at section 4A(1)(b) could then be used to amend section 4 to provide definitions of ‘gender’ and ‘age’.

#### *Reason for taking this power*

7. In their Stage 2 Report, the Justice Committee stated “*the Committee is supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. We invite the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.*” The Government’s response to the Committee of 1 November set out the Government’s position that it “*notes the Committee’s support for the inclusion of categories beyond sectarian hate in relation to the section 1 offence and the invitation to consider the inclusion of age and gender. The Government also notes the very detailed and thoughtful consideration by the Equal Opportunities and Justice Committees on the same issue in the context of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Given the complex arguments presented in the course of the consideration of the 2009 Act, the Government will bring forward an amendment to allow for the extension of the offence to cover additional characteristics including age and gender at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.*”

8. The Government considers that the appropriate means of enabling ‘age’ and ‘gender’ to be added to the list of groups in s 1(4) at a later time if, following consultation, it is considered appropriate to do so is to provide a power to amend sections 1(2), 1(4) and 4 to enable Ministers to amend by order the list of prohibited behaviours and protected groups, and to make consequential changes to the definitions contained at section 4. This would avoid the need for Parliament to consider entirely new primary legislation whose sole purpose was to add a new group to the list at section 1(4) and make any necessary consequential changes. We do not envisage that the adding of age or gender to the list at section 1(4), if following consultation, it was considered appropriate, would raise any issues which could not adequately be considered by the Parliament under the affirmative procedure. The power is drawn in such a way as to be wider than only allowing the addition, modification or deletion of groups listed at section 1(4). It would also enable appropriate modifications to be made to the list of behaviours specified at section 1(2) in the event that new forms of offensive behaviour at football emerge that it would be useful to specify as ‘behaviour’ under section 1(2), rather than relying on the general provision at section 1(2)(e) concerning behaviour which a reasonable person would be likely to find offensive. The power also enables adjustments to be made to the definitions of ‘groups’ at section 4 in the event that it is necessary to reflect changes in thinking on equality issues.

9. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. These powers have been taken to ensure that appropriate provision can be made to ensure that any order which modifies sections 1 or 4 does not affect any prosecution for something done before the modification, for example in the event that any existing behaviour was removed from section 1 and replaced with another broader behaviour which encompassed the behaviour which was removed.

#### *Choice of procedure*

10. This power can be used to widen (or narrow) the kinds of behaviour covered by the offensive behaviour at football offence and therefore we consider the appropriate level of parliamentary scrutiny should be the affirmative procedure.

#### **Section 6A – Power to modify sections 5(5)(b) and 6**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** affirmative procedure

#### *Provision*

11. Section 5(5) of the Bill provides that it is an offence for a person to communicate material to another person if that material is threatening and the person communicating it intends by doing so to stir up hatred on religious grounds. Section 6 defines various terms used in section 5.

12. Section 6A(1)(a) provides the Scottish Ministers with a power to modify section 5(5)(b) of the Bill so as to add or remove a ground of hatred to or from those for the time being listed in that section, or to vary a ground of hatred for the time being mentioned in that section. Section 6A(1)(b) provides a power to modify section 6 so as to add, remove or vary a definition to or from those for the time being mentioned in that section in consequence of a change made using

the power at section 6A(1)(a). Section 6A(2) provides that an order under section 6A(1) may specify grounds of hatred by reference to hatred against groups of persons or individuals of specified descriptions and that it may specify such descriptions by reference to specified personal characteristics. Section 6A(2)(c) provides that, in relation to any ground added by the order, the order may modify the Act so as to make such provision for the same or similar purposes as that in section 5A (*Protection of freedom of expression*) as the Scottish Ministers consider necessary or appropriate.

13. The power would enable, for example, an amendment to be made to section 5(5)(b) to add threats intended to incite hatred on the grounds of sexual orientation or disability to that section. The power has been drafted so as to enable consequential amendments to be made to section 6 concerning definitions of terms used in any amendment to section 5(5)(b) and to enable any provision considered necessary to ensure protection of freedom of expression in consequence of the changes to the extent of section 5(5)(b) to be made. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. Such powers may be required to ensure that any modification of sections 5 or 6 does not affect any prosecution for something done before the modification.

#### *Reason for taking this power*

14. In their Stage 2 report, the Justice Committee noted that there were differing views on whether section 5 should be widened to cover other categories of people and acknowledged that *“this is an issue that would require more consideration.”* Some who gave evidence to the Justice Committee considered there to be a strong case for extending section 5(5)(b) to cover threats intended to stir up hatred of persons on the grounds of their sexual orientation, disability or transgender status. The Committee therefore recommended *“that the Scottish Government consult on widening section 5 at an appropriate point should the Bill be passed.”*

15. In its response to the Committee Report of 3 November, the Government stated: *“The Government notes the concerns about the lack of consultation on the implications of widening section 5 and the Committee’s conclusion that such consultation should be undertaken after the Bill is enacted. The Government will therefore bring forward an amendment to allow for the extension of the offence to cover additional characteristics at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.”*

16. The Government considered that the appropriate means of meeting the commitment given to the Justice Committee was to amend the Bill to provide an order-making power to amend section 5(5)(b) to enable additional grounds of hatred to be added to the scope of this offence. It was considered that this was preferable to requiring entirely new primary legislation to be brought before Parliament to make changes to the list of groups covered by the offence concerning threats intended to incite hatred as many of the issues concerning the framing of an offence of threats intended to stir up hatred are the same, irrespective of the grounds on which hatred is being stirred up and we do not consider it an effective use of Parliamentary time to require entirely new primary legislation to add new “grounds” of hatred to this offence..

17. In considering the scope of the amendment, we considered it important to ensure that appropriate provision concerning protection for freedom of expression could be made when making any amendment to add additional groups to be covered by the offence concerning threats intended to

incite hatred. )Part 3A of the Public Order Act 1986, as amended by the Schedule 16 to the Criminal Justice and Immigration Act 2008 provides for an offence concerning threats intended to stir up hatred on grounds of sexual orientation. That Act makes specific provision concerning protection of freedom of expression in relation to stirring up hatred on grounds of sexual orientation, stating, for the avoidance of doubt that urging people to refrain from or modify sexual conduct or practices shall not of itself be taken to be threatening or intended to stir up hatred. Similar provision could be made under section 6A(2)(c) were the power to be used to specify sexual orientation as a ground of hatred.

#### *Choice of procedure*

18. This power can be used to widen Condition B of the threatening communications offence so as to criminalise threats made with the intention of stirring up hatred of other groups of people (e.g. by reason of their race, sexuality or disability). Therefore we consider the appropriate level of parliamentary scrutiny to be the affirmative procedure.

### **Section 8 - Commencement**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by statutory instrument**  
**Parliamentary procedure: The Order must be laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010**

#### *Provision*

Section 8 of the Bill provides that with the exception of sections 8 and 9, which come into force immediately on Royal Assent, the Scottish Ministers may by order bring the provisions of the Bill into force.

#### *Reason for taking this power*

Section 8 of the Bill as introduced had made provision for the offence provisions to come into force immediately on Royal Assent, as it had been introduced as emergency legislation with the intent that it would come into force ahead of the 2011/12 football season. However, as it is no longer being treated as emergency legislation, we now consider it more appropriate that the Act should come into force by order.

#### *Choice of procedure*

As is now usual for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

*This document relates to the Offensive Behaviour at Football and Threatening Communications  
(Scotland) Bill as amended at Stage 2 (SP Bill 1A)*

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