

OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, introduced in the Scottish Parliament on 16 June 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 1–EN.

POLICY OBJECTIVES OF THE BILL

"When Donald Dewar addressed this parliament in 1999, he evoked Scotland's diverse voices: the speak of the Mearns; the shout of the welder above the din of the Clyde shipyard; the battle cries of Bruce and Wallace. Now these voices of the past are joined in this chamber by the sound of 21st century Scotland. The lyrical Italian of Marco Biagi. The formal Urdu of Humza Yousaf. The sacred Arabic of Hanzala Malik. We are proud to have those languages spoken here alongside English, Gaelic, Scots and Doric. This land is their land, from the sparkling sands of the islands to the glittering granite of its cities. It belongs to all who choose to call it home. That includes new Scots who have escaped persecution or conflict in Africa or the Middle East. It means Scots whose forebears fled famine in Ireland and elsewhere. That is who belongs here but let us be clear also about what does not belong here. As the song tells us for Scotland to flourish then "Let us be rid of those bigots and fools. Who will not let Scotland, live and let live." Our new Scotland is built on the old custom of hospitality. We offer a hand that is open to all, whether they hail from England, Ireland, Pakistan or Poland. Modern Scotland is also built on equality. We will not tolerate sectarianism as a parasite in our national game of football or anywhere else in this society."

Alex Salmond, First Minister of Scotland, 18 May 2011, Scottish Parliament

2. The objective of the Bill is 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 measures are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society.

3. To achieve this objective the Bill creates two new criminal offences. The first offence will criminalise the full range of offensive and threatening behaviour, including “sectarian” behaviour, at or in connection with football matches. The second offence criminalises threatening, or inciting, serious violence and threats which incite religious hatred.

4. There have been historical issues about the extent to which the criminal law extends to cover various behaviours that society would deem “sectarian”. “Sectarian” is a term which is not defined in Scots law and there are many competing viewpoints about what is or should be included and excluded from any definition. What is crucial about the measures in this Bill is that they do not rest on any such definition. We intend that these measures will cover all offensive or threatening behaviour at football matches, regardless of whether it is “sectarian”. This means offensive or threatening behaviour likely to incite public disorder, whether that is through songs and chants, displaying banners or otherwise. In terms of threatening communications, the focus is on threatening or inciting serious harm intended to cause fear and alarm or threats that incite religious hatred, regardless of whether such communications are of a “sectarian” character or not.

BACKGROUND

5. Scotland is proud of its history, a history which has fostered our values of equality, fairness and inclusion, which values diversity, welcomes outsiders and binds all Scotland’s people together. We need to recognise, however, that there are less positive aspects of our society, expressed in violent and bigoted attitudes and behaviours which are incompatible with those values and which have no place in the Scotland we aspire to be. This Bill seeks to strengthen our established laws to ensure that we can root out these violent and bigoted attitudes and behaviours from Scottish society and make our communities safer.

Offensive behaviour related to football

6. The primary but not sole motivation for the measures in this Bill, both in terms of the nature of the measures themselves and the urgency with which we are seeking to introduce them, concerns football. Football is Scotland’s national game; it brings pleasure to millions and can serve to bring communities closer together. Unfortunately, it can also be where the attitudes and behaviours we seek to eradicate are most visible and damaging. Scottish football at its best combines pride and passion with a sense of responsibility, respect and discipline. However, there is absolutely no place in football for those who let their passion become violence, or their pride become bigotry.

7. These are not new problems. Scottish football has faced serious issues over the years, which in the past have primarily related to the misuse of alcohol and resultant general disorder. While increasingly effective policing has meant that there have been improvements, in terms of the behaviour within football grounds, stubborn elements remain including “sectarian” and otherwise offensive chanting.

8. The 2010/11 football season saw some of these problems reach an intolerable level, with “sectarian” and offensive behaviour, misconduct from players and managers, death threats, and live ammunition and bombs sent to prominent figures directly and indirectly associated with football. This suggests that certain individuals and groups have lost all perspective. These

attitudes and behaviours are never justified but they seem utterly out of place in the context of what is ultimately no more than a game.

9. The high profile of football makes this all the more damaging, as such unacceptable behaviour is shown in the media time and time again and broadcast throughout the world. Not just Scottish football, but Scotland's reputation has been damaged. Decisive and immediate action is required to begin to repair this damage and to demonstrate our collective view that such attitudes and behaviours will no longer be tolerated in any form. This Bill is a crucial first step in pursuing our vision for a better Scotland.

10. On 8 March 2011, at a meeting, chaired by the First Minister and attended by the Chief Executives of the Scottish Football Association, the Scottish Premier League, the Scottish Football League, Celtic and Rangers Football Clubs and the Chief Constable of Strathclyde Police, agreement was reached to work together to tackle the serious social issues affecting Scottish football; including sectarianism, alcohol misuse and violence. This agreement to work together was expressed in a Joint Statement which set out eight commitments, to be overseen by a Joint Action Group, reporting to Scottish Ministers before the start of the new football season in July 2011.

11. Subsequent to this meeting, further serious incidents occurred, including the sending of viable explosive devices, which caused even greater damage to the reputation of Scottish football and to our nation's reputation as a tolerant and inclusive society. These incidents demand a serious and immediate response and this Bill is a central part of that response, reinforcing the Scottish Government's full commitment to the work of the Joint Action Group and to our wider work on sectarianism. There is no doubt that a transformation of attitudes and behaviours is needed to restore Scottish football's reputation. Small steps are no longer adequate; the context of Scottish football needs to change from one too often dragged down by the negative, to one that again can encourage and sustain the pride and passion for which Scottish supporters are still known throughout the world. All the partners in the Joint Action Group share this vision for Scottish football, which reflects the Government's wider vision for a better Scotland.

12. In summary, it is a critical assumption of this Bill that there is something very specific and increasingly unacceptable about attitudes and behaviour expressed at football matches, whether that be "sectarian", racist or homophobic. There are contexts within which strongly held religious, political or cultural views are of course acceptable and quite appropriate. The unacceptable cost to individuals, communities and ultimately society means 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. Preventing the serious harm to individuals and communities caused, whether inside or outside the stadia, must be the overriding priority, and this means everyone must moderate their attitudes and behaviour. We believe that the vast majority of football fans understand this perfectly well and there is little need of interference from the law to ensure that reason prevails. There will always be passion, pride, allegiance and, indeed, banter. However, there is a small often determined minority for whom provoking, antagonising, threatening and offending are seen as part and parcel of what it means to support a football team. Whatever their motivation, this Bill seeks to demonstrate that such a view is mistaken and will no longer be accepted.

Threatening communications

13. The problems this Bill seeks to tackle, while often found in football, go beyond football. Those who have lost perspective seem to think they can act with impunity, using any means available to threaten and intimidate. Whether it be in open view in banners waved, or behind the wrongly presumed anonymity of a computer keyboard, threats to seriously harm or threats intended to stir up religious hatred have no place in the Scotland we want to live in. The physical and psychological impact on individuals and their families can be severe, often aggravated by the anonymity of those making the threats and uncertainty as to whether they are real or not. We cannot any longer allow this fear and hatred to be spread.

14. Such acts are often already criminal but the range of ways in which such threatening behaviour can be expressed requires a stronger response from the law. Threats to seriously harm another person or threats intended to stir up religious hatred are simply unacceptable and this Bill will serve to ensure that they are also serious crimes.

15. While this Bill makes clear that threats or incitement to serious harm or threats intended to stir up religious hatred are entirely unacceptable, we do not believe that it restricts legitimate freedom of expression, nor freedom to practice and promote a religion; these too are some of Scotland's most essential values. Such freedoms allow crucially for satirical comment, criticism and even harsh words, whether expressed by young or old, at home, on the street, or on the stage. However, when such criticism becomes a threat, in particular a threat to seriously harm another person or which stirs up religious hatred, we believe individuals or groups have thereby forfeited their right to express or communicate that threat whether to the person threatened or any other person. We must all take responsibility for our words and actions, and when these are no longer reasonable and threaten others, and so are no longer justifiable, then we must all be accountable for the consequences.

16. In addition, as made clear above, public disorder at football matches can be provoked and worsened by expressing or inciting hatred against particular groups and this Bill makes clear that all such offensive or threatening behaviour is unacceptable and spells out the consequences for those who seek to threaten or incite hatred.

NATURE AND SCOPE OF PROPOSED OFFENCES

17. We propose creating new criminal offences relating to:

- offensive behaviour at football matches; and
- threatening communications.

Offensive behaviour at football matches

Policy Objective

18. To provide the police with powers to deal with offensive or threatening behaviour which is liable to incite public disorder at football matches.

Key Information

19. The offence is intended to address the problem of offensive and threatening conduct, including singing and chanting and the display of offensive flags and banners (in particular, those of a “sectarian” or racist nature) which are known to incite public disorder associated with football matches.

20. At present, disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant.

21. However, there is concern that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law. Such offensive behaviour might not satisfy the strict criteria for causing ‘fear and alarm’ required to prove Breach of the Peace, or section 38 of the 2010 Act. The Bill, therefore, seeks to put beyond doubt that behaviour related to football matches which is likely to incite public disorder and which would be offensive to any reasonable person is a criminal offence. Introducing this offence will serve to clarify rather than complicate the law, and will provide reassurance to the public in relation to our collective abhorrence of this sort of behaviour. It will serve to send a very clear and powerful signal to football fans and the public more generally that such behaviour at football matches is simply unacceptable. It will also mean that an offender’s criminal record will clearly show that that he or she had engaged in offensive behaviour specifically related to football, rather than any more general offence.

22. There is no evidence of a significant problem with disorder or “sectarian” or otherwise offensive behaviour associated with sports other than football. The Bill, therefore, provides that the new offence should apply in respect of football matches only. However, problems of disorder relating to football matches are not solely, or even always primarily, associated with behaviour at football stadia, but with behaviour occurring outside the stadia and on the way to and from matches on public transport and on our cities’ streets as well as in pubs and other venues where matches are being televised. The approach adopted in the Bill is to ensure that offensive and threatening behaviour occurring at any of these places is caught by the offence.

23. This is based on the approach used with respect to football banning orders. The Bill, therefore, provides that the offence can be committed:

- (a) at a regulated football match or while the person committing it is entering or leaving (or trying to enter or leave) the ground; or
- (b) on a journey to or from a regulated football match.

24. The definition of a regulated football match is based on that used in respect of football banning orders and will include behaviour in public venues in which football matches are being televised, whether that be outdoor big screens or public houses, as well as offensive behaviour on

journeys to and from these venues. Adopting this approach will mean that any conviction arising from this new offence would also automatically constitute strong grounds for imposition of a football banning order on the offender. The definition will ensure that the legislation extends to games played by Scottish football clubs elsewhere in the world. This will enable action to be taken to prosecute those who engage in offensive or threatening behaviour where Scottish clubs are playing in Europe and elsewhere.

25. The offence will criminalise behaviour which is likely to incite public disorder and:
- involves the expression of hatred to a person or group of persons because of their religion, race, ethnicity, nationality, ethnic or national origins, sexual orientation, transgender identity or disability; or
 - which is threatening; or
 - which would cause offence to a reasonable person.

26. The offence does not refer specifically to “sectarian” behaviour and the term is not defined in Scots law. The offence instead refers to behaviour which constitutes an expression of or incitement to religious or other hatred, behaviour which is threatening, and behaviour which a reasonable person would find offensive. The Bill does not, therefore, seek to criminalise only behaviour which is “sectarian” but all behaviour related to football that is likely to lead to public disorder. This is not focused on one team, or one song or chant, but all offensive songs and chants by the supporters of any team, including our national team. The Bill criminalises such offensive behaviour likely to incite public disorder whether it is clearly motivated by racial or religious bigotry or offensive in some other way to any reasonable person in Scotland. While recognising freedom of political expression, it is clear that when such expression is designed to offend or threaten others and threatens public order, then it is unacceptable, and has no place at a football match.

27. The nature of the public debate means that there has been and will continue to be a focus on “sectarian” or religious hatred expressed in the context of football matches. However, there is a clear recognition that the nature of the offensive behaviour the Bill seeks to cover is in fact wider. The provisions are intended to cover other identified issues including racist and homophobic chanting at football matches. Evidence collated as part of the Scottish Government’s contribution to the Equality and Human Rights Commission’s inquiry into disability harassment, which is due to be published later in 2011, demonstrated a need for explicit recognition of the potential for disability-related threats, harassment and abuse in a range of contexts. The Bill makes it clear that expressions of hatred against a person or group of persons because of their disability at a football match would be covered.

28. In determining whether the offensive or threatening behaviour would be likely to incite public disorder, it will not be a defence to argue that public disorder would be unlikely solely because measures, such as a heavy police presence, were in place to prevent disorder, or because all or the vast majority of those present participated in the offensive or “sectarian” behaviour. The Bill, therefore, ensures that the singing of offensive and “sectarian” songs or chants at games where only a small number of the other team’s supporters who might be offended are present, or after the vast majority of those supporters have left the ground, can and will be subject to criminal sanctions.

29. The Bill proposes to introduce an offence which:
- criminalises offensive or threatening behaviour which would be likely to incite public disorder at football matches, and at any public place where a football match is being broadcast;
 - targets expressions of hatred of a person or group of persons because of their religion, race, ethnicity, nationality, ethnic or national origins, sexual orientation, transgender identity or disability;
 - covers a wide range of offending behaviour from that which might appropriately be dealt with by fixed penalty notices or community payback orders to serious incitement to public disorder which requires to be tried on indictment. The maximum penalty is 5 years imprisonment plus an unlimited fine when tried on indictment and 12 months imprisonment plus a fine of up to £10,000 when tried summarily.

Threatening communications

Policy Objective

30. To provide new powers to tackle threatening communications.

Key Information

31. In recent months, there has been a serious problem of the posting of bullets and bombs to prominent people connected to football and with the posting of images, messages and videos on the internet inciting or threatening acts of serious violence towards people connected to football.

32. While there has been a particular problem of threats made to people who are in some way connected with football, there is a wider problem with the posting of threatening material, including bullets, and the motivation for these threats appears to be of a “sectarian” nature. This threatening material appears intended to stir up hatred against people of a particular religious faith or ethnicity and create or contribute to an atmosphere in which some see it as acceptable to threaten certain individuals with serious violence. The Bill, therefore, does not confine the threatening communications offence to football, nor to “sectarian” incidents. Threatening communications are a serious concern, regardless of whether they are, or can be proven to be, “sectarian” or connected to football.

33. There are a number of offence provisions which may currently apply in respect of the making of threatening communications. These include the common law offences of breach of the peace and uttering threats, the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the offences at Part III of the Public Order Act 1986 (incitement of racial hatred). Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant. Furthermore, it is a crime in itself under Scots law to incite the commission of a criminal offence. Finally, where the communication is electronic in nature, section 127 of the Communications Act 2003 criminalises “improper use of a public electronic communications

network”, specifically the sending of a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character.

34. While these laws are in place they are not always easily applied to this behaviour. The requirement for a “public element” can make a charge of breach of the peace difficult to bring in some cases. It can also be difficult to establish that someone actually intended to carry out a threat or incite someone else to commit a crime in relation to the common law offences of uttering threats and incitement. While the offence of “threatening and abusive behaviour” does not require a public element, it does require that the behaviour must be of a threatening and abusive *manner* and could not necessarily be used to prosecute threats made with the intent of inciting religious hatred. Finally, in relation to electronic communications, case law has left some doubt about whether the Communications Act offence can be used to prosecute people who create offensive websites or “groups” on social networks, as opposed to sending threatening emails or other communications.

35. A further potential gap in our law is highlighted by the fact that England and Wales, Northern Ireland and the Irish Republic have all legislated to provide for specific offences relating to inciting religious hatred. Scotland is, therefore, the only part of the UK without a specific offence relating to inciting religious hatred. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may be appropriate but inciting religious hatred without a racial element is not currently a specific offence in Scotland.

36. We believe that a specific offence will bring clarity to the law in this area, send a clear message that such behaviour is unacceptable, and enable the courts to impose stiffer sentences on the most serious offenders. The Bill, therefore, proposes an offence to address two classes of threat: threats of serious violence, and threats intended to stir up religious hatred, whether or not they involve threats of serious violence.

37. The offence criminalises any communication with at least one other person which threatens a person with serious violence or death, or incites others to kill or commit a seriously violent act against a person, or which implies such a threat. The offence is committed where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm. The offence will apply to text, images, video and recorded sound, communicated by any means (by post, on leaflets or posters or posted on the internet).

38. The requirement that material communicated must be intended to cause fear or alarm (or is communicated with recklessness as to whether fear and alarm is caused) for an offence to be committed is intended to ensure that depictions of death or injury in art, literature, the theatre, film, video games, or similar cultural or dramatic contexts, and threats made in jest that no reasonable person would find alarming are not caught by the offence; whereas depictions (for example of prominent real-life figures) intended as an implied threat to that person or group of people will be criminalised.

39. Clearly, where there is compelling evidence that a person making a threat to kill a person intends to act upon that threat, it would be possible to charge the person with uttering threats or conspiracy to murder, which carry a maximum penalty of life imprisonment. This offence is intended to deal with threats of death or serious injury where there may not be evidence of intention to carry it out, including where the person making such a threat may not intend to carry it out, but who nonetheless causes fear and alarm to those subjected to such threats.

40. The offence will also criminalise threats made with the intent of stirring up religious hatred. “Religious hatred” is defined as meaning hatred against a person or group of persons based in their membership of a religious group, or of a social or cultural group with a perceived religious affiliation. The definition of “religious group” is the same as that used in section 74 of the Criminal Justice (Scotland) Act 2003, which provides for a statutory aggravation that an offence was aggravated by religious prejudice. It brings Scotland into line with England and Wales, where threats intended to stir up religious hatred are criminalised by the Public Order Act 1986, as amended by Racial and Religious Hatred Act 2006 (and both Northern Ireland and the Irish Republic have also legislated to criminalise inciting religious hatred).

41. The provision is restricted to *threats* made with the *intent* of stirring up religious hatred. As such, it does not interfere with the right to preach religious beliefs nor a person’s right to be critical of religious practices or beliefs, even in harsh or strident terms. There was extensive criticism of early attempts to criminalise incitement of religious hatred in England and Wales on the grounds that provisions extending to insults and abuse as well as threats could inadvertently criminalise comedians and satirists who make jokes about religion, or even religious texts themselves. We believe that the Bill avoids those problems and does not restrict legitimate freedom of expression.

42. The offence will apply to anything done outside Scotland by a person who is a British national or who is habitually resident in Scotland. This is intended to ensure that a person cannot evade criminal liability by making threatening communications (whether by sending them in the post or posting on the internet) from outside Scotland. The offence will also apply to a communication made from outside Scotland if the person making it intends the communication to be seen primarily in Scotland. This ensures that someone based outwith Scotland, who may well travel frequently to Scotland for the purposes of, for example, attending football matches, cannot evade prosecution if he or she makes threatening communications from outside Scotland targeted e.g. at people involved in Scottish football or inciting religious hatred in Scotland. It would not, on the other hand, apply where a person who is not a British national makes threatening communications from outside Scotland which are not primarily intended to be seen in Scotland.

43. The Bill proposes to introduce an offence which:

- criminalises communications of any kind to one or more persons which make threats of serious violence to a person, or incite the commission of acts of serious violence to a person;
- criminalises communications of any kind to one or more persons which make threats intended to stir up religious hatred;
- will apply to postings, messages etc., displayed in, or primarily intended to be seen in Scotland; and

- is triable either way and subject to a maximum penalty of 5 years imprisonment plus an unlimited fine when tried on indictment and 12 months imprisonment plus a fine of up to £10,000 when tried summarily.

Enforcement

44. As the definition of where Offence A can take place is based on the scope of Football Banning Orders (FBOs), we would expect the enforcement of this new offence to lead to continued and more effective use of FBOs. Clear, targeted approaches to offensive behaviour at football games can be very effective in reducing such behaviour by supporters, as seen by the deployment of the Anti-sectarian Initiative by Strathclyde Police at the final Old Firm game of the 2010/11 season. The introduction of these new offences is intended to have a similar effect by strengthening the law around offensive behaviour at football grounds and threatening communications.

45. The Joint Action Group, established following the Football Summit on 8 March 2011, is considering a range of measures to tackle violence, bigotry and alcohol misuse associated with football. These new offences will form a central element of the wider considerations of the Joint Action Group and will inform their report to Scottish Ministers before the start of the new football season.

ALTERNATIVE APPROACHES

46. The measures in this Bill are only part of a broader strategy to tackle problems not only in Scottish football but in wider society. In the short term, further measures to address problems related to football will be introduced through the work of the Joint Action Group, and in the longer term the Government is committed to tackle sectarianism by all means at its disposal. The Government has, therefore, sought to balance the need for very immediate action to resolve the most pressing football related problems ahead of the new season with a longer term view of further actions required to achieve our aims on sectarianism. This Bill is, therefore, limited to what the Government and partners believe is immediately necessary.

47. While the circumstances of the 2010/11 Scottish football season have brought matters to a head, these are issues that have poisoned the national game for a long time now. We are clear that very few people will deny that action is due. It is a manifesto commitment of the Government to take a “zero tolerance” approach to the problems of violence and sectarianism. This provides a clear mandate for action. The very serious nature of the disorder associated with Scottish football and the recent prevalence of serious threats communicated through an increasing variety of means, demanded that this necessary action also be immediate to ensure that any necessary measures are in place ahead of the next football season to address any repetition of such unacceptable behaviour.

48. Considerable thought was given to whether the necessary and immediate action need involve a Bill to create new criminal offences or whether it could have involved a further determination to use existing measures more effectively. While in relation to offensive and disorderly conduct at football matches there is coverage of existing law in relation to most of the behaviour we are seeking to eradicate, there are nevertheless areas where greater clarity and a strengthened response would be beneficial. In relation to the communication of threatening

material, there is an obvious gap when compared to elsewhere in the UK regarding the behaviour we are seeking to eradicate. It is clear, therefore, that legislation is required to achieve our stated aims.

49. It was equally important that the action be proportionate. The Bill as introduced represents what the Scottish Government considers to be a proportionate response to the unique circumstances in which Scotland, and Scottish football, find itself. We consider it crucial that the next football season starts with new, effective measures in place to begin the process of eradicating the unacceptable attitudes and behaviours from our national game and society more generally.

50. The question of what is proportionate in this context is vital. To allow the measures introduced by this Bill to be in place by the start of the new football season, will require a fast-track parliamentary process. We accept that this will limit the time available for detailed scrutiny of the Bill. The Scottish Government has considered carefully whether the benefits of a more prolonged parliamentary process to allow more time for discussion and wider consultation would outweigh the risks of further damage to Scottish football and our society if we do not take immediate action to address the issues arising during the 2010/11 season. The Government is convinced that responding quickly and decisively to the seriousness of the situation we find ourselves in is, on balance, more important.

51. A primary purpose of the Bill is to clarify and strengthen the law in relation to “sectarian” and offensive chanting. Historically, there have been calls for very specific sorts of action to deal with “Sectarian chanting” at football matches. It is often suggested that the most effective approach would be simply to ban certain songs and chants. The Scottish Government has, therefore, considered whether this approach should be adopted in the Bill. We have concluded that the problems with constructing a proscribed list which is definitive, the difficulty in keeping such a list up to date to account for any new songs and chants and the potential for ‘loopholes’ being created, possibly by even the most minor adjustment to existing songs and chants, means that the creation of such a list in legislation would be cumbersome and ineffective.

52. The Bill tackles this issue without the need for an inflexible and unwieldy mechanism such as lists of banned chants. It does so by criminalising any behaviour that expresses or stirs up religious or other hatred and would be likely to incite public disorder related to football as well as any other behaviour likely to cause public disorder related to football which would be offensive to a reasonable person in Scotland. It is our express intention that this will cover all “sectarian” songs and chants as well as all otherwise offensive songs or chants.

53. We welcome moves by football authorities, clubs, and fans to take a strong lead in the debate on what it is and what is not acceptable. This Bill will provide a general framework for that debate but there will need to be significant and sustained effort by those groups to ensure that such unacceptable behaviour is eliminated.

54. The need for a fast track procedure to ensure that the new offences created by the Bill are in place in time for the 2011/12 football season has been an important consideration for the Scottish Government in considering the scope and content of the Bill. This Policy Memorandum makes clear that the specific impetus for this fast track legislation was the recent upsurge in

unacceptable behaviour related to football, including bullets being posted to people connected to football and sectarian threats to people connected to football being posted on the internet and on social networking media.

55. A particular issue which we considered very carefully is whether the threatening communications offence should be extended to catch 'live' speech as well as recorded speech. A distinction can be made on the basis that recorded threats, like written threats, may indicate not only a stronger expression of such views than everyday speech but also a more serious intention to carry out such threats. Our view, however, was that it is not a significant enough distinction to justify their exclusion from this legislation. A primary consideration in reaching a conclusion on this issue is that the criminalising offensive behaviour related to football will cover verbal threats and the expression or inciting of religious hatred at, or on the way to and from, a regulated football match at any public place where such matches are televised where those threats are likely to lead to public disorder. The most significant consideration, however, is that verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour which gave rise to the need for this Bill and the wider implications of such an extension deserve fuller consideration.

56. The Scottish Government has, therefore, sought to ensure that the Bill is tightly drawn to tackle specific issues rather than ranging more widely to cover other issues relating to sectarianism or other forms of hatred which may be equally offensive and equally deserving of a firm legislative response but which were not part of the specific impetus for this Bill. The Government is clear that Bill covering a much wider range of attitudes and behaviours and introducing a wider range of measures would not have been justified without fuller consultation and engagement.

57. The Scottish Government remains committed, however, to considering what further or wider measures may be necessary to build on the provisions made in this Bill, both in support of our wider commitments on sectarianism and as a result of experience in implementing the Bill's provisions. This legislation represents only the first step in this Government's programme of action against sectarianism, it will be followed by further steps, including further legislation if necessary, until we can be sure that our objectives are achieved.

CONSULTATION

58. As explained, we believe that the measures in this Bill need to be in place before the start of the 2011/12 football season, not least to begin to repair the damage done to the reputation of Scottish football and Scotland more generally by recent events. This has of necessity curtailed the opportunity to engage in a standard consultation on the provisions of the Bill. Nevertheless, we have and will engage with a wide range of people and interest groups on the provisions of the Bill. Our plans to introduce new legislation to tackle sectarianism have been discussed with a range of partners including the Convention of Scottish Local Authorities, Association of Chief Police Officers in Scotland, Scottish Courts Service, Scottish Prison Service, Scottish Legal Aid Board, Scottish Football Association, Scottish Football League and Scottish Premier League as well as the Crown Office and Procurator Fiscal Service.

59. These measures have not, therefore, been proposed in a vacuum. The behaviours this Bill seeks to eradicate are under very active and expert consideration by the Joint Action Group established after the Scottish Football Summit on 8 March 2011. This has meant there have been discussions with key partners including the Association of Chief Police Officers in Scotland (ACPOS) and the governing bodies of Scottish football: the Scottish Football Association, Scottish Premier League and Scottish Football League.

60. The work of the Joint Action Group has provided a very expert forum for discussions on the issues we are seeking to tackle through this Bill and certainly this expert advice has shaped our proposals. It has also reinforced our commitment to our wider work to tackle sectarianism and there will continue to be consultation and engagement around the longer term action required to eradicate these attitudes and behaviour. A key partner in that wider work is local government. We fully recognise the vital role they play in engaging and supporting Scottish communities. We have therefore initiated a constructive dialogue with the Convention of Scottish Local Authorities.

61. We also recognise that children and young people may be affected, particularly by the new threatening communications offence and its potential relevance to modern forms of communication such as mobile phones, the internet, social networks, etc. To ensure we understand how the legislation might impact on children and young people, we have engaged with the Scottish Commissioner for Children and Young People, the Scottish Youth Parliament and Young Scot. We are working closely with Young Scot to provide information on the new offences to young people via their suite of communication networks. The Scottish Youth Parliament also discussed the issues relating to legislation on sectarianism and proposals to tackle sectarianism in the longer term at its AGM (11-12 June) and provided feedback to the Scottish Government.

62. To ensure that the new offences do not restrict legitimate freedom of expression, or freedom to practice and promote a religion, we are engaging in dialogue with the Scottish Human Rights Commission. We have also undertaken to engage with the Scottish Parliament's Cross Party Group on Human Rights when it next meets on 21 June 2011 to discuss legislation on sectarianism.

63. Finally, in relation to the technical and legal aspects of the Bill, we have also consulted with key interests in the criminal justice system, including the Crown Office and Procurator Fiscal Service, Scottish Court Service, Scottish Prison Service and Scottish Legal Aid Board. We will of course continue these discussions to ensure that the implementation of the Bill's provisions is as effective as possible.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

64. The Bill aims to benefit all the people of Scotland, building safer and stronger communities free from violence and the fear of violence. The measures set out in the Bill, along with the work of the Joint Action Group, are aimed at making a significant contribution to eradicating "sectarian" and other discriminatory behaviour, not just in Scottish football but in

wider society. The Bill aims to strengthen protection against criminal acts carried out in the name of prejudice. Proper and effective use of the legislation will send a strong message that bigotry and prejudice have no place in a modern, diverse, multi-cultural Scotland. In conjunction with preventative and rehabilitative measures, as well as the ongoing work at grass-roots level in our communities, the Bill will help to break down barriers, moving people's perceptions away from stereotyped and misconceived views of identity – and indeed, showing that identity is much more complex than the football team you support. A fuller description of the equal opportunities issues around the Bill will be set out in the Equality Impact Assessment to be published to accompany the Bill.

Human rights

65. The Scottish Government is satisfied that the provisions of this Bill are compatible with the European Convention on Human Rights

66. The offence of behaving in an offensive manner at a football match could raise issues in relation to Articles 9 (freedom of thought, conscience and religion) and 10 (right to freedom of expression) of the Convention. However, much of the behaviour that the Bill is seeking to address would not amount to a manifestation of a person's religious beliefs in terms of Article 9, and may amount to an abuse of the rights of others and so not be protected by Article 10. To the extent that a prosecution for an offence under section 1 may interfere with the rights protected by Articles 9 and 10, prosecutors and courts will have to consider whether such an interference is, in the particular circumstances, necessary in the interests of public safety and the prevention of public disorder.

67. The offence of making a threatening communication could raise issues in relation to Articles 8 (right to respect for private and family life), 9 and 10 of the Convention. Given that this offence relates to communications which are threatening in nature and which could cause fear or alarm in others, or are intended to incite religious hatred, it is considered that although a prosecution for this offence may, in some cases, interfere with the rights guaranteed by those Articles, such a prosecution may nevertheless be justified in the interests of public safety and the prevention of public disorder and crime. Again, prosecutors and courts will be required to act compatibly with these rights in individual cases. It is also considered that the defence that the behaviour was reasonable is an evidential rather than a legal burden and is not incompatible with Article 6.2 (right to a fair trial).

Island and rural communities

68. The Bill has no differential impact on island and rural communities.

Local government

69. We fully recognise the vital role of local government in supporting communities to overcome issues such as sectarianism. Energising and engaging communities, understanding and responding directly to their needs, are things that local authorities are better placed to do than national Government. We believe that these measures, as part of a wider package, will in the long term have a very positive impact for local government as we begin to see increased

community cohesion and integration that avoids, for example, the need for community safety and criminal justice measures.

70. In the shorter term, we recognise that courts may use community sentences such as community payback orders in dealing with those committing offences under the provisions of the Bill. Local authorities will have responsibility for implementing such sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. The financial implications for local government are set out in the Financial Memorandum accompanying the Bill.

Sustainable development

71. The Bill will have no negative impact on sustainable development.

Business and Regulatory Impact Assessment

72. A Business and Regulatory Impact Assessment (BRIA) has not been completed in relation to this Bill. The Minister for Community Safety and Legal Affairs does not consider that a BRIA is necessary as the additional costs of policing and enforcing the offences set out in the Bill will fall primarily on public service organisations including the police, Scottish Court Service, Crown Office and Procurator Fiscal Service and the Scottish Prison Service.

73. The estimated costs arising as a result of the provisions of the Offensive Behaviour in Football and Threatening Communications (Scotland) Bill are set out in the Financial Memorandum accompanying the Bill.

This document relates to the Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL

POLICY MEMORANDUM

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

ISBN 978-1-4061-7572-1



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