

LORD ADVOCATE'S GUIDELINES ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL (AS INTRODUCED)

Purpose

The objective of these offences is to tackle sectarian hatred and other offensive and threatening behaviour related to football matches and to prevent the communication of threatening material, particularly where it incites religious hatred. The primary but not sole motivation for the offences concerns football. While the vast majority of supporters attend matches with the sole purpose of enjoying Scotland's national game, there continues to be a bigoted and undesirable element who continue to sing and chant "sectarian" and other offensive verses. These offences are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society.

Offences

The Act creates 2 new criminal offences. The offence of "offensive behaviour at regulated football matches" criminalises offensive or threatening behaviour in relation to football matches that is likely to incite public disorder. The offence of threatening communications creates an offence of making communications which contain threats of serious violence or which contain threats intended to incite religious hatred.

The first offence is not restricted to behaviour which is "sectarian" but applies all behaviour related to football that is likely to lead to public disorder, it is not focused on one team, or one song or chant but all offensive songs and chants or other offensive behaviour by the supporters of any team, including our national team.

OFFENSIVE BEHAVIOUR AT FOOTBALL MATCHES

The offence provides the police with powers to deal with offensive or threatening behaviour in relation to football matches that is liable to incite public disorder and 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.

Problems of disorder relating to football matches are not solely, or even always primarily, associated with behaviour at football stadiums. Any offensive or threatening behaviour related to football matches that occurs outside stadiums, on public transport and in town streets as well as in pubs and other venues where matches are being televised is caught if it occurs on a journey to or from the match or at a place where the match is televised.

Scope of the offence

A person commits an offence if a person engages in behaviour of the kind listed below in relation to a regulated football match and which is likely to incite public disorder:

- Expressing hatred of, or stirring up hatred against an individual or group of persons based on their membership (or presumed membership) of a religious group, a social or cultural group with a perceived religious affiliation, a group defined by reference to colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity or disability;
- Behaviour that is motivated (wholly or partly) by hatred of such a group;
- behaviour that is threatening; or
- other behaviour that a reasonable person would consider offensive

The offence can be committed:

- (a) at the ground where a regulated football match is being held, on the day on which it is being held;
- (b) while the person is entering or leaving (or trying to enter or leave) the ground where the match is held;
- (c) on a journey to or from a football match - A person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and a person's journey includes breaks (including overnight breaks); and
- (d) any place (other than domestic premises) at which such a match is being broadcast.

Regulated Football Match (including televised matches)

The definition of a "regulated football match" is similar to the definition in the Football Banning Orders legislation and a Football Banning Order could be imposed where there is a conviction for this offence. There is a presumption that the prosecutor will seek a Football Banning Order if there is a conviction under this legislation or for any offence if the behaviour is football related.

On a journey to or from a football match

If the person is believed to have been intending to attend a match, the report must include evidence to support this contention.

Examples of evidence that may allow such inferences to be drawn are:

- Possession of a match ticket;
- Wearing teams colours in proximity of the football ground or on a route to the ground;
- Person is a season ticket holder; and
- Person is with a group of persons who it can clearly be evidenced are on the way to the match.

The offence also specifies that persons can be regarded as having been on a journey to or from a regulated football match whether or not the person attended or

intended to attend the match. This includes those who travel to towns and cities where football matches are being played solely to indulge in violence or other offensive behaviour.]

Televised matches

An offence can also be committed at any public venue where football matches are being televised, whether by outdoor screens or in public houses or other public venues where the match is being broadcast, including commercial premises where television screens broadcasting the match are being displayed. The legislation provides that an offence can be committed at any point during the day on which a match (including match highlights) is broadcast, so sectarian or other offensive behaviour in such places both before and after the broadcast is covered. However, the crucial element to constitute an offence is that the offensive behaviour is connected to the football match being shown (or which has been shown or will be shown) and that the behaviour risks causing public disorder.

INCITING PUBLIC DISORDER

Type of Conduct and Behaviour

Behaviour expressing hatred or which is threatening or a reasonable person would be likely to consider offensive

The offence does not refer specifically to sectarian behaviour as the term is not defined in Scots law. The offence instead refers to behaviour which constitutes an expression of or incitement to or is motivated by religious or other hatred, behaviour which is threatening, and behaviour which a reasonable person would find offensive and is likely to lead to public disorder.

The singing of songs and chants or the display of banners, that is clearly motivated by hatred on racial, religious, cultural or social grounds or by hatred of a group based on their sexual orientation, transgender identity or disability or which is threatening are examples of the type of behaviour that will be caught by this offence if they are likely to cause public disorder. Such conduct is unacceptable and has no place at a football match.

While, it is a matter for the judgement of a police officer having regard to the nature and words of the song, including any "add ons", the surrounding circumstances and the context in which it is being sung to determine whether a song or lyrics are threatening or expressing hatred, the following are examples of the types of songs and lyrics which are likely to be threatening or express hatred:

- Songs/lyrics which promote or celebrate violence against another person's religion, culture or heritage
- Songs/lyrics which are hateful towards another person's religion and religious leaders, race, ethnicity, colour, sexuality, heritage or culture

Behaviour that is offensive to the reasonable person

In order for a criminal offence to be committed, it is not sufficient that an individual or individuals are (or claim to be) offended by a song or other behaviour; the behaviour must be of a character which is likely to be offensive to a reasonable person. While it is a matter for the judgement of a police officer whether a song or other behaviour is likely to be offensive to a reasonable person having regard to the nature and lyrics of the song, including any “add ons”, the surrounding circumstances and the context in which it is being sung, the following are examples of the type of songs and lyrics which are likely to be offensive to a reasonable person.

- Songs/lyrics in support of terrorist organisations
- Songs/lyrics which glorifies or celebrates events involving the loss of life or serious injury.

It should be noted that in order for a criminal offence to be committed under this offence, in addition to proof that the song/lyrics are threatening or offensive, it must be proved that the conduct was likely to incite public disorder.

General Approach

In determining whether the offensive or threatening behaviour would be likely to incite public disorder, it is **not a defence** that public disorder would be unlikely to occur solely due to:

- measures to prevent disorder being in place, such as a heavy police presence; or
- because all or the vast majority of those present participated in the offensive or threatening behaviour, including where all or the vast majority of opposition supporters have left the ground.

The offence **WILL NOT**

- Criminalise singing national anthems in the absence of any other aggravating, threatening or offensive behaviour
- Criminalise making religious gestures in the absence of any other aggravating, threatening or offensive behaviour
- Criminalise football banter or bad taste in the absence of any other aggravating, threatening or offensive behaviour

Officers should have regard to proportionality, legitimate football rivalry and **common sense** when assessing whether the conduct would cause offence to the reasonable person.

Choice of Charges

Disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace or as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of offensive behaviour at a football match, such behaviour at or related to football matches should be reported as that offence in preference to a common law breach of the peace or contravention of section 38. It is not appropriate to add aggravations

in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence. If appropriate, these aggravations can be added to other charges libelled on the same complaint.

THREATENING COMMUNICATIONS

The offence is intended to address threats of serious harm and threats that incite religious hatred. It is not confined to football or “sectarian” incidents but is intended to address such incidents.

Scope of the offence

The offence is committed if a person communicates material to at least one other person which:

- threatens a person or people of a general description with serious violence or death, or incites others to kill or commit a seriously violent act against a person or persons of a particular description, or which implies such a threat and 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; or
- consists of *threats* made with the *intent* of stirring up religious hatred.

Defence

It is a defence for a person to show that the communication of the material was, in the particular circumstances, reasonable.

Definitions

“Communicates” means communicates by any means (other than by unrecorded speech).

“Material” means anything that is capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form and will apply to text, images, video and recorded sound, communicated by any means (by post, on leaflets, or posters or posted on the internet).

“Seriously violent act” means an act that would cause serious injury to, or the death of, a person.

“Religious hatred” is defined as meaning hatred against a person or group of persons based on their membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation.

Type of Behaviour

Threats of Serious Violence or Death

The 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.

If there is evidence that a person making a threat to kill a person intends to act upon that threat, consideration should be given to charges of uttering threats or conspiracy to murder.

Threats with the Intent of Stirring up Religious Hatred

The offence is committed if a person communicates material, including displaying any written material, which is threatening, and it is intended thereby to stir up religious hatred. The material communicated must be threatening, and intended to stir up religious hatred; recklessness is not enough.

Freedom of Expression

The offence is not intended to infringe, prohibit or restrict legitimate freedom of expression nor freedom to practice and promote a religion. Such freedoms allow for satirical comment, criticism and expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of its adherents or any other belief system or practices of its adherents. While these freedoms are not absolute, this offence will only interfere with them where a threat is made.

The offence **WILL NOT**

- Prevent peaceful religious preaching
- Restrict legitimate freedom of speech including the right to criticise or comment on religion or non-religious beliefs, even in harsh or derogatory terms
- Criminalise jokes and satire about religion or non-religious beliefs
- Criminalise depictions of threats in art, literature, the theatre, film, video games, or similar cultural or dramatic contexts
- Criminalise threats made in jest that no reasonable person would find alarming

Choice of Charges

Threatening communications can, in certain circumstances, be prosecuted as other offences including breach of the peace and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of threatening communications the conduct should be reported as an offence of threatening communications in preference to any other offence unless the conduct is of such seriousness that the appropriate penalty is likely to exceed 5 years. In such circumstances, consideration should be given to labelling an offence of breach of the

peace. Where the charge involves threats with the intent of stirring up religious hatred, it is not appropriate to add an aggravation in terms of prejudice relating to religion to this offence. If appropriate, the aggravation can be added to other charges libelled on the same complaint.

Offences outside Scotland

Both of these offences can be committed outside Scotland and will apply to anything done by a person who is a British national or who is habitually resident in Scotland.

In relation to offensive behaviour at football matches, this can only be committed outwith Scotland when the match involves a national team appointed to represent Scotland or a team representing a club that is a member of a football association or league based in Scotland.

In relation to threatening communications, this offence will also apply to a communication made from outside Scotland if the person making it intends the communication to be read, listened to or seen primarily in Scotland. This ensures that someone based outside 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.

However, given the practical and logistical difficulties of investigating and prosecuting a crime that occurred outside Scotland, a careful and measured approach must be taken and the authorities in the place where the offence occurred should ordinarily have primary jurisdiction. However, it is recognised that the decision to report a matter to the Procurator Fiscal in these circumstances is an operational matter for the police.

Custody/Use of Undertakings

Where there is evidence that an offence has been committed the accused should be reported in custody. Only in extenuating circumstances should an accused be liberated subject to an undertaking to appear at court.

In cases where an offence appears to have been committed and an early arrest is not possible, the police should ensure that an early report is submitted to the Procurator Fiscal in order that consideration may be given to an application for a warrant to arrest the accused.

In relation to the behaviour of players and officials at a football match further reference should be made to the **Lord Advocate's guidelines to Chief Constables incidents during sporting events**

Football Liaison Prosecutors

Each COPFS, Federation has a dedicated Football Liaison Prosecutor (FLP). The FLPs will engage with the Football Coordination Unit Scotland (FoCUS) that has

been tasked with taking the lead on strategic thinking on the policing of Scottish football and will support the delivery of a consistent approach to the investigation and enforcement of offences related to football. The FLPs will liaise closely with, the police and other key partners to:

- Ensure a consistent and robust response to cases which have a football related element;
- Raise awareness and champion the use of Football Banning Orders with Procurators Fiscal;
- Work with the police to identify best practice and to further improve quality of reporting of such cases;
- Contribute to the training of and the development of guidance;
- Engage with a range of key stakeholders;
- Monitor the use of FBOs in their Federation.

Contact details for FLPs

North Federation

East Federation

West Federation