

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Stage 3 briefing on the
Offensive Behaviour at Football and
Threatening Communications
(Scotland) Bill**

December 2011

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to public consultations on issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

1. Liberty (the National Council for Civil Liberties) devolved long before the United Kingdom itself. For many years we worked alongside a Scottish sister organisation before the sad demise of the Scottish Human Rights Centre a few years ago. Since then, we have collaborated on occasion with Scottish lawyers on particular issues. However, we have had neither the resources nor cause for regular submission to the Scottish Parliament. Nonetheless, we have a number of members and supporters in the jurisdiction and believe it to be of considerable importance in debates about Human Rights in the UK, Europe and further afield. We hope that MSPs will feel able to consider this particular contribution, given the huge human rights importance of considering free expression in the struggle against prejudice, the coverage of some of the proposed offences beyond Scotland and our recent experience of broad speech offences in England and Wales.

2. The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill provides for two new offences aimed at tackling sectarian division and associated violence in Scotland. One offence aims to deal with the possible incitement of public disorder in relation to Scottish football; the second offence criminalises threatening communication generally. During Stage 2 proceedings the Government significantly amended the Bill¹ and the possible content of these offences by allowing for the conduct element of these offences to be varied by statutory instrument. Allowing for the modification of criminal conduct by way of Ministerial order is a breathtaking expansion of power. Use of the statutory instrument power to introduce significant policy decisions without full parliamentary scrutiny on par with that provided for proposed legislation is an extraordinary move which only goes to show that this Bill is poorly planned and poorly drafted. This Bill was motivated by escalating criminal behaviour in the turbulent 2010/11 football season² (although the Bill goes far beyond seeking to address just these events).³ The Scottish Government first attempted to push this Bill through Parliament as an

¹ Inserting new clauses 4A and 6A.

² See the Report of the Justice Committee, SP Paper 21, 1st Report 2011 (Session 4) *Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2*, at para 31. Report available at <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/42951.aspx>.

³ See the Report of the Justice Committee, *ibid*, at para 34, and the Policy Memorandum for the Bill at para 26. The Policy Memorandum is available at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/29678.aspx>.

emergency measure in June 2011.⁴ It is unsurprising, given the serious implications of the Bill for free expression, that the Government soon reverted to normal parliamentary procedure and the Bill has since proceeded with the detailed consideration such proposed new offences changes demand.⁵ The ad hoc development of this Bill and late insertion of such wide powers only goes to further show that the best solution for this Bill is a pause.

3. There is no question that minimising violence in connection with football or otherwise is an important and laudable policy objective. However Liberty is concerned that the broadly framed offences proposed in this Bill, and now Ministerial powers to amend them, will also unnecessarily sweep up individuals exercising their right to free speech⁶ who have no intention to commit or incite a criminal offence and in the event do not do so. Our concerns are only heightened given there are a plethora of offences on the statute book and in the common law dealing with breach of the peace,⁷ violence and incitement. Section 38 of the *Criminal Justice and Licensing (Scotland) Act 2010* provides for an offence of “*threatening and abusive behaviour*”. Section 74 of the *Criminal Justice (Scotland) Act 2003* allows for offences to be aggravated by religious prejudice. Football banning orders can be made against individuals convicted of a violent offence which involves a football match.⁸ The *Offences (Aggravation by Prejudice) Scotland Act 2009* allows for an offence to be aggravated by the perpetrator evincing malice and ill-will towards the victim on the grounds of sexual orientation, transgender identity or disability, or where a perpetrator is motivated by such malice and ill-will.⁹ The distinguishing feature of these offences is that they are closely tied to the commission of an *offence* and the intention to commit the offence.

4. The right to free speech, protected by the *Human Rights Act 1998*, is not an absolute right. However any interference with it must be shown to be necessary and

⁴ The Bill was tabled on 16th June 2011 and was at first proposed to be dealt with as an emergency Bill to be passed in time for the football season commencing in late July 2011. See Justice Committee Report, which outlines the procedural history of the Bill, at para’s 47 to 59.

⁵ Scottish Parliament *Official Report*, 23rd June 2011 at column 1020.

⁶ Protected by Article 10 of the European Convention on Human Rights.

⁷ The Lord Advocate defined the common law breach of the peace offence for the Justice Committee as requiring “*the conduct to be ‘severe enough to cause alarm to ordinary people and threaten serious disturbance to the community’ and ‘genuinely alarming and disturbing, in its context, to any reasonable person’*”. See Report of the Justice Committee, *ibid*, at para 118.

⁸ Section 51 of the *Police, Public Order and Criminal Justice (Scotland) Act 2006*.

⁹ See sections 1 to 3.

proportionate to achieve a legitimate aim. Legal or prosecutorial guidance and assurance that free speech will be protected is of minimal use when the protections are not embodied within the offence itself. Any intrusion on the right to express ourselves brought about by broadly framed offences will have a chilling effect on free speech, whether it be the freedom to sing an age old anthem or express and exchange new ideas. It is an integral part of the right – and vital to the lifeblood of democracy – that individuals feel able to express their views (even distasteful and unpleasant views) without fear of criminal repercussion.

5. If this Bill is to pass, Liberty believes the offences it contains must be significantly better defined to ensure that behaviour is only criminalised where it is intended that the expression of hatred against a particular individual or group is intended to lead to criminal damage against the person or property.¹⁰ Otherwise the unintended consequences of this Bill will not only criminalise speech, but will also risk unnecessarily sweeping a high number of people, including young people, into the criminal justice system. Indeed, the Policy memorandum for the Bill acknowledges that if the offences in this Bill target all instances of offending within its provisions the cost of doing so would be “*unsustainable*”.¹¹

6. During Committee stage the Government tabled new clause 5A to provide “*for the avoidance of doubt*” that nothing in the threatening communications offence will prohibit or restrict

- discussion or criticism of religion or religious belief or practices;
- expressions of antipathy, dislike, ridicule, insult or abuse towards those matters;
- proselytising; or
- urging of adherents of religions to cease practising their religions.

In inserting the amendment the Government is attempting to provide “*reassurance that we are not affecting individuals*” right to speak freely on the matters articulated

¹⁰ Indeed the Justice Committee noted that there was a general view among witnesses “*that aspects of the section 1 offence remain unclear. The draft guidelines to the police are welcome but the Committee notes that it is also important to ensure that the legislation itself is robust.*”: Justice Committee Report, *ibid*, at para 149.

¹¹ See the Financial Memorandum for the Bill, at para 52. Available at [http://www.scottish.parliament.uk/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20\(Scotland\)%20Bill/b1s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Offensive%20Behaviour%20at%20Football%20and%20Threatening%20Communications%20(Scotland)%20Bill/b1s4-introd-en.pdf).

in the new clause as outlined above.¹² The new amendment intends to show that “*the Government is responding to real concerns that have been expressed outside Parliament*”.¹³ Far from providing reassurance, the need to include such a clause only indicates that the broadly framed provisions in the Bill are indeed endangering the right to free expression and must be re-thought. Contrary to providing clarity, this new clause only creates an even more difficult decision for police officers exercising their discretion to arrest and charge possible offenders under this Act.

7. Liberty believes the best way to protect freedom of speech is to ensure that the interference is proportionate and targeted under the particular prescriptive terms of the statute. Accordingly, in this short briefing we firstly set out the offences and then suggest a number of amendments which would improve the Bill by tightening its provisions and removing unnecessarily wide definitions.

The football offence

Outline of the offence

8. The first offence under clause 1 of the Bill makes it an offence, punishable by up to five years in prison,¹⁴ to engage in certain behaviour if it is likely, or would be likely, to incite public disorder where that behaviour relates to a regulated football match involving a Scottish football team.¹⁵ The conduct element of the offence can be constituted by an act or things said or otherwise communicated (e.g. on a t-shirt or banner) as a single act or course of conduct.¹⁶ Behaviour will fall within the offence provisions if disorder would be likely to occur but for the fact that there are measures in place to prevent it, and even where people would be likely to be incited but are not actually present or are not present in sufficient numbers.¹⁷ The offence targets behaviour which

¹² Official Report of the Justice Committee, 22nd November 2011, at column 511.

¹³ Official Report, *ibid*, at column 511 to 512.

¹⁴ A person guilty of the offence could face up to five years imprisonment and/or a fine for conviction on indictment, and up to 12 months and/or a fine on summary conviction: clause 1(6) of the Bill.

¹⁵ A ‘regulated football match’ is defined in clause 2 of the Bill to include matches in Scotland or involving Scottish teams within the UK (as defined in s 55 of the *Public Order and Criminal Justice (Scotland) Act 2006*) and any match overseas involving a Scottish representative team or a club which is a member of a football association or league based in Scotland.

¹⁶ Clause 4(1).

¹⁷ Clause 1(5).

- expresses hatred about or stirs up hatred against an individual, or a group of people, because they are a member of or are presumed (by the person expressing the hatred or stirring up hatred) to be a member of
 - a religious group, social or cultural group with perceived religious affiliation, or someone who associates but is not a member of that group,¹⁸ or
 - a group with a protected characteristic including colour, race, nationality, ethnicity, sexual orientation, transgender identity or disability;¹⁹
- is motivated in whole or in part with any of these groups;²⁰
- is threatening;²¹ or
- constitutes ‘other behaviour’ a reasonable person would be likely to consider offensive.²²

Behaviour will fall within the scope of the offence²³ if it occurs in the grounds where the football match is being held on the day of the match; while the person is entering or leaving such grounds or intending to do so; or on a journey to or from the regulated football match, including journeys with overnight breaks and whether or not the person attended or intended to attend the match.²⁴ Following Stage 2 amendments the behaviour will also fall within the scope of the offence if it is directed towards, or engaged in together with, another person who is in the grounds on the day of the match, entering or leaving the ground, or on a journey to the ground.²⁵ The offence will also apply to behaviour occurring when a person is in or going to any place, other than domestic premises, where the match is being televised.²⁶

9. Clause 1 could conceivably cover all manner of conduct which will not necessarily lead to violence. The concept of what constitutes ‘stirring up hatred’ is not defined. What will be the signs that hatred is ‘stirred up’, especially given the offensive behaviour need only ‘be likely’ to incite disorder which may never occur?

¹⁸ Clause 1(2).

¹⁹ Clause 1(2)(a), (b) and 1(4). It is irrelevant that the behaviour might be motivated by any other factor, such as the player’s football playing style: clause 1(5), Explanatory Memorandum at para 8. See definitions of “religious group” and the protected characteristics in clause 4(3).

²⁰ Clause 1(2)(c).

²¹ Clause 1(2)(d).

²² Clause 1(2)(e).

²³ That is, it will be considered ‘in relation to’ a regulated football match as required under clause 1, and defined by clause 2.

²⁴ Clause 2(2)(aa).

²⁵ New clause 2(2)(ab).

²⁶ Clause 2(3).

Will an angry slogan about a Celtic football club carried by a Rangers fan be sufficient to fall within the prohibited behaviours? With no intent required to incite violence, the trigger of an individual feeling 'offended' is an incredibly low threshold. Indeed it already appears that police are attempting to ban the singing of certain songs by infiltrating football crowds and threatening to arrest anyone singing such songs, although it is unclear under what power the police proposed to do so.²⁷ Giving police such a wide discretion based on subjective factors of what may be perceived to be offensive or hateful will only lead to misapplication and misuse.

10. The Bill's Policy Memorandum states that the cost of unacceptable attitudes expressed at football matches "*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*".²⁸ However criminalising even the most unpalatable, illiberal and offensive speech should be approached with grave caution in a democracy. Free speech is far more precious than the desire to protect hurt feelings, particularly when our criminal statute book is bursting with public order, violent and property offences directed at those who strive to turn hate into real intimidation or violence against others. Of course violence must be dealt with, but it would be far better dealt with by using the relevant criminal offences already on the statute book and addressing the root social causes of public disorder at football matches. This offence will also affect the vast majority of non-violent football fans who may wish to sing traditional club anthems but have no intention of causing any public disorder.

Proposed amendments to the clause 1 offence

Amendment 1

Clause **1(1)**, page **1**, line **7**, leave out subsection 1(b) and insert -
'(b) the behaviour is intended to incite public disorder; and
(c) there is a substantial risk that public disorder will result from the person engaging in behaviour of a kind described in subsection (2).

Clause **1(1)**, page **1**, line **9**, insert at end -

²⁷ See "Old Firm cops vow to snatch hate song bigots from Easter Sunday showdown crowd" *Daily Record* (13 April 2011), available at <http://www.dailyrecord.co.uk/news/scottish-news/2011/04/13/old-firm-cops-vow-to-snatch-hate-song-bigots-from-easter-sunday-showdown-crowd-86908-23057861/>.

²⁸ Policy Memorandum to the Bill, *ibid*, at para 12.

(1A) For the purposes of sub-section 1(1) 'public disorder' means criminal violence against the person or criminal damage to property.

Effect of Amendment 1

Unamended, clause 1(1) provides that a person commits an offence if, in relation to a regulated football match, they engage in a type of behaviour defined in subsection 1(2) and that behaviour is "likely to" or "would be likely to" incite public disorder. This amendment would mean that the behaviour would only constitute a criminal offence if it was *intended* to incite public disorder, which is defined to mean criminal violence against the person or criminal damage to property.

Amendment 1 works independently of, or, preferably, in association with, Amendment 2 (below).

Briefing on Amendment 1

As currently drafted, the Bill goes further than provided for in the criminal law in that a person need not *intend* to cause public disorder by their speech or behaviour. Since the early 19th Century it has been an offence at common law to incite or solicit another to commit an offence. No offence has to be committed or attempted for a person to be arrested. Accordingly while it is an offence to commit an assault at a football ground or incite another person to do so, it currently is not an offence to simply hate someone or express that hatred. The criminal law requires a person to intend that, as a consequence of their words or actions, another would commit an offence. These offences have the effect of removing the requirement for intention upon which the criminal law of incitement has always been dependant. By removing the intention requirement this Bill will criminalise a number of behaviours hitherto protected as part of a person's freedom of expression. The Lord Advocate has stated in his draft guidance for police officers that

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 are examples of the type of behaviour that would cause offence to a reasonable person and 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.*²⁹

Creating yet further criminal offences focussed on careless or unpalatable speech is a dangerous route to tackle societal problems. Should individuals be criminalised for singing a football chant intended to antagonise the opposition and express pride in a football side, but not to lead to violence? The suggested amendment would still address concerns that chanting can lead to violence at football matches, but would limit the impact on free speech by requiring a person to intend for violence to persons or criminal damage to property to be consequential to their behaviour.

Amendment 2

Clause 1(2), page 1, line 11, leave out ‘, or stirring up hatred against,’.

Clause 1(2), page 1, line 16, leave out ‘, or stirring up hatred against,’.

Clause 1(2), page 1, line 19, leave out sub-section (c).

Clause 1(2), page 1, line 22, leave out sub-clause (e).

Clause 4(2), page 3, line 30, leave out sub-clause (a).

Effect of Amendment 2

These amendments will provide limits to what can constitute ‘behaviour’ for the purposes of the offence. The first two amendments will omit the undefined term of ‘stirring up hatred against’ and leaving out subsection (c) providing for behaviour motivated wholly or partly by hatred of a group, and (e) providing for ‘other behaviour that a reasonable person would be likely to consider offensive’. The final amendment proposed removes from the definition of ‘membership’ in subsection 4(2) association with members of the targeted group.

Briefing on Amendment 2

This group of amendments would provide for a much clearer definition of the elements of this offence. ‘Stirring up hatred’ is incredibly vague, difficult to objectively assess and therefore extremely difficult to enforce. Similarly the broad notion in sub-

²⁹ See the Lord Advocate’s Draft Guidelines on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (As introduced), available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20111101_LA_draft_guidance.pdf.

section (c) would allow the hatred element of the behaviour to form just a part of the criminal conduct. Again this is unacceptably wide and under its remit could ban any number of statements and acts which could be perceived to involve just an element of 'hatred'. A player could, for example, criticise another player's performance and add in a spiteful reference to the origin of their team jersey and potentially fall within the provisions of the offence.³⁰

We also propose in this group of amendments to leave out sub-section (e).³¹ This catchall provision would shoehorn into the offence innumerable behaviours to be criminalised on the basis that a person feels 'offended'. Providing that an offence is committed by behaviour reasonably considered 'offensive' echoes other speech offences which have stifled freedom of expression by criminalising speech which others may consider 'alarming or distressing'. Public order offences where the criminal harm is constituted by the reasonable person feeling "*harassed, alarmed or distressed*" have undoubtedly had a chilling effect on free speech.³² An example of this is the arrest of a young man (who Liberty advised) who was threatened with prosecution under English public order legislation criminalising speech considered to harass, alarm or distress a person on grounds of their religious faith³³ for peacefully holding a placard that read "*Scientology is not a religion it is a dangerous cult*".³⁴ While no prosecution ultimately went forward the fact that a peaceful protester who was merely expressing his opinion could be threatened with prosecution demonstrates the danger of these types of offences.

Such an example demonstrates how legislative provisions with good aims can have serious unintended consequences for freedom of expression. In the context of the football offence in this Bill, a person feeling offended, even though the communicator need not have intended to so offend and even where it only need to be likely to incite public disorder, is simply too low a threshold.

³⁰ See the Explanatory Memorandum for the Bill at para 8.

³¹ The Justice Committee invited the Government to reflect on concerns raised that section 1(2)(e) "*may be too expansive and may raise concerns in respect of adherence to freedom of speech*" and ECHR requirements. Justice Committee Report, *ibid*, at para 163.

³² Section 5 of the *Public Order Act 1986*, for example, provides for an offence to be committed where a person, with or without any intention, uses any "*threatening, abusive or insulting*" words or behaviour or displays any writing, posters or signs to that effect which is likely to result in another person feeling "*harassed, alarmed or distressed*".

³³ Under section 5 of the POA, *ibid*.

³⁴ On 10 May 2008. See "Scientology arrest makes a mockery of the law" *The Telegraph*, 21st May 2008, available at <http://www.telegraph.co.uk/comment/3558604/Scientology-arrest-makes-a-mockery-of-the-law.html>.

Threatening communications offence

Outline of the offence

11. The second general hate speech offence in clause 5 of the Bill is similarly broadly framed and loosely worded, with similar implications for freedom of expression. Unlike the clause 1 offence, this offence does not specifically relate to football. The clause 5 offence, also punishable by up to five years in prison,³⁵ criminalises threatening communication which satisfies one of two conditions:

- (a) *Condition A* stipulates that the provision must contain or imply a threat, or incitement, to carry out a seriously violent act³⁶ against a person or particularly described persons, which would cause a reasonable person to suffer fear or alarm, which is the intention of the person so communicating or the person is reckless as to whether it would do so;³⁷ or
- (b) *Condition B* stipulates that the material is threatening and the communicator intends (and who is not merely reckless as to the possibility) to stir up religious hatred.³⁸

The offence provisions will encompass an image depicting or implying the carrying out of a seriously violent act, whether it be actual or fictitious, against a person, whether that person depicted is living or dead, actual or fictitious; in circumstances where a reasonable person would likely consider that is what the image implies.³⁹ It will not cover unrecorded speech, but will include communication by any other means and related expressions.⁴⁰ Accordingly the offence will cover posting on the internet, emails, printed media, and so on. A communicator will be able to defend their action by showing that in the circumstances of the image or words communicated it was reasonable, such as where a person is communicating a threat that has been made

³⁵ Clause 5(7). A person convicted on an indictment is liable to a term of imprisonment not exceeding five years and/or a fine; a person summarily convicted will face imprisonment for up to 12 months, and/or a fine.

³⁶ Defined in clause 6(5) to include an act which would cause serious injury to, or the death of, a person.

³⁷ Condition A, Clause 5(2).

³⁸ Condition B, Clause 5(5). Religious hatred is defined as hatred of a group of persons based on the membership of a religious group, as defined in s 74(7) of the *Criminal Justice (Scotland) Act 2003*, or of a social or cultural group with perceived religious affiliation, or of an individual based on their membership of such a group. Membership includes association with the group.

³⁹ Clause 5(3).

⁴⁰ Clause 6(2).

to the police.⁴¹ As with the first offence in clause 1, the communications offence applies to conduct outside of Scotland by a British citizen or a person habitually resident in Scotland.⁴² The offence also applies to a communication made by a person outside of Scotland if the person intends the communication to be read, looked at, watched or listed to primarily in Scotland.⁴³

12. Again the elements of this offence need not necessarily include intent. It employs loose and widely framed terms such as ‘fear or alarm’, a considerably low threshold. The offence is also extremely broad in its jurisdictional reach; indeed it is intended to cover offences conducted outside of the jurisdiction but the effects of which have an impact inside of Scotland. The deliberate targeting of online communication makes the level of interference in the right to free speech only more acute given we live in an age where people increasingly rely on the internet to allow them to gain access to information and provide information to others. There are elements of the offence which could be removed and amended which would greatly lessen the threat to overly restrict the right to free speech.

Proposed amendments to the clause 5 offence

Amendment 3

Clause **5(1)(b)**, page 4, line 34, leave out ‘either’ and ‘or Condition B’.

Clause 5, page 5, line 18, leave out sub-clause 5(5).

Clause **5(2)(b)**, page 5, line 2, leave out ‘suffer fear or alarm’ and insert ‘genuinely fear for their personal safety’.

Clause **5(2)(c)**, page 5, line 3, leave out sub-clause 5(2)(c) and insert ‘(c) the person communicating the material intends by doing so to cause a reasonable person to genuinely fear for their personal safety’.

Effect of Amendment 3

This amendment firstly proposes to remove Condition B as a possible basis on which a person could commit an offence – that is, where the communicated material is (a)

⁴¹ Clause 5(6), Explanatory Memorandum at para 29.

⁴² Clause 7(1).

⁴³ Clause 7(2). The prosecution of such a person may take place in any sheriff court district in which the person is apprehended or in custody, or in such sheriff court district as the Lord Advocate may direct, as if the offence had been committed in that district: clause 7(3).

threatening and (b) the person communicating it intends by doing so to stir up religious hatred.

The amendments to sub-section 5(2) will clarify that to satisfy the offence a person need genuinely fear for their personal safety, and provide that a person intends for that specific fear to be felt.

Briefing on Amendment 3

Condition B allows for an offence to be committed even where the target group or individual does not feel threatened. That is, there is no requirement that the threat to cause fear or alarm to a person, it need only 'stir up religious hatred', a term which is not defined in the Act. The reach of this offence, which will encompass internet posting, tweets and blogs as well as more traditional modes of communication, and communication from overseas, is consequently enormous. The Lord Advocate suggests in his draft guidelines that the threats made in jest that no reasonable person would find alarming will not fall within the purview of the offence.⁴⁴ However similar offences in England have been broadly deployed to address exactly such jovial, albeit misjudged intent. Section 127 of the *Communications Act 2003*,⁴⁵ for example, has been used to prosecute a young man who tweeted his frustration about being unable to see his girlfriend due to airport closure because of winter snow. His tweets, which were made without intent to carry out their content or incite others to do so, resulted in his conviction for being a menace under the Act.⁴⁶

Amendment 4

Clause 5(2)(c), page 5, line 5, leave out sub-section (ii).

Effect of Amendment 4

The effect of this proposed amendment is to remove the element of the offence which states that a person commits the offence not only where they are *reckless* as to whether the communication would do so.

Briefing on Amendment 4

⁴⁴ See the Draft Lord Advocate Guidelines on the Bill, *ibid*.

⁴⁵ Under section 127 a person is guilty of an offence if he sends by means of a public electronic communications network a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character, or causes such message or matter to be sent.

⁴⁶ See <http://www.bbc.co.uk/news/uk-england-south-yorkshire-11736785>

Requiring such a low threshold of recklessness in the context of this offence will undoubtedly have a chilling effect on communication, particularly as it will be immaterial to the commission of an offence that a person is caused fear and alarm. It will also be irrelevant whether anyone was in fact incited to carry out a seriously violent act against a person. Subsection (ii) thereby goes much further than the existing criminal law relating to incitement as it potentially allows for acts to be criminalised without the need for any intention on the part of the person committing the offence. As discussed above, incitement in criminal law has always been dependent on an element of intention – that is, the person has to intend that, as a consequence of their words or actions, another would commit an offence.

Recklessness is of course an element in some criminal offences. However the concept is normally applied to actions that are themselves within the realm of criminality, such as common assault, criminal damage and battery. The rationale for this is that if you hit someone or deceive them then it is appropriate for a jury to be able to convict you of an offence even if you did not intend the consequences of your actions. The same nexus between action and consequence should not exist for speech offences. Speech does not naturally reside in the realm of criminality. That is why the element of intention should always be attached to speech offences. It is the means by which proper criminal responsibility can be determined. Accordingly we urge parliamentarians to remove the element of recklessness from the offence under clause 5.

Increased Ministerial powers to modify the offences

Outline of the powers

During the Stage 2 Committee proceedings the Government, in an unprecedented move at this stage of parliamentary scrutiny,⁴⁷ inserted a power to amend the Bill's two criminal offences by statutory instrument. New clause 4A will allow Ministers by order to amend the football offence in clause 1 by adding or removing a criminal behaviour under sub-clause 1(2) or varying a description of the behaviour.⁴⁸ It also includes a power to add or remove one of the protected groups against which

⁴⁷ See the Official Report of the Subordinate Legislation Committee, 29th November 2011, at column 171, where the Committee Member John Scott MSP referred to *“the unusual nature of this introduction of subordinate legislation at stage 2, for which there seems to be little or no precedent – certainly in Scottish Parliament legislation”*.

⁴⁸ Clause 4A(1)(a)(i) and (ii).

expressing hatred is an offence under clause 1, or vary the description of the group. New clause 6A similarly allows for the conduct element of the threatening communications offence to be amended by statutory instrument. As outlined above, Condition B of the threatening communications offence provides that an offence will have been committed where the communicated material is threatening and the communicator intends to stir up hatred on religious grounds. The new clause 6A would allow for variation, addition or removal of a ground of hatred in this Condition by way of statutory order. By order the Government would be able to specify a hatred offence by reference to hatred of a group of persons or individuals of specified description, or specified personal characteristics.⁴⁹ In so doing the Government would also be able to modify the new clause 5A (purported to be providing protection for freedom of expression).⁵⁰

Both powers to amend the offences by statutory instrument will be subject to affirmative parliamentary procedure, which requires any statutory instrument to be laid and approved by resolution of the Scottish Parliament.⁵¹ The Subordinate Legislation Procedure is set out in Chapter 10 of Standing Orders of the Scottish Parliament.⁵² After being laid before Parliament and notification published in the Business Bulletin,⁵³ the statutory instrument or draft instrument shall be referred to the Subordinate Legislation Committee, and the lead committee within whose remit the instrument falls.⁵⁴ The affirmative procedure requires the Government to lodge a motion during the committee proceedings calling on the committee to recommend to Parliament that the instrument to be approved.⁵⁵ This approval motion can be debated for no more than 90 minutes during committee proceedings, although in advance of the debate the committee may take evidence on the statutory instrument.⁵⁶ A statutory instrument may only be approved or rejected in its entirety; accordingly no amendments to the wording of the instrument will be ruled in order. The lead committee must then report back to Parliament on the instrument or draft

⁴⁹ Clause 6A(2)(a) and (b).

⁵⁰ Clause 6A(2)(c) and (d).

⁵¹ Section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

⁵² 4th Edition, November 2011, available at

<http://www.scottish.parliament.uk/Parliamentaryprocedureandguidance/StandingOrdersv4.1.pdf>.

⁵³ Rule 10.1 and 10.9 respectively.

⁵⁴ Rule 10.1(3)(a), (b). The statutory instrument may also be referred to Parliament on a motion of the Parliamentary Bureau: Rule 10.1(3)(b).

⁵⁵ See 'Subordinate Legislation' in Parliamentary Procedure: Guidance on Committees, available at <http://www.scottish.parliament.uk/parliamentarybusiness/24417.aspx>.

⁵⁶ See Rule 10.6 'Motion for Approval', *ibid*.

instrument within 40 days with its recommendations.⁵⁷ If the committee does recommend the statutory instrument be approved, the Parliamentary Bureau proposes, by motion, that Parliament agree to approve the draft instrument. The only participants permitted to take part in this debate on the approval motion is the member moving the motion, the member of the Scottish Executive or junior Scottish Minister in charge of the instrument (if different to the mover), and one speaker against the motion, each of whom will be permitted to speak for no more than three minutes.⁵⁸

Despite assurances given by the Government during Committee proceedings that the affirmative procedure will allow for proper consultation and debate,⁵⁹ it is clear that the subordinate legislation procedure does not equate to the kind of scrutiny expansion of these powers would require. Given this Bill has already met with such strong opposition at every stage of its parliamentary process, the possible amendment of these offences by anything other than a full scrutiny procedure is an entirely unwelcome development.

Proposed amendment

Amendment 5

Page 4, line 9, leave out clause 4A.
Page 6, line 20, leave out clause 6A.

Effect of Amendment 5

Amendment 5 includes two stand part amendments to leave out the newly inserted clauses 4A and 6A.

Briefing on Amendment 5

Liberty believes that enacting criminal offences – particularly ones with such ramifications for civil liberties – should only occur after proper and full parliamentary scrutiny. The affirmative procedure, allowing for only 90 minutes of debate, does not equate to the extensive three stage procedure for parliamentary bills. The ability to use the statutory instrument procedure to allow for expanded criminal offences

⁵⁷ Rule 10.6(5).

⁵⁸ Rule 10.6(5).

⁵⁹ See, for example, the Official Report of the Justice Committee, *ibid*, at column 497 the Minister for Community Safety and Legal Affairs stated that “The fact that the power will be subject to affirmative procedure will mean that any changes will happen only after proper consultation and if Parliament votes in favour of them.”

stretches the function of the subordinate legislation procedure far beyond the purpose for which it was intended. Widening criminal offences by way of statutory instrument is as inappropriate as it is dangerous, robbing Parliament of the opportunity to fully scrutinise Government policy in exercising its democratic function. Liberty urges parliamentarians to reject these newly inserted clauses.

Sophie Farthing