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THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) ACT 2012 – ASSESSING THE CASE FOR REPEAL

A. INTRODUCTION

In November 2016, four and a half years after the introduction of the controversial Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (hereafter OBTC Act), Labour MSP James Kelly lodged a Member's Bill seeking to repeal the legislation. The Bill, in which Kelly criticises the OBTC Act as “an illiberal law”, received support from all four opposition parties, and represented the culmination of several years of campaigning by activists and some opposition MSPs. Despite this, the Scottish Government remain committed to retaining the Act, with various SNP sources citing a “lack of alternative approaches” offered by critics. Minister for Community Safety Annabelle Ewing claimed that the vote in the Scottish Parliament to repeal the Act “threatens to set us back as a country in our efforts to effectively combat prejudice, hate crime and sectarianism”.¹ This short article attempts to outline and contextualise the current situation, and offers a further contribution to the debate based on findings from my ongoing doctoral research.²

B. CONTEXT AND SUMMARY

Legislation aimed at tackling the allegedly sectarian or otherwise offensive behaviour of football supporters was proposed at a summit in the immediate aftermath of a high-tension match between Celtic and Rangers in March 2011,³ though it is important to note that actual disorder amongst fans at the match was minimal. Around the same time, a series of incidents with apparent racist or sectarian motives received intense media focus. Neil Lennon, the then Celtic manager, received death threats and, along with two Celtic players (who, like Lennon, were Northern Irish Catholics), received bullets in the post. Former Cardinal Keith O'Brien revealed that the previous year he had received a live bullet in the post prior to the Pope's

¹ Scottish Government News Release, ‘Offensive Behaviour Act’, 2 November 2016, available at <http://news.gov.scot/news/offensive-behaviour-act>.

² My research takes a sociological approach, exploring the OBTC Act and sectarianism more broadly from the perspective of football supporters.

³ See *The Guardian*, 8 March 2011, available at <https://www.theguardian.com/uk/2011/mar/08/celtic-rangers-old-firm-violence>

visit to Scotland, by senders claiming to be the Protestant Action Group.⁴ Viable parcel bombs were intercepted which had been sent to Lennon, his QC, the late Paul McBride, and former Labour MSP Trish Godman (the latter, both high profile Celtic-supporting Catholics), as well as to Cairde na hÉireann, an Irish Republican group based in Glasgow.⁵ Furthermore, Lennon was publicly attacked by an opposition supporter in May 2011 and called a “fenian bastard”, though the ‘religiously-aggravated’ aspect of that charge was dropped when the case went to trial.⁶

The OBTC Act has been described as a “panic reaction” to this apparent spike in sectarian-motivated attacks.⁷ Indeed, the situation in early 2011 was highly unusual, as sectarianism in Scotland has tended to manifest itself in a far subtler manner. Yet the decision to introduce legislation solely targeting football supporters was contentious given that the aforementioned incidents took place outwith the context of football and appeared to be characterised by anti-Irish and anti-Catholic sentiment as much as by antipathy towards a particular football club. The Bill was eventually passed by the Scottish Parliament on 14 December 2011 and came into force on 1 March 2012. Amidst claims that this was a knee-jerk and politically-motivated piece of legislation the Act was marked by opposition from the outset, and was the first piece of legislation to be passed in the Scottish Parliament without cross-party support.

Notably, the word sectarianism is absent from the text of the legislation despite the fact that it was – and continues to be – framed this way in the political and media rhetoric.⁸ Rather, the Act created an offence of engaging in behaviour “in relation to a regulated football match” which “is likely to incite public disorder” and which is hateful, threatening or

⁴ See *The Scotsman*, 21 April 2011, available at <http://www.scotsman.com/news/cardinal-says-he-s-going-on-as-normal-after-threat-1-1596529>.

⁵ See *The Scotsman*, 20 April 2011, available at <http://www.scotsman.com/news/celtic-manager-neil-lennon-qc-paul-mcbride-and-former-msp-trish-godman-targeted-with-letter-bombs-1-1595731>.

⁶ See *The Guardian*, 31 August 2011, available at <https://www.theguardian.com/football/2011/aug/31/neil-lennon-attacker-sectarian-verdict>.

⁷ Michael Lavalette and Gerry Mooney, ‘The Scottish state and the criminalisation of football fans’ (2013) 93 *Criminal Justice Matters* available at <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/09627251.2013.833790.pdf>.

⁸ E.g. in the OTBC Bill’s Policy Memorandum, Alex Salmond stated (at [1]): “We will not tolerate sectarianism as a parasite in our national game of football or anywhere else in this society”.

is “other behaviour that a reasonable person would be likely to consider offensive”.⁹ Crucially, an offended party or a person likely to be incited to public disorder does not have to be present for the law to be enforced, a point defended by Former Justice Secretary Kenny MacAskill as he stated: “The absence of good people to be offended doesn’t make something inoffensive if it patently is offensive”.¹⁰ For some, this veers into dangerous legal territory given the subjective nature of offensiveness, and the ‘reasonable person’ test in this legislation has attracted a great deal of criticism.

C. THE REVIEW

In section 11 of the Act, the Scottish Government committed to reviewing it after two full football seasons in operation. In June 2015, it published a report entitled *An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, based on research conducted by an independent research team*.¹¹ Alongside this, a review of Section 6 was conducted internally. The Minister for Community Safety and Legal Affairs, Paul Wheelhouse, stated in Parliament that “we have fulfilled the requirement in section 11 of the Act for us to report on the operation of the offences in sections 1 and 6 by 1 August this year”.¹² The authors of the evaluation of Section 1 commented that “the evaluation is intended to be one contribution, sitting alongside other possible evidence, perspectives or material in the Scottish Government’s consideration of the Act”. The lead researcher, Dr Niall Hamilton-Smith, added:

Our evaluation neither endorses nor rejects the Act, but presents robust evidence on patterns of implementation, perceptions of impact and emerging issues and questions relating to section one of the legislation.¹³

⁹ Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, s 1(1), (2).

¹⁰ See *The Herald*, 16 March 2016, available at http://www.heraldscotland.com/opinion/14345916.Kenny_MacAskill__It_is_right_to_bring_to_book_those_who_perpetrate_offensive_behaviour_at_football_grounds_and_elsewhere/.

¹¹ Hamilton-Smith et al, *An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012* (2015), available at <http://www.gov.scot/Resource/0047/00479049.pdf>.

¹² SP OR 16 June 2015 col 9.

¹³ University of Stirling News Release, ‘Stirling Study Considers Football Behaviour Legislation’, 12 June 2015, available at <https://www.stir.ac.uk/news/2015/06/stirlingstudyconsidersfootballbehaviourlegislation/>.

Critics have claimed that the Scottish Government did not fulfill its duty to carry out a full review of the Act by simply publishing an evaluation¹⁴, and have also pointed out that the evaluation itself has been cited selectively. The Scottish Government’s press release stated that “[t]he evaluation found evidence from a range of sources that offensive behaviour at football matches has decreased since the legislation was introduced”.¹⁵ Yet the report emphasises that this cannot be directly attributed to the Act itself:

broader crime trends make it extremely difficult to make judgements about the impact of the Act. Both police recorded, and crime survey figures show sustained falls in most of the relevant crime categories, both before and after the introduction of the Act.¹⁶

In short, the Scottish Government has been accused by opposition politicians and activists of ducking the responsibility to fully review the Act and failing to take seriously the negative impacts of the legislation, which this paper now moves on to discuss.

D. CRITICISMS OF THE ACT

The Act has been challenged from many angles, including from leading Human Rights organisations. The Scottish Human Rights Commission, during a consultation on the OBTC Bill in 2011, recommended that the Government delete the section which refers to “behaviour that a reasonable person would be likely to consider offensive”.¹⁷ Liberty described the Act as having a “chilling effect” on free speech and freedom of expression.¹⁸ The Law Society of Scotland pointed that out the law could cause “confusion” rather than the clarity it was

¹⁴ See comments by Labour MSP James Kelly, quoted in STV News, 12 January 2016, available at <https://stv.tv/news/scotland/1338718-campaigners-urge-msps-to-back-review-of-controversial-football-act/>

¹⁵ Scottish Government News Release, ‘Offensive Behaviour Act evaluation published’, 12 June 2015, available at <http://news.gov.scot/news/offensive-behaviour-act-evaluation-published>.

¹⁶ Hamilton-Smith et al, above n12, sec 4 para 20.

¹⁷ SP OR J 20 September 2011 col 278-279.

¹⁸ Liberty, *Briefing on the Proposed Football Act (Repeal) (Scotland) Bill*, October 2016, available at

[https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20the%20Proposed%20Football%20Act%20\(Repeal\)%20\(Scotland\)%20Bill.pdf](https://www.liberty-human-rights.org.uk/sites/default/files/Liberty's%20briefing%20on%20the%20Proposed%20Football%20Act%20(Repeal)%20(Scotland)%20Bill.pdf).

apparently seeking to bring, and noted that there was sufficient existing legislation to deal with threatening behaviour or behaviour that would incite hate:

a substantial proportion of the offensive behaviour related to football which leads to public disorder was likely to be caught by the substantive criminal law which existed prior to the 2012 Act coming into force, and continues to exist.¹⁹

The fact that the Act tackles only behaviours which take place in the context of football has led to claims that football fans are being treated in a discriminatory manner, as the same behaviours would either be tolerated, or tackled differently, if they occurred at any other sporting event, for example. The Law Society of Scotland also expressed concerns about the “definition and meaning of behaviour in relation to a regulated football match”²⁰ and confusion around what constitutes unacceptable or offensive forms of behaviour.

Specific concerns have been raised regarding how the Act has operated in practice. Policing practices in particular have been criticised by supporters’ groups and activists.²¹ In my own research, participants emphasised a breakdown in trust between supporters and the police. Many spoke of a general increase in ‘surveillance’, with one supporter commenting:

I think it is eerily similar to a police state when you’re at a football game. You know, you can’t walk round the corner without cameras or eyes on you. It’s just a worrying time to be a football fan.

Although participants of all ages offered similar responses, the implementation of the Act appears to have disproportionately affected younger supporters. In response to the recently published consultation exercise on the proposal to repeal the Act, Glasgow City Council stated that “[w]e are concerned at the number of young men in particular that are being

¹⁹ See Law Society of Scotland, Committee update December 2016, available at [http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/committee-updates-2016/december-2016/proposed-football-act-\(repeal\)-\(scotland\)-bill/](http://www.lawscot.org.uk/members/legal-reform-and-policy/law-reform/committee-updates-2016/december-2016/proposed-football-act-(repeal)-(scotland)-bill/).

²⁰ Law Society of Scotland, Committee update December 2016.

²¹ See Fans against Criminalisation statement 16 February 2017, available at <http://fansagainstcriminalisation.com/author/fac/> and CommonSpace article, 18 November 2015, available at <https://www.commonspace.scot/articles/2945/exclusive-i-will-fucking-ruin-your-life-football-fans-recording-alleged-police-abuse>

criminalised by the legislation”.²² The 2015 evaluation of the Act discussed earlier raised similar concerns. The report highlighted that representatives of Police Scotland described fans as ‘risk groups’ and commented:

This categorisation of young supporters and ‘singing sections’ as risk groups, whilst potentially appropriate on occasions, also seemed commonplace and potentially problematic, in particular when sections of supporters, who whilst maybe having the potential to be offensive, were clearly not associated with more violent disorder, came to draw on the scarce police assets and resources normally reserved for violent risk groups.²³

Of course, policing of young people is a concern not limited to football supporters. Law and Mooney argue that the Scottish criminal justice system has seen a shift towards a more punitive approach since the early 2000s.²⁴ Recent research by Kath Murray on Police Scotland’s stop and search practices highlighted that in some areas:

officers make extensive use of stop and search without reasonable suspicion and searches tend to impact on younger age groups, arguably over and above the probability of offending.²⁵

Other related issues raised in my research included claims that in the event of being charged under the Act, young people (predominately young men) are frequently encouraged to plead guilty even if they contest having acted illegally and have no previous convictions or contact with the criminal justice system. Furthermore, evidence suggests that it is not, despite the rhetoric, being used to solely tackle sectarianism, hate crime or prejudice, and in fact is being

²² Proposed Football Act (Repeal) (Scotland) Bill, available at http://www.parliament.scot/S5MembersBills/20161128_Football_Repeal_Bill_FINAL_SUMMARY.pdf.

²³ An evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012’, available at <http://www.gov.scot/Resource/0047/00479049.pdf>

²⁴ Alex Law and Gerry Mooney, “The De-Civilizing Process and Urban Working Class Youth in Scotland” (2012) 38 *Social Justice* 126.

²⁵ Kath Murray, “Stop and search in Scotland: An evaluation of police practice” (2014), SCCJR report available at <http://www.sccjr.ac.uk/publications/stop-and-search-in-scotland-an-evaluation-of-police-practice/>

utilised to deal with far more low-level behaviours.²⁶ For example, a participant in my research was convicted under the Act for swearing at a police officer during a football match. Aside from the appropriateness of responding to such incidents with arrests, this participant's experience highlights the symbolic labelling power of the legislation as he explained: "even though there was no sectarian element to my charge, the fact that I was done under the Offensive Behaviour Act – all anyone sees about that is sectarian, sectarian". Being charged under this particular legislation, rather than with breach of the peace, for example, has had a significant impact on his life given the connotations of the Act with sectarianism and hate crime.

A final problem with the legislation is that it also sustains a common-sense understanding of sectarianism which hinders genuine attempts to tackle the problem. Although the Act is used in a broader manner, the Court of Criminal Appeal in *Donnelly and Walsh v Procurator Fiscal, Edinburgh* stated that: "the main, but not exclusive, focus is on the behaviour of certain Celtic and Rangers fans with their long standing attachment to opposing factions involved in the politics of Ireland, and Ulster in particular".²⁷ This common-sense understanding, also reflected in much of the academic analysis on the topic, suggests that sectarianism is a problem of hostilities between two equal groups. There is insufficient space to explore this in detail here, however this 'culture of equivalence' occludes the fact that most religiously aggravated offences in Scotland have been against Roman Catholics,²⁸ and overlooks the historic racialisation of Irish Catholics and the structural inequalities that they faced.²⁹ As Kay Goodall commented at the time of the Act's introduction:

²⁶ According to evidence compiled by activist group Fans Against Criminalisation, examples of behaviours leading to arrest and prosecution under the Act includes:

- wearing a t-shirt referring to oneself as an 'unrepentant Fenian bastard'
- gesticulating in an unspecified way to opposition supporters
- arguing with stewards
- arguing with police officers

Submission to the Consultation on repeal of the Offensive Behaviour Act, available at <http://fansagainstcriminalisation.com/fac-submission-to-the-consultation-on-repeal-of-the-offensive-behaviour-act/>

²⁷ *Donnelly and Walsh v Procurator Fiscal, Edinburgh* [2015] HCJAC 35 at [1].

²⁸ Scottish Government, *Religiously Aggravated Offending in Scotland 2015-16*, (2016) available at <http://www.gov.scot/Resource/0050/00501327.pdf>

²⁹ See Satnam Virdee 'Racism, Class and the Racialized Outsider' (2014).

It is wrong to imply by omission that the hostility is the same on both sides. Chants of “Prod” or “Hun” and a few breach of the peace convictions do not amount to equivalence. Scots law, however, could not successfully distinguish the two phenomena without incurring huge criticism: recognising the differences would thus inevitably be left to the fiscals and the courts.³⁰

To date, in the implementation of the OBTC Act, these differences remain largely unrecognised.

E. CONCLUSION

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 has had a range of (mostly negative) effects on football supporters since its introduction, which this paper has attempted to outline. In addition, I suggest that the way the Act is increasingly conceptualized within a Hate Crime ‘framework’ risks undermining separate legislation which exists to protect minority groups from victimisation. The definition of hate crime is broadened to include behaviours such as singing a song at a football match which is identified as offensive, or other more low-level offences such as swearing at a police officer. Without significant reform of the legislation, calls for its repeal are likely to intensify.

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³⁰ Kay Goodall, ‘Tackling Sectarianism Through the Criminal Law’ (2011) 15 EdinLR 425.