

PE1593/C

SUBMISSION FROM THE PETITIONER

We would like to thank Police Scotland and Mr Wheelhouse for their responses to the concerns raised within our petition about the Offensive Behaviour at Football and Threatening Communications (Scotland) 2012. We have responded in full to both documents and have used appropriate subheadings to provide clarity in the structure of our responses.

Scottish Government

Stirling Report

The Ministers' response contains many sections which have been 'cut and pasted' from previous communication and to which we have already responded. However, we will rehearse them again here.

Our main contention is that the Act was not reviewed as the Government were required to do. The response from the SG is that the legislative requirement to review the Act was 'fulfilled' by the publication of an evaluation of the Act carried out by the University of Stirling and a statement of the Government's response to it. This is wrong in a number of respects. Firstly, the remit of the research project was not to look at the experiences of those charged under it which is a significant part of the public concern about the Act and about which we, in FAC, are uniquely placed to provide evidence; the question of the conviction rates and how to understand them was not examined; and, most damningly, the research team issued a public statement on the website of the University of Stirling the day after the report was published clearly indicating that this was an evaluation and not the review¹. They said:

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.

And concluded:

Dr Niall Hamilton-Smith, Senior Lecturer in Criminology at the University of Stirling said: "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."

¹ <https://www.stir.ac.uk/news/2015/06/stirlingstudyconsidersfootballbehaviourlegislation/>

Further, the Minister chose to highlight only those part of the report which appeared to offer support to the Act and failed to give any emphasis to the fact that the research showed the following:

- Charges fell by 24 percent between the first and second year of the Act's introduction **though it is not possible to determine whether this is directly attributable to the Act.** (our emphasis).
- The average time to progress and conclude football-related charges appears to be particularly lengthy; a source of frustration and unfairness felt by some fans.
- Policing methods in the early stages were seen as adversarial and disproportionate by some fans whilst enforcement of the Act by policing and stewarding was inconsistent between different grounds.

And

In the qualitative research, both fans and stakeholders expressed some disquiet over the extent to which the Act is perceived to be targeted at younger fans.

The Minister made no mention of the research findings which suggested that there were indications that disorderly or even violent behaviour was taking place away from grounds while the resources of the police were directed towards policing 'offensiveness' at grounds.

The report also noted that some Sheriffs were 'emphatically critical'. So, in summary, the Government chose to respond to the favourable comments of the Police, the COPFS and 'some' Sheriffs.

On that basis, it is clear that the Act itself was not reviewed but that the Act was evaluated in some, but not all, respects and that the Minister responded to some, but not all, of its findings. This is not an open and transparent review of the Act which the public expected and which could have taken the form of the scrutiny which the then Bill was subjected to before it became an Act. This would have allowed for a variety of stakeholders to provide evidence directly to the Justice Committee, for example, and not through the prism of a government-commissioned research project, the remit of which is necessarily decided in advance. *In this regard, we can inform the Committee that the Law Society of Scotland has indicated in writing to one of its members that it would be happy to be consulted on its views of the Act.*

You-Gov Poll

This SG-commissioned poll has been quoted *ad nauseam* as saying that 80% of 'those surveyed' supported the Act. The number surveyed was 1044. Of those, 52% said they were 'not very interested' or 'not at all interested' in football. So we can conclude that 501 individuals were in a position to know anything about the Act and how it operates other than what they read in the media. Even if we include the whole sample, we are talking about 835 people supporting the Act which does not amount to very much given the several thousand who have indicated to this

Committee their opposition to the Act. Moreover, this number has to be interpreted on the basis of the actual question the respondents were asked, which was:

"The Offensive Behaviour at Football and Threatening Communications Act" aims to tackle sectarian or offensive chanting and threatening behaviour related to football which is likely to cause public disorder. To what extent do you support or oppose this law?

Clearly, the responses are then predicated on the basis that the Act does precisely what is indicated in the question. Indeed, as we indicated to the Committee in January, one wonders why the number is not 100% rather than 80% if this statement is true. We would suggest it is because those respondents who know anything about the Act do not accept that this is what the Offensive Behaviour Act aims to do or actually does.

FAC evidence

The Minister states that 'correspondents' were repeatedly advised' about the Stirling Research. We don't understand the relevance of this point and offer no response to it. If what he means by this is that this was our opportunity to present the evidence we have, we would point out to the Committee that we were not invited to speak to the Stirling researchers until after the interim report was finalised, and, more importantly, at that stage neither he nor his civil servants had provided any clarity as to what the review would consist of. Indeed, when we met with him on 4/6/15 he was still not able to provide that clarity. So our position is that we still thought we would provide our evidence directly as part of the review process. We spoke to many MSPs in the period spring/early summer of 2015, including the Justice spokespersons of most of the opposition parties and they also believed that the review and the Stirling research were not synonymous. Finally, he notes that we have still not provided our evidence to him. Our response to that is that we cannot see why we, as a group of volunteers, would give up our time to inform the Minister of the detail of our concerns when he concludes in the same letter that the SG 'does not believe a further review of the Act is necessary at this time'. Moreover, any trust we had in the Minister has been damaged by his failure to retract without reservation his repeated allegation that we offered our support to the SACRO scheme. He has continued to obfuscate on this matter to this date despite acknowledging that we never discussed the scheme with him on 4th June which is the only occasion we have met him.

We remain ready to provide that wealth of detail in the context of a full, transparent review by the Scottish Parliament of the operation of the Act.

Recent incidents at football matches

Mr Wheelhouse goes on to comment on what he calls 'more visible, singing, chanting and the use of pyrotechnics' at recent games. His introduction of the issue of pyrotechnics can only be mischievous as he must be well aware that these are not

covered under the Act and would be covered by other legislation. His lurid and unsubstantiated references to 'risks of serious disfigurement' and risk to life is simply compounding this tactic. We offer no response to this as it does not merit a response other than to say it is not relevant to the petition.

Football fans

Mr Wheelhouse goes on to refer to the circumstances in which the Act was introduced. He refers to 'unprecedented levels of misconduct'. We invite Mr Wheelhouse to give any evidence to support this ridiculous statement but until he does we must simply refute it.

His reference to the delivery of 'viable explosive devices' ignores two important issues. First, they had not happened at the time the Act was first mooted. These first parcel was sent on 26th March 2011 and detail were not made public till the following month². The so-called 'Shame Game' which led to the 'Summit' was on 2nd March and the Summit which concluded that new legislation was necessary was on 7th March. Even if the idea of legislation came later in the process it was clearly being floated before the incidents referred to above were in the public domain. More importantly than all of this, however, is that we already had laws which made sending 'viable explosive devices' through the post illegal and this Act contributes not one iota to the prevention of that practice. One would have thought a Minister with his remit would have known that.

The Ministers main purpose in this section, in as far as we understand it, is to refute our allegation that the Act discriminates against football fans. His rebuttal of this point consists of saying that it protects football fans from abuse on their way to a game. He fails to provide evidence of one single incidence of such a thing happening. The fact remains that behaviours which would not be criminal in any other setting become criminal in the context of a regulated football match and that this is not only discriminatory in theory but is discriminatory in practice given its disproportionate impact on those who attend football matches as compared to the mythical football-fan abusing members of the general public on whom the Minister relies to rebut our case.

Offensiveness

Here the Minister seeks to argue that offensiveness as a concept is clear and undisputed in response to our claims that it is precisely the opposite. He makes reference to the well-known legal concept of the 'reasonable person'. We refer the Committee to the Opinion of the Court³ in the stated case by the PF Dingwall against Joseph Anthony Cairns

Thus, the Act distinguishes between, on the one hand, "a reasonable person" and, on the other, a person "likely to be incited to public disorder". It may be that a person likely to be incited to public disorder is of a more volatile

² <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-13129139>

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=113686a6-8980-69d2-b500-ff0000d74aa7>

temperament than a reasonable person or, to use the language of the sheriff, an uninitiated member of the public. The person likely to be incited to public disorder may have particular interests and particular knowledge.

Clearly the law is not based on the 'reasonable person'.

The Minister goes on to say that the law does not criminalise 'general football banter (even in bad taste)'. We have offered the committee plentiful evidence, that this is inaccurate. Swearing and other comments have led to prosecutions under the Act and that is a matter of recorded fact.

Statistics

The Minister makes some comments about the way we have calculated the conviction rate. He suggests that only looking at concluded cases in a period, regardless of when the charges were laid, is the most appropriate way to calculate conviction rates. This would be true if cases proceeded through the courts at the same rate but the evidence provided by the Government's own sponsored research indicates that this is not the case. *We suggest the Committee ask the Government's Statistical Service to calculate how many of the cases which go to trial ie do not involve a Guilty plea, result in conviction.* The conviction rate over the whole period of the Act is, on any view, 22% but even if it were the higher figure given by the government, this is still a very low figure. To suggest that in 2015, 42 concluded cases with 38 convictions gives a 90% conviction rate is statistically illiterate.

In relation to the response from ACC Higgins, we feel that this is a weak response to the points we have made and we absolutely refute the contention that the picture we have painted of the impact of this legislation is inaccurate. We have responded below to each of the points made by Assistant Chief Constable Bernard Higgins in order to bring clarity on the matter and to further highlight exactly why we believe this Act must be reviewed and ultimately repealed.

ACC Higgins

Police and Supporter Relations

Assistant Chief Constable Higgins makes the very reasonable point that is merely the role of the police to enforce the legislation as they perceive it, based on the wording of the law itself and the case law set in the courtroom. Where we disagree however is with the argument that this means that 'the subjective nature of the behaviour is, to some large extent, removed'.

Subjectivity is ultimately what underpins the legislation itself and thus it cannot be removed. Offensiveness is undeniably subjective. Mr Higgins himself was recently quoted stating that fans should report fellow supporters to the police if they are heard calling someone 'bald', but it would be safe to assume there are very, very few people who believe that something of that nature is particularly offensive or should constitute an offence. But if Mr Higgins or one of his officers found it to be offensive, or felt that someone, somewhere, might find it offensive, then an arrest could be

made.

The reality is that it would also be utterly impossible for the police to arrest everyone who acted in a way which may offend someone, as this Act calls for. Thus, the police are forced to make subjective judgements and cannot possibly enforce the law equally.

So when two young Hamilton fans were arrested for singing a song about local rivals which included profanity, or when a Rangers fan was just this weekend arrested for holding a banner which said 'Axe The Act' (in reference to this very legislation), it was clearly down to the subjective judgement of the officer on hand to decide to make an arrest. FAC do not believe that swearing should result in a criminal conviction and we find the attempts to prevent peaceful protests against the Act to be yet another dangerous attack on freedom of expression. We cannot possibly imagine any other situation whereby another group in society, who consider themselves to be persecuted, would be actively prevented from taking peaceful steps to air their concerns.

Police Scrutiny/Presence

We understand entirely the points made that there are many football matches with a minimal police presence. This however does not negate the fact the police presence at many matches is overbearing and unnecessary.

We are surprised to note that Mr Higgins has insisted that Police Scotland would not divert resources to police offensiveness at the expense of seeking to prevent violent incidents from occurring. This directly contradicts the report carried out by the University of Stirling, the key piece of research cited by the Scottish Government when arguing that the Act is working.

Defendants of this legislation cannot reasonably expect to cite this research in evidence when it suits their argument but dismiss out of hand the concerns raised within it when it undermines them.

We also find it deeply troubling that Mr Higgins suggests that he wishes to deter the fans who would be charged under this Act from attending football matches, given that the 'offences' which fall under this Act can often be so minor. Not all fans are thugs and bigots, but that is even true of all fans charged and convicted under this legislation. We fear that Mr Higgins may be successful in deterring a huge number of normal fans from attending matches if fans are continually viewed and treated in this way.

Dawn Raids

Mr Higgins contends that careful consideration is given when any fan is arrested and that the response is appropriate. We however feel that these words ring hollow when considering the instance of the fan who was arrested in front of his panic-stricken girlfriend at the airport upon returning from holiday, only for the charge to be dropped within a fortnight. Or the mother, a night-shift worker, who was awoken to find two police officers at the foot of her bed as she slept during the day, having let

themselves into her house, without a warrant, to apprehend her son.

Mr Higgins may not be comfortable with the term 'dawn raids' but we find ourselves far less comfortable with the practise itself. The procedure of arresting groups of fans simultaneously on Friday mornings, causing fear and alarm to the families, and the additional hardship of a weekend in a police station for those charged, is malicious and unwarranted. We call on Police Scotland to publicly state that they will cease this practice to help re-build the relationship between fans and the police.

Filming of Supporters

Mr Higgins has stated that fans are only filmed for an average of 3 minutes per match, but the reality is that fans standing in certain sections of stadiums or those going to away matches are often filmed for far longer periods consistently throughout matches (as well as sometimes before and after). This 'average' is not at all a reflection of their experience.

Only weeks ago, 3 police officers stood and filmed the 111 section of Celtic Park for large periods of the match. When asked by Celtic Football Club's Supporter Liaison Officer why they were doing so, they noted that they were filming to capture sectarian singing. This is in spite of the fact that no sectarian songs were sung throughout the match.

The intrusive filming of supporters when no offence is being committed only serves to further damage the relationship between fans and the police. This approach treats fans as criminals unnecessarily and has without question made law-abiding fans feel intimidated when trying to enjoy a match.

Searching of supporters

Fans Against Criminalisation understand the occasional requirements for stewards to conduct searches upon entry to the stadium however we are worried by reports of fans being stopped by Police Scotland away from the stadium and non-consensually searched. In October of last year for example a group of Celtic fans were stopped, 'kettled', and told that they would not be allowed to attend the match unless they 'consented' to be searched. Police Scotland Superintendent Alan Murray stated that this was done in part because members of this group were known to police for engaging in hate crime. This is in spite of the fact that not a single one of these supporters has ever had any criminal charge for committing hate crime, and no other evidence suggests that they would engage in such behaviour.

'Intelligence' of this calibre being used as justification for harassing, stopping and searching young fans simply demonstrates why relations between fans and the police have broken down. We sincerely hope that this practise too will cease immediately and that Police Scotland will withdraw the slur made regarding these fans and will apologise for these remarks.

Freedom of Speech and Political Expression

Mr Higgins makes it absolutely clear that it is the job of the police to enforce the

Offensive Behaviour at Football and Threatening Communications (Scotland) 2012 Act, a point we fully understand. He goes on however to claim that "Police Scotland will also attempt to facilitate protest and freedom of political expression, provided it is peaceful".

This is a fundamental contradiction. The legislation itself is what infringes upon freedom of expression. Police Scotland cannot reasonably contend that they seek to uphold freedom of expression when they have arrested someone for holding a banner which merely said 'Axe The Act'. This simply serves as one example of the repression of political expression. Another example would be that this legislation has also led to a fan being threatened with arrest for wearing a pro-Palestine t-shirt, which we believe highlights precisely why this act is flawed. Football fans should not lose their right to hold and express legitimate political opinion with the purchase of a match ticket.

We would like to state very clearly that this is not the fault of Police Scotland. They are being tasked to enforce this law by the Scottish Government, and to do so fairly whilst upholding freedom of speech is an impossible task. SNP MSP John Mason even thinks that football fans wearing a YES Scotland badge should be susceptible to police action, whilst SNP party political billboards can be found at football stadiums across the country. The hypocrisy clearly lies with the government in this instance.

Hamilton and Motherwell Supporters

We find the comments made in regards to the arrest of two young Hamilton fans to be particularly worrying. The fact that these young men pled guilty, motivated by fear having spent several nights in HM Prison Greenock, does not excuse the way in which they were treated and key questions remain unanswered. For example, why were these young men not released on an undertaking and instructed to return to court at a later date? This would be normal practice even for far more serious crimes than swearing in the streets. The reality is that they have spent more time in custody than people arrested and subsequently convicted of violent offences. These were two young men who should have never have been arrested as their 'offence' was so incredibly minor. Swearing at, or en route to, a football match may not be exemplary behaviour but it does not a criminal make. They were then forced to endure four nights in prison as a result of this, which could easily have led to considerable psychological trauma. They were then convicted on the basis of an admission made out of fear. This conviction will follow these two young men and could seriously hinder their future prospects. Their treatment is just one example among many of the way in which the Police Service of Scotland have used their discretion to treat football fans far more harshly than other members of the community. One has to ask why that would be. Perhaps the answer lies in the 'shock and awe' approach which the Police Service of Scotland admitted to using to enforce this Act. Or perhaps they have been directed to adopt this approach by the Football Fiscals or higher authorities.

It might be useful for the Committee to seek clarity from the COPFS as to the approach they adopt in relation to football-related 'crime' as we are well aware that Fiscals have to seek permission from higher up the chain of authority in order to

make even very routine decisions which they would normally have the discretion to make on their own. *The Committee might also want to ask who made the decision to go to appeal (over verdict or sentence) in two cases: PF v Dion McLeish (Dundee); PF v Joseph Cairns (Dingwall) and to threaten to appeal in two other cases PF v McNaughton (Inverness) and PF v Bateman and six others (Glasgow) and thereby extend the time period during which these young men had to endure a threat hanging over their lives and livelihoods.* The Crown makes less than one appeal a year and only in the most serious cases and here we have them appealing or beginning and then dropping appeals in no less than ten cases in four years which involved singing!

This together with the case of the two young Hamilton fans highlights very well why this Act needs to be reviewed as a matter of urgency to prevent a repeat scenario.

Conclusion

We hope that the Committee finds our responses illuminating and an adequate response to the documents sent to us. We are pleased to note that Bernard Higgins actively encourages further scrutiny to foster better relationships and effective legislation, and assume that this means he is supportive of our call for a full and frank review of the Act to provide the scrutiny he yearns for.

We would like to re-iterate that the relationship between the police and football fans has been utterly corrupted by this legislation and feel that the only way to repair the damage done is to have this Act repealed. We might also add that it is not conducive to a healthy democracy to have young people lose trust in our Government which appears so willing to interfere in their private life but so unwilling to listen to or address their legitimate concerns.