

# **OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) ACT 2012**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 1 – Offensive behaviour at regulated football matches***

4. This section creates a statutory offence of engaging in offensive behaviour which is likely to incite public disorder at a regulated football match.
5. Subsection (1) provides that a person who engages in behaviour in relation to a regulated football match which is of a kind mentioned in subsection (2) and is, or would be, but for the factors listed at subsection (5), likely to incite public disorder, commits an offence.
6. Subsection (2) lists the five kinds of behaviour which trigger the offence at subsection (1). These are:
  - (a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of a religious group, a social or cultural group with a perceived religious affiliation, or group defined by reference to a characteristic listed in subsection (4) (for example, by engaging in sectarian chanting or singing);
  - (b) expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of a group mentioned in paragraph (a) above (for example, expressing hatred of a particular player or manager because of that person's presumed or actual religious affiliation);
  - (c) behaviour that is motivated by hatred of a group mentioned in paragraph (a) above;
  - (d) behaviour that is threatening; or
  - (e) other behaviour that a reasonable person would be likely to consider offensive (for example, this would include, but is not limited to, sectarian songs or chants).
7. Subsection (3) provides, for the avoidance of doubt, that it is irrelevant whether the hatred expressed was also based on any other factor, such as, for example, hatred of a particular football club or player's playing style as well as their religious affiliation, race or other factor listed at subsection (2)(a) or (b).
8. Subsection (4) provides a list of further characteristics, other than religion, by which a group may be defined, in respect of which it is an offence to express or stir up hatred. These are: colour; race; nationality; ethnic or national origins; sexual orientation; transgender identity; and disability.
9. Subsection (5) provides that behaviour shall be deemed likely to incite public disorder if it would be likely to incite public disorder but for the fact that measures have been

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put in place to prevent public disorder. Such measures might include a strong police presence and rigid separation of opposing supporters, or the fact that persons likely to be incited to public disorder are not present, or not present in sufficient numbers, for example because ‘away’ supporters are greatly outnumbered by home supporters, or because one team’s supporters have left the match before the other.

10. Subsection (6) specifies that the maximum penalty on indictment is 5 years imprisonment or an unlimited fine or both.

### ***Section 2 – Regulated football match: definition and meaning of behaviour “in relation to” match***

11. This section provides a definition of a “regulated football match” and sets out the circumstances in which behaviour is considered to have taken place “in relation to a regulated football match”.
12. Subsection (1)(a) provides that a “regulated football match” is one as defined by section 55(2) of the [Police, Public Order and Criminal Justice \(Scotland\) Act 2006](#). These will include football matches anywhere in the United Kingdom where one or both of the participating teams represent a country or territory; or a club which is a member of the Scottish Premier League or the Scottish Football League, the Football League, the Football Association Premier League, the Football Conference or the League of Wales. Subsection (1)(b) qualifies that broad definition and provides that matches taking place outside Scotland are only considered “regulated football matches” if 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. As such, a game between, for example, two English Premier League clubs taking place in England would not be a “regulated football match”.
13. Subsection (2)(a) provides that, for the purpose of the offence at section 1, a person’s behaviour shall be considered to have occurred in relation to a regulated football match if it happens at the ground where a regulated football match is being held on the day on which it is being held, while the person is entering or leaving the ground where the match is being held, or on a journey to or from the match.
14. Subsection (2)(b) provides that persons who engage in behaviour described in section 1(2) who are not themselves on a journey to a regulated football match, but who direct the behaviour at, or join in with, people who are on a journey to a regulated football match, also commit the offence. Similarly, persons who are not themselves in, entering or leaving the ground, but whose behaviour falls within section 1(2), commit an offence if such behaviour is directed towards or engaged in along with a person in, entering or leaving the ground.
15. Subsection (3) provides that the references in subsection (2) to a regulated football match include any place, other than domestic premises, where a match is televised. As such, the offence can be committed by people watching a match at a pub, or in a public space where the match is televised.
16. Subsection (4) provides that a person may be regarded as having been on a journey to or from a regulated football match whether or not that person attended, or intended to attend the match. This ensures that offensive and disorderly behaviour, whether committed by supporters travelling to matches without tickets or by others but directed towards or engaged in along with such supporters, is covered by the offence set out in section 1. It further provides that a person’s journey may include breaks, including overnight breaks.

### ***Section 3: Fixed penalties***

17. This section amends section 128 of the [Antisocial Behaviour etc. \(Scotland\) Act 2004](#) to add the offence of *Offensive behaviour at regulated football matches* in section 1 to

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the list of offences in respect of which a Fixed Penalty Notice under Part 11 of that Act can be issued. A Fixed Penalty Notice can be issued anywhere in Scotland under the [Antisocial Behaviour \(Fixed Penalty Offence\) \(Prescribed Area\) \(Scotland\) Regulations 2007](#).

#### ***Section 4: Sections 1 and 2: interpretation***

18. This section defines the meaning of certain terms for the purposes of sections 1 and 2.
19. Subsection (1) provides that section 1(1) applies to behaviour of any kind, including things said or otherwise communicated (e.g. with a banner or on a T-shirt) as well as things done.
20. Subsection (2) provides that the references to membership of a group in section 1(2) include association with members of that group (e.g. expressing hatred of those who socialise with members of a particular religious group), that the reference to “presumed membership” in section 1(2) means presumed by the person expressing hatred or stirring up hatred, and as such, it is irrelevant that the person or people in question are not in fact members of the group and that “religious group” has the meaning given by section 74(7) of the [Criminal Justice \(Scotland\) Act 2003](#).
21. Subsection (3) defines the terms “disability” and “transgender identity” for the purpose of section 1(4).
22. Subsection (4) defines the term “televised” and makes clear that it extends to matches shown on a screen or projected onto any surface by any means (e.g. by means of internet streaming or ‘webcasting’, as well as conventional television broadcasting).

#### ***Section 5: Power to modify sections 1 and 4***

23. [Section 5](#) provides Scottish Ministers with the power by order to modify sections 1 and 4. The power is subject to the affirmative procedure. Subsection (1) provides a power to add a description of behaviour to, or remove or vary a description of behaviour listed in, section 1(2); to add to, remove from or vary the list of characteristics in section 1(4) which define the groups in respect of whom it is an offence to incite or express hatred; to add a definition to, or remove or vary a definition contained in, section 4(2) or (3); and to disapply section 1(5)(b) in relation to behaviour described in section 1(2). Subsection (2) provides that any order made under subsection (1) may make such consequential, transitional, transitory or saving provisions as are considered appropriate.

#### ***Section 6: Threatening communications***

24. This section creates a new offence of making threatening communications.
25. Subsection (1) provides that a person who communicates material to another person where either of Condition A (set out in subsections (2)-(4)) or Condition B (set out in subsection (5)) is satisfied commits an offence.
26. Subsection (2) sets out the three tests which must be satisfied for Condition A to be met. These are:
  - that the material consists of, contains or implies a threat or incitement to carry out a seriously violent act against a person, or against persons of a particular description. Persons of a particular description may, for instance, be supporters of a particular football club or members of a particular religious group;
  - that the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm; and
  - that the person communicating the material either intends to cause fear or alarm, or is reckless as to whether the communication of the material would cause fear or alarm.

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27. Subsection (3) provides that, for the purposes of Condition A, where the material consists of an image which depicts or implies the carrying out of a seriously violent act against a person or against persons of a particular description, and a reasonable person would be likely to consider that the image implies the carrying out of a seriously violent act against an actual person, or against actual persons of a particular description, the image may be taken to imply a threat or incitement as mentioned in subsection (2) (a). This ensures, for the avoidance of doubt, that a doctored image of, for example, a prominent public figure depicting an act which would cause serious injury to that person, and intended as an implied threat, would fall within the scope of Condition A.
28. Subsection (5) sets out the two tests which must be satisfied for Condition B to be met. These are:
  - that the material is threatening; and
  - that the person communicating it intends to stir up hatred on religious grounds.
29. This is wider than Condition A, in that it covers threats of any kind, and not only threats of serious violence. In contrast with Condition A, a person who is merely reckless that a communication would have the effect of stirring up religious hatred would not be caught by the offence. This ensures that a person making a communication containing what he or she intended to be legitimate comment or criticism of a religion or religious beliefs would not commit the offence solely because others considered it had the effect of stirring up hatred on religious grounds.
30. Subsection (6) provides that it is a defence for a person charged with an offence under this section to show that the communication of the material was, in the particular circumstances, reasonable. This would cover, for example, a person who communicates a threat of serious violence made by someone else for the purpose of alerting the police, a journalist reporting a threat of serious violence made by another person, or the communication of threats as part of an artistic or theatrical performance.
31. Subsection (7) specifies that the maximum penalty on indictment for an offence under this section is 5 years imprisonment or a fine or both.

### ***Section 7: Protection of freedom of expression***

32. This section makes clear, for the avoidance of doubt, that Condition B of the ‘threatening communication’ offence does not prohibit or restrict certain behaviours that would be protected under existing rights of freedom of expression.
33. Subsection (1) sets out the behaviours which are not restricted by section 6(5). They are:
  - discussion or criticism of religions or the beliefs or practices of adherents of religions,
  - expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,
  - proselytising (that is attempting to convert persons who hold particular religious views or no such views), or
  - urging of adherents of religions to cease practising their religions.
34. Subsection (2) provides that ‘religion’ in subsection (1) includes:
  - religions generally,
  - particular religions,
  - other belief systems.

**Section 8: Section 6: interpretation**

35. This section defines terms used in section 6.
36. Subsection (2) provides that “communicates” means communicates by any means other than by unrecorded speech alone. As such it includes communications made by post or printed media, on the internet or through websites, email, blogs, podcasts, etc.
37. Subsection (3) defines “material” as anything capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form. As such, it includes printed text, video, sound recordings, images, etc.
38. Subsection (4) defines “hatred on religious grounds” as hatred of a group of persons based on their membership or presumed membership of a religious group (as defined by section 74(7) of the [Criminal Justice \(Scotland\) Act 2003](#)), or of a social or cultural group with a perceived religious affiliation, or of an individual based on their membership or presumed membership of such a group.
39. Subsection (5) defines a “seriously violent act” as one that would cause serious injury to, or the death of, a person.
40. Subsection (6) provides that in subsection (4) “membership” of a group includes association with members of that group, and “presumed” means presumed by the person making the communication (as such, if a person stirs up hatred of a person because he believes that person to be a member of a particular religious group, it is irrelevant that the person is not, in fact, a member of that group).

**Section 9: Power to modify sections 6(5)(b) and 8**

41. This section allows for sections 6(5)(b) and 8 to be amended by order made by the Scottish Ministers. Subsection (1) provides a power to amend section 6(5)(b) to add ground of hatred to, or remove or vary a ground of hatred covered by, Condition B of the ‘threatening communications’ offence and to amend section 8 so as to add, remove or vary a definition that relates to a ground of hatred mentioned in section 6(5)(b).
42. Subsection (2) provides that an order under subsection (1) may specify grounds of hatred by reference to groups of persons, or individuals, of a specified description, and may specify such descriptions by reference to specified personal characteristics. It further provides that, in relation to any ground added by the order, an order may modify the Act so as to make provision for similar purposes as that in section 7 (protection of freedom of expression).
43. Subsection (3) provides that any order made under subsection (1) may make such consequential, transitional, transitory or saving provision as Scottish Ministers consider appropriate. The order-making power is subject to the affirmative procedure.

**Section 10: Sections 1(1) and 6(1): offences outside Scotland**

44. This section makes provision regarding the circumstances in which the offences at sections 1(1) and 6(1) may be committed outside Scotland. In these circumstances, the acts will constitute offences under Scots law (though not necessarily under the law of the country in which the act took place).
45. Subsection (1) provides that the offence at section 1(1) applies to anything done outside Scotland by a person to who is habitually resident in Scotland.
46. Subsection (2) provides that, as well as applying to anything done in Scotland by any person, the offence at section 6(1) also applies to a communication made by any person from outside Scotland if the person intends the communication to be heard, seen, read, looked at, watched or listened to primarily in Scotland. Thus the offence could be committed, for example, by an Irish national posting a threat to a prominent figure in Scottish football from outwith Scotland, but would not be committed by, for example,

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a Dutch national posting a threat to a prominent figure in English football from outwith Scotland.

47. Subsection (3) provides that, where a person commits an offence outwith Scotland, he or she may be tried 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 there.

### ***Section 11: Report on operation of offences***

48. This section states that the Scottish Ministers are required to report to Parliament on the operation of the offences in section 1 and 6 during a period beginning on the day that those offences come into force and ending 2 years after the 1 August next occurring after that day. The effect of this is that the report will cover two full football seasons. The report must be laid in Parliament not later than 12 months after the end of this period.
49. Subsection (2) states the Scottish Ministers, before preparing a report under subsection (1) must consult with such persons as they consider appropriate.

### ***Section 12: Commencement***

50. This section provides for section 12 itself and section 13 to come into force on Royal Assent. The other provisions shall come into force on such a date as Ministers appoint by order.