Passage of the

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill 2011

SPPB 170
Passage of the

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill 2011

SP Bill 1 (Session 4), subsequently 2012 asp 1

SPPB 170
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Bill (As Passed) (SP Bill 1B)
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

Following the Introduction of this Bill, the Member in Charge of the Bill, the Minister for Community Safety and Legal Affairs (Roseanna Cunningham MSP) proposed by motion that the Bill be treated as an Emergency Bill. The Parliamentary Bureau subsequently proposed in a business motion that the Minister’s motion be considered on 23 June 2011.

Rule 9.21 of the Parliament’s Standing Orders sets out the provisions that apply to an Emergency Bill. Under that Rule, no Stage 1 Report is required for an Emergency Bill. Stage 1 consists only of a debate in the Chamber on the general principles of the Bill. The Justice Committee did, however, take evidence on the Bill at meetings on 21 and 22 June 2011 in order to inform that debate, but did not produce a report at that time.

The Parliament agreed on 23 June 2011 that the Bill should be treated as an Emergency Bill. It then agreed a proposed timetable, with Stage 1 to be taken later on 23 June, and Stages 2 and 3 to be taken on 29 June.

The Stage 1 debate took place later on 23 June 2011. Shortly after the debate, and before the Parliament was to vote on whether to approve the general principles of the Bill at Stage 1, the First Minister announced that, if the Parliament agreed to the general principles, he would propose an extended timetable for consideration of the
Bill at Stages 2 and 3, to enable the Bill to be passed by the end of the year. The Parliament agreed to the general principles of the Bill on 23 June 2011. The relevant Official Report extracts from First Minister’s Questions on 23 June are, therefore, included in this volume along with the Official Report of the Stage 1 debate on the Bill and the procedural and timetabling motions.

On 29 June 2011, the Parliament agreed, by a motion lodged on behalf of the Parliamentary Bureau, that for the purposes of Stages 2 and 3, the Bill would no longer be treated as an Emergency Bill, that the Justice Committee would be designated as lead committee at Stage 2 and that Stage 2 should be completed by 11 November 2011. The Parliament subsequently agreed, by a motion lodged on behalf of the Parliamentary Bureau, to extend that deadline to 2 December 2011.

The Justice Committee subsequently issued a call for evidence and took further evidence on the Bill at meetings in September. It then produced a Report. That Report lists, at Annexes C and D, the oral and written evidence received. That evidence (including the evidence taken on 21 and 22 June) is reproduced in full in this volume after the Report. The Report was debated in the Chamber prior to the start of Stage 2 proceedings.

Under Emergency Bill procedures, no report on the Financial Memorandum is required before the Parliament considers the general principles of the Bill. The Finance Committee did, however, consider the Financial Memorandum prior to the start of Stage 2 proceedings, and wrote to the Justice Committee to highlight key themes from its evidence. That letter is included in the Justice Committee’s Report at Annex A. Extracts from the minutes and Official Report of the meeting where the Finance Committee took evidence are included in this volume after the Justice Committee’s Report.

The Subordinate Legislation Committee is not required to consider and report on any delegated powers in an Emergency Bill. The Bill as Introduced did not contain any provisions conferring delegated powers. Following agreement at Stage 2 to amendments that did confer delegated powers, the Scottish Government produced a Delegated Powers Memorandum (which was titled ‘Supplementary Delegated Powers Memorandum’) and the Subordinate Legislation Committee considered and reported on the Bill As Amended at Stage 2. That report, and the associated extracts from the minutes and Official Report, are included in this volume.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill
[AS INTRODUCED]

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Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Offensive behaviour at regulated football matches

1  Offensive behaviour at regulated football matches

5 (1) A person commits an offence if, in relation to a regulated football match—

(a) the person engages in behaviour of a kind described in subsection (2), and

(b) the behaviour—

(i) is likely to incite public disorder, or

(ii) would be likely to incite public disorder.

10 (2) The behaviour is—

(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,

(ii) a social or cultural group with a perceived religious affiliation,

(iii) a group defined by reference to a thing mentioned in subsection (4),

(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 any of sub-paragraphs (i) to (iii) of paragraph (a),

(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,

(d) behaviour that is threatening, or

(e) other behaviour that a reasonable person would be likely to consider offensive.

15 (3) For the purposes of subsection (2)(a) and (b) it is irrelevant whether the hatred is also based (to any extent) on any other factor.

20 (4) The things referred to in subsection (2)(a)(iii) are—
(a) colour,
(b) race,
(c) nationality (including citizenship),
(d) ethnic or national origins,
(e) sexual orientation,
(f) transgender identity,
(g) disability.

(5) For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

(a) measures are in place to prevent public disorder, or
(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

2 Regulated football match: definition and meaning of behaviour “in relation to” match

(1) In section 1 and this section, “regulated football match”—

(a) has the same meaning as it has for the purposes of Chapter 1 (football banning orders) of Part 2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (see section 55(2) of that Act), but

(b) does not include a football match outside Scotland unless the match involves—

(i) a national team appointed to represent Scotland, or
(ii) a team representing a club that is a member of a football association or league based in Scotland.

(2) For the purposes of section 1(1), a person’s behaviour is in relation to a regulated football match if it occurs—

(a) in the ground where the regulated football match is being held on the day on which it is being held,
(b) while the person is entering or leaving (or trying to enter or leave) the ground where the match is being held, or
(c) on a journey to or from the regulated football match.

(3) The references in subsection (2)(a) to (c) to a regulated football match include a reference to any place (other than domestic premises) at which such a match is televised; and, in the case of such a place, the references in subsection (2)(a) and (b) to the ground where the match is being held are to be taken to be references to that place.

(4) For the purpose of subsection (2)(c)—
(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and

(b) a person’s journey includes breaks (including overnight breaks).

3 Fixed penalties

In Part 1 of the table in section 128 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (fixed penalty offences), after the entry relating to section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, insert—

| “Section 1(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011 (asp 00)” | Offensive behaviour at regulated football matches |

4 Sections 1 and 2: interpretation

(1) Section 1(1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and

(b) behaviour consisting of—

(i) a single act, or

(ii) a course of conduct.

(2) In section 1(2)—

(a) membership, in relation to a group, includes association with members of that group,

(b) “presumed” means presumed by the person expressing hatred or, as the case may be, doing the stirring up,

(c) “religious group” has the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7).

(3) In section 1(4)—

(a) “disability” means physical or mental impairment of any kind,

(b) “transgender identity” means any of the following—

(i) transvestism,

(ii) transsexualism,

(iii) intersexuality,

(iv) having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender,

(v) any other gender identity that is not standard male or female gender identity.

(4) In section 2(3), “televised” means shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise.
Threatening communications

5 Threatening communications

(1) A person commits an offence if—
   (a) the person communicates material to another person, and
   (b) either Condition A or Condition B is satisfied.

(2) Condition A is that—
   (a) the material consists of, contains or implies a threat, or an incitement, to carry out
      a seriously violent act against a person or against persons of a particular
      description,
   (b) the material or the communication of it would be likely to cause a reasonable
      person to suffer fear or alarm, and
   (c) the person communicating the material—
      (i) intends by doing so to cause fear or alarm, or
      (ii) is reckless as to whether the communication of the material would cause
           fear or alarm.

(3) For the purposes of Condition A, where the material consists of or includes an image
    (whether still or moving), the image is taken to imply a threat or incitement such as is
    mentioned in paragraph (a) of subsection (2) if—
    (a) the image depicts or implies the carrying out of a seriously violent act (whether
        actual or fictitious) against a person or against persons of a particular description
        (whether the person or persons depicted are living or dead or actual or fictitious), and
    (b) 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.

(4) Subsection (3) does not affect the generality of subsection (2)(a).

(5) Condition B is that—
    (a) the material is threatening, and
    (b) the person communicating it intends by doing so to stir up religious hatred.

(6) It is a defence for a person charged with an offence under subsection (1) to show that the
    communication of the material was, in the particular circumstances, reasonable.

(7) A person guilty of an offence under subsection (1) is liable—
    (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or
        to a fine, or to both, or
    (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or
        to a fine not exceeding the statutory maximum, or to both.

6 Section 5: interpretation

(1) Subsections (2) to (5) define expressions used in section 5.

(2) “Communicates” means communicates by any means (other than by means of
    unrecorded speech); and related expressions are to be construed accordingly.
(3) “Material” means anything that is capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form.

(4) “Religious hatred” means hatred against—
   (a) a group of persons based on their membership (or presumed membership) of—
      (i) a religious group (within the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7)),
      (ii) a social or cultural group with a perceived religious affiliation, or
   (b) an individual based on the individual’s membership (or presumed membership) of a group mentioned in either of sub-paragraphs (i) and (ii) of paragraph (a).

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

(6) In subsection (4)—
   (a) “membership”, in relation to a group, includes association with members of that group, and
   (b) “presumed” means presumed by the person making the communication.

General

7 Sections 1(1) and 5(1): offences outside Scotland

(1) As well as applying to anything done in Scotland, sections 1(1) and 5(1) also apply to anything done outside Scotland by—
   (a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen,
   (b) a person who under the British Nationality Act 1981 (c.61) is a British subject,
   (c) a British protected person within the meaning of that Act, or
   (d) a person who is habitually resident in Scotland.

(2) Section 5(1) also applies to a communication made by any person from outside Scotland if the person intends the material communicated to be read, looked at, watched or listened to primarily in Scotland.

(3) Where an offence under section 1(1) or 5(1) is committed outside Scotland, the person committing the offence may be prosecuted, tried and punished for the offence—
   (a) in any sheriff court district in which the person is apprehended or in custody, or
   (b) in such sheriff court district as the Lord Advocate may direct,
   as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial and punishment, deemed to have been committed in that district).

8 Commencement

This Act comes into force on the day after Royal Assent.
9 Short title

The short title of this Act is the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Introduced by: Kenny MacAskill
On: 16 June 2011
Supported by: Roseanna Cunningham
Bill type: Executive Bill
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill introduced in the Scottish Parliament on 16 June 2011:

   • Explanatory Notes;
   • a Financial Memorandum;
   • a Scottish Government Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 1–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Bill provides for two new criminal offences. The offence of ‘Offensive behaviour at regulated football matches’ criminalises offensive or threatening behaviour likely to incite public disorder at certain football matches. The offence of ‘Threatening communications’ provides for a criminal offence concerning the sending of communications which contain threats of serious violence or which contain threats intended to incite religious hatred.

COMMENTARY ON SECTIONS

Section 1 – Offensive behaviour at regulated football matches

5. This section creates a statutory offence of engaging in offensive behaviour which is likely to incite public disorder at a regulated football match.

6. Subsection (1) provides that a person who engages in behaviour at 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.

7. 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.
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

(d) Behaviour that is threatening; or

(e) Other behaviour that a reasonable person would be likely to consider offensive – this would include, but is not limited to, sectarian songs or chants.

8. 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).

9. 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.

10. 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 put in place to prevent public disorder, such as 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.

11. Subsection (6) specifies that the maximum penalty is 5 years imprisonment and a fine not exceeding the statutory maximum.

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

12. 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”.

13. 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) 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”.

14. Subsection (2) 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.

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 being 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 being broadcast.

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 committed by supporters travelling to matches without tickets to attend the match are covered by the offence provisions. 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 at section 1 to 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: Threatening communications

23. This section creates a new offence of making threatening communications.

24. 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.

25. 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.

26. 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.

27. 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 religious hatred.

28. 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 religious hatred.

29. 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 or a journalist reporting a threat of serious violence made by another person.

30. Subsection (7) specifies that the maximum penalty is 5 years imprisonment and a fine not exceeding the statutory maximum.

Section 6: Section 5: interpretation

31. This section defines terms used in section 5.

32. Subsection (2) provides that “communicates” means communicates by any means other than by unrecorded speech alone. As such it includes communications made by post, on the internet through websites, email, blogs, podcasts etc, by printed media, et cetera.

33. 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, et cetera.

34. Subsection (4) defines “religious hatred” as hatred of a group of persons based on their 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 of such a group.

35. Subsection (5) defines a “seriously violent act” as one that would cause serious injury to, or the death of, a person.

36. Subsection (6) provides that, in relation to 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 religion).

Section 7: Sections 1(1) and 5(1): offences outside Scotland

37. This section makes provision regarding the circumstances in which the offences at sections 1(1) and 5(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).

38. Subsection (1) provides that the offences apply to anything done outside Scotland by a person to whom this subsection applies (e.g. a British citizen or a person who is habitually resident in Scotland). As such, a British citizen commits this offence irrespective of where in the world they make the threatening communication from.
39. Subsection (2) provides that the offence at section 5(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 (whether or not they fall within subsection (1)). 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, a Dutch national posting a threat to a prominent figure in English football from outwith Scotland.

40. 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 as the Lord Advocate may direct, as if the offence had been committed there.

Section 8: Commencement

41. The Act will come into force at the start of the day following the day on which the Bill receives Royal Assent.

FINANCIAL MEMORANDUM

INTRODUCTION

42. This document relates to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill introduced in the Scottish Parliament on 16 June 2011. It has been prepared by Kenny MacAskill MSP, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

43. The purpose of this Financial Memorandum is to set out the Scottish Government’s estimated costs associated with the measures introduced by the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. It should be read in conjunction with the Bill and the other accompanying documents, including the Policy Memorandum which explains in detail the policy intention of the Bill.

44. The Scottish Government does not envisage significant additional costs associated with the introduction of these measures. The main costs, where they occur, are likely to relate to the policing and enforcement of the measures set out in the Bill, the anticipated increase in the number of cases which may be brought to the courts as a result of such enforcement, and the costs associated with dealing with those convicted, whether that conviction leads to a community or custodial sentence. It is anticipated that the majority of the costs will fall to the Scottish Administration.
45. It is crucial to the estimates that follow that much of the behaviour that the provisions cover is already criminal and therefore liable to prosecution. There is well-established case law on the use of breach of the peace, for example, in cases similar to those set out in these provisions. The new measures do, however, bring clarity and strengthen the law. It is not necessarily the case that the estimated number of additional arrests, prosecutions, and custodial or other sentences will entail a significant new or additional financial burden, as there may well have been arrests, prosecutions and disposals anyway. It is therefore difficult to estimate the net effect of these new provisions.

46. Against this background, the Scottish Government does not expect its costs in 2011/12 to exceed £0.5 million, which could be met from within existing Justice portfolio budget provision. The new and additional costs arising as a result of the measures in this Bill falling in later years are estimated to be in the range of £0.7 million to £1.5 million per annum, with provision to be considered against other priorities as part of the forthcoming Spending Review.

BACKGROUND

47. In preparing this Memorandum, the Scottish Government has consulted with the Association of Chief Police Officers in Scotland (ACPOS), Crown Office and Procurator Fiscal Service (COPFS), Scottish Legal Aid Board (SLAB), Scottish Court Service and Scottish Prison Service (SPS).

48. A basic assumption in preparing this Memorandum has been that there is an increasing social problem in relation both to offensive behaviour associated with football and, more widely, certain threats communicated in a variety of ways. A commitment has been made to eradicate these behaviours and the attitudes underlying them from society. This will require considerable effort from a very wide range of agencies in the public and voluntary sectors.

49. Crucially, however, the provisions in this Bill are only one part of a much wider programme, building on much existing work, that will be necessary to deliver the outcomes sought. This wider programme relates to work to tackle sectarianism, violence reduction and alcohol misuse. These programmes of work are long standing with established funding mechanisms. This is intended to justify an assumption that, while there may be some refocusing and reprioritisation on the issues we are seeking to tackle through this Bill, they are in fact not new and generally can be tackled through established means.

50. This Memorandum limits itself more narrowly to the impact and any potential additional costs incurred as a direct result of the provisions in the Bill, which will naturally have an impact primarily on the criminal justice system. The financial implications of any wider programme will be considered and detailed separately as that work develops.

51. Given that the Scottish Government is seeking to eradicate these behaviours, there is likely to be an initial period of activity, but the anticipated overall costs will reduce over time as public information and the awareness of successful prosecutions begins to have a deterrent effect, and more general preventative approaches in relation to offending and sectarianism take hold. Ultimately, in the absence of the relevant offending behaviour, the Scottish Government
would hope that these offences need rarely if ever be used. While savings would, therefore, be expected over time, it is not possible at this point to estimate the extent of such savings and when they would be realised.

52. Another crucial assumption concerns the very wide potential scope of the new offences and thereby the prospect of a very considerable number of prosecutions etc., with all the consequential costs. In relation to the offences covering offensive behaviour at football matches, this means everything covered by the definition of a “regulated football match”, along with travel to and from those matches and wherever such matches are being broadcast. In relation to the “threatening communications” offence the scope is potentially even wider, given that any relevant threatening communication could include threats communicated from outside Scotland, which can be seen or heard in Scotland. The potential costs of enforcing all such instances of the offences would be unsustainable.

53. The actual cost of these new measures, however, will be determined by the extent of their use (the number of arrests, investigations, prosecutions, trials and disposals). The assumptions used to determine the actual cost of introducing these measures have been developed in close consultation with a range of partners including ACPOS and COPFS. The most significant new costs would potentially fall to SPS, in particular if these measures lead to a number of new, substantial custodial sentences. In addition, there will be extra calls on the Legal Aid Fund, the costs of prosecution and in court proceedings, and in dealing with disposals at all levels. However, as outlined above, given the coverage of existing offences, we do not predict that there will be a significant number of additional cases.

ASSUMPTIONS

54. A number of assumptions have been made with respect to the potential costs involved in detecting and prosecuting cases under the new measures. Figures and estimates relating to policing costs have been provided by the Strathclyde Police Territorial Policing Unit, and that Force’s Finance Department. These concentrate on the recent known costs associated with “Old Firm” fixtures and, therefore, represent the most significant example of policing potential offensive behaviour at football matches. The Scottish Government accepts that there are other high profile Scottish football fixtures with their own particular demands, but considers it reasonable to use “Old Firm” fixtures as providing the upper limit of what may be required.

55. Estimates have also been made about the “unit costs” associated with pursuing prosecutions through both the Solemn and Summary court procedures. These estimates are based on known average costs in each case, and have been calculated by the Scottish Government, in consultation with other stakeholders. Similarly, assumptions about potential disposals - custodial, community payback order (CPO), fines or other disposals - are based on existing experience of court disposals.
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

56. In summary, the assumptions used in the following sections are:

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<thead>
<tr>
<th>Costs</th>
<th>Solemn cases</th>
<th>Summary cases</th>
</tr>
</thead>
<tbody>
<tr>
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<td>Prosecution costs per case</td>
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<table>
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<tr>
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</thead>
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<td>10%</td>
</tr>
<tr>
<td>% CPO</td>
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<td>15%</td>
</tr>
<tr>
<td>% fine/other disposal</td>
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<td>75%</td>
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<td>6 months</td>
</tr>
<tr>
<td>Actual time served</td>
<td>1.5 years</td>
<td>3 months</td>
</tr>
</tbody>
</table>

57. In discussion with the Scottish Children’s Reporter Administration (SCRA) it was agreed that the new offences in the Bill were unlikely to result in any significant increase in referrals. As a result, there would be very little financial impact on SCRA, and there is no estimate of such costs in this Memorandum.

OFFENSIVE BEHAVIOUR AT REGULATED FOOTBALL MATCHES

COSTS ON THE SCOTTISH ADMINISTRATION

Policing and enforcement

58. Scottish police forces already commit significant resources to policing and managing football matches, not just in and around the stadium, but in the wider area of pubs and clubs, town centres and, in the case of domestic abuse, in private dwellings. The Scottish Government accepts the principle that such resources should only be deployed when necessary. It is no part of the assumptions of this Bill that the introduction of these measures will require football matches to be policed that are not already being policed. It remains for the local Force, in consultation with football clubs, to assess risk of public disorder and respond accordingly.

59. As part of the case made to the Scottish Government in connection with the football “summit” on 8 March 2011 and the work of the Joint Action Group, Strathclyde Police have considered and provided information on “Old Firm” matches. Policing such fixtures is expensive due to the level of resources involved, which includes a number of officers who will be required to work on planned “rest days”.

60. On average, an Old Firm game costs £328k to police, with Sunday fixtures costing £346k and weekday fixtures costing £282k. Strathclyde’s figures also show that a total of 8,605 officers have been committed to policing the stadium/footprint of “Old Firm” fixtures since the
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

start of the 2007/08 season, up to the match on 2 March 2011. This represents an average of some 478 officers per fixture, of which around 86% are Constables and less than 1% are Chief Superintendent or Superintendent level officers. In addition, resources dedicated to such matches include Bronze Commanders; Events Room staff; Football Intelligence Team staff; officers committed to Divisional Action Plans; and staff based in headquarters departments, as well as pre-match resourcing.

61. In total, some £2.3 million was spent policing the seven “Old Firm” fixtures between 28 February 2010 and 2 March 2011. Just under half of that expense was incurred from the additional deployment of officers throughout the Force area (in support of Divisional Action Plans), while a further 41% of the overall cost (£941k) was attributable to Stadium Footprint policing.

62. In response to problems on 2 March in particular, Strathclyde Police enhanced their response to the issues as demonstrated by initiatives such as the 35-officer dedicated anti-sectarian deployment at “Old Firm” games. This forms part of Strathclyde’s existing “Anti-Sectarian Initiative” (ASI) which will continue to set the framework for policing fixtures in that Force’s area. As a result, the additional costs of policing arising as a direct result of the new measures is likely to be relatively small, and would be absorbed within existing resources and plans. It is also important to recognise that such a response will not be necessary on many occasions through the football season.

63. What this case study has shown is the potential for disorder at football matches and beyond to be a resource-intensive business. The question is whether the measures in the Bill will add to the burden. The Scottish Government does not rule out that individuals who are not currently considered to be acting criminally will be arrested on the basis of these new offences. However, since the primary intent of the measures is to bring clarity and strengthen the law, and not criminalise behaviour that is not already likely to be prosecuted, the policing response to football matches is not expected to be dramatically different, and certainly not in a way that demands a whole new approach or significant additional resources. With these measures in place, the police will still have to police high-profile, high-risk fixtures, and police them appropriately. Indeed, since the purpose is to bring clarity and strengthen the law in relation to offensive behaviour associated with football matches, the response of Match Commanders and deployed officers should be made easier by these provisions.

Courts and Prisons

64. The report provided by Strathclyde Police showed that there have been 204 arrests within the footprint of a stadium when an “Old Firm” game has taken place between October 2007 and 2 March 2011. Of these, 62 arrests were for “sectarian” breach of the peace offences, more than half of which took place around the fixtures on 20 February and 2 March 2011. This number is, however, relatively small compared to the wider pattern of violence and disorder occurring on match days.
Solemn cases

65. The Scottish Government anticipates that the new measures set out in the Bill will in large part be used in place of existing offences including breach of the peace. Given this, it is anticipated that the new measures will lead to a relatively small additional number of the most serious cases being prosecuted in the Sheriff Courts under solemn procedure, with the expectation that a substantial custodial sentence would be imposed on conviction. It is difficult to predict exact levels of activity at this stage, but the Scottish Government has prepared estimates which assume that between five and 10 additional cases would be tried each year in the Sheriff Solemn court. Using the assumed costs set out above it is anticipated that this could give rise to additional costs to the courts of some £0.05 to £0.1 million per annum. This includes estimates for the increased cost of legal aid (£7-£14k), prosecution (£35-£70k) and court costs (£7-£15k). In addition, it is anticipated that the long-term costs to the Scottish Prison Service of five to 10 sentences imposed each year would amount to between £0.3 and £0.6 million per annum.

Summary cases

66. There will also be a higher number of less serious cases, for example of offensive chanting or singing, which are prosecuted through the Sheriff Court Summary procedure. Given the Scottish Government's stated intention of tackling and eradicating offensive behaviour at football matches, it considers that a realistic estimate of new prosecutions would lie between 50 and 100 additional cases per annum. At these levels the additional costs to the courts system, including legal aid, prosecution and costs in court, would be in the range £56k to £113k per annum. Available data on Summary case convictions show that around 10% of such cases will result in custodial sentences. Assuming a sentence length of six months (with three months served) the long-term costs to the Scottish Prison Service would be some £72k to £144k per annum, including costs associated with remand.

Direct measures

67. Under the provisions of the Bill, the police will have the option of issuing fixed penalty notices (FPNs) for relatively minor offences under the new offensive behaviour provision. Such offences might be targeted at chanting or other offensive behaviour at a less serious level. However, the Scottish Government considers that FPNs offer an appropriate method of dealing with higher numbers of such cases, while continuing to give a clear message about the commitment to tackle such behaviour. Given this, it is anticipated that between 200 and 500 FPNs might be issued directly by the police each year. The costs involved in disposing of offences in such a way are relatively small - involving perhaps five to 15 minutes of police time, with some additional processing costs relating to the collection of fines etc. However, even the upper estimate of new FPNs issued should be seen in the context of some 60,000 FPNs handed out for antisocial behaviour more generally each year. Given this, the Scottish Government considers that the additional costs of dealing with low level offences through FPNs is insignificant in relation to existing resources, and can be absorbed within the existing resources available to the police service in Scotland.
COSTS ON LOCAL AUTHORITIES

68. A further sentencing option available to the courts will be the imposition of community payback orders (CPOs). The responsibility for administering CPOs lies primarily with local authorities and the costs would therefore fall to councils. Assuming some 15% of summary cases - between eight and 15 cases per year - were disposed of through CPOs, it is estimated that additional costs would amount to between £18k to 36k per annum. Against a background of some 14,000 community sentences imposed each year across Scotland, with direct support funding of £100 million from central Government, any additional costs to local authorities arising from the new measures are not considered to be significant. The Scottish Government will, however, monitor and review these costs in consultation with COSLA once the legislation is implemented.

THREATENING COMMUNICATIONS

COSTS ON THE SCOTTISH ADMINISTRATION

Policing and enforcement

69. The policing and enforcement of offences around threatening communications is a developing area and it is difficult at this stage to estimate the costs involved in addressing the issue across such a wide range of media from written material, through broadcasting and the internet. Police and prosecutors are developing increasingly sophisticated investigatory and evidential approaches and such activity is increasingly seen as part and parcel of tackling crime. This is a crucial point in relation to estimating whether this offence will create an additional burden on those investigating and prosecuting crimes of this sort. There is a recognition from the police that an increasing level of resource will have to be directed to some of these issues to reflect changes in people's behaviour. It is, therefore, expected that the introduction of this new offence will if anything help direct police and prosecution resources more efficiently by clearly defining the scope of criminal behaviour.

70. New activity arising out of the measures in the Bill is likely to be aimed at the worst offenders, in particular in the early stages as investigative and evidential procedures are sharpened. Again, this is based on evidence from case studies. The Scottish Government is aware of recent activity in the Strathclyde Police area which would seem relevant to these provisions. Strathclyde Police have provided figures to show that they are currently investigating some 51 individuals and/or web pages displaying “sectarian” or hate-fuelled postings in the wake of high profile arrests in March 2011. However, Strathclyde Police also report that, while more people are viewing such websites etc., there has been a noticeable drop in such postings over the same period, with some users removing their own offensive remarks, or deleting accounts. This is likely to be due to an increasing recognition that the police and others are taking an interest in such activity.

71. Given activities at this level, the Scottish Government considers that the policing and enforcement of threatening communications will continue to be part of the emerging police response to such behaviour including e-crime, and that the costs of this can be absorbed within existing resources.
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

Courts and Prisons
72. As with the offence of offensive behaviour, it is difficult to predict exact levels of activity at this stage, but the Government anticipates that prosecutions pursued under this provision will be targeted at the worst offenders. It is considered that the estimates of costs below are based on a realistic assumption of the number of such prosecutions, the same unit cost assumptions as set out above.

Solemn cases
73. It is anticipated that there will be between two and five new Solemn cases through the courts each year, leading to additional court costs of between £20k and £49k per annum. Assuming each results in an average custodial sentence of three years (18 months served) the new costs to the Scottish Prison Service would range from £120k to £300k per year.

Summary cases
74. For less serious offences dealt with through Summary procedures, it is expected that there could be between 20 and 50 new cases a year, with costs to the courts service ranging from £22k to £56k per annum. Prison sentences of six months would lead to costs of £29k to £72k per annum (including remand costs).

COSTS ON LOCAL AUTHORITIES
75. Based on the assumptions set out above, the Scottish Government expects that there would be a very small number of new community payback orders imposed as a result of these offences, with potential additional costs of £7k-£18k falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES
76. A formal Business and Regulatory Impact Assessment (BRIA) has not been completed in relation to this Bill. The Cabinet Secretary for Justice does not consider that a BRIA is necessary, as the additional costs of policing and enforcing the offences set out in the Bill will fall largely to public service organisations including the police, Scottish Court Service, Crown Office and Procurator Fiscal Service and the Scottish Prison Service, as well as to local authorities, as set out in this Memorandum.

77. There will, however, be additional costs to football clubs where policing activity is increased around matches. Football clubs currently contribute to the costs of policing regulated football matches. Figures provided by Strathclyde Police for the seven “Old Firm” games between 28 February 2010 and 2 March 2011 show that the Force has billed the two clubs an average of some £47,300 per fixture. This covers around 34% of the costs of policing the stadium “footprint”, and around 10% of the overall cost of additional policing in the Force area on fixture days. While the Scottish Government does not anticipate that the new measures will require a significant increase in overall policing resources, it is possible that there will be changes in the way different matches are policed. Such changes have the potential to lead to increased costs for clubs, but it is difficult to estimate the actual level of any increase as this will
These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

depend on a number of factors including discussions with police around risks at each fixture, the potential for additional in-house stewarding and liaison, etc.

OVERALL COSTS

78. Given all of the above, the total additional costs of introducing, enforcing and disposing of the new offences in the Bill may amount to between £0.7m and £1.5m per annum over the course of the next Spending Review period. Costs in 2011/12 are expected to be less given the time taken to establish the new approach following enactment; these costs should not exceed £0.5 million. These costs represent the Scottish Government’s best estimate of new costs at this time, and will be kept under review as the new measures are brought into effect, and as the work of the Joint Action Group and others develops further.

Summary of cost estimates (£000)

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<thead>
<tr>
<th>Number of offences</th>
<th>Offensive Behaviour</th>
<th>Threatening Comms</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
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<tr>
<td>Police</td>
<td>Existing resources</td>
<td>Existing resources</td>
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<td>Court Service</td>
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</tr>
<tr>
<td>Solemn Cases</td>
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<tr>
<td>Summary Cases</td>
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<tr>
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These documents relate to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

* In the Table above, Court Costs may be broken down as follows (£000):

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<tr>
<th></th>
<th>Offensive Behaviour</th>
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<tr>
<td><strong>Solemn</strong></td>
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**EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE**

79. On 16 June 2011, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

“In my view, the provisions of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

80. On 16 June 2011, the Presiding Officer (Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, introduced in the Scottish Parliament on 16 June 2011. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 1–EN.

POLICY OBJECTIVES OF THE BILL

“When Donald Dewar addressed this parliament in 1999, he evoked Scotland’s diverse voices: the speak of the Mearns; the shout of the welder above the din of the Clyde shipyard; the battle cries of Bruce and Wallace. Now these voices of the past are joined in this chamber by the sound of 21st century Scotland. The lyrical Italian of Marco Biagi. The formal Urdu of Humza Yousaf. The sacred Arabic of Hanzala Malik. We are proud to have those languages spoken here alongside English, Gaelic, Scots and Doric. This land is their land, from the sparkling sands of the islands to the glittering granite of its cities. It belongs to all who choose to call it home. That includes new Scots who have escaped persecution or conflict in Africa or the Middle East. It means Scots whose forebears fled famine in Ireland and elsewhere. That is who belongs here but let us be clear also about what does not belong here. As the song tells us for Scotland to flourish then “Let us be rid of those bigots and fools. Who will not let Scotland, live and let live.” Our new Scotland is built on the old custom of hospitality. We offer a hand that is open to all, whether they hail from England, Ireland, Pakistan or Poland. Modern Scotland is also built on equality. We will not tolerate sectarianism as a parasite in our national game of football or anywhere else in this society.”

Alex Salmond, First Minister of Scotland, 18 May 2011, Scottish Parliament

2. The objective of the Bill is to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. These measures are intended to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society.
3. To achieve this objective the Bill creates two new criminal offences. The first offence will criminalise the full range of offensive and threatening behaviour, including “sectarian” behaviour, at or in connection with football matches. The second offence criminalises threatening, or inciting, serious violence and threats which incite religious hatred.

4. There have been historical issues about the extent to which the criminal law extends to cover various behaviours that society would deem “sectarian”. “Sectarian” is a term which is not defined in Scots law and there are many competing viewpoints about what is or should be included and excluded from any definition. What is crucial about the measures in this Bill is that they do not rest on any such definition. We intend that these measures will cover all offensive or threatening behaviour at football matches, regardless of whether it is “sectarian”. This means offensive or threatening behaviour likely to incite public disorder, whether that is through songs and chants, displaying banners or otherwise. In terms of threatening communications, the focus is on threatening or inciting serious harm intended to cause fear and alarm or threats that incite religious hatred, regardless of whether such communications are of a “sectarian” character or not.

BACKGROUND

5. Scotland is proud of its history, a history which has fostered our values of equality, fairness and inclusion, which values diversity, welcomes outsiders and binds all Scotland’s people together. We need to recognise, however, that there are less positive aspects of our society, expressed in violent and bigoted attitudes and behaviours which are incompatible with those values and which have no place in the Scotland we aspire to be. This Bill seeks to strengthen our established laws to ensure that we can root out these violent and bigoted attitudes and behaviours from Scottish society and make our communities safer.

Offensive behaviour related to football

6. The primary but not sole motivation for the measures in this Bill, both in terms of the nature of the measures themselves and the urgency with which we are seeking to introduce them, concerns football. Football is Scotland’s national game; it brings pleasure to millions and can serve to bring communities closer together. Unfortunately, it can also be where the attitudes and behaviours we seek to eradicate are most visible and damaging. Scottish football at its best combines pride and passion with a sense of responsibility, respect and discipline. However, there is absolutely no place in football for those who let their passion become violence, or their pride become bigotry.

7. These are not new problems. Scottish football has faced serious issues over the years, which in the past have primarily related to the misuse of alcohol and resultant general disorder. While increasingly effective policing has meant that there have been improvements, in terms of the behaviour within football grounds, stubborn elements remain including “sectarian” and otherwise offensive chanting.

8. The 2010/11 football season saw some of these problems reach an intolerable level, with “sectarian” and offensive behaviour, misconduct from players and managers, death threats, and live ammunition and bombs sent to prominent figures directly and indirectly associated with football. This suggests that certain individuals and groups have lost all perspective. These
attitudes and behaviours are never justified but they seem utterly out of place in the context of what is ultimately no more than a game.

9. The high profile of football makes this all the more damaging, as such unacceptable behaviour is shown in the media time and time again and broadcast throughout the world. Not just Scottish football, but Scotland’s reputation has been damaged. Decisive and immediate action is required to begin to repair this damage and to demonstrate our collective view that such attitudes and behaviours will no longer be tolerated in any form. This Bill is a crucial first step in pursuing our vision for a better Scotland.

10. On 8 March 2011, at a meeting, chaired by the First Minister and attended by the Chief Executives of the Scottish Football Association, the Scottish Premier League, the Scottish Football League, Celtic and Rangers Football Clubs and the Chief Constable of Strathclyde Police, agreement was reached to work together to tackle the serious social issues affecting Scottish football; including sectarianism, alcohol misuse and violence. This agreement to work together was expressed in a Joint Statement which set out eight commitments, to be overseen by a Joint Action Group, reporting to Scottish Ministers before the start of the new football season in July 2011.

11. Subsequent to this meeting, further serious incidents occurred, including the sending of viable explosive devices, which caused even greater damage to the reputation of Scottish football and to our nation’s reputation as a tolerant and inclusive society. These incidents demand a serious and immediate response and this Bill is a central part of that response, reinforcing the Scottish Government’s full commitment to the work of the Joint Action Group and to our wider work on sectarianism. There is no doubt that a transformation of attitudes and behaviours is needed to restore Scottish football’s reputation. Small steps are no longer adequate; the context of Scottish football needs to change from one too often dragged down by the negative, to one that again can encourage and sustain the pride and passion for which Scottish supporters are still known throughout the world. All the partners in the Joint Action Group share this vision for Scottish football, which reflects the Government’s wider vision for a better Scotland.

12. In summary, it is a critical assumption of this Bill that there is something very specific and increasingly unacceptable about attitudes and behaviour expressed at football matches, whether that be “sectarian”, racist or homophobic. There are contexts within which strongly held religious, political or cultural views are of course acceptable and quite appropriate. The unacceptable cost to individuals, communities and ultimately society 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. Preventing the serious harm to individuals and communities caused, whether inside or outside the stadia, must be the overriding priority, and this means everyone must moderate their attitudes and behaviour. We believe that the vast majority of football fans understand this perfectly well and there is little need of interference from the law to ensure that reason prevails. There will always be passion, pride, allegiance and, indeed, banter. However, there is a small often determined minority for whom provoking, antagonising, threatening and offending are seen as part and parcel of what it means to support a football team. Whatever their motivation, this Bill seeks to demonstrate that such a view is mistaken and will no longer be accepted.
13. The problems this Bill seeks to tackle, while often found in football, go beyond football. Those who have lost perspective seem to think they can act with impunity, using any means available to threaten and intimidate. Whether it be in open view in banners waved, or behind the wrongly presumed anonymity of a computer keyboard, threats to seriously harm or threats intended to stir up religious hatred have no place in the Scotland we want to live in. The physical and psychological impact on individuals and their families can be severe, often aggravated by the anonymity of those making the threats and uncertainty as to whether they are real or not. We cannot any longer allow this fear and hatred to be spread.

14. Such acts are often already criminal but the range of ways in which such threatening behaviour can be expressed requires a stronger response from the law. Threats to seriously harm another person or threats intended to stir up religious hatred are simply unacceptable and this Bill will serve to ensure that they are also serious crimes.

15. While this Bill makes clear that threats or incitement to serious harm or threats intended to stir up religious hatred are entirely unacceptable, we do not believe that it restricts legitimate freedom of expression, nor freedom to practice and promote a religion; these too are some of Scotland’s most essential values. Such freedoms allow crucially for satirical comment, criticism and even harsh words, whether expressed by young or old, at home, on the street, or on the stage. However, when such criticism becomes a threat, in particular a threat to seriously harm another person or which stirs up religious hatred, we believe individuals or groups have thereby forfeited their right to express or communicate that threat whether to the person threatened or any other person. We must all take responsibility for our words and actions, and when these are no longer reasonable and threaten others, and so are no longer justifiable, then we must all be accountable for the consequences.

16. In addition, as made clear above, public disorder at football matches can be provoked and worsened by expressing or inciting hatred against particular groups and this Bill makes clear that all such offensive or threatening behaviour is unacceptable and spells out the consequences for those who seek to threaten or incite hatred.

NATURE AND SCOPE OF PROPOSED OFFENCES

17. We propose creating new criminal offences relating to:
   • offensive behaviour at football matches; and
   • threatening communications.

Offensive behaviour at football matches

Policy Objective

18. To provide the police with powers to deal with offensive or threatening behaviour which is liable to incite public disorder at football matches.
Key Information

19. The offence is intended to address the problem of offensive and threatening conduct, including singing and chanting and the display of offensive flags and banners (in particular, those of a “sectarian” or racist nature) which are known to incite public disorder associated with football matches.

20. At present, disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant.

21. However, there is concern that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law. Such offensive behaviour might not satisfy the strict criteria for causing ‘fear and alarm’ required to prove Breach of the Peace, or section 38 of the 2010 Act. The Bill, therefore, seeks to put beyond doubt that behaviour related to football matches which is likely to incite public disorder and which would be offensive to any reasonable person is a criminal offence. Introducing this offence will serve to clarify rather than complicate the law, and will provide reassurance to the public in relation to our collective abhorrence of this sort of behaviour. It will serve to send a very clear and powerful signal to football fans and the public more generally that such behaviour at football matches is simply unacceptable. It will also mean that an offender’s criminal record will clearly show that that he or she had engaged in offensive behaviour specifically related to football, rather than any more general offence.

22. There is no evidence of a significant problem with disorder or “sectarian” or otherwise offensive behaviour associated with sports other than football. The Bill, therefore, provides that the new offence should apply in respect of football matches only. However, problems of disorder relating to football matches are not solely, or even always primarily, associated with behaviour at football stadia, but with behaviour occurring outside the stadia and on the way to and from matches on public transport and on our cities’ streets as well as in pubs and other venues where matches are being televised. The approach adopted in the Bill is to ensure that offensive and threatening behaviour occurring at any of these places is caught by the offence.

23. This is based on the approach used with respect to football banning orders. The Bill, therefore, provides that the offence can be committed:

   (a) at a regulated football match or while the person committing it is entering or leaving (or trying to enter or leave) the ground; or

   (b) on a journey to or from a regulated football match.

24. The definition of a regulated football match is based on that used in respect of football banning orders and will include behaviour in public venues in which football matches are being televised, whether that be outdoor big screens or public houses, as well as offensive behaviour on
journeys to and from these venues. Adopting this approach will mean that any conviction arising from this new offence would also automatically constitute strong grounds for imposition of a football banning order on the offender. The definition will ensure that the legislation extends to games played by Scottish football clubs elsewhere in the world. This will enable action to be taken to prosecute those who engage in offensive or threatening behaviour where Scottish clubs are playing in Europe and elsewhere.

25. The offence will criminalise behaviour which is likely to incite public disorder and:
   - involves the expression of hatred to a person or group of persons because of their religion, race, ethnicity, nationality, ethnic or national origins, sexual orientation, transgender identity or disability; or
   - which is threatening; or
   - which would cause offence to a reasonable person.

26. The offence does not refer specifically to “sectarian” behaviour and the term is not defined in Scots law. The offence instead refers to behaviour which constitutes an expression of or incitement to religious or other hatred, behaviour which is threatening, and behaviour which a reasonable person would find offensive. The Bill does not, therefore, seek to criminalise only behaviour which is “sectarian” but all behaviour related to football that is likely to lead to public disorder. This is not focused on one team, or one song or chant, but all offensive songs and chants by the supporters of any team, including our national team. The Bill criminalises such offensive behaviour likely to incite public disorder whether it is clearly motivated by racial or religious bigotry or offensive in some other way to any reasonable person in Scotland. While recognising freedom of political expression, it is clear that when such expression is designed to offend or threaten others and threatens public order, then it is unacceptable, and has no place at a football match.

27. The nature of the public debate means that there has been and will continue to be a focus on “sectarian” or religious hatred expressed in the context of football matches. However, there is a clear recognition that the nature of the offensive behaviour the Bill seeks to cover is in fact wider. The provisions are intended to cover other identified issues including racist and homophobic chanting at football matches. Evidence collated as part of the Scottish Government’s contribution to the Equality and Human Rights Commission’s inquiry into disability harassment, which is due to be published later in 2011, demonstrated a need for explicit recognition of the potential for disability-related threats, harassment and abuse in a range of contexts. The Bill makes it clear that expressions of hatred against a person or group of persons because of their disability at a football match would be covered.

28. In determining whether the offensive or threatening behaviour would be likely to incite public disorder, it will not be a defence to argue that public disorder would be unlikely solely because measures, such as a heavy police presence, were in place to prevent disorder, or because all or the vast majority of those present participated in the offensive or “sectarian” behaviour. The Bill, therefore, ensures that the singing of offensive and “sectarian” songs or chants at games where only a small number of the other team’s supporters who might be offended are present, or after the vast majority of those supporters have left the ground, can and will be subject to criminal sanctions.
29. The Bill proposes to introduce an offence which:
   • criminalises offensive or threatening behaviour which would be likely to incite public disorder at football matches, and at any public place where a football match is being broadcast;
   • targets expressions of hatred of a person or group of persons because of their religion, race, ethnicity, nationality, ethnic or national origins, sexual orientation, transgender identity or disability;
   • covers a wide range of offending behaviour from that which might appropriately be dealt with by fixed penalty notices or community payback orders to serious incitement to public disorder which requires to be tried on indictment. The maximum penalty is 5 years imprisonment plus an unlimited fine when tried on indictment and 12 months imprisonment plus a fine of up to £10,000 when tried summarily.

**Threatening communications**

*Policy Objective*

30. To provide new powers to tackle threatening communications.

*Key Information*

31. In recent months, there has been a serious problem of the posting of bullets and bombs to prominent people connected to football and with the posting of images, messages and videos on the internet inciting or threatening acts of serious violence towards people connected to football.

32. While there has been a particular problem of threats made to people who are in some way connected with football, there is a wider problem with the posting of threatening material, including bullets, and the motivation for these threats appears to be of a “sectarian” nature. This threatening material appears intended to stir up hatred against people of a particular religious faith or ethnicity and create or contribute to an atmosphere in which some see it as acceptable to threaten certain individuals with serious violence. The Bill, therefore, does not confine the threatening communications offence to football, nor to “sectarian” incidents. Threatening communications are a serious concern, regardless of whether they are, or can be proven to be, “sectarian” or connected to football.

33. There are a number of offence provisions which may currently apply in respect of the making of threatening communications. These include the common law offences of breach of the peace and uttering threats, the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the offences at Part III of the Public Order Act 1986 (incitement of racial hatred). Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant. Furthermore, it is a crime in itself under Scots law to incite the commission of a criminal offence. Finally, where the communication is electronic in nature, section 127 of the Communications Act 2003 criminalises “improper use of a public electronic communications
network”, specifically the sending of a message or other matter that is grossly offensive, or of an indecent, obscene or menacing character.

34. While these laws are in place they are not always easily applied to this behaviour. The requirement for a “public element” can make a charge of breach of the peace difficult to bring in some cases. It can also be difficult to establish that someone actually intended to carry out a threat or incite someone else to commit a crime in relation to the common law offences of uttering threats and incitement. While the offence of “threatening and abusive behaviour” does not require a public element, it does require that the behaviour must be of a threatening and abusive manner and could not necessarily be used to prosecute threats made with the intent of inciting religious hatred. Finally, in relation to electronic communications, case law has left some doubt about whether the Communications Act offence can be used to prosecute people who create offensive websites or “groups” on social networks, as opposed to sending threatening emails or other communications.

35. A further potential gap in our law is highlighted by the fact that England and Wales, Northern Ireland and the Irish Republic have all legislated to provide for specific offences relating to inciting religious hatred. Scotland is, therefore, the only part of the UK without a specific offence relating to inciting religious hatred. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may be appropriate but inciting religious hatred without a racial element is not currently a specific offence in Scotland.

36. We believe that a specific offence will bring clarity to the law in this area, send a clear message that such behaviour is unacceptable, and enable the courts to impose stiffer sentences on the most serious offenders. The Bill, therefore, proposes an offence to address two classes of threat: threats of serious violence, and threats intended to stir up religious hatred, whether or not they involve threats of serious violence.

37. The offence criminalises any communication with at least one other person which threatens a person with serious violence or death, or incites others to kill or commit a seriously violent act against a person, or which implies such a threat. The offence is committed where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm. The offence will apply to text, images, video and recorded sound, communicated by any means (by post, on leaflets or posters or posted on the internet).

38. The requirement that material communicated must be intended to cause fear or alarm (or is communicated with recklessness as to whether fear and alarm is caused) for an offence to be committed is intended to ensure that depictions of death or injury in art, literature, the theatre, film, video games, or similar cultural or dramatic contexts, and threats made in jest that no reasonable person would find alarming are not caught by the offence; whereas depictions (for example of prominent real-life figures) intended as an implied threat to that person or group of people will be criminalised.
This document relates to the Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011

39. Clearly, where there is compelling evidence that a person making a threat to kill a person intends to act upon that threat, it would be possible to charge the person with uttering threats or conspiracy to murder, which carry a maximum penalty of life imprisonment. This offence is intended to deal with threats of death or serious injury where there may not be evidence of intention to carry it out, including where the person making such a threat may not intend to carry it out, but who nonetheless causes fear and alarm to those subjected to such threats.

40. The offence will also criminalise threats made with the intent of stirring up religious hatred. “Religious hatred” is defined as meaning hatred against a person or group of persons based in their membership of a religious group, or of a social or cultural group with a perceived religious affiliation. The definition of “religious group” is the same as that used in section 74 of the Criminal Justice (Scotland) Act 2003, which provides for a statutory aggravation that an offence was aggravated by religious prejudice. It brings Scotland into line with England and Wales, where threats intended to stir up religious hatred are criminalised by the Public Order Act 1986, as amended by Racial and Religious Hatred Act 2006 (and both Northern Ireland and the Irish Republic have also legislated to criminalise inciting religious hatred).

41. The provision is restricted to threats made with the intent of stirring up religious hatred. As such, it does not interfere with the right to preach religious beliefs nor a person’s right to be critical of religious practices or beliefs, even in harsh or strident terms. There was extensive criticism of early attempts to criminalise incitement of religious hatred in England and Wales on the grounds that provisions extending to insults and abuse as well as threats could inadvertently criminalise comedians and satirists who make jokes about religion, or even religious texts themselves. We believe that the Bill avoids those problems and does not restrict legitimate freedom of expression.

42. The offence will apply to anything done outside Scotland by a person who is a British national or who is habitually resident in Scotland. This is intended to ensure that a person cannot evade criminal liability by making threatening communications (whether by sending them in the post or posting on the internet) from outside Scotland. The offence will also apply to a communication made from outside Scotland if the person making it intends the communication to be seen primarily in Scotland. This ensures that someone based outwith Scotland, who may well travel frequently to Scotland for the purposes of, for example, attending football matches, cannot evade prosecution if he or she makes threatening communications from outside Scotland targeted e.g. at people involved in Scottish football or inciting religious hatred in Scotland. It would not, on the other hand, apply where a person who is not a British national makes threatening communications from outside Scotland which are not primarily intended to be seen in Scotland.

43. The Bill proposes to introduce an offence which:

- criminalises communications of any kind to one or more persons which make threats of serious violence to a person, or incite the commission of acts of serious violence to a person;
- criminalises communications of any kind to one or more persons which make threats intended to stir up religious hatred;
- will apply to postings, messages etc., displayed in, or primarily intended to be seen in Scotland; and
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- is triable either way and subject to a maximum penalty of 5 years imprisonment plus an unlimited fine when tried on indictment and 12 months imprisonment plus a fine of up to £10,000 when tried summarily.

Enforcement

44. As the definition of where Offence A can take place is based on the scope of Football Banning Orders (FBOs), we would expect the enforcement of this new offence to lead to continued and more effective use of FBOs. Clear, targeted approaches to offensive behaviour at football games can be very effective in reducing such behaviour by supporters, as seen by the deployment of the Anti-sectarian Initiative by Strathclyde Police at the final Old Firm game of the 2010/11 season. The introduction of these new offences is intended to have a similar effect by strengthening the law around offensive behaviour at football grounds and threatening communications.

45. The Joint Action Group, established following the Football Summit on 8 March 2011, is considering a range of measures to tackle violence, bigotry and alcohol misuse associated with football. These new offences will form a central element of the wider considerations of the Joint Action Group and will inform their report to Scottish Ministers before the start of the new football season.

ALTERNATIVE APPROACHES

46. The measures in this Bill are only part of a broader strategy to tackle problems not only in Scottish football but in wider society. In the short term, further measures to address problems related to football will be introduced through the work of the Joint Action Group, and in the longer term the Government is committed to tackle sectarianism by all means at its disposal. The Government has, therefore, sought to balance the need for very immediate action to resolve the most pressing football related problems ahead of the new season with a longer term view of further actions required to achieve our aims on sectarianism. This Bill is, therefore, limited to what the Government and partners believe is immediately necessary.

47. While the circumstances of the 2010/11 Scottish football season have brought matters to a head, these are issues that have poisoned the national game for a long time now. We are clear that very few people will deny that action is due. It is a manifesto commitment of the Government to take a “zero tolerance” approach to the problems of violence and sectarianism. This provides a clear mandate for action. The very serious nature of the disorder associated with Scottish football and the recent prevalence of serious threats communicated through an increasing variety of means, demanded that this necessary action also be immediate to ensure that any necessary measures are in place ahead of the next football season to address any repetition of such unacceptable behaviour.

48. Considerable thought was given to whether the necessary and immediate action need involve a Bill to create new criminal offences or whether it could have involved a further determination to use existing measures more effectively. While in relation to offensive and disorderly conduct at football matches there is coverage of existing law in relation to most of the behaviour we are seeking to eradicate, there are nevertheless areas where greater clarity and a strengthened response would be beneficial. In relation to the communication of threatening
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material, there is an obvious gap when compared to elsewhere in the UK regarding the behaviour we are seeking to eradicate. It is clear, therefore, that legislation is required to achieve our stated aims.

49. It was equally important that the action be proportionate. The Bill as introduced represents what the Scottish Government considers to be a proportionate response to the unique circumstances in which Scotland, and Scottish football, find itself. We consider it crucial that the next football season starts with new, effective measures in place to begin the process of eradicating the unacceptable attitudes and behaviours from our national game and society more generally.

50. The question of what is proportionate in this context is vital. To allow the measures introduced by this Bill to be in place by the start of the new football season, will require a fast-track parliamentary process. We accept that this will limit the time available for detailed scrutiny of the Bill. The Scottish Government has considered carefully whether the benefits of a more prolonged parliamentary process to allow more time for discussion and wider consultation would outweigh the risks of further damage to Scottish football and our society if we do not take immediate action to address the issues arising during the 2010/11 season. The Government is convinced that responding quickly and decisively to the seriousness of the situation we find ourselves in is, on balance, more important.

51. A primary purpose of the Bill is to clarify and strengthen the law in relation to “sectarian” and offensive chanting. Historically, there have been calls for very specific sorts of action to deal with “Sectarian chanting” at football matches. It is often suggested that the most effective approach would be simply to ban certain songs and chants. The Scottish Government has, therefore, considered whether this approach should be adopted in the Bill. We have concluded that the problems with constructing a proscribed list which is definitive, the difficulty in keeping such a list up to date to account for any new songs and chants and the potential for ‘loopholes’ being created, possibly by even the most minor adjustment to existing songs and chants, means that the creation of such a list in legislation would be cumbersome and ineffective.

52. The Bill tackles this issue without the need for an inflexible and unwieldy mechanism such as lists of banned chants. It does so by criminalising any behaviour that expresses or stirs up religious or other hatred and would be likely to incite public disorder related to football as well as any other behaviour likely to cause public disorder related to football which would be offensive to a reasonable person in Scotland. It is our express intention that this will cover all “sectarian” songs and chants as well as all otherwise offensive songs or chants.

53. We welcome moves by football authorities, clubs, and fans to take a strong lead in the debate on what it is and what is not acceptable. This Bill will provide a general framework for that debate but there will need to be significant and sustained effort by those groups to ensure that such unacceptable behaviour is eliminated.

54. The need for a fast track procedure to ensure that the new offences created by the Bill are in place in time for the 2011/12 football season has been an important consideration for the Scottish Government in considering the scope and content of the Bill. This Policy Memorandum makes clear that the specific impetus for this fast track legislation was the recent upsurge in
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unacceptable behaviour related to football, including bullets being posted to people connected to football and sectarian threats to people connected to football being posted on the internet and on social networking media.

55. A particular issue which we considered very carefully is whether the threatening communications offence should be extended to catch ‘live’ speech as well as recorded speech. A distinction can be made on the basis that recorded threats, like written threats, may indicate not only a stronger expression of such views than everyday speech but also a more serious intention to carry out such threats. Our view, however, was that it is not a significant enough distinction to justify their exclusion from this legislation. A primary consideration in reaching a conclusion on this issue is that the criminalising offensive behaviour related to football will cover verbal threats and the expression or inciting of religious hatred at, or on the way to and from, a regulated football match at any public place where such matches are televised where those threats are likely to lead to public disorder. The most significant consideration, however, is that verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour which gave rise to the need for this Bill and the wider implications of such an extension deserve fuller consideration.

56. The Scottish Government has, therefore, sought to ensure that the Bill is tightly drawn to tackle specific issues rather than ranging more widely to cover other issues relating to sectarianism or other forms of hatred which may be equally offensive and equally deserving of a firm legislative response but which were not part of the specific impetus for this Bill. The Government is clear that Bill covering a much wider range of attitudes and behaviours and introducing a wider range of measures would not have been justified without fuller consultation and engagement.

57. The Scottish Government remains committed, however, to considering what further or wider measures may be necessary to build on the provisions made in this Bill, both in support of our wider commitments on sectarianism and as a result of experience in implementing the Bill’s provisions. This legislation represents only the first step in this Government’s programme of action against sectarianism, it will be followed by further steps, including further legislation if necessary, until we can be sure that our objectives are achieved.

CONSULTATION

58. As explained, we believe that the measures in this Bill need to be in place before the start of the 2011/12 football season, not least to begin to repair the damage done to the reputation of Scottish football and Scotland more generally by recent events. This has of necessity curtailed the opportunity to engage in a standard consultation on the provisions of the Bill. Nevertheless, we have and will engage with a wide range of people and interest groups on the provisions of the Bill. Our plans to introduce new legislation to tackle sectarianism have been discussed with a range of partners including the Convention of Scottish Local Authorities, Association of Chief Police Officers in Scotland, Scottish Courts Service, Scottish Prison Service, Scottish Legal Aid Board, Scottish Football Association, Scottish Football League and Scottish Premier League as well as the Crown Office and Procurator Fiscal Service.
59. These measures have not, therefore, been proposed in a vacuum. The behaviours this Bill seeks to eradicate are under very active and expert consideration by the Joint Action Group established after the Scottish Football Summit on 8 March 2011. This has meant there have been discussions with key partners including the Association of Chief Police Officers in Scotland (ACPOS) and the governing bodies of Scottish football: the Scottish Football Association, Scottish Premier League and Scottish Football League.

60. The work of the Joint Action Group has provided a very expert forum for discussions on the issues we are seeking to tackle through this Bill and certainly this expert advice has shaped our proposals. It has also reinforced our commitment to our wider work to tackle sectarianism and there will continue to be consultation and engagement around the longer term action required to eradicate these attitudes and behaviour. A key partner in that wider work is local government. We fully recognise the vital role they play in engaging and supporting Scottish communities. We have therefore initiated a constructive dialogue with the Convention of Scottish Local Authorities.

61. We also recognise that children and young people may be affected, particularly by the new threatening communications offence and its potential relevance to modern forms of communication such as mobile phones, the internet, social networks, etc. To ensure we understand how the legislation might impact on children and young people, we have engaged with the Scottish Commissioner for Children and Young People, the Scottish Youth Parliament and Young Scot. We are working closely with Young Scot to provide information on the new offences to young people via their suite of communication networks. The Scottish Youth Parliament also discussed the issues relating to legislation on sectarianism and proposals to tackle sectarianism in the longer term at its AGM (11-12 June) and provided feedback to the Scottish Government.

62. To ensure that the new offences do not restrict legitimate freedom of expression, or freedom to practice and promote a religion, we are engaging in dialogue with the Scottish Human Rights Commission. We have also undertaken to engage with the Scottish Parliament's Cross Party Group on Human Rights when it next meets on 21 June 2011 to discuss legislation on sectarianism.

63. Finally, in relation to the technical and legal aspects of the Bill, we have also consulted with key interests in the criminal justice system, including the Crown Office and Procurator Fiscal Service, Scottish Court Service, Scottish Prison Service and Scottish Legal Aid Board. We will of course continue these discussions to ensure that the implementation of the Bill’s provisions is as effective as possible.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

64. The Bill aims to benefit all the people of Scotland, building safer and stronger communities free from violence and the fear of violence. The measures set out in the Bill, along with the work of the Joint Action Group, are aimed at making a significant contribution to eradicating “sectarian” and other discriminatory behaviour, not just in Scottish football but in

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wider society. The Bill aims to strengthen protection against criminal acts carried out in the name of prejudice. Proper and effective use of the legislation will send a strong message that bigotry and prejudice have no place in a modern, diverse, multi-cultural Scotland. In conjunction with preventative and rehabilitative measures, as well as the ongoing work at grassroots level in our communities, the Bill will help to break down barriers, moving people’s perceptions away from stereotyped and misconceived views of identity – and indeed, showing that identity is much more complex than the football team you support. A fuller description of the equal opportunities issues around the Bill will be set out in the Equality Impact Assessment to be published to accompany the Bill.

Human rights

65. The Scottish Government is satisfied that the provisions of this Bill are compatible with the European Convention on Human Rights

66. The offence of behaving in an offensive manner at a football match could raise issues in relation to Articles 9 (freedom of thought, conscience and religion) and 10 (right to freedom of expression) of the Convention. However, much of the behaviour that the Bill is seeking to address would not amount to a manifestation of a person’s religious beliefs in terms of Article 9, and may amount to an abuse of the rights of others and so not be protected by Article 10. To the extent that a prosecution for an offence under section 1 may interfere with the rights protected by Articles 9 and 10, prosecutors and courts will have to consider whether such an interference is, in the particular circumstances, necessary in the interests of public safety and the prevention of public disorder.

67. The offence of making a threatening communication could raise issues in relation to Articles 8 (right to respect for private and family life), 9 and 10 of the Convention. Given that this offence relates to communications which are threatening in nature and which could cause fear or alarm in others, or are intended to incite religious hatred, it is considered that although a prosecution for this offence may, in some cases, interfere with the rights guaranteed by those Articles, such a prosecution may nevertheless be justified in the interests of public safety and the prevention of public disorder and crime. Again, prosecutors and courts will be required to act compatibly with these rights in individual cases. It is also considered that the defence that the behaviour was reasonable is an evidential rather than a legal burden and is not incompatible with Article 6.2 (right to a fair trial).

Island and rural communities

68. The Bill has no differential impact on island and rural communities.

Local government

69. We fully recognise the vital role of local government in supporting communities to overcome issues such as sectarianism. Energising and engaging communities, understanding and responding directly to their needs, are things that local authorities are better placed to do than national Government. We believe that these measures, as part of a wider package, will in the long term have a very positive impact for local government as we begin to see increased
community cohesion and integration that avoids, for example, the need for community safety and criminal justice measures.

70. In the shorter term, we recognise that courts may use community sentences such as community payback orders in dealing with those committing offences under the provisions of the Bill. Local authorities will have responsibility for implementing such sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. The financial implications for local government are set out in the Financial Memorandum accompanying the Bill.

Sustainable development

71. The Bill will have no negative impact on sustainable development.

Business and Regulatory Impact Assessment

72. A Business and Regulatory Impact Assessment (BRIA) has not been completed in relation to this Bill. The Minister for Community Safety and Legal Affairs does not consider that a BRIA is necessary as the additional costs of policing and enforcing the offences set out in the Bill will fall primarily on public service organisations including the police, Scottish Court Service, Crown Office and Procurator Fiscal Service and the Scottish Prison Service.

73. The estimated costs arising as a result of the provisions of the Offensive Behaviour in Football and Threatening Communications (Scotland) Bill are set out in the Financial Memorandum accompanying the Bill.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) moved S4M-377—That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be treated as an Emergency Bill.

After debate, the motion was agreed to (by division: For 78, Against 39, Abstentions 0).

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S4M-00371—That the Parliament agrees that stages 1, 2 and 3 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be taken on the following days—

Stage 1: 23 June 2011; and

Stages 2 and 3: 29 June 2011.

The motion was agreed to (by division: For 78, Against 7, Abstentions 32).

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) moved S4M-00357—That the Parliament agrees to the general principles of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

After debate, the motion was agreed to/disagreed to (by division: For 103, Against 5, Abstentions 15).

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Financial Resolution: The Minister for Community Safety and Legal Affairs (Roseanna Cunningham) moved S4M-00383—That the Parliament, for the purposes of any act of the Scottish Parliament resulting from the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b)(iii) of Rule 9.12 of the Parliament’s Standing Orders arising in consequence of the act.

The motion was agreed to.

Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, did not move S4M-00393 which would have set out a business programme for 29 and 30 June and 7 and 8 September 2011.
Scottish Parliament

Thursday 23 June 2011

[The Presiding Officer opened the meeting at 09:15]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (Emergency Bill)

The Presiding Officer (Tricia Marwick): Good morning. The first item of business is consideration of motion S4M-00377, in the name of Roseanna Cunningham, to treat the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as an emergency bill.

09:15

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill was introduced in Parliament on 16 June. Rule 9.21 of the Parliament’s standing orders provides that bills may be considered under emergency procedure. I propose that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be considered under the emergency procedure, under rule 9.21.

The reasons for considering the bill under the emergency procedure were discussed at the Justice Committee when I appeared before it earlier this week, and there has been significant media coverage of the issue, but I hope that it is helpful to Parliament for me to set out the Government’s reasons for proposing that the bill be considered under the emergency procedure. I make it clear that the Government does not make the proposal lightly and we do not propose that the process should be used as a matter of course. However, we believe that the bill is exceptional and justifies the use of the emergency procedure.

The bill is a specific response to a particular problem that was brought into sharp focus at football matches and on our televisions earlier this year. I was ashamed to witness such behaviour and I am sure that my views are shared by many in the chamber. The Government reacted quickly to those events by calling a football summit and thereafter establishing the joint action group, which is addressing a wider range of actions and strategies to tackle sectarianism and offensive behaviour over the longer term. The group will report to ministers in July. However, the Government believes that we need to move even faster than that. We believe that it is right that we should give a clear signal to the police, the courts, the football authorities and the clubs, and to the fans and the wider public, that offensive and sectarian behaviour around football matches is simply not acceptable. It is time to end this blight on our national game.

We also believe that it is right that we tackle the wider issue of people sending threatening communications. The scenes at the old firm game were bad enough, but when they were followed by hateful and vitriolic posting on the internet and by the sending of bombs and bullets through the mail, it was clear that we had to act, and act quickly. We believe that the bill must be in place for the start of the new season so that the law is clarified, the police are given additional tools to deal with such behaviour and everyone is clear about our intentions and determination to deal with the issue right from the outset of the season.

Johann Lamont (Glasgow Pollok) (Lab): Will the minister give way?

Roseanna Cunningham: I am approaching my last paragraph.

I welcome the support that we have had for the bill, most notably from the police, who will have to respond to the legislation and deal with offenders. The police are clear that we should have the new powers in place by 23 July. That is why we have brought forward the bill quickly and why we are asking Parliament to respond accordingly. It is a short bill, and it is clear and focused on the particular issues that I have outlined. Of course, it is only the first part of a wider and long-term strategy. I therefore call on the Parliament to support my proposal that the bill be taken under the emergency procedure.

I move,

That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be treated as an Emergency Bill.

09:18

Paul Martin (Glasgow Provan) (Lab): I rise on behalf of the Scottish Labour Party to oppose the motion in the name of Roseanna Cunningham. I make it clear that the Scottish Labour Party deplores any form of sectarianism. Of course we support the introduction of legislation to tackle the root of that very serious issue, but we must recognise the Parliament’s role in interrogating whether proposed legislation will be effective and will stand up to scrutiny. Proposals should be tested at every possible opportunity.

The way in which the Government introduced the legislation is unacceptable. We are concerned that we are not being afforded the opportunity to
produce effective legislation. Is the Government suggesting that wider Scotland should not be given the opportunity to interrogate the legislation at every opportunity? The Government must realise that this is not its Parliament—it is the people's Parliament. People in wider Scotland deserve their say and to be afforded that opportunity.

Given the importance of the issue, we propose using the recess period to give additional opportunities to scrutinise the proposals and to allow for proper consideration of the bill. That would enter into the spirit of what the Government's business manager, Bruce Crawford, suggested in a recent article in the Sunday Herald, in which he called for more focused opportunities for pre and post-legislative scrutiny and committee inquiries. The Government should enter into the spirit of what it has proposed in press articles.

Margo MacDonald (Lothian) (Ind): Why does the member think that there should be such a different attitude in England when Alex McLeish gets death threats because he is going to another club? Does the member think that the Westminster Parliament will rush through emergency legislation to deal with that?

Paul Martin: We need to focus on the issues and major challenges that we face in Scotland. There should be opportunities for people in wider Scotland to contribute to what is an important debate. The process that the Government is following will not give the people's Parliament that opportunity.

For once, I agreed with the First Minister when he said in his victory speech that the Scottish National Party does not hold a "monopoly on wisdom". That was confirmed following the appearance of the Minister for Community Safety and Legal Affairs at the Justice Committee on Tuesday. It is time for the Government to recognise that this is the people's Parliament and to give the people of Scotland the opportunity to contribute to this important debate.

09:22

Alison McInnes (North East Scotland) (LD): I rise to oppose the motion. The First Minister told the country in his victory speech in May that the SNP had "a majority of the seats, but not a monopoly on wisdom".

He was right, but today those words ring hollow, because the SNP is attempting to use its majority to circumvent, marginalise and just plain ignore the wisdom of the Parliament, outside experts and the people of Scotland.

We are being asked to agree to a process that will result in two new criminal offences being created in slightly more than a week. We are being asked to create a new law with no formal consultation and no time for expert evidence or detailed examination of whether a law is needed, where it might be needed, how it will work, what it will cost or what wider implications it might have. There is not an emergency. We do not have wide, gaping holes in our laws that mean that criminals are getting off scot free. We have not suddenly discovered a new crime that needs to be addressed instantly, and it is disrespectful to the people of Scotland to suggest otherwise.

Parliamentary process is not meant to be played with at the Government's whim. Pre-legislative scrutiny, evidence taking and committee consideration are not meant to be an inconvenience to Government; they are there to ensure that every decision that we make and every new law that we create is in the best interests of the people whom we are elected to represent.

Our code of conduct states:

"Members are accountable for their decisions and actions to the Scottish people. They should consider issues on their merits, taking account of the views of others."

By using its majorities to force through the bill at breakneck speed, the Government is not allowing members to consider the issue on its merits or to take account of the views of others. However, I can guarantee that we will still be held accountable by the people of Scotland. Making new laws is not a process that should be rushed. It is the most serious thing that Parliament does, and Parliament should be given time to do it.

09:24

David McLetchie (Lothian) (Con): We in the Conservatives have a great deal of sympathy with the sentiments that have been expressed by Paul Martin on behalf of Labour and Alison McInnes on behalf of the Liberal Democrats. However, we must recognise the political realities, which are that the Government is determined to enact a piece of legislation before the start of the new football season to address some of the problems that emerged in the course of the previous season.

That being the case, and given the Government's majority in the Parliament, the choice before members is in reality between an expedited form of the ordinary bill procedure or using the emergency procedure and, as the cabinet secretary has proposed, having an emergency bill.

The difference between the two is simply this. If we had an expedited ordinary bill procedure, any amendments to the bill at stage 2 would be considered only by the members of the Justice
Committee—nine members of the Parliament. If, however, we adopt the emergency bill procedure, stage 2 will be taken on the floor of the chamber and all members will have an opportunity to debate and vote on the issues.

Given the pace that the Government has determined for the legislation, it is vital that all members of the Parliament have the opportunity to consider and vote on amendments to the bill. In the circumstances, the process that the cabinet secretary proposes is therefore correct.

09:25

Patrick Harvie (Glasgow) (Green): The minister tells us that it is time to end the blight of sectarianism. If members of this Parliament thought that the five sides of A4 that make up the bill would achieve that, we would want to see it passed quickly. However, I do not believe that these five sides of A4 will achieve that. Indeed, I go further: I think that there is a risk that the bill will do more harm than good.

When we legislate at such a pace, we make mistakes. It has happened before and it will happen again. If we let it happen with a bill that creates offences that could see people in prison for up to five years, there is a serious risk that, as has happened south of the border with other legislation, people will be convicted and imprisoned for trivial matters that we would not wish to see prosecuted. There is an additional risk that legislation that contains mistakes will result in people not being convicted—they will get through loopholes—when their behaviour has been serious.

If we get legislation such as this bill wrong, we will bring the entire attempt to address sectarianism and wider hate crimes through legislation into disrepute. We risk doing more harm than good if we pass legislation at this pace and do not take the time to iron out mistakes. Let us pause and take the time to hear from wider civic Scotland—as Paul Martin said—and to do our jobs as parliamentarians and scrutinise the Government’s legislation. When we have acted at this pace in the past, we have made mistakes, as anybody would. Let us not do the same with an issue as serious as this one.

The Presiding Officer: Ms Cunningham?

09:27

Roseanna Cunningham: I simply press the motion.

The Presiding Officer: The question is, that motion S4M-00377, in the name of Roseanna Cunningham, to treat the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as an emergency bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: The Parliament is not agreed. The division bell will sound and proceedings will be suspended for five minutes to allow members to return to the chamber.

09:28

Meeting suspended.

09:33

On resuming—

The Presiding Officer: We come to the division on the motion. Members should please cast their votes now.

For

- Adam, Brian (Aberdeen Donside) (SNP)
- Adam, George (Paisley) (SNP)
- Adamson, Clare (Central Scotland) (SNP)
- Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- Biagi, Marco (Edinburgh Central) (SNP)
- Brodie, Chic (South Scotland) (SNP)
- Brown, Gavin (Lothian) (Con)
- Brown, Keith (Clackmannanshire and Dunblane) (SNP)
- Burgess, Margaret (Cunninghame South) (SNP)
- Campbell, Aileen (Clydesdale) (SNP)
- Campbell, Roderick (Mid Scotland and Fife) (SNP)
- Carlaw, Jackson (West Scotland) (Con)
- Constance, Angela (Almond Valley) (SNP)
- Crawford, Bruce (Stirling) (SNP)
- Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
- Davidson, Ruth (Glasgow) (Con)
- Dey, Graeme (Angus South) (SNP)
- Don, Nigel (Angus North and Mearns) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Dornan, James (Glasgow Cathcart) (SNP)
- Eadie, Jim (Edinburgh Southern) (SNP)
- Ewing, Annabelle (Mid Scotland and Fife) (SNP)
- Ewing, Fergus (Inverness and Nairn) (SNP)
- Fabiani, Linda (East Kilbride) (SNP)
- Finnie, John (Highlands and Islands) (SNP)
- FitzPatrick, Joe (Dundee City West) (SNP)
- Fraser, Murdo (Mid Scotland and Fife) (Con)
- Gibson, Kenneth (Cunninghame North) (SNP)
- Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
- Goldie, Annabel (West Scotland) (Con)
- Grahamie, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
- Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
- Hyslop, Fiona (Linlithgow) (SNP)
- Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
- Johnstone, Alex (North East Scotland) (Con)
- Keir, Colin (Edinburgh Western) (SNP)
- Kidd, Bill (Glasgow Anniesland) (SNP)
- Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
- Lyle, Richard (Central Scotland) (SNP)
- MacAskill, Kenny (Edinburgh Eastern) (SNP)
- MacDonald, Angus (Falkirk East) (SNP)
- MacDonald, Gordon (Edinburgh Pentlands) (SNP)
- Mackay, Derek (Renfrewshire North and West) (SNP)
- Mackenzie, Mike (Highlands and Islands) (SNP)
- Mason, John (Glasgow Shettleston) (SNP)
The Presiding Officer: The result of the division is: For 78, Against 39, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be treated as an Emergency Bill.

Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McLetchie, David (Lothian) (Con)
McMillan, Stuart (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dumfries) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eddie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
MacDonald, Margo (Lothian) (Ind)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Business Motion

The Presiding Officer (Tricia Marwick): The next item of business is consideration of a Parliamentary Bureau motion. I ask Bruce Crawford to move motion S4M-00371, setting out the timetable for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

Motion moved,

That the Parliament agrees that stages 1, 2 and 3 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be taken on the following days—

Stage 1: 23 June 2011; and

Stages 2 and 3: 29 June 2011.—[Bruce Crawford.]

The Presiding Officer: The question is, that motion S4M-00371, in the name of Bruce Crawford, on the timetable for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alleen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (North East Scotland) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McLetchie, David (Lothian) (Con)
McMillan, Stuart (West Scotland) (SNP)
Mills, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Bansffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)
Against
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alison (Lothian) (Green)
MacDonald, Margo (Lothian) (Ind)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Rennie, Willie (Mid Scotland and Fife) (LD)
Abstentions
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
The Presiding Officer: The result of the division is: For 78, Against 7, Abstentions 32.

Motion agreed to,

That the Parliament agrees that stages 1, 2 and 3 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be taken on the following days—

Stage 1: 23 June 2011; and

Stages 2 and 3: 29 June 2011.

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-00357, in the name of Kenny MacAskill, on stage 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

09:36

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): First of all, I thank the Justice Committee for moving so quickly to take evidence on the bill, those who have submitted—and might still be in the process of submitting—written evidence and those who have given or will give oral evidence. I realise that everyone has had to respond quickly to enable us to put the legislation in place before the start of the new football season and I am sure that the whole Parliament will acknowledge the contribution that has been made externally so far.

I must start with the reasons for introducing the legislation and our urgency in doing so. A few weeks have passed but we must not forget where we were at the end of the last football season, when we were faced with some of the most shameful behaviour and incidents that have been seen in many years. Those scenes were broadcast and reported on repeatedly and seen throughout the world, and the disorder, the bigotry, the threats and, ultimately, the bullets and bombs through the post have shamed not only Scottish football but Scotland itself.

The bill is a direct response to those shameful incidents. It is short, sharp and aimed directly at the most immediate problems we face. We will face other, wider challenges in the longer term but the bill represents a proportionate response to an immediately serious issue.

Football is Scotland's national game; it brings pleasure to millions and can be a very powerful force for good. Unfortunately, as the events of the last season have shown, it can also be where the bigoted attitudes and behaviours that we seek to eradicate are most visible and damaging. During the 2010-11 football season, some of those problems reached an intolerable level with sectarian and other offensive singing and chanting from supporters, misconduct by players and managers, death threats posted on the internet and live ammunition sent to prominent figures both directly and indirectly associated with football. When support for a football club is expressed through violence, when pride becomes bigotry and
hatred and when rival supporters chant vile sectarian abuse at one another on the terraces, we cannot simply shake our heads and say, “This is the way it’s always been and the way it always will be”.

Willie Rennie (Mid Scotland and Fife) (LD): Why does the Government want to pass a law that, according to the Law Society of Scotland, “rather than being innovative, in many ways simply restates the law that already exists”?—[Official Report, Justice Committee, 21 June 2011; c 63.]

Roseanna Cunningham: There are very good and specific reasons why this legislation is required. If the member had been able to listen to the Lord Advocate’s evidence at yesterday’s meeting of the Justice Committee, he would have heard them. I commend the Official Report of that meeting to him.

We do not intend to take the path of hopelessness and acceptance. Instead, we seek a path to a more hopeful and inclusive Scotland where the Government acts decisively to protect people from discrimination and hatred and to make our communities safer.

Some have suggested that the Government thinks that the bill on its own will eradicate sectarianism from Scottish football, but the proposed legislation is not a quick fix for the whole problem of sectarianism. It is specifically directed at dealing with some very ugly manifestations of sectarianism and is only one part of what will be a broader strategy of on-going and developing work.

Margo MacDonald (Lothian) (Ind): Is the legislation specifically targeted at the two clubs in Scotland that are identified with sectarian chanting or does it encompass behaviour at other clubs? For example, I have seen my club drawn into this net and cannot think why.

Roseanna Cunningham: The bill relates not to specific clubs but to behaviour. If such behaviour happens at other club grounds, it will be caught.

When the First Minister was re-elected on 18 May, he made it quite clear in his acceptance speech that “We will not tolerate sectarianism, as a parasite in our national game of football or anywhere else in this society.”—[Official Report, 18 May 2011: c 32.]

Johann Lamont (Glasgow Pollok) (Lab): The minister said that the legislation will apply to other football clubs. Does she not realise that the pace at which the bill is being put through Parliament means that we have had no discussion or debate about whether it should address sectarian behaviour not just at football clubs but in our communities? That denies a problem that is much more widespread and affects more than football clubs.

Roseanna Cunningham: That is a nonsensical position to take. We are not denying the problem in Scotland; instead, the bill deals very specifically with its manifestation in football. We all realise that there is a bigger, much more deeply rooted problem that manifests itself in much wider parts of society, and the Government will continue to deal with that. Indeed, I have been given that specific task by the First Minister.

As I said, the bill is only one part of what will be a broader strategy. It provides for two new criminal offences, the first of which outlaws offensive behaviour that incites public disorder at football matches, when travelling to and from matches and when watching football in public areas and places such as pubs. The second outlaws threatening communications, and I will now say something about each.

Our primary intention with regard to offensive behaviour at football matches is to tackle behaviour that is likely to incite public disorder. Three forms of such behaviour are covered: expressing or stirring up hatred based on religious, racial, sexual or other grounds through, for example, sectarian singing or other offensive chanting; threatening behaviour; and any other behaviour that would be offensive to a reasonable person. Some commentators have attempted to divert attention from what the bill is obviously intended to cover by suggesting increasingly fanciful hypothetical situations that appear to bring the provisions into disrepute and I am delighted that the police, the prosecution service, the football authorities and others have welcomed the introduction of the offence, partly because of the clarity that it brings.

James Kelly (Rutherglen) (Lab): Will the minister give way?

Roseanna Cunningham: I really need to get on.

The offence is not about criminalising the singing of national anthems or making the sign of the cross. The bill seeks to criminalise behaviour that is offensive and likely to incite public disorder. National anthems in and of themselves are expressions of national pride; they are not normally sung to stir up racial or ethnic hatred and cannot be considered offensive to a reasonable person.

That said, we have to be clear: that does not mean that bigots can misuse innocent songs and gestures for despicable purposes. We are no more listing banned songs than we are listing songs that are always acceptable, however deviously they might be used. As the Bishop of Motherwell, Joseph Devine, said this week:

“Any sign, song, picture or whatever can be easily abused ... In themselves, the sign of the cross and the
That point was made equally eloquently by the Lord Advocate yesterday to the Justice Committee, and I cannot agree more.

It has been suggested that the offence is not necessary and that existing offences such as breach of the peace are adequate to deal with the kind of behaviour that we are seeking to tackle at football matches. Indeed, I think that Willie Rennie made that very point.

I am, of course, aware that people are arrested and prosecuted for offensive and disorderly behaviour at football matches under the existing law. However, we are concerned that neither breach of the peace nor the offence of threatening and abusive behaviour is ideally suited to dealing with disorder at football matches—in particular, the sectarian and bigoted behaviour that can all too often provoke disorder. To prove that breach of the peace has been committed, it is necessary to establish that the accused’s behaviour would be likely to cause genuine alarm to a reasonable person, but proving that offensive sectarian chanting at a football match would cause alarm to a reasonable person will not always be straightforward. Given everything that happened last season, the link to public disorder is more straightforward.

There is an impression that the bill was made up in splendid isolation. That is absolutely not the case. We have benefited directly from the hands-on experience of tackling disorder at football matches. When Chief Superintendent Andy Bates, the match commander at Ibrox, and Chief Superintendent Gill Imery, the match commander at Tynecastle, say that they believe that the bill will benefit them in policing difficult football matches, we can be confident that we are getting it right.

Of course, not all the problems with Scottish football last year took place at or around football matches. The live ammunition that was sent to Celtic manager Neil Lennon that appeared on the internet, and the sectarian bile that was posted on social networks and blogs all go beyond what happens on the terraces. To address that, the bill introduces a new offence of making threatening communications.

The offence covers threats of serious violence that are intended to cause fear or alarm and threats that are made with the intent of inciting religious hatred. They include implied threats, such as images that depict serious harm to an individual.

Patrick Harvie (Glasgow) (Green): The minister has made it clear several times that the bill refers to “hatred”. In previous hate crime legislation—to use the shorthand description—the Government used the term “malice and ill-will”. Are “hatred” and “malice and ill-will” identical in meaning? Will they be interpreted identically in the courts? Is “hatred” a wider concept than “malice and ill-will” and, if so, in what way?

Roseanna Cunningham: I am afraid that I must advise Mr Harvie that nobody can predict exactly how the courts will interpret any phrase. One difficulty that we are in is that some court judgments have interpreted even breach of the peace in a way that is not recognisable to some of us. I am sure that members who heard that football fans chanting racist abuse at a black player was discovered not to be a breach of the peace, according to the court, would find that surprising, to say the least. When a case is in court, we are in the court’s hands.

The threatening communications offence applies to threats that are made through the mail, on the internet and on banners, posters and T-shirts, and to other threats whether they are written, images or sound recordings. However, it does not restrict a person’s legitimate freedom of speech, including the right to criticise or comment on religion or non-religious beliefs, even in harsh terms. The offence is concerned solely with threats.

Stewart Maxwell (West Scotland) (SNP): I thank the minister for her comments on what the offence does not cover and on freedom of speech. Is she open to including a freedom-of-speech provision? Outside bodies have suggested that—to many members, I am sure.

Roseanna Cunningham: We have not considered that aspect—

Alison McInnes (North East Scotland) (LD): Why not?

Roseanna Cunningham: I say with the greatest respect that that is because the bill as drafted excludes speech. That is why the proposal looks as if it would be extra to requirements.

The second offence is not restricted to football. The high-profile threats that have been made to prominent figures who are connected with Scottish football have highlighted the issue, but no matter the context in which such threats are made, there is no place in Scotland for people who threaten and intimidate their fellow citizens in such a way.

The measures in the bill are a proportionate response to a serious problem. We must act quickly to restore faith in our national game, which
matters to millions of Scots. I am reassured that Stewart Regan, the Scottish Football Association’s chief executive, and Neil Doncaster, the Scottish Premier League’s chief executive, agree that measures should be in place before the new football season starts and not come in halfway through it or later.

We expect the offences in the bill to be enforced and prosecuted. Through our record investment in the Scottish police service to secure 1,000 extra officers for the front line, the resources are available to ensure that enforcement happens. We are also working with the police service through the joint action group, which was established in March, to assess whether more is needed. We will not hesitate to ensure that resources are available, if gaps are identified. The group will report on 11 July.

Significant police resources and other resources are deployed on policing football. We know that more than 1,000 officers are required to police an old firm game and that arrests and prosecutions take place for offences at football. The new offences will make the job of Scotland’s police officers that bit easier. The offences will be not an added burden but further tools in the box.

Sectarianism, discrimination and prejudice are all completely unacceptable wherever and whenever they occur. As a society, we must stand united and do what we can to build a proud and confident nation in which everyone—regardless of their background—is welcomed. The measures in the bill are a significant initial step towards that goal.

I move,

That the Parliament agrees to the general principles of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

09:50

James Kelly (Rutherglen) (Lab): I welcome the opportunity to speak in the stage 1 debate on the bill’s general principles. Scottish Labour recognises the scourge of sectarianism, particularly when it manifests itself in parcel bombs being sent to senior public figures, including a previous member of the Parliament. We recognise and condemn it as a stain on Scottish society when thousands of people sing songs against particular religious groups.

John Mason (Glasgow Shettleston) (SNP): Does James Kelly accept that seeking to delay the bill or such legislation sends out the message that sectarianism is acceptable?

James Kelly: I must say that that is absolute nonsense. I have just got to my feet, and the first thing that I have done is to make it absolutely clear that Scottish Labour condemns sectarianism without fear and without favour.

I will outline my thoughts on the bill, including the truncated timetable. There is a case for introducing legislation to create an offence that deals with sectarianism and for examining the gaps in relation to breach of the peace and internet crimes. However, that case is very much work in progress.

I congratulate the Justice Committee on its work this week to interrogate the bill and I welcome the Government ceding to Labour demands for committee scrutiny of the bill, because it has flagged up important issues.

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): In fairness, what the Justice Committee did was cross-party.

James Kelly: I recognise that cross-party work was done, but I am sure that Ms Grahame concedes that that came after I and my Labour colleague on the committee made representations to her.

As was said in the discussion of the emergency bill motion, the timescale for the bill is too short. The arguments in favour of taking the bill under the emergency procedure have been flimsy. The Justice Committee heard the concerns of the Law Society of Scotland, the Church of Scotland and Celtic about the truncated timetable. The football clubs were somewhat surprised by the bill. In recent weeks, the SNP Government has told us that one reason for introducing the bill as emergency legislation was that the clubs had asked for it and wanted it in place by the start of the new season. However, as the committee heard yesterday, the clubs did not ask for the bill or for it to be treated as an emergency. Indeed, the Rangers representative said that the bill’s publication was something of a surprise.

The Lord Advocate told The Times—not a parliamentary committee or Parliament—that Parliament was there to pass laws and that we should get on with passing laws. I say to him that Parliament is not “The X Factor”. A rush to legislate does not serve Parliament or Scotland well. We should have taken more time to consider the bill.

Derek Mackay (Renfrewshire North and West) (SNP): There is no doubt that the incidents that we have seen have been escalating. If the member thinks that we are going too quickly in passing legislation before the start of the new season, what kind of incident would make him think again?

James Kelly: I point out to Derek Mackay that the shambolic appearance of the minister at the Justice Committee on Tuesday led to the
confusion in yesterday’s newspaper headlines, which suggested that someone making the sign of the cross or singing the national anthem would result in a prosecution. That is the result of rushing to legislate—[Interruption.]

The Presiding Officer: Order. We would like to hear the member speak.

James Kelly: More time requires to be taken in order that we get the definitions correct, particularly in section 1, which deals with offences around football matches. Police, prosecutors and the public need certainty about those definitions. When the first football game of the season comes, the police officers who are at the grounds will need to know what songs and gestures are covered by the act.

Humza Yousaf (Glasgow) (SNP): Will the member give way?

James Kelly: No, I will not give way. I have taken plenty of interventions and I need to make progress.

A specific framework must be put in place so that people have that certainty come the start of the season.

Also at the Justice Committee, the Lord Advocate explained why he felt that the laws relating to breach of the peace are ineffective. He cited case law in which alleged breaches of the peace had been committed on domestic premises but the matter was not pursued by the court. It is, therefore, a surprise that offences that take place on domestic premises are not covered by the bill. I feel that that should be examined. When a football match is on, more people gather in homes across Scotland to watch it, and there have been instances in my constituency of people committing antisocial behaviour on domestic premises because of actions around football matches.

Margo MacDonald: Will the member take an intervention?

James Kelly: I am sorry, but I need to make progress.

The definition of “regulated football matches” also needs to be reconsidered. For example, the bill does not cover highlights of football matches. Old firm games often kick off early and the highlights are still running throughout the evening, when people have consumed more alcohol, which can lead to trouble in pubs.

On the internet issues, the minister must provide clarification. The bill sets out two categories of offence. Category B deals specifically with religion, but category A is much more wide-ranging. The minister seemed somewhat surprised when that was pointed out at the committee on Tuesday.

Inadequate resources are being allocated to support the bill. As Les Gray of the Scottish Police Federation said, the money that is being allocated will not scratch the surface. The financial memorandum states that police support for the bill will be met from existing resources. We are told that we need to pass the bill as emergency legislation in time for the start of the new football season, but the financial memorandum shows that no additional police resources are being committed to support it.

The issue of sectarianism is wide ranging and requires much further consideration beyond the bill. We need to consider what we can do in our education system and how we can work with groups such as Nil by Mouth. It appears to me that the SNP has come somewhat late to the tackling sectarianism agenda. It was quiet and complacent about it for much of the previous session. If the bill is to be passed at stage 3, consideration must be given to a sunset clause.

Parliament has a duty to make a difference and we have a job to do in getting right the legislation to tackle sectarian bile and in stating that it is unacceptable. If we get the legislation wrong, that will result in chaos and confusion. So far, the SNP’s performance on this has been short of the mark; it has a big six days ahead. Scotland deserves better and it is time for the SNP to get its act together.

10:00

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): We are all agreed on the need to tackle the problem of sectarianism in our society. It may seem an obvious point, but it is important that whatever disagreements there may be on aspects of the bill are looked at in that context. None of us wants to see our society blighted by that problem in the future. In the limited time that I have available to me this morning, I will focus on three areas of concern: first, the lack of consultation; secondly, the uncertain nature of some of the offences in the bill and the unintended consequences; and thirdly, the wider problem of sectarianism in small parts of our society.

Concerns have been raised in a number of quarters, both by the Justice Committee and by other individuals and organisations, about the speed with which the bill is being pushed through Parliament. Given the nature of the events that we witnessed at the end of the last football season, it is understandable that the Government wants to move swiftly to address the problem of sectarianism. We have seen some very ugly scenes plastered across our television screens and newspapers in recent months; however, we should not pretend that the problems are new. We should be wary of falling into a pattern of
legislating to suit short-term media headlines rather than finding long-term solutions to Scotland’s problems. Legislation can make a difference, but we have a responsibility to ensure that it is fair, workable and consistent.

There are also concerns about how the legislation might be interpreted. For example, could a republican Scot claim that someone singing “God Save the Queen” was engaging in offensive behaviour under section 1? Despite what the minister has said this morning, neither she nor the Lord Advocate has been able or willing to rule out that possibility, which I still have concerns about. It would be ridiculous if we passed legislation that had the consequence of criminalising those who sing their national anthem.

Even more than is usual for legislation on criminal behaviour, much will depend on the police’s and the procurators fiscal’s interpretation of the law; however, the ambiguity that is allowed for in the bill will make their job extremely difficult. What about songs that have more than one set of lyrics but have been known to be offensive in the past? What about football supporters humming or whistling the tunes of offensive songs without singing any of the words? What about songs that do not refer to religious aggravation but instead celebrate events such as the Ibrox disaster or the death of former prominent players? Such songs may not be examples of sectarianism, but they are equally likely to incite hatred and are equally vile in tone.

Roseanna Cunningham: Does the member not accept that he has just outlined precisely the reasons why one must not go down the road of listing songs or excluding songs? That is exactly our argument.

John Lamont: If the legislation is so uncertain that people do not know whether they are breaking the law, surely there is an argument for taking the time to consult to ensure that we get it right. The bill will clearly put a lot of additional responsibility on our police officers. That is no reason not to pass the bill, but it demands that we tread carefully before venturing down such an ambiguous path.

My third and final point is about my concerns for our wider society and what we should be doing to tackle the problem at an earlier stage. The problem of sectarianism in parts of west central Scotland is much bigger and wider than just sectarianism at football matches. The reality is that young men at football matches act in that way as a result of the conditioning that starts at an early age. Certain parts of society—admittedly small—in west Scotland have promoted that culture, including partly through our education system. The segregation of our young people brings them up to believe that the two communities should be kept separate. That is something that I know a little about, having been brought up and educated in the system of west central Scotland—the same system that produced many, if not all, of those who have been responsible for the shocking behaviour that we have witnessed in recent months.

I am a former pupil of Kilwinning academy—a school that I am incredibly proud of and that gave me an excellent education, got me into university and probably taught me more about life than many other schools might have done. However, the school—or, more accurately, the system—conditioned me into thinking that there was a difference between those of us who went to Kilwinning academy and those who went to the Catholic school around the corner, St Michael’s academy.

Yes, my school was a co-educational, comprehensive, non-denominational school. Yes, I remember that there were some pupils who originated from other parts of the world, but the school was predominately white and Protestant. I remember only one Catholic classmate or, rather, only one classmate who was prepared to admit to being Catholic.

Annabelle Ewing (Mid Scotland and Fife) (SNP): Would the member give way?

John Lamont: I have quite a lot to say in the time available to me.

Every morning, the buses from the Garnock valley would bus the pupils past Kilwinning academy to the Catholic school around the corner. In my early, naive years, I would ask my parents to explain why the buses drove past a school that I thought was perfectly adequate to go to another school. Unfortunately, others at my school were less naive. When the old firm played or on dates of historical importance, I clearly remember the stones and eggs that were thrown at the buses ferrying pupils past my school. The pupils in the buses would spit at my classmates as they walked to school. Of course, the school tried to take tough action against those responsible, but when so many are involved in such behaviour, that is extremely difficult.

The education system in that part of Scotland is effectively the state-sponsored conditioning of those sectarianism attitudes. I say that as someone who believes that as a Christian country we should do more to promote Christian values in our young people and to support religious education in schools. In those small pockets of west central Scotland, those attitudes are being entrenched at home and in the wider community. It was not just football supporters or pubs that were segregated in that way. More respectable institutions such as rotary clubs and golf clubs were split on religious grounds.
However, we should not be surprised by that, when in west central Scotland we allow our children to be educated into believing that there is something so different about the two religions that pupils cannot be allowed to share the same school building. It is little wonder that parts of our society continue to segregate themselves in later life when that is what they are taught when they are at school.

The Government has indicated its willingness to listen to parties from across the chamber and to govern in a consensual manner. I hope that the minister will reflect on the concerns that have been expressed today and ensure that the bill is as fair, workable and consistent as possible.

The Deputy Presiding Officer (John Scott): We move to the open debate. I am sorry to tell members that we are extremely tight for time and that I will have to restrict what would otherwise have been six-minute speeches to five-minute speeches.

10:07

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I must not take it personally, Presiding Officer, but every time I stand up there is a warning.

I accept David McLetchie’s argument on the pragmatic approach, and the minister’s good purposes. That said, I have some comments to make. For new members, I say that usually in a stage 1 debate I would speak as convener, but this is not a committee stage 1 debate because the business bureau did not refer the bill to my committee. In passing, I say to James Kelly that I will have to restrict what would otherwise have been six-minute speeches to five-minute speeches.

If members will forgive me, I will speak as convener, even in these unusual circumstances. I thank the committee staff, the official report—which published the oral evidence for us, which was helpful to us and, indeed, to the minister—all the witnesses, including the minister and her officials, and the Lord Advocate. Not least, though, I thank committee members for attempting at breakneck speed to give some semblance of disinterested scrutiny to the proposed legislation.

The Lord Advocate said in his contribution at the committee yesterday that draft guidance for clubs and the police—which no one has mentioned so far—will be published on Friday. The guidance will, I hope, be extremely helpful. However, I have to say to the Lord Advocate that to imply that because it is a short, sharp bill, it should not be contentious or flawed, is not a compelling argument from him or the minister. If there were ever a one-section bill—I do not know whether there ever could be one—it might be extremely contentious, so that is not a principle that one can rely on.

Many witnesses, particularly the Law Society of Scotland, the Church of Scotland and the Equality Network, were extremely unhappy about the use of emergency procedure. When I put it to him that the proposed legislation had been well trailed in the media, Tim Hopkins of the Equality Network quite rightly said:

“We knew that it was coming but I have to say that when we saw it on Friday morning it came as quite a surprise to us—it was quite different from what we were expecting.”

I replied:

“That is a fair response.”

There is a big difference between trailing a policy and having specific legislation before us.

An interesting comment was made by the representative from the Church of Scotland, who compared the bill with the legislation to ban smoking:

“Law works at its best when the majority of the population think that it represents a collective will ... Measures that have been effective, such as the smoking ban, work not because they are enforced but because the passage of the legislation was taken to mean that people supported it—it was seen as the collective position.”—[Official Report, Justice Committee, 22 June 2011; c 88 and 82.]

That is a fair argument.

Representatives of the clubs, the Scottish Football Association and the Scottish Premier League confirmed that they had not sought legislation but that their concerns had been somewhat assuaged after the briefing by the Lord Advocate yesterday morning, particularly with regard to the guidance.

I am grateful to the Lord Advocate for that. I am also grateful to him for distinguishing from breach of the peace—raised earlier by Willie Rennie—which is one of the criminal offences currently utilised in cases of aggressive threatening behaviour inter alia at football matches. I look forward to the response from the Law Society, which took a distinctly different view.

On balance and in fairness, I should say that the Association of Chief Police Officers in Scotland fully supported the legislation.

No doubt others will deal with the funding arrangements.

Questions that have arisen on specific sections of the bill will have to be addressed at stages 2 and 3. An example is section 1(5)(b). I will not quote it—members can see it—but does it exempt
public houses showing a match on a widescreen when only one team's supporters are present? Does it apply to supporters' club rooms? The Lord Advocate could not answer that question when I asked him about it at yesterday's meeting, when he said that he would give it consideration. We need to know about that, because it is a serious issue.

The provisions in sections 2(4)(a) and 2(4)(b) seemed wide to me, and I did not fully understand the explanation. I may be dull of wit and mind but I hope that someone will explain those provisions to me because they may be open to challenge under freedom of movement legislation. No doubt that will be explained in due course, during the amendment stages.

Section 6(2), which another member addressed earlier, excludes unrecorded speech. I ask members to look at what is said in the interesting submission from the Equality Network about why that is excluded, because I believe that it is not excluded in other, comparable legislation.

We all wish to see a reduction in sectarian violence but if, as predicted, the bill proceeds to stage 3 and is passed, I give notice that I intend to lodge an amendment or amendments at stage 2—and possibly at stage 3, if my stage 2 amendments are rejected—to require either a review or a sunset clause after two seasons of football, because the very people who should be engaged in this debate, namely the supporters and the fans, have not been engaged. We have not heard from them.

10:13

Graeme Pearson (South Scotland) (Lab): I acknowledge the convener of the Justice Committee's even-handed account of the work done by the committee in the past couple of days. She is quite right—and the minister knows—that although this is a short bill, as today's debate has demonstrated, big issues lie behind the words on the paper.

Legislation worthy of enforcement demands proper public scrutiny and a review by members of this Parliament in order that we can give knowing consent and authority to the law. The minister relies on the authorities to support her position, although I have seldom heard those in authority decline what appear to be additional powers.

In the context of anti-sectarian legislation, the Justice Committee, on behalf of Parliament, has spent two short meetings taking evidence, debating complex issues and reviewing proposals deemed a priority by Government. The process has been sobering. It has demonstrated starkly the frustrations faced by members of the public, and others already referred to, in trying to feed into our considerations. As witnesses representing interests as diverse as the Church of Scotland, the Equality Network and national football authorities and clubs indicated, there has been little or, in the case of the clubs, no attempt to consult on the proposals. One witness noted that such a course of action was unheard of.

There is a view that failure to give the general public the opportunity properly to consider the bill over a reasonable period means that the community might have no sense of ownership of the bill or confidence that it can deliver its stated aims. That is crucial when we consider that we pride ourselves on supporting the principle of policing by consent. If, as has been suggested during the past two days, elements of the proposals alienate or criminalise a section of our community unnecessarily because the legislation was poorly prepared, we will regret the unseemly haste that has been demonstrated.

Members have identified the weaknesses in the bill. It is striking that only the Government and the people who will be tasked with enforcing the legislation on the Government's behalf have spoken enthusiastically in support of the bill, without acknowledging the criticisms. Academics Dr Sarah Christie and Dr David Mc Ardle left us in no doubt that more effective enforcement of the current legislation would be a more appropriate response, and their view was reinforced by the Law Society of Scotland.

Fewer than 130 football banning orders are current, after four years of prosecutions. In my opinion, that indicates a lack of universal commitment in respect of our current difficulties. Indeed, one of our witnesses opined that elements of our judiciary

"see banning orders as a regime that was developed down south to deal with a peculiarly English problem. One of the sheriffs said, 'It is an English act with a kilt on it.' It is of limited utility in Scotland".—[Official Report, Justice Committee, 21 June 2011; c 61.]

I think not.

Our witnesses gave of their time and energy to offer their views at very short notice. Many more individuals, by means of e-mail and written submissions, reported grave concern that a police officer would be required in the heat of action to establish the difference between an offence under the bill and a joke, proselytising, free speech or satire—and would likely have to do so in the glare of the media and crowd attention. That is a tall order for anyone. As a result of those concerns, two Christian organisations are going to court to attempt to prevent the progress of the bill.

Our witnesses from football clubs said that although they had attended a highly publicised summit the announcement of the bill had come as
a surprise. They were briefed on the proposal only immediately before the Justice Committee's meeting—a week before the bill is due to become law. A Government that displays cavalier disregard for basic principles creates danger. We need wisdom and prudence, not tough talk and grandstanding. The vast majority of football supporters deserve to be treated with respect. Sections 1 to 4 will not produce a suitable or proportionate response to the problems of sectarianism.

The Deputy Presiding Officer: You must close now, please.

Graeme Pearson: I invite the minister to display her skills in openness, accessibility and listening and to go away and think seriously about the reservations that have been expressed. The Scottish Police Federation said:

"the financial memorandum is way off the mark". [Official Report, Justice Committee, 21 June 2011; c 38.]

Given the reduction in policing and the use of stewards in our football grounds in the interests of cutting costs, I hope that we will think again.

10:18

John Finnie (Highlands and Islands) (SNP): I will make a few general comments, specifically on policing, and I will pick up on evident misunderstandings on the part of some members.

I am disappointed that Graeme Pearson thinks that there is not universal commitment to tackling offensive behaviour at football matches and threatening communications. That is not my understanding; I think that there is public support for tackling hate crime associated with football and I think that there is public support for the criminal justice system and its ability to enforce the bill and other legislation.

There are genuine and heartfelt concerns about the consultation process, but the public understand that we need to act on the matter, and that is what has happened. Members heard about the evidence that has been taken. The Scottish Police Federation said:

"the financial memorandum is way off the mark". [Official Report, Justice Committee, 21 June 2011; c 38.]

Given the reduction in policing and the use of stewards in our football grounds in the interests of cutting costs, I hope that we will think again.

James Kelly: I am sure that the member has studied the financial memorandum. Does he agree that the resources to support the bill will be met from existing resources and that no additional police resources will be put in to support the bill?

John Finnie: I will address the member’s point in my next comment, because I was about to speak about the difference in emphasis between what Mr Gray and ACC Corrigan said about the finances. ACC Corrigan talked about using a "reasonable number" of officers. As Mr Pearson understands, every event is risk assessed and the assessment relates to the resources—and all the implications of that. ACC Corrigan went on to say that it is not about tripling the number of officers—I think that his comment followed Mr Gray’s comments and were made in the context of talk about the heavy campaign on the control of alcohol in football grounds, which by its nature required a police presence. The bill will require a targeted presence.

It is also important to recall that Mr Corrigan has said elsewhere that he would adopt a “preventative” approach, which involves publicising the issue. When that happened at the most recent old firm game, there was a marked reduction in the instances of sectarian singing.

Johann Lamont: Does the member think that there is a particular issue to do with policing pubs in which football is watched, in relation to establishing which games are being watched and whether people are actually watching the game? Does he accept that, in the initial stages, a deal of police resource will be required to enable the police to go into pubs where there might be disorder?

John Finnie: With respect, that happens at the moment. I am a regular attender at football matches, and public houses are often visited by officers in considerable numbers who are dealing with other matters. That is happening in any case. It is about the difference between being reactive and being proactive. I think that ACC Corrigan was emphasising that the mere promotion of the legislation would be sufficient to address the issue.

On resources to tackle threatening communications, it was fascinating to hear what ACC Corrigan said about how gang violence in Glasgow is being dealt with by police cadets who have knowledge of social media. In any case, there are resources to deal with internet crime.

I want to talk about three other matters that I think are important, which other members mentioned.
The Deputy Presiding Officer: You have 40 seconds.

John Finnie: Yes indeed.

The question is whether the proposals are necessary, legitimate and proportional. I think that they are necessary, as has been evidenced. I asked a simple question of the Lord Advocate yesterday. I asked him whether he thinks, as the police do, that the bill will fill a gap in the legislation. He said yes.

Is the bill legitimate? Certainly, everyone should welcome the aim of strengthening protection against criminal acts that are carried out in the name of prejudice. Is it proportional? It most certainly is. Guidance will be issued. I commend the bill and the scrutiny that is on-going.

The Deputy Presiding Officer: I remind members that we are very tight for time and they must keep speeches to a strict five minutes.

10:24

Humza Yousaf (Glasgow) (SNP): Offensive behaviour at football affects everyone in society, as many members said, whether we are football fans or not.

The sectarian and religious hatred at football grounds that the bill aims to tackle is not confined to people of a particular religion or faith, as members said. My cousin, like me, is a Scottish Pakistani of the Muslim faith but, unlike me, he is a passionate supporter of Rangers Football Club and has attended many matches in his time. Members who are familiar with old firm security will be aware that the police do their very best to keep fans separated for as long as possible, but there inevitably comes a point when fans meet and converge, and sometimes violence occurs.

My cousin once told me that he happened to be walking back from an old firm match during one of those unfortunate times when violence broke out. He did his best to avoid the mêlée, but he told me that he was confronted by a rival fan and asked whether he was a Protestant, although that word was not used. He looked down, stared at himself and mumbled back, “Actually, I’m a Muslim.” The young man replied, “Don’t get cheeky. Are you a Protestant Muslim or a Catholic Muslim?” Perhaps that is a funny point but, unfortunately, the story simply reiterates the point that sectarianism goes far beyond the constraints of religion, which we often restrict it to.

I wish to address briefly some concerns that many members have made in the debate and over the past few days and weeks.

Many members have quite correctly commented on the haste that the bill is being dealt with. I have no doubt at all that, in an ideal world, we would have liked as much time as possible for consultation on this important bill, but a balance of priorities must be struck. Every member should cast their mind back to where they were when they heard the news about Neil Lennon, Paul McBride QC and Trish Godman, who is a former colleague of many members, being sent parcel bombs through the post. Scotland was numb. As a society, we felt that the rivalry and posturing had gone far too far, and there was a clear indication from the people that they expected something to be done about the matter now.

John Park (Mid Scotland and Fife) (Lab): Will the member take an intervention?

Humza Yousaf: I do not have enough time. This will be a quick five minutes, unfortunately.

It has been reiterated time and again that the bill does not intend to be a magic bullet for the problems that we face, and it will not eradicate in an instant all offensive and hate-driven behaviour on our football terraces. However, it is an indicator of our resolve to send out a strong message that, as parliamentarians, we hear the cries of the people and are taking their concerns with the utmost seriousness, which they deserve.

Some members have suggested that the nature of the offences that will be created is unclear. I draw their attention to the Conservative Party’s own Paul McBride QC, who said:

“As legislation goes, it’s simple as pie—you don’t even need to be legally qualified to understand it.”

As one of those non-legally qualified people to whom Mr McBride alludes, I can attest that, although the bill may not be pie-like in its simplicity, it is not nearly as complex as some members suggest.

Yesterday’s sensationalised headlines about national anthems and religious gestures were simply unhelpful. Mr Lamont, who initiated questioning on the matter, must know better. He will be fully aware that there is the element of discretion in relation to many offences, be it breach of the peace or otherwise. Officers and the courts must take into account all the relevant facts, the details and, most important, the context. I do not believe for a moment that Mr Lamont thinks that the various authorities would ever overstep that mark. In fact, given his legal background as a former solicitor, it is inconceivable that he does not know all that. Perhaps he simply awoke that morning feeling slightly mischievous, or perhaps he was putting forward his credentials for a certain soon-to-be-vacant post in his party.

Jim Hume (South Scotland) (LD): Will the member give way?
Humza Yousaf: I have only a minute and a half left. Okay, go ahead then—you have 10 seconds.

Jim Hume: The member has mentioned a Queen’s counsel and Mr Lamont, who is a former lawyer. Does he disagree with the Law Society of Scotland? It has stated that the bill

“seeks not to replace or clarify the existing law but to add another layer of law, which is not always the best way to approach things.”—[Official Report, Justice Committee, 21 June 2011; c 66.]

Humza Yousaf: I take to be more important the views of the Lord Advocate, who has said that the bill will plug any gaps that exist and, on top of that, the views of the police, who are, it should be remembered, on the front line picking up broken bottles and taking people to hospitals in the aftermath of many matches. They say that the legislation must be brought in now.

When we took evidence from police officials on Tuesday this week, ACC Campbell Corrigan and Les Gray told us that they were confident that they could train their officers in sufficient time for the start of the season. Any member who attempts to undermine that confidence in our police is extremely unhelpful.

There are a number of other points that I would like to make, but I can see that I am out of time.

I agree with the convener of the Justice Committee, Christine Grahame, that some kind of review structure should be in place for the legislation.

Football is our national game. We should be proud of it, and we should not feel the need to cringe when we hear it mentioned on the evening news. Let us not pass up the opportunity to start the new season with a different tone on the matter.

10:29

Alison McInnes (North East Scotland) (LD): As many members have said, every single one of us wants to see an end to sectarianism. We want to see an end to all discrimination, prejudice and abuse, but the bill will not achieve that. Laws do not operate in a vacuum. If we need a new law to help to deal with these issues—and, given time, we may find that we do—it must be created in concert with a wider approach. Attempting to legislate without that context is as unwise as it is futile.

We cannot tackle sectarianism from the top down. We need a joined-up approach that involves people from different communities throughout Scotland. I welcome the work that is being done with the joint action group on football, and look forward to reading its final report and seeing what recommendations it makes on what can be done to prevent a repeat of the dreadful scenes that we saw earlier this year. Sadly, such scenes have been a fact of life in Scotland for more than 100 years. However, I am forced to ask why the Government went to the trouble of setting up the joint action group if it is not willing to wait and hear what it has to say. Yesterday, The Scotsman opined that the

“Unseemly rush leaves Scots law open to ridicule”.

Not one member is saying that sectarian behaviour or any abusive or prejudiced behaviour should be tolerated, but such behaviour is already illegal. The bill, which the Government would prefer no one to look at too closely, will not criminalise anything that is not already illegal. It will not make the existing law clearer or give the police any additional powers to deal with sectarianism or other abusive behaviour. As far as I can see, it will create more confusion, more inconsistency and more questions.

Before any law is passed in the Parliament, there are questions that have to be answered. We are usually able to explore the issues during weeks of scrutiny and evidence and expert advice taking. However, as we have seen, the Government is determined that Parliament will not be allowed its rightful role in the legislative process. I still want the questions answered, and the people of Scotland deserve to have them answered. Therefore, I will ask the minister those questions.

What evidence is there that there are gaps in our existing laws that need to be closed? How many people have committed crimes aggravated by religious prejudice but have not been punished because our existing laws do not cover the offences? Could the scenes that we witnessed earlier this year have been prevented if existing laws were enforced more consistently? How many prosecutions could be brought under the new offences? How many of those prosecutions could not be made under the current law? How many breach of the peace charges with a religious prejudice aggravation have been brought, only for the aggravation to be dropped in order to make the prosecution?

In what circumstances will the new law make singing “God Save the Queen”, “Rule, Britannia!” or “Flower of Scotland” illegal? Should people not have the right to know what they can sing without being arrested? Should people not know where they can sing without being arrested? Why should singing a certain song be a crime if it is sung at a football ground but not if it is sung on a march?

How are the police meant to determine whether a person is on a journey to or from a match? In what circumstances could a person be described as being on a journey to a match, if they have no intention of attending that match?
What situations are covered by the provision on a match that is being televised? Is a hospital common room or a mobile phone in a park covered?

What is the definition of a “serious injury”? What is the definition of “stirring up” religious hatred?

Does the communications aspect cover what is written on a flag or on a person? At what point does speech become recorded speech? How does the Government expect the new law to be policed?

Christine Grahame: Will the member take an intervention?

Alison McInnes: I have no time, as I have many questions for the minister.

If the financial memorandum is indeed “way off”, how can the public be confident that there will be adequate resources to enforce the new law? How can the Government defend passing a new law that will require test cases to define its extent?

Christine Grahame: Will the member give me 10 seconds?

Alison McInnes: No.

What consideration has the Government given to the difficulties with gathering evidence for crimes that have been committed abroad and with getting witnesses and suspects to Scotland? How is a defence of reasonableness defined?

Neil Findlay (Lothian) (Lab): On a point of order, Presiding Officer. I say to Ms Grahame and others that Alison McInnes’s comments could be debated if we were given more time to discuss the bill.

The Deputy Presiding Officer: I am sorry, but that is not a point of order. We will move swiftly on.

Alison McInnes: Can the Government guarantee that a newspaper that reprints a death threat from the internet or elsewhere could not be caught out by the reckless provision in section 5?

I see that I am running out of time, so I will leave it at just 30 unanswered questions for now. I look forward to hearing the answers to those questions, as do the people of Scotland, I am sure.

I am reminded of something that a wise man once said—I am sure that he must be a wise man, as he is a former MSP, and he went on to be political adviser to the First Minister. When he was considering sectarianism in the Justice 2 Committee in 2002, Duncan Hamilton said:

“it is wrong to legislate simply because we have the power to do so and to assume that that legislation will make an improvement.”—[Official Report, Justice 2 Committee, 11 December 2002; c 2449.]

I could not agree more.

The Deputy Presiding Officer: Helen Eadie has a very tight five minutes.

10:34

Helen Eadie (Cowdenbeath) (Lab): If the bill is about sending a strong and clear message from the Parliament that sectarianism is not acceptable in any shape or form, I congratulate the Government on initiating that message. I strenuously support its aim, but I strongly oppose its rushing the bill through Parliament in the way that it is doing.

Like others, I have heard and read what commentators, professionals and people on the front line are saying about denying civic Scotland’s input to the legislative process. Paul Martin spoke for me when he offered that Labour Party members would work through the recess to address the issue with urgency, and I am disappointed that the Government has turned that offer down. James Kelly also spoke for me in everything that he said.

As others said, we are being asked to vote on many issues without anticipating what the unintended consequences might be. The Law Society of Scotland said that lack of consultation and use of the emergency bill procedure set a bad precedent. Similarly, others who gave oral evidence to the Justice Committee expressed very serious concern that there had been no prior consultation on the issues.

Probably like many other members, I have been sent an e-mail from the Christian Institute and CARE—Christian Action Research and Education—advising us of the legal challenge that they propose and the QC opinion that they have secured, which sets out a variety of matters such as failure to consult stating legal precedents, European convention on human rights issues and questions about the Scottish Parliament’s competence on the extraterritorial issues. In the QC’s words,

“The procedural failures in the introduction of—and the substantive defects on the face of—the Bill are so conspicuously bad that it is unclear why the Bill is being taken forward in its current form, which leave it open to successful legal challenge before the courts by any interested member of the public.”

In its financial memorandum, the Government says that the legislation is a minimal change and that it does not seek to prosecute new offences or increase the number of prosecutions significantly. Some people propose that that approach suggests that the bill is window dressing or a public relations statement to Scotland’s people about what
direction the Government is insisting on. Members might agree that that is, of itself, sufficiently important, but there is a real danger of creating unrealistic expectations.

I am in no doubt that the destination that the Government wants to get to is absolutely right, but its road map is absolutely wrong. There are many questions for it to answer. For example, is it acting illegally? Aidan O’Neill QC of Edinburgh states in his opinion of 21 June, which was prepared for the Christian Institute and CARE, that it is doing so on a range of issues. I read much of that detailed opinion yesterday evening.

In an oral presentation on the bill’s provisions at the stakeholder meeting on 17 June, the civil servant tasked with advising on the policy of the bill stated that civil servants had been instructed only some three weeks ago to produce a bill on the issue, whereas they would normally expect the production of a bill to be the outcome of a process of research and consultation extending over 18 months.

Are the various commentators correct who have said that it is rather unclear whether section 1 introduces new substantive criminal offences or is about clearly restating the law? It is valuable to be clear about the law, but the bill is not introducing new crimes and the sort of behaviours that we are talking about are already offences.

In the committee, Tim Hopkins said:

“The inclusion of the offence of stirring up religious hatred, in particular, was not trailed at all—we had certainly heard nothing about it. The offence is actually quite substantive and, indeed, created a huge amount of debate down south when it was proposed. That is where we think the biggest problem lies.”

He continued:

“The offence is similar to breach of the peace, so arguably it does not extend the law very much. Homophobic and sectarian behaviour at football matches can already be prosecuted as a breach of the peace aggravated by one of the statutory hate crime aggravations. It has been said that breach of the peace is too broad and the boundaries of the law are not clear.”—[Official Report, Justice Committee, 22 June 2011; c 88.]

We already know that there are many people in Scotland who, like the Government, have a huge reservoir of good will and the ability to contribute to this key work. We need to accept their offers of assistance and engage with them meaningfully.

However, I remind members that, when the United Kingdom Government attempted to legislate for Scotland, as well as for England and Wales, on inciting religious hatred, the Scottish National Party MPs opposed the measure in the Westminster Parliament on the basis that they considered existing Scots law to be sufficient to deal with the issue. I leave members to ponder that point.

10:40

Roderick Campbell (North East Fife) (SNP): I welcome the bill. Many critics question whether it is necessary. Many commentators have commented that, in the common-law offence of breach of the peace and in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 in particular, we have sufficient laws, which could be enforced in relation to behaviour such as that under discussion if they were used fully, and that sentencing could also be addressed under current legislation. “So why do we need the bill?” they ask.

Let us be clear that existing legislation could be used on many occasions, but it is in the nature of law that offences can be prosecuted in many different ways, and it is for the police and the Crown to consider how best to proceed when alternatives are available. In addition, the same argument—that the same ends could be achieved under existing law—was made during the passage of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and rejected then.

There is no doubt that the bill fulfils a need. It represents an opportunity to send a clear message to Scotland that behaviour of the sort that it covers is not acceptable in modern-day Scotland. It makes that abundantly clear to all who attend football matches and I believe that it will encourage enforcement.

However, it is not an all-encompassing bill and nor should it seek to be one. I am heartened by the support of the police representatives in that respect, by the comments of the SFA chief executive, Stewart Regan, and by the willingness of the football clubs’ representatives to embrace the measure in an undoubtedly short timescale. However, that means, of course, that there is a responsibility on the Parliament to ensure that the bill is well crafted.

In that respect, I welcome the Law Society of Scotland’s comments on the definition of regulated football matches. I also welcome the Equality Network’s thoughtful contribution to the debate and its support for the section 1 offence. I also share its concerns on the narrow remit of section 5(5) which, in contrast to section 1, is restricted to religious hatred only. However, the clear intention of the bill is not to impact on proselytising or anything of an artistic nature. Therefore, on the defences that would be available under section 5(6), it is arguable that less is better. I am not currently persuaded that the adoption of an English-style freedom of expression defence would improve matters.

We have heard a little about deficiencies in the existing law on breach of the peace. It is clear that paragraph 21 of the policy memorandum does not
adequately state the common-law position. However, it is equally clear from the decision in HMA v Harris that the absence of a public element would be fatal to a prosecution for breach of the peace. Addressing that is at least part of the intention of section 1(5)(b).

James Kelly: On the deficiencies in the current law on breach of the peace in relation to domestic premises, does Roderick Campbell accept that there is a shortfall in the bill in that the offences in it do not cover such premises?

Roderick Campbell: No, I do not agree with that point.

Critics of the bill have also made a great deal of play about what they say is a lack of clarity in a bill that may outlaw the singing of the national anthem. I fully support the minister and the Lord Advocate when they draw attention to the fact that, in considering whether there is any offensive act, account must be taken of the facts, character and context. No legislation can be looked at in a vacuum.

I also fully support the fact that measures on offensive legislation will cover not only fans’ behaviour but that of players and officials. That is an important aspect that needs to be emphasised.

Margo MacDonald: Would that offensive behaviour extend to the chant that one occasionally hears on Easter Road: “If you hate the”—expletive removed—“Jambos, clap your hands”?

Roderick Campbell: The minister might care to deal with that matter in her closing speech.

We should also accept that the bill is no silver bullet. We cannot change a culture overnight.

Johann Lamont: Will the member give way?

Roderick Campbell: No.

Additional measures—such as stricter policing of licensed premises on the day of matches, toughest policing, prosecution of e-hate crime and tackling sectarianism among offenders—are important. I also hope that the joint action group can build on its work and its six-point joint action plan, which was announced in May.

Perhaps inevitably, much of the comment on the bill has focused on the speed of its progress, but we have a problem that needs to be sorted and we should not shy away from dealing with it. Sunset clauses may have attractions, but in my view it will be necessary to keep the legislation under review for longer than it would be prudent to use a sunset clause.

The Deputy Presiding Officer: I regret that the member must close now.

Roderick Campbell: We have work to do on the bill, but let us support it and get to work on helping to build a better society.

10:45

John Park (Mid Scotland and Fife) (Lab): I welcome the opportunity to speak in this very important debate, as I welcomed the opportunity to participate in the members’ debate on sectarianism and anti-Irish racism last week. I left that debate knowing that many members in the chamber want to tackle the issue. While today’s debate might ebb and flow, I know that every single one of us here wants a solution, and wants to improve the circumstances that people are facing outwith the Parliament.

There are legitimate concerns about the speed of the bill process, but I recognise that the Government is trying to improve things. I will highlight my main concern about the pace at which we are going. One issue that has been raised is how we as a Parliament engage with civic Scotland. There are people who have legitimate concerns on this matter inside and outside the Parliament, but if we try to introduce laws on sectarianism too quickly it allows those who have illegitimate concerns to raise them, too. That is one of the main issues that we need to deal with today and in the next week or so as we scrutinise the legislation.

The changes that we are seeking to introduce are a laudable attempt to move things in the right direction. However, in order to make a real difference we must educate people over a longer period of time. That is why I stressed in last week’s members’ debate that I felt—perhaps with the benefit of hindsight—that it was a little disappointing that the First Minister and the Scottish National Party Government moved away in the previous session of Parliament from that educational approach and from the focus on sectarianism.

If we are going to introduce legislation now, we need to ensure that we promote education alongside it. I see that Stewart Maxwell is shaking his head, but, for the new members here, that is what happened: the focus was taken away.

Stewart Maxwell: I am sorry to correct Mr Park, but that is not what happened. We moved to a situation in which we dealt directly with the issue and with organisations outside the Parliament. We moved away from public relations stunts and publicity events that were purely for the Evening News and did not actually tackle the issue.

John Park: I thank Stewart Maxwell for giving me the opportunity to respond to that. To declare an interest, I was actively involved in sectarianism work before I entered the Parliament in 2007.
Although the summits might have had a PR or a media focus, I know about the level of work that was going on in the Scottish Government at that time, and I know that it stopped taking place after 2007. I am speaking from experience.

There are a number of organisations such as Nil by Mouth, sense over sectarianism and show bigotry the red card—which I became aware of last week and is part of Show Racism the Red Card—that do some fantastic work. As parliamentarians, we need to support them as much as we can, but we need to find out how we can lever in significant support.

Roseanna Cunningham: Does Mr Park accept that those organisations have received significant sums of money from this Government throughout the period and are continuing to receive that money against the backdrop of the cuts from Westminster that we are having to deal with?

John Park: I know that the Government took a different approach, and that there has been a lack of focus. I am trying to explain that we need to move forward. It is not just about legislation; it is about education and putting extra resource into it over a longer period of time.

I will say a bit about threatening communication and how we challenge some of the language and behaviour around that. We have a real issue that has developed over a period of time with regard to self-regulation and the internet. I commend the Government for trying to do something about that, as the issue is difficult to deal with.

The registration, operation and moderation of websites must be examined more specifically. Certain organisations have encouraged people to hide behind nicknames to criticise people in the public eye and make arrangements around football matches. We as a Parliament must tackle that, and so must the Scottish Government.

I am happy that we are moving forward on the issue today. There has been debate about the pace of the process, but we need to send a clear message that we are united in wanting to tackle sectarianism and make a difference. I know that members in the chamber believe that, but the Government must listen to the points that we make so that we can all make a difference and get legislation that we can work on.

10:50

Colin Keir (Edinburgh Western) (SNP): For Margo MacDonald's benefit, as a pretty well-known Jambo around the place who has done missionary work in Easter Road on numerous occasions I do not take offence at many of the things that she mentions.

I welcome the fact that members on all sides of the chamber recognise the need to clamp down on sectarian crime, and hate crime in general. Such crimes shame this country. We undoubtedly have one of the most awkward sectarian problems in Europe, which damages this country and its international reputation as a multicultural, friendly and tolerant society.

My colleagues and the minister have outlined the bill’s aims and the importance of ensuring that it comes into force before the start of the football season. Earlier this week, the Justice Committee took evidence from a number of people representing different stakeholder groups with an interest in the proposed legislation. Like members in the chamber today, everyone wants an end to this cancer, and we should not allow it to take any more of a grip than it already has.

The bill is generally supported by the police. Assistant Chief Constable Corrigan and Les Gray of the Scottish Police Federation both view the bill as a useful tool for enforcement, mainly because the Scottish courts are now defining breach of the peace in a more restrictive way, which makes convictions more difficult to obtain. The minister gave a good example of that in her opening statement.

We have heard from the SPL, the SFA, Celtic and Rangers, all of which desire to see the end of sectarianism because it does their clubs no good nationally or in the international arena. I grant that they did, like many people, have concerns about the speed of the bill’s progress.

It was interesting to hear the Lord Advocate’s views. He was quite clear that the sensationalist headlines in many of yesterday morning’s newspapers were not accurate. Humza Yousaf pointed out earlier that the guidance will make clear that, as with breach of the peace, everything is determined on fact, circumstances and, most important, context.

As the Lord Advocate stated, the guidance makes clear that the bill

"is not intended to criminalise the singing of national anthems in the absence of any other aggravating behaviour. It is not intended to criminalise the making of religious gestures while national anthems are being sung in the absence of any aggravating behaviour".

It is

"not intended to cover peaceful preaching or to restrict freedom of speech, including the right to criticise or comment on religious or non-religious beliefs, even in harsh or derogatory terms. It is not intended to criminalise jokes or satire about religious or non-religious beliefs."—[Official Report, Justice Committee, 22 June 2011; c 101.]

Those concerns have been addressed, which deals with some of the issues that objectors have raised.
I will move my focus to the wider aspects surrounding sectarianism, such as education, although I will not necessarily make the same point that John Lamont made earlier. It would be short-sighted to suggest that sectarianism flares up only during football matches or sport in general. Although it is often manifested during certain football games, we must acknowledge that we need to look beyond enforcement to tackle the root of the problem, as Assistant Chief Constable Corrigan mentioned in his evidence.

The Labour Party has on several occasions suggested that the SNP did little to fight sectarianism during its first term in government, but that is misleading. Over the past three years, the SNP has developed an online educational resource that has delivered workshops in schools to nearly 3,000 pupils, who have now gone on to deliver a wide range of anti-sectarian work.

James Kelly: Can Colin Keir tell us what happened to the anti-sectarianism strategy that the then Minister for Community Safety, Fergus Ewing, promised in November 2009?

Colin Keir: It might be a better idea if the member asked the minister that question.

We took advantage of the role-model status of footballers to educate young people about the wrongs and dangers of Islamophobia, which should have no place in multicultural Scotland. In 2009-10, the Scottish Government provided £415,000 to projects aimed at tackling sectarianism, including in schools, and additional resources were made available to Learning and Teaching Scotland.

I see that I am running out of time. I know that there are concerns about the speed with which the legislation is going through the Parliament. One bill on its own will not change our society; it takes every citizen to acknowledge that there is a problem and to show willingness to solve it. As I have said, there are concerns about the speed with which the legislation is being passed, but the problem is not of our making—it goes back many years and it needs to be looked at now. I would like our generation to be the one that relegates sectarianism and hate crime in Scotland to the history books. That might not be possible in the short term, but I believe that the bill could be a good starting point for on-going work.

Questions have been raised about why tackling sectarianism was not a priority for the SNP Government during the four years of the previous session, and about why First Minister Jack McConnell’s initiative on sectarianism was never taken up but was pushed to the side and forgotten. Perhaps Alex Salmond and Kenny MacAskill will ask themselves those questions in a quiet moment during the recess.

Where do we draw the line between cultural patriotism and sectarian behaviour? It is a precariously thin line. No one really knows where to draw it—indeed, no one really wants to draw it. One risk of the bill—which the Justice Committee clearly identified over the past couple of days—is that the definitions of the new crimes and of sectarian behaviour are not sufficiently clear. The bill fails to draw the line.

That failure throws up two issues. The first is that by failing to define those crimes properly, the Parliament is handing the power to define sectarian crime to the courts. Nobody would really envy the procurator fiscal who is charged with marking the first of these cases in late July or August, nor the procurator fiscal who prosecutes the case and the sheriff who hears it come September. There is wide scope for judicial interpretation. That is the courts’ job, but by leaving the lawyers such latitude for interpretation Parliament has surrendered a lot of its democratically elected mandate to pass good, clear, thorough and workable legislation and handed it over to the courts and the Crown.

The second issue is that the law will not be clearly understood by the public. One of the founding principles of jurisprudence in this country is that the law must be clear and understandable, so that people know what they can and cannot do before they are hauled in by the police and the courts.

Over the past few days, the Justice Committee has heard about the confusion about what will fall within the ambit of the bill and what will not. Certain songs, words and phrases will be covered, but it will depend on how they are delivered and the intonation and level of aggression used.

I am not saying that this is easy law to make—it is highly complex, highly charged and highly emotive—but that makes it all the more clear that Parliament should have taken the time to consult properly, pore over the detail and start to foresee the consequences of the bill.

Humza Yousaf: Will the member take an intervention?

Jenny Marra: No thank you.

The bill could throw up all sorts of human rights issues: challenges relating to freedom of speech,
to freedom of expression and to the European convention on human rights might all come down the line. That is why the Government must commit not just to passing the bill then sitting back and letting the football season commence but to writing a sunset clause or review period into it. Whatever mechanism is used, the Government must commit to making monitoring, enforcement and paying proper attention to the legislation a priority over the whole five years of this session, not just these opening few weeks.

We owe it to Scotland and to the next generation—to the children who are sitting behind me today—to legislate well on this issue and commit to seeing it through.

As part of a longer-term commitment on tackling sectarianism, I ask the Government to work with other parties on a major review that probes the causes of our problem. We all know that prejudice is not confined to the football terraces. The bill tries to tackle the most obvious and public manifestation of sectarianism, but it does not tackle religious bigotry in the play parks of our communities, in the pubs and in the streets. The root causes of our problem must be addressed, and I do not think for a minute that that will be easy.

I look forward to the Government’s proposals for tackling the root causes of bigotry; an investigation into the poverty that blights areas where bigotry and prejudice can too easily take hold; and careful and considered proposals on how we can bring about a cultural change and move to a better Scotland that is tolerant and accepting of different religious and cultural identities.

11:01

John Mason (Glasgow Shettleston) (SNP): Thank you for the opportunity to take part in the debate. A number of members have asked whether the bill is too rushed. As a person, I tend to be on the cautious side of things—I want to consult, hear people’s views and sleep on a decision before I make it, which sometimes might upset my staff. However, there are times in life when we have to make a point, take action and show that something is really important. I believe that we are in that position now.

The opposite danger of going too fast is going too slowly, so that five years from now we are still sitting here talking about these things, with people still having similar concerns.

The bill is not the final answer on sectarianism, but it is an attempt to deal with one part of it. It is important that this Parliament states that we are serious about it.

Paul Martin said that this is a people’s Parliament. He is correct, but the danger for him is that he is getting out of touch with the people. Even since the election, a number of people in my constituency, which is adjacent to his, have suggested to me that all marches be banned. I do not agree with that, but there is considerable public feeling that we have to do something, not just in the bill but beyond it.

Patrick Harvie said that if we get it wrong, we might do more harm than good. He is mistaken on that point. Sometimes we have to try things. They will not always be perfect, but we have to give them a go and we have to be seen to be doing something.

Margo MacDonald: Does the member believe that we have to do something for the sake of doing it? In the park today, I passed a car on which was an Irish flag flying gaily in the breeze. It was there really to tell us to get our act together and not be so silly with this legislation.

John Mason: I disagree that we are acting for the sake of acting. We are acting because there is a real problem here and we all believe that we have to deal with it.

A number of speakers have raised the issue of who has been fighting hard against sectarianism and who has not. We all have to share some of the blame for not always confronting it at different times. I think I am correct in saying that Donald Gorrie of the Liberal Democrats was the first MSP who really ran with it in the Parliament. I am happy to accept that Jack McConnell did, too. When I was elected to Glasgow City Council, which clearly was not run by my party, sectarianism was not on the agenda—the council was not talking about sectarianism, but we raised the issue at that stage.

I want to raise a couple of issues on which I hope that the minister can provide some reassurance—some members have raised them already. The first is resources. Some legislation, such as the smoking ban, has been largely self-policing. However, other legislation, such as that prohibiting the use of mobile phones while driving, has become a joke, because one cannot walk down the street or drive a car without seeing people using a mobile phone while driving. That is a danger with any legislation. I suspect that it would take more resources than we have at our disposal to clamp down on the use of mobile phones. I seek a reassurance from the minister that she is happy that the British Transport Police, for example, have enough resources. When I am on trains in my constituency that pass near Celtic Park—

Drew Smith (Glasgow) (Lab): I know that John Mason is aware of my motion on the fact that Partick Thistle’s ground is to become a police-free
ground. How does he envisage the bill being enforced at such a ground?

John Mason: As the member probably knows, I am not a Partick Thistle fan but a Clyde fan, so I would not want to go anywhere near Partick Thistle. The member is asking the same question that I am asking. I seek from the minister some reassurance about resources.

The second point, which is raised in legal advice from the Christian Institute and elsewhere, relates to freedom of expression. Can the minister give us some reassurance that the bill does not need to include a section that guarantees freedom of speech, especially with regard to religious evangelism or proselytising?

11:06

Patrick Harvie (Glasgow) (Green): I say to John Mason that the disagreement that we have is not about the nature of the problem but about whether the detail of the bill—not the signal that it sends—is part of the solution.

For the benefit of new members, for whom this is the first taste of legislative scrutiny in the Parliament, I point out that this is not how it is supposed to be—it is not the way in which scrutiny normally happens. Most stage 1 speeches begin with a fairly obvious and slightly boring comment in which the member thanks the relevant committee for producing its detailed stage 1 report and taking all the evidence on the bill. We make that comment time after time—and we mean it. Today, we do not have before us a stage 1 report that would give us the opportunity to reflect on how members have received evidence, reflected on it and changed their view. Often, members do not change their view on the principle of legislation, but they do change their view on the detail. That detailed scrutiny has not happened in this case. We do not have the capacity or time to do our job on the bill in a week.

There are really serious issues relating to the detail of the bill’s content. I raised one such issue during the minister’s opening remarks: it concerned the difference between “hatred” and the term “malice and ill-will”, which has been used in previous hate crime legislation. The minister was not able to say whether those terms mean the same thing or why there has been a change. If we do not know what the terms mean, why have we changed from one to the other?

The wide nature of this hate crime legislation is welcome in principle. This is not a sectarianism bill—it covers a wide range of forms of hate crime. That is good in principle, for example because of the high level of homophobia that exists both in football and elsewhere in society. However, it clearly implies a far wider range of situations in which offences could be committed under the bill. Previously, time has been taken to consider the options—to recognise that not every form of hate crime requires exactly the same legislative response, because the details differ. The working group on hate crime that was set up back in the first session produced recommendations that were not enacted until my member’s bill—the Offences (Aggravation By Prejudice) (Scotland) Bill—did so last session. There were years of consultation and scrutiny to get the detail right before the proposals reached the statute book or even came before Parliament for a vote.

Humza Yousaf: Patrick Harvie spoke about his concerns about time. Does he agree with the SFA head, Stewart Regan, who says that it would be “challenging” and unnatural to introduce legislation midway through a season? Is he content to wait for another football season to go by without doing anything?

Patrick Harvie: Parliament does not operate by football season—it operates by taking the time to get the legislation right. Passing bad legislation now would be worse than doing nothing.

I want to talk about section 5 of the bill, on threatening communications, because that is where I see the most serious problems arising. The section ignores and cuts through fundamental debates about what freedom and liberty mean in the online sphere that are on-going in our society and throughout the world. It bears no relationship to regulated football matches, so there is no justification for the argument that the threatening communications section must be in place for the new football season. It has nothing to do with what happens at football games or where games are broadcast. It does not cover live speech, but it covers recorded speech. A person could say something live that is perfectly legal and legitimate, but as soon as someone takes a clip of it on their mobile phone and puts it up on YouTube, an offence will have been committed. There are really serious problems.

Alison McInnes: Will the member give way?

Patrick Harvie: I am afraid that I do not have time to take another intervention. I wish that we had more time.

Section 5 covers religious grounds only. Why does it not cover hate crime in general, as other provisions of the bill do? Will it cover trivial issues such as those involved in the Twitter joke trial down south, of which members will be aware? Paul Chambers was convicted of menacing electronic communication for a really trivial joke. There is also no commitment to a freedom-of-speech defence. The minister says that the issue has not even been considered.
In concluding, let me say something that the fictional Sir Humphrey once said to his Prime Minister and that I hope someone has said to this minister: “If you must do this damn silly thing, don’t do it in this damn silly way.”

11:11

Bob Doris (Glasgow) (SNP): I hoped that I would never see the day in this chamber when Labour, in the form of Mr Kelly, would use our sectarian problems for party-political point scoring. In his speech, Mr Kelly suggested that the SNP had come on board late to tackle the scourge of sectarianism. His comment was unworthy of our debate and I thought that we would struggle to exceed it, until I heard Mr Lamont’s speech. Denominational schooling does not foster sectarianism, but intolerance of denominational schooling can do so. We witnessed a little of that intolerance in Mr Lamont’s speech this morning.

I stress two other points in relation to tackling sectarianism. First, despite some of the comments that we have heard in the chamber today, sectarianism is not specifically a west-of-Scotland problem—that is just wrong. Secondly, sectarianism at football grounds does not occur only with some Celtic or Rangers supporters—it happens to varying degrees with different football supporters at different clubs across Scotland. We witnessed a little of that intolerance in Mr Lamont’s speech this morning.

Bob Doris: I am sorry, but I have only four minutes. I do not have time to take an intervention.

The speed of the bill process and the degree of scrutiny to which the bill is subject have been hot topics, to say the least. There is a balancing act to be performed. Do we have the bill on the statute book before the start of the new football season, or do we afford greater time for consultation and scrutiny? There is a reasonable debate to be had about that, but there is no black and white here—it is a judgment call. On balance, I agree that we should be fleet of foot and act quickly to get the bill on the statute book before the start of the football season. On balance, that judgment is correct. We need to focus on the start of the new season. That is why the bill has been introduced now.

I turn to how the police and the courts will use the bill—specifically, its interpretation. I strongly believe that having a list of approved or proscribed songs or actions would be unworkable and unhelpful, no matter how long we take to scrutinise the bill. That is why there are no specific lists for breach of the peace. Under common law, breach of the peace is “conduct which presents as genuinely alarming and disturbing, in its context, to any reasonable person.”

There are no specific lists of conduct that falls into that category. We must proceed likewise in the bill. However, as we have heard, there will be guidance.

Margo MacDonald: Will the member give way?

Bob Doris: I have only four minutes. I ask Margo MacDonald to sit down.

Margo MacDonald: The member is lucky to have four minutes.

Bob Doris: The specifics of the bill relate to how some people in our society use football as a vehicle to peddle sectarianism and hatred. Although there is other relevant legislation, there is clearly a legislative gap on the specifics of football. This emergency bill seeks to fill that gap and I support it for the reasons that I have given. I ask for reassurance that there is robust post-legislative scrutiny and follow-up legislation if need be.

In his opening speech, Mr Kelly suggested other ideas for future legislation, which we should not rule out. I listened carefully to what he had to say.

I apologise to Margo MacDonald and other members for not being able to take their interventions, but time has been rather short.

11:15

David McLetchie (Lothian) (Con): A great many fine words have been spoken this morning, none better than those of the Minister for Community Safety and Legal Affairs in her opening speech, which reflected our collective sense of outrage and shame at the behaviour of some of our fellow Scots at football matches, not only during the season just gone, which was truly an annus horribilis, as someone might have said, but in seasons past.

Those of us who love the game of football and who frequently attend matches to support our team, as I have been doing for nearly 50 years, have become so used to the vile and crude songs, abuse and chants that we have almost tended to regard it as an ingrained part of the game—an unpleasant part of the football experience that has to be suffered and that nothing will change.

The events of the season past have brought into focus the need to do more to tackle the problem, not just for the sake of the game but for the reputation of our country. To that extent, the resolve and determination of the Government should be welcomed. However, we sit in this Parliament not just to voice fine sentiments and noble aspirations and goals; we are here also to construct the laws that govern our citizens and it is in relation to a proposed law—not a tokenistic or symbolic offering, or a piece of political
prejudice and bigotry, but the expression of behaviour in Scotland embraces not just religious inescapable fact. For that reason, sectarian persuasion is only one aspect. That is an those to be found in Ireland, of which religious migration of people in both directions means that Northern Ireland—of which we have had a timely result of his erudite explanation of the history of our country and of Ireland, the court concluded that evincing vocal support for the Irish Republican Army in a public place could well be a breach of the peace, but it could not be an offence aggravated by religious prejudice under the terms of the Criminal Justice (Scotland) Act 2003.

The bill before us makes exactly the same error. It is heavy on explicit references to membership of “a religious group” or “a social or cultural group with a perceived religious affiliation”, but it says nothing explicitly about behaviour that expresses support for terrorist organisations, be they republican or loyalist, which have been responsible in recent years for the murders of thousands of our fellow citizens. There will be no public confidence in the proposed measures unless that sort of behaviour is specified in the bill. I am afraid that the ministers’ answer that such conduct can fall into some other generalised sub-category will not wash. We will, therefore, lodge an amendment at stage 2 to repair that omission, and I urge the Government to consider it seriously.

The Scottish Conservatives will abstain in the stage 1 vote, in order to give the Government an opportunity to address our concerns on that and other issues, and we will make our final judgment at stage 3.

11:21

Johann Lamont (Glasgow Pollok) (Lab): We all acknowledge the significance of the debate and the importance of the issue.

I will speak first about the timing and why that matters. The Lord Advocate said that we had a choice: we could talk to ourselves for a while, or we could just get on with it. Even with the very limited scrutiny that the Justice Committee could give to the bill, it was able to raise important questions—not in a hostile way, and not in a way that would be difficult for the Government—that I, for one, had not thought of before. Our process strengthens any legislation, even when we start from the point of view of supporting a bill. I hope
that, in her summing up, the Minister for Community Safety and Legal Affairs will make it clear that she disagrees fundamentally with the approach that the Lord Advocate took when he made his comments.

After the election, the Scottish Labour Party in particular wished to acknowledge what the SNP had done in winning the election. We said that we wanted to co-operate with the Scottish Government wherever we could, but that we reserved the right not to do so where we disagreed. When I said that—I have said it publicly—I did not imagine that the argument that I would get into would be on sectarianism, an issue that all members of the Parliament—particularly Jack McConnell during his time as First Minister—have highlighted and on which they have demanded that action be taken.

It is a matter of huge frustration that, instead of taking the current approach, we could have built unity by working through the parliamentary process on good proposed legislation, and thereby sent out a very strong message. The Government has made it difficult for people to build that unity. I object in the strongest of terms to any implication that says that we do not care about sectarianism if we oppose the bill. That is fundamentally unfair and unjust. We want to ensure that, if the bill is enacted, the voice coming from the Parliament says that we are united in opposing the behaviour that has promoted it and that we take the matter seriously. We do not want the law to be implemented in such a way that people can deride and disregard it.

We have lost an opportunity, at this early stage, to build such unity. We were explicitly told by ministers, by means of an argument that I found I could accept, that the clubs wanted the legislation to be in place before the new season started. That was a powerful argument for supporting the passage of the bill, but the clubs have in fact told us that that is simply not the case. We must ask what the truth of the matter is. Sadly, I am left with the feeling that the First Minister thought that it was a good idea to get the legislation in before the next season, and his ministers have been left to develop a post hoc rationalisation for doing that.

Margo MacDonald: If the First Minister and the Government were, at this late stage, to be persuaded by the arguments that the bill must be given greater scrutiny, would the Opposition find it in their hearts to applaud that step back rather than condemn it?

Johann Lamont: Absolutely. I am happy to condemn the SNP on a range of things, including its objections to the constitutional settlement but, on this issue, we can be united on getting the right legislation through. During stages 2 and 3 we want to do what we can to make the bill as strong as possible and we will reserve our judgment on the bill until the end of that period.

John Lamont talked about Catholic schools. In my constituency, I have Catholic and non-denominational schools of which I am immensely proud. It is inconsistent for people to argue that children going to separate schools causes discrimination, when we know that, historically, that is not the case. Further, it certainly does not make sense for someone who advocates private education to say that those difficulties are the consequence of separating children.

Alison McInnes asked a number of questions and I would welcome the minister making a commitment to answer them in writing, because that would help us in our further consideration of the bill.

There is a place for legislation that sends signals, clarifies issues and ensures that people understand that the subject with which it deals is a problem, so we do not simply say that there is no place for this kind of legislation. We will make a judgment on the bill after interrogating it further at stages 2 and 3.

I will ask the minister a number of questions. We accept that there are issues around breach of the peace legislation that can weaken the possibility of securing a conviction. I accept the role of legislation in naming the crime, which is why I support legislation on stalking and legislation that identifies trafficking and domestic abuse. I understand why that is being done and I do not think that that, in itself, should be an objection.

We have significant concerns, however, about how the legislation will be policed in public houses. I am not talking about a ridiculous scenario. I am concerned about the possibility that someone who is abusive and offends people in a pub in which the television is not on will not commit a crime, while someone who does so when the television is on will commit a crime. How will that be policed? Who should someone complain to? How will we train people who work in pubs to deal with that situation? That is not a trivial point; it is important. Related to that is the question whether someone who commits an offence was or was not going to the football, or had been going to go the football but changed their mind.

Those who do not wish this legislation to work will make hay in those areas and we must acknowledge that there are those who do not want it to work. I am not being mischievous, but there are people who, by the very nature of their bigoted behaviour, will want to find ways of undermining people’s confidence in the legislation.

Equally, we need to know what advice the police are getting. We are asking the police to implement legislation as it is getting royal assent. How do we
imagine that they are being trained? What are they to be told that they have to do? I would like reassurance on that matter.

Another area that we would like the minister to consider further concerns the question of domestic premises. Bob Doris made the point that sectarianism does not happen only at Celtic and Rangers games, but it is also true that it does not happen only at football games. Do we imaging that the bigot leaves his bigotry at the turnstile as he heads home? I know that, in our communities, sectarianism is the abuse of choice and that, when a football match is on, someone who has hostility to his neighbour will use their faith against them as a means of abusing them. We would like to know whether it is possible for the bill to encompass those situations. It is important that we do not allow the bill to be about just football. If we had had longer to think about the matter, we might have wanted to amend the hate crime legislation in a different way in order to identify specific behaviours in our community and in the football ground. In saying all that, I do not want to gainsay the important response to the events of last year.

I want the minister to respond in particular to the points from Tim Hopkins about why condition B in section 5(5) identifies only religious hatred and to say whether she would consider expanding that condition. I also ask the minister to respond to the critical issue of the sunset clause. For us, it is not a get-out clause. We must identify now how the review would take place and who would be involved in it. I would like the monitoring of the bill to be reported to the Parliament within six months and at regular intervals thereafter. If we get confidence on those matters, it might be that that would give us confidence in supporting legislation that we know must be seen as a response to unacceptable behaviour that has shamed us and shamed Scotland in the way that the minister identified.

11:30

Roseanna Cunningham: A great many points have been raised today. I will deal with as many as I can in this speech and will follow up others as quickly as possible.

There is support across the chamber for the aims of the bill. I welcome that, because it is helpful for us all to remember where we are trying to get to, even if we have the occasional disagreement on how we get there. A modern Scotland cannot continue to tolerate behaviour at football matches that stirs up any kind of hatred, or threats that are intended to cause others fear and alarm, on the internet or elsewhere. I believe that support for that aim is echoed across Scotland. People saw the scenes that we all saw and have had enough. Rightly, they expect this Government and this Parliament to do something about the situation.

We have taken decisive action from the start because it is our view that we should move quickly on the matter. We simply cannot run the risk of allowing the next football season to kick off in the same way in which the last one finished. That is the fundamental point that has driven us and is the reason why we did not try to extend the legislation much beyond its present scope. I will return to that point.

There has been support for taking action before the start of the new season. Support has come not only from the SFA, for the good and practical reasons that Stewart Regan outlined over the past day or two, but from Paul McBride, one of the people who was a victim of what happened at the end of last season. His view is that we are absolutely correct to bring in the legislation as quickly as possible and that there is no reason for delay.

James Kelly: Would the minister care to correct the impression that has been given that the football clubs asked for the legislation to be introduced by the start of the new season? Clearly, as was shown at yesterday’s Justice Committee meeting, that is not the case.

Roseanna Cunningham: I am not conscious that I ever indicated to anyone that the football clubs had asked us to do that. They certainly support the principle of the legislation, and are on record as saying so, and the SFA is definitely of the view that it needs to be in force before the start of the football season and should not be introduced in the middle of a football season.

A number of members have called for us to consider having a sunset clause, which would provide that the legislation would expire after a fixed period unless the Parliament agreed to keep it in force beyond the end of that period. There are significant concerns around attaching a sunset clause to legislation that involves the creation of criminal offences, not least of which is the risk that the sun might set in the period between someone having been convicted and having been sentenced. There are good reasons why, in the main, those clauses do not tend to attach to legislation that deals with criminal offences. However, I understand the concerns that lie behind the request and the Government is actively examining options for reviewing the operation of the legislation over time. We will take into account the concerns that have been expressed and we hope to bring a proposal back to the Parliament before the end of next week. I hope that members will accept that in the spirit in which it is offered.

Margo MacDonald: I remind the minister that the Terrorism Act 2006 requires to be renewed
every year. Perhaps we could consider that device?

Roseanna Cunningham: It will not surprise Margo MacDonald to know that we took that into account in relation to the requests that have been made. There are reasons why the provisions in the 2006 act would not apply in the same way in relation to the issue that we are discussing. I am happy to discuss the issue further with Margo MacDonald if she wishes.

There has been a lot of discussion and debate about whether the bill is needed, given the existence of other laws that could be used to prosecute individuals. In committee, the Lord Advocate and I used examples to make the point that there have been real concerns in recent years about the uses of breach of the peace and how they have been narrowed over time. We want the bill to provide further clarity for police and prosecutors by focusing on the core problem of behaviour that incites public disorder.

Alison McInnes asked a series of questions, some of which relate to specific figures, and I will make sure that she gets specific answers to those. I say this in the kindest way, but some of her questions suggest that she probably does not know a great deal about current Scots law. She asked what the definition of a reasonable person is in Scots law; everyone who is involved in Scots law has used that terminology endlessly in legislation and it is often integral to the working of the law. It is not defined, precisely because a reasonable person can change in all sorts of circumstances and over time. I undertake to get back to Alison McInnes on the specific issues to which we can easily provide an answer, but some of her questions go way wider than required for discussion of the bill.

Alison McInnes: Will the minister take an intervention?

Roseanna Cunningham: I really must get on if I am to deal with points from other members.

The second offence addresses threatening communications, including those that incite religious hatred. I believe that it will address a gap in the current law in Scotland when it is compared with legislation elsewhere.

A lot of points have been raised. One or two members mentioned freedom of speech. Of course, it was always possible to extend the second offence to include actual speech but, precisely because of the concerns that have been expressed here today—concerns that we share—we did not do so. I hope that members will accept that.

John Park made some rather more measured comments about changes in the way in which sectarianism might or might not have been tackled over the years. He must accept that, under the previous Administration, entirely new projects were started. Specific examples are the Iona Community, which worked with prisoners, and the sectarianism in the workplace project, which was funded through nil by mouth. For all the anti-sectarianism groups, this year’s financial contribution is more than £0.5 million, and that is working extremely well.

John Park: I acknowledge those projects, some of which have had lifespans over successive Governments. My point was that there was political leadership before 2007, but that shifted and the First Minister did not have the same focus. With hindsight, we all agree that that leadership should have stayed.

Roseanna Cunningham: In the two and a half minutes that I have left, I need to deal with what we are talking about today.

James Kelly raised a point about the definition of regulated football matches, which is exactly the same as it is in football banning orders. We are deliberately not changing it.

After John Lamont’s astonishing diversion into a diatribe against Scottish education, perhaps the Conservatives need to reconsider how they approach sectarianism in Scotland. What he said suggests that they are reckless about whether sectarianism gets stirred up even further. It was a quite astonishing intervention.

I hope that I have dealt with John Mason’s freedom of speech point.

Other members raised the issue of resources. We are in constant discussion with the police about the resources that will be required. Part of that discussion is taking place in the joint action group and announcements will be made on 11 July as a result of that work. I hope that members accept that.

I come to Johann Lamont’s perfectly fair point about the extent to which the fallout from such behaviour can extend far beyond football. She is absolutely right and I agree with her. I have not ruled out coming back with further legislation in future if we can identify how best to do that. However, we are using an accelerated timetable to pass the bill and we are trying to keep it as confined and defined as possible. I will have a discussion with Johann Lamont about the future.

I must conclude because time is short—I have 20 seconds. I underline the importance of the bill and remind members about the clear and unequivocal support given by Assistant Chief Constable Campbell Corrigan and the on-the-record support for the introduction of the legislation by Celtic Football Club and Rangers...
Football Club. Members are welcome to look at the record if they want to see the quotes.

The Presiding Officer (Tricia Marwick): That concludes the stage 1 debate on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. The question on the motion will be put after First Minister’s question time.

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Financial Resolution

11:40

The Presiding Officer (Tricia Marwick): The next item of business is consideration of motion S4M-00383, in the name of John Swinney, on the financial resolution for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any act of the Scottish Parliament resulting from the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b)(iii) of Rule 9.12 of the Parliament’s Standing Orders arising in consequence of the act.—[Roseanna Cunningham.]

The Presiding Officer: The question on the motion will be put following First Minister’s question time.
First Minister’s Question Time

12:00

Engagements

1. Iain Gray (East Lothian) (Lab): To ask the First Minister what engagements he has planned for the rest of the day. (S4F-00065)

The First Minister (Alex Salmond): I have meetings to take forward the Government’s programme for Scotland.

Iain Gray: Two weeks ago, I met the First Minister and told him that we want to support legislation against sectarianism, but I expressed serious concerns about the timetable. He told me that the football clubs were demanding that he legislate before the start of the season. Yesterday, both Rangers and Celtic said that the bill was too rushed. The Law Society, the churches and Christine Grahame, the convener of the Justice Committee, all agreed. The Lord Advocate said that the bill does not necessarily have to be in place before the football season. Does the First Minister now regret not acting for four years and having to squeeze the legislation into two weeks?

The First Minister: I listened this morning to the comments that were made across the chamber. I always listen to our partners in the enterprise to try to eliminate sectarianism and sectarian displays from Scottish football. I accept—I think that everybody accepts—that we have a majority in this chamber but we need consensus. On this issue above all, I want consensus; I want consensus across the chamber and across our partner organisations.

I ask Parliament at half past 12 to agree—unanimously or near unanimously, I hope—to the bill at stage 1 to allow consideration to continue. I will then propose that business managers, in consultation with the convener of the Justice Committee, discuss a new timetable that will allow for further consideration and evidence to be taken on the bill in advance of formal consideration of stage 2 amendments at the Justice Committee. Stage 3 proceedings would then follow in the usual manner for a public bill, with the intention behind such a timetable for discussion being that the bill would be passed by the end of this year. If Parliament agrees to the general principles of the bill at 12.30, I will ask Bruce Crawford to initiate discussions with business managers.

What we say in this place on this issue has huge ramifications across society, so I hope that we can allow for the probability—the certainty, even—that each and every single one of us wants to eliminate sectarianism and sectarian displays from Scottish football, and that each and every
one of us wants to eliminate sectarianism from Scottish society.

What we do as a Parliament and how we avoid the opportunity to attack each other on who said what when, or who did what when, is an important part of that joint message. I hope that the Parliament will accept that there is a huge and genuine urgency in the matter, and that it will also accept that this Government wishes to achieve consensus in Parliament and throughout Scottish society.

Iain Gray: I welcome the fact that the First Minister has listened to the concerns about the timetable. It is certainly the intention on this side of the chamber to support the principles of the bill. I made it clear that we want to support the Government in legislating against bigotry in football and, indeed, anywhere else.

To achieve consensus, however, we have to try to get the approach right. This week’s examination of the bill has not helped with that. At her appearance at the Justice Committee, the Minister for Community Safety and Legal Affairs struggled to clarify what actions would be caught by the bill. Indeed, the Lord Advocate had to return to the committee yesterday to provide further clarification. In the spirit of achieving consensus, I ask the First Minister to clarify now how actions such as singing the national anthem or blessing oneself could be considered a crime under the bill.

The First Minister: I advise Iain Gray to look at the words of the minister and those of the Lord Advocate, who was actually making his first appearance before the committee. As the Lord Advocate explained, these things depend on “the facts, the circumstances and the context”—[Official Report, Justice Committee, 22 June 2011; c 101.] as has always been the case with many offences in Scots law.

I am going to avoid the obvious temptation of saying that, in dealing with this subject, we have to be prepared to recognise that each of us has a bona fide interest in driving sectarianism out of the game of football and out of Scottish society. The bill that has been introduced is, I think, clear in its intent and purpose and can be clearly implemented. The objections that have been raised against it are not—by a vast majority—about intent or even content, but about whether enough time is being allowed to give wider society, and the groups and interest groups that we carry with us, their say on the bill. That was one of the points that was made by the Labour spokesperson in this morning’s debate. What I am offering in good faith to the chamber is exactly the opportunity to do that.

Given that offer, given what people have said in the debate and given what is—believe me—the reservoir of goodwill from people across Scottish society to a Parliament that is prepared to take action on this matter, cannot we now go forward on that basis?

Iain Gray: If the First Minister had listened, he would have heard me say that, yes, we can go forward on that basis. However, that does not mean that we can sidestep difficult questions about legislating on such a difficult and sensitive area, or questions about the way in which the legislation, which we want to be put in place, will be implemented.

Concerns have been raised this week not only about the timescale, but about resourcing implementation of the legislation. Les Gray of the Scottish Police Federation said that he supports the bill, but it will not work without resources and the financial memorandum is not enough. Given that we all must prove that we are serious about legislating properly and ensuring that legislation works, will the First Minister make any commitment with regard to the additional resources that will be required to implement the legislation and make it work?

The First Minister: The resources will be in place to ensure that the legislation is implemented effectively. I know that Iain Gray will be the first to acknowledge that the evidence from the Association of Chief Police Officers in Scotland and from the responsible police officers who are in the front line, which demonstrated their strong welcome for the legislation and their confidence in their ability to implement it, is a factor that I am sure carries away with people across the chamber in their wish to support it.

Iain Gray: One of the statements about the bill that the minister made this week—and which I welcomed—was that this would not be the beginning and end of legislation or other action to address sectarianism and bigotry. As the First Minister well knows, we have for some years now argued that we must at community level, and through educational measures in particular, work to root out this aspect of our society. What other measures does the First Minister envisage will follow consideration of the bill, that will go beyond football into wider society and, indeed, beyond legislation?

The First Minister: I am glad that Iain Gray has given me the opportunity to state that the legislative arm of the actions of the joint action group was only one of six workstreams and that the other five workstreams will report to the Government in the next few weeks. Obviously, we will want to share that work. One useful aspect of that timetable—and, indeed, of the new timetable for legislation—is that it will enable people to see...
that legislative action is only one of the initiatives that are being taken in football. Moreover, initiatives in the game of football form only one part of the initiatives that will be taken across society. Again, I say that I listened to the debate this morning.

The support for community-based organisations working against sectarianism has in the past few years been greater than ever before. In financial terms, over the past four years a budget of £224,000 has become a budget of £525,000. I think that John Park said in the earlier debate that he had come across the organisation Show Bigotry the Red Card. Both Iain Gray and I attended the launch of that organisation. However, what is perhaps more important is that in the coming year the funding for its valuable work is £120,000. That organisation is coming to the attention of members and the wider society in football because it is one of the many groups that are being funded by the Government at the present moment. The community initiatives, the educational initiatives and particular organisational initiatives will continue to be supported in a co-ordinated fashion.

However, I am grateful to Iain Gray for giving me the opportunity to point out that the legislative arm is only one of the initiatives on how we will drive this evil out of the game of football. I listened to every aspect of the debate and I have spoken to many of our stakeholders, whose urgency and support in this matter are absolute in terms of their determination. I hope and believe—and I take people at their word on this—that by making available the timetable for fuller consideration, we will be able to carry the Parliament unanimously, and together exorcise and drive out this blight from our game of football and from our country.

Secretary of State for Scotland (Meetings)
2. Annabel Goldie (West Scotland) (Con): To ask the First Minister when he will next meet the Secretary of State for Scotland. (S4F-00058)

The First Minister (Alex Salmond): I will meet him on Saturday, alongside the Prime Minister, the Secretary of State for Defence and others when the Duke of Rothesay takes the salute at the armed forces and veterans parade that forms part of the celebrations for armed forces day.

Annabel Goldie: We all agree that we must deal with sectarianism, which is vile, odious and utterly unacceptable. The imperative of the majority Scottish Government is to get the bill right, so I welcome the common sense that has broken out and the Scottish Government’s recognition of the need for a longer timetable. I am not given often to praising the First Minister, but he has shown maturity in accepting that his Government had not got the bill right. I say to him well done for accepting that and for putting the bill on to a much more realistic footing.

It seems that, under the bill as drafted, there are circumstances in which making the sign of the cross or singing the national anthem could constitute a crime. Within the bill, criteria range widely: from hatred, to behaviour that is threatening or offensive, to behaviour that is likely to incite public disorder. Can the First Minister confirm that, with the new timetable, the Scottish Government will look at whether the criteria in the bill are consistent with previous legislation? Now that a more extensive consultation process is possible, will the Scottish Government consider whether the criteria as currently listed are adequate?

The First Minister: I believe that the criteria are adequate. I think that anyone who listened to and saw the Lord Advocate explain exactly those points before the Justice Committee yesterday would be fully satisfied that the nature of the bill is well within the tradition of Scots law, because it depends on facts, circumstances and context. Some of the stories that have been running this week have no basis in reality in that sense. The Lord Advocate gave excellent examples to explain that, so that even non-lawyers like me would understand. I thought that his evidence put the canard to rest. We should bear that in mind.

The bill—as Annabel Goldie knows, the legislation has two parts: offensive behaviour causing public disorder at and around football matches, and threats that incite serious harm or religious hatred—is certainly the type of legislation that is required. With the extra time that will be available for discussion and debate, I am sure, and I welcome Annabel Goldie’s indication of this, that the Conservative party will be able to support the legislation.

Annabel Goldie: I will broaden this out a bit. Even if over the longer timetable—which is very welcome—we address some of the ambiguities and uncertainties in, and maybe even limitations of the bill, the sad and ugly truth is that in certain parts of the west of Scotland we have embedded and entrenched sectarian attitudes. The bill is only part of solving the problem. What is the Scottish Government’s strategy to deal with that repugnant culture that, sadly, runs more broadly than just in football stadia or certain pubs?

The First Minister: We must not underrate the importance of not tolerating sectarian displays in our national game. There is a consequence of that happening for generations in Scottish society. Sometimes societies decide that, on the balance of opinion, enough is enough and something requires to be done, and something that was acceptable or seen to be tolerated a generation ago no longer has a place in a civilised
society. The two things are interlinked because of the importance of our beautiful game of football and the power that it has for good, which must be mobilised—a point that was made by our church leaders during the debates that we had earlier this year. The work on driving sectarianism out of football is only part of a wider approach involving community and educational initiatives. I would be glad to go through the organisations and the import of what is being supported. We must not underrate the extent to which the two are connected.

If Annabel Goldie will allow me to do so, I will make an observation. It is rather unfortunate if I contributed to the sacking last week of Paul McBride QC as an adviser to the Conservative Party; I did not mean to do so. I have been following closely what Mr McBride has had to say about the bill. He is an advocate with huge experience in Scots law and his support for the bill has been fully in the traditions of Scots law. His has been one of the powerful voices arguing for action to be taken as quickly as possible.

Kezia Dugdale (Lothian) (Lab): In the light of new information regarding the cost of the Edinburgh trams project, does the First Minister agree that the time has come to instigate a full public inquiry?

The First Minister: I am supportive of a public inquiry into the trams project. We should let the City of Edinburgh Council continue its deliberations, but a public inquiry would be an excellent thing to do. I say as gently as possible to the member that, if it comes to a public inquiry, some people and some political parties will have more to worry about than others.

Cabinet (Meetings)

3. Willie Rennie (Mid Scotland and Fife) (LD): To ask the First Minister what issues will be discussed at the next meeting of the Cabinet. (S4F-00062)

The First Minister (Alex Salmond): The next meeting of the Cabinet will discuss issues of importance to the people of Scotland.

Willie Rennie: When politicians change their minds, we must welcome their reflection and consideration rather than complain and criticise. I offer my thanks to the First Minister for listening on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

The First Minister: I welcome that acknowledgement from the Liberal Democrats. It gives me great hope that, as we go through the process as a Parliament, we can set an example to wider society, as Scotland would expect.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Stage 1

The Presiding Officer (Tricia Marwick): I will now put the question on motion for the stage 1 debate for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

The question is, that motion S4M-00357, in the name of Kenny MacAskill, on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Galloway and Inver Isles) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Angus (Falkirk East) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Doon Valley) (SNP)
Fergusson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffith, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macdonald, Margo (Lothian) (Ind)
MacIntosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McCulloch, Margaret (Central Scotland) (Lab)
McDonald, Mark (North East Scotland) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfries and Galloway) (Lab)
Parker, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmaze, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge andChryston) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkaldy) (SNP)
Urqhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against
Hume, Jim (South Scotland) (LD)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scott, Tavish (Shetland Islands) (LD)

Abstentions
Brown, Gavin (Lothian) (Con)
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Financial Resolution

12:31

The Presiding Officer (Tricia Marwick): I will now put the question on the financial resolution for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

The question is, that motion S4M-00383, in the name of John Swinney, on the financial resolution for the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, be agreed to.

Motion agreed to,

That the Parliament, for the purposes of any act of the Scottish Parliament resulting from the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, agrees to any expenditure of a kind referred to in paragraph 3(b)(iii) of Rule 9.12 of the Parliament’s Standing Orders arising in consequence of the act.

The Presiding Officer: I suspend the meeting until 2.15.

12:31

Meeting suspended.
Business Motion

The Presiding Officer (Tricia Marwick): The next item of business is consideration of business motion S4M-00393, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a business programme.

16:58

The Cabinet Secretary for Parliament and Government Strategy (Bruce Crawford): Presiding Officer, after the First Minister's announcement earlier today, I propose to take a revised proposal for next week's business to next week's meeting of the Parliamentary Bureau. I will therefore not be moving S4M-00393.
Offensive Behaviour at Football and Threatening Communications: Paul Martin, on behalf of the Parliamentary Bureau, moved S4M-00449—That the Parliament agrees that, for the purposes of Stages 2 and 3, the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be no longer treated as an Emergency Bill, and that—

(a) for the purposes of Rule 9.7.1, the Justice Committee be designated as lead committee; and

(b) consideration at Stage 2 be completed by 11 November 2011.

The motion was agreed to (DT).
# Justice Committee

## 1st Report, 2011 (Session 4)

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Justice Committee

Remit and membership

Remit:

To consider and report on:

a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and

b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
James Kelly (Deputy Convener)
John Lamont
Alison McInnes
Graeme Pearson
Humza Yousaf

Committee Clerking Team:

Peter McGrath
Joanne Clinton
Andrew Proudfoot
Christine Lambourne
The Committee reports to the Parliament as follows—

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Non-legislative measures
1. The Committee notes that the Government does not consider that the Bill is a solution in itself to what the Government sees as Scotland’s sectarian problem. We would be interested to know what other non-legislative action the Government proposes to take, and invite it to clarify whether it has examined, or proposes to examine, for example work done in Northern Ireland.

The Bill, young people, and the criminal justice system
2. The Committee draws to the Scottish Government’s attention some witnesses’ concerns that the Bill should not bring large numbers of young people into the criminal justice system. We note the general availability within the criminal justice system of diversions from prosecution and non-custodial disposals in appropriate cases.

Timetabling of the Bill
3. The Committee recognises that the Scottish Government accepted the case for taking more time to consider the Bill.

Provision for review
4. The Committee notes that the Scottish Government may be receptive to the inclusion of a provision in the Bill requiring the Scottish Government to undertake formal review of the legislation after an appropriate point, should it be enacted. The Committee would welcome the inclusion of a review provision.

Role of the media in Scottish football
5. The Committee notes the important role the media play in relation to the reporting of Scottish football. This places an onus on the media to use this power responsibly.

Dealing with offensive behaviour at football – the law
6. The Committee believes that there are lasting problems surrounding offensive behaviour in Scottish football that need to be dealt with.
7. A majority\(^1\) of the Committee support the new offence of offensive behaviour at football. The majority believe that the Government has made the case that there are gaps in the law that do not enable the police and prosecutors to target offensive behaviour effectively.

8. The Committee would welcome clarification from the Lord Advocate as to whether section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is being used this season to prosecute cases of offensive behaviour at football matches. If so, we would also welcome an assessment from the Lord Advocate of the efficacy of that provision in obtaining convictions.

9. The Committee agrees that it is important to label offences so that it is clear whether a hate crime has been committed and, if so, what type of hatred it is. “Naming and shaming” can be an important weapon in the criminal law’s armoury, in helping to change attitudes about what is considered socially unacceptable. The Committee would welcome clarification that the Crown Office and Procurator Fiscal Service are seeking to ensure the right data is captured for football-related offences.

Dealing with offensive behaviour at football – the football authorities
10. The Committee agrees that the football authorities have failed to take firm action to deal with offensive behaviour at football. Over many years, they have allowed the issue to drift. If firm action had been taken earlier, offensive behaviour at football might have been stamped out, or at least significantly reduced.

11. It is for the SFA and the SPL to determine once and for all who has authority in relation to disciplinary issues concerning the supporters of SPL clubs. We are dismayed that the two bodies do not appear to be close to resolving this issue at a time when clear leadership, and effective joint working, is badly needed. We would expect this matter to be dealt with as a matter of urgency.

Offensive behaviour at football – detail of the offence
12. The Committee notes a general view amongst witnesses that aspects of the section 1 offence remain unclear. The Lord Advocate’s draft guidelines to the police are welcome but the Committee notes that it is also important to ensure that the legislation itself is robust.

13. The Committee is supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. We invite the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.

14. The Committee invites the Scottish Government to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights.

15. The Committee notes the Scottish Government’s assurances that the purpose of the section 1 offence is to protect public order in relation to football matches rather than to create a “hate crime” that outlaws certain behaviour

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\(^1\) Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; Humza Yousaf MSP
whether or not anyone else is present to be offended or provoked. We seek the Scottish Government’s views on whether this could be made clearer in the drafting of the section 1 offence.

16. The Committee would also welcome the Scottish Government clarifying its views – whether in the legislation or in, for example, the Lord Advocate’s guidance to the police – as to the section 1 offence’s application to venues such as supporters clubs, where it may be presumed that those present would generally be of a like mind. At the same time, the Committee recognises the basic right of all employees to work in a dignified environment, free from language or behaviour that they may consider offensive towards them.

17. The Committee acknowledges that offensive behaviour that may provoke public disorder can be a problem in relation to matches televised in public places (pubs for instance), that this sort of behaviour is unacceptable, and that it may sometimes be necessary to apply the criminal law to deal with it. If there is to be a new offence of offensive behaviour at football matches, we accept that it is appropriate that it cover televised matches. But the Scottish Government should consider whether the parameters of the offence in relation to televised matches need to be made clearer.

18. The provisions in the Bill concerning travel to or from matches raise similar questions about whether or not particular situations are covered. We accept that some of the worst manifestations of offensive behaviour that provoke public disorder can occur when fans are travelling to a match (often with little concern about whether they actually get inside the stadium) and that it is appropriate to seek to make provision for this. Again, we invite the Scottish Government to consider whether there is scope to make the relevant provisions any more clear.

Offence of threatening communications – general views

19. The Committee supports efforts to prevent hateful and inflammatory communications online and in other types of new media. There is a need to make sure that our laws are robust and up-to-date, in order to deal with this fast evolving milieu. It would be a matter of concern if gaps in the current law prevented the successful prosecution of serious cases of hateful communication. Not all Members are wholly convinced that the Scottish Government has made a clear case that those gaps exist, particularly in view of recent successful prosecutions under the current law.

20. However a majority² of the Committee are prepared to support the proposal for a new offence of threatening communications. The majority notes that the creation of this offence may provide greater certainty to online users about what is and is not legally acceptable under Scots law.

21. The Committee would welcome the Government (a) giving consideration to our queries and recommendations below on how the provision might be made more effective, and (b) providing further information to the Committee on whether and, if so, why, section 38 of the Criminal Justice and Licensing (Scotland) Act

² Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; Humza Yousaf MSP
2010 is not considered adequate to prosecute threatening online communications, despite a number of apparently successful recent prosecutions.

22. The Committee invites the Scottish Government to note the comments of some organisations about the danger of drawing large numbers of children and young people into the ambit of the criminal law or the Children's Hearing system via the new offence of threatening communications.

**Threatening communications – protection of freedom of speech**

23. The Committee notes that the Scottish Government is open to considering the inclusion of a provision protecting freedom of speech in relation to the new offence of threatening communications, to provide assurance that section 5 of the Bill does not inhibit the free, open and, perhaps at times offensive expression of views on religious matters. We would welcome such a provision.

**Threatening communications – widening the ambit of the offence?**

24. The Committee recognises differing views on whether to widen section 5 (offence of threatening communications) to cover other categories of protection, and acknowledges that this is an issue that would require more consideration. The Committee therefore invites the Scottish Government to consult on widening section 5 at an appropriate point should the Bill be passed.

25. The Committee would not support the widening of the section 5 offence to include unrecorded speech, because we recognise the civil liberties implications of creating a law that, perhaps unwittingly, has the potential to criminalise private conversation or conversation within domestic premises.

26. The Committee would welcome clarification as to whether a live stream of a speech or conversation would be deemed to be “unrecorded speech” under the Bill.

**Threatening communications – enforcement and extraterritoriality**

27. The Committee notes the resource implications of section 5, if it were enforced to its full extent. We consider that this points to the likelihood of it being used for “exemplary” purposes to deal with extreme cases of threatening behaviour online. The Committee would welcome the Scottish Government clarifying what resources and training are being provided to law enforcement services to deal with online crime generally. We note the suggestion that an advisory committee of experts might be appointed to assist in the development of effective law enforcement in the online sphere.

28. Given the absence of clear national barriers online, the Committee accepts the case for an extraterritorial provision in respect of the offence of threatening communications. The Committee expects that use of it would be restricted to exceptional cases, where it is considered in the national interest to pursue a conviction and there is reasonable prospect of it being successful.
INTRODUCTION

29. The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill\(^3\) was introduced into the Parliament on 16 June 2011. The Bill makes provision for two new offences: offensive behaviour at regulated football matches; and threatening communications. Both are punishable up to a maximum of five years imprisonment.

Background to the Bill

30. The background to the Bill and its overall aims are set out in the Scottish Government’s policy memorandum\(^4\) accompanying the Bill and rehearsed further in the briefing\(^5\) on the Bill prepared by the Scottish Parliament Information Centre. Ministerial speeches in the Stage 1 Parliamentary debate on the Bill also set out the Government’s thinking in promoting the Bill. We do not propose to elaborate much further on these matters in this report.

31. It is, however, important to note at the outset that the Government envisaged the Bill as a response to the widely reported events that occurred on and off the pitch during the 2010-11 Scottish Premier League football season. This included threatening mail, including parcel bombs, being sent to certain individuals apparently because of their links to particular football clubs (Celtic in particular) and hateful messages being posted online. The Government has presented the Bill as complementary to the work of the Joint Action Group,\(^6\) comprising representatives of the Government, the Old Firm, football authorities and the police, set up in the aftermath of a particularly stormy Celtic-Rangers match on 2 March 2010, although not every member of the group has, in the end, fully signed up to the Bill.\(^7\) It was, and is, the Government’s view, that new laws are needed to address the problem.

“Sectarianism” and the Bill

32. The events leading to the Bill have tended to be described in the media and by the Government as being sectarian in nature. The policy memorandum

\(^3\) Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, as introduced (SP Bill 1, Session 4 (2011)). Available at: http://www.scottish.parliament.uk/s4/bills/01-offbehfoot/index.htm

\(^4\) Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Policy Memorandum (SP Bill 1, Session 4 (2011)). Available at: http://www.scottish.parliament.uk/s4/bills/01-offbehfoot/b1s4-introd-pm.pdf


\(^6\) The JAG produced a report on 11 July with 40 agreed action points, mainly pertaining to the roles and functions of football governing bodies, clubs and referees, to be taken forward in parallel with the proposed Bill. (http://www.scotland.gov.uk/Publications/2011/07/football-summit-report) [Accessed October 2011]

\(^7\) Celtic and Rangers Football Clubs expressed reservations with the Bill before the Committee when it was being proposed as emergency legislation; Scottish Parliament Justice Committee. Official Report, 22 June 2011, Col 113 and 115-116. See also Celtic Football Club. Written submission; Rangers Football Club. Written submission.
repeatedly refers to “sectarianism”, “religious hatred” and “bigotry”, and it would appear that these are to be understood as having broadly similar meanings.

33. The exact nature and meaning of “sectarianism” in Scotland is a complex and controversial subject. The anti-sectarian charity Nil by Mouth remarked in its written submission to the Committee that sectarianism “transcends its dictionary meaning when applied in Scotland” and that it is a “fusion of religion, politics, identity and ignorance.” Whole books and theses have been written on the subject of sectarianism in Scotland.

34. The Committee does not propose to add to this literature, other than is necessary for the purpose of scrutinising the Bill. It is sufficient to note at this early point that, as discussed later on, the Bill extends beyond what would generally be described as “sectarian” behaviour, even if a very wide definition of the term were applied. In other words, the Bill would go beyond seeking to address the most notorious events surrounding the last football season. This is expressly acknowledged in the policy memorandum.

Dealing with sectarianism, bigotry and hatred: the wider context

35. The Government and other witnesses argue the Bill is necessary. Others disagree. Those arguments are dealt with later in the report. Then there are those who can see a possible need for the Bill but think that non-legislative measures to deal with sectarianism or intolerance are just as important, or more so. We should also mention that there are those who expressed doubts that something called “sectarianism” meaningfully exists in modern Scotland, a view that the Scottish Government strongly disputes, as does the Committee.

36. A number of organisations have drawn the Committee’s attention to the work they and others carry out to combat bigotry and intolerance. We are grateful for this evidence, which has helped remind the Committee that there is a much bigger picture, beyond the criminal law. Evidence from organisations working with children and young people has underlined that both the problem and the solution start early. Attitudes towards “difference” and “otherness” – both negative and positive – are ingrained from an early age. Parents and other early-years role models have a crucial role to play in helping nurture positive attitudes and respect for difference. So does education. This ties in with a key theme in modern Scottish public affairs, the importance of early intervention and preventative spending – spending to save, in other words – a point made expressly by Nil By Mouth in its submission.

37. Some witnesses queried why football was being specifically targeted in the legislation and not, for instance, parades and marches of a perceived sectarian character. (In similar vein, we had drawn to our attention evidence showing that the vast majority of cases of criminality aggravated by religious hatred took place

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8 See also eg Harps Community Project. Written submission. Grand Orange Lodge of Scotland. Written submission.
9 See also eg Harps Community Project. Written submission. Grand Orange Lodge of Scotland. Written submission.
10 Eg Amnesty International. Written submission; Action for Children Scotland. Written submission.
11 Eg YouthLink Scotland. Written submission; Children in Scotland. Written submission; Action for Children Scotland. Written submission; Childline in Scotland. Written submission; Scottish Parliament Justice Committee. Official Report, 13 September 2011, Col 262.
12 Eg Paul Cochrane. Written submission; Tom Minogue. Written submission.
outside of a football context.\footnote{Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 243.}) It was useful and interesting to receive views of this sort, which again reminded us of the bigger picture. However, the Committee’s attention has primarily focussed on the content of the Bill and on whether it would be a valuable addition to the criminal law, rather than what is not in it.

38. Our attention was also drawn to what was perceived as the good work done in Northern Ireland in recent years to address social problems that are in many respects similar to those found here. Some felt that Scotland had been left behind by the progress made there.\footnote{Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 188; Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 266; Amnesty International. Written submission; Council of Ethnic Minority Voluntary Sector Organisations Scotland. Written submission.}

39. The Scottish Government has been clear from the outset that this Bill is not intended to solve the “sectarian” problem on its own. In her opening statement to the Committee on 21 June, the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, told the Committee—

> “I know that sectarianism is not confined to football. It is a much wider and deeper problem for Scotland, and this Government is committed to rooting it out. The bill is therefore only part of a much wider programme of actions against sectarianism. It is, however, a vital first step in the Government's programme in this new session of Parliament.”\footnote{Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 16.}

40. Several organisations said it would be helpful if the Government clarified what other action it proposed to take to combat sectarianism that would be complementary to the Bill.\footnote{Eg Nil By Mouth. Written submission. Coalition for Racial Equality and Rights. Written submission. Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 263}

The Bill, young people, and the criminal justice system

41. There were also those who, whatever they thought about the Bill in general, worried that it might lead to many thousands of people, especially young men and adolescent males, coming into contact with the criminal justice system.\footnote{Eg Celtic Supporters Trust. Written submission. Children in Scotland. Written submission.} They saw this as a potentially clumsy and counter-productive (not to mention expensive) way of trying to improve individual and societal attitudes. Tom Halpin of the charity Sacro, which works to reduce re-offending, told us that—

> “If the definitions in the bill are enforced in their broadest sense, beyond the current good intentions … young people who are engaging in what should be a positive cultural community activity, such as going to a sporting event, could be caught up with peer group activity and end up, all of sudden, in the criminal justice system, rather than the underlying bigotry being dealt with.”\footnote{Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 257.}

42. Some further views were expressed specifically in relation to the “threatening communications” offence and young people, and we address these later in the report.

\footnotetext[17]{Eg Celtic Supporters Trust. Written submission. Children in Scotland. Written submission.}
43. In relation to the enforcement of both proposed offences and the likelihood of large numbers of individuals being prosecuted, the Scottish Government’s financial memorandum accompanying the Bill states in the introduction that “it is crucial to the estimates that follow that much of the behaviour that the provisions cover is already criminal and therefore liable to prosecution.”\textsuperscript{19} The memorandum goes on to downplay the prospect of the Bill imposing significant new costs on the police, courts and prison services. It notes the potential wideness of the two new offences (including extraterritorial aspects, discussed later) and remarks that “the potential costs of enforcing all such instances of the offences would be unsustainable.”\textsuperscript{20} The memorandum refers to “an initial period of activity” after the Bill is enacted, but adds that “the anticipated overall costs will reduce over time as public information and the awareness of successful prosecutions begins to have a deterrent effect, and more general preventative approaches … begin to take hold.”\textsuperscript{21}

44. These sentiments were echoed in comments by Les Gray of the Scottish Police Federation that the police would want to “hammer”\textsuperscript{22} the legislation in the first year of its enforcement, to underline its deterrent effect. However, Assistant Chief Constable Campbell Corrigan reassured the Committee that giving the police the new powers would not mean that on match days they would “destabilise a crowd by wading into it and trying to take out large numbers of fans”.\textsuperscript{23} He said the Committee could expect the police to take a proportionate approach.

45. The Committee notes that the Government does not consider that the Bill is a solution in itself to what the Government sees as Scotland’s sectarian problem. We would be interested to know what other non-legislative action the Government proposes to take, and invite it to clarify whether it has examined, or proposes to examine, for example work done in Northern Ireland.

46. The Committee draws to the Scottish Government’s attention some witnesses’ concerns that the Bill should not bring large numbers of young people into the criminal justice system. We note the general availability within the criminal justice system of diversions from prosecution and non-custodial disposals in appropriate cases.

Procedural history of the Bill

47. The Bill has an unusual procedural history. The Scottish Government initially intended to fast-track the Bill through Parliament so that it could become law in time for the new football season in late July 2011. To do this, it proposed that the Bill should be treated as emergency Bill, except that it proposed placing a gap between Stage 1, to be taken on 23 June, and Stages 2 and 3, to be taken on 29 June. (Under standing orders, the ordinary position for emergency Bills is that the Parliament takes all three Stages on the same day.)

\textsuperscript{19} Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Explanatory Notes (and other accompanying documents) (SP Bill 1, Session 4 (2011)), paragraph 45. Available at: http://www.scottish.parliament.uk/s4/bills/01-offbehfoot/b1s4-introd-en.pdf

\textsuperscript{20} Explanatory Notes, Paragraph 52.

\textsuperscript{21} Explanatory Notes, Paragraph 51


48. The Justice Committee took evidence on the Bill, from five panels of witnesses on 21 and 22 June. We did so in the awareness that we would not have time to produce a report on the Bill in time for the Stage 1 debate. Our intention was to take as much evidence as possible in the limited time available so as to help inform that debate and any future debates on amendments. The Committee also issued a call for written evidence on the Bill (necessarily with a very short deadline for responses) targeted at key stakeholders.

49. Questions were raised at those two meetings about the Bill and about the use of emergency procedure.

50. On 23 June, the Parliament first debated a motion to treat the Bill as an emergency Bill. This was agreed to after a division. The Parliament then agreed by division to consider the Bill according to the timetable set out in paragraph 3 above. The Parliament then debated the Bill at Stage 1.

51. Shortly after the debate, and just before the Parliament was to vote on whether to approve the general principles of the Bill at Stage 1, the First Minister announced that, if the Parliament agreed to the general principles, he would propose an extended timetable for consideration of the Bill at Stages 2 and 3, to enable the Bill to be passed by the end of the year. He said he hoped that providing more time for evidence-taking on the Bill would increase the likelihood of the Parliament and wider Scottish society achieving consensus on the issues raised.

52. The Committee recognises that the Scottish Government accepted the case for taking more time to consider the Bill. We warmly thank those witnesses who appeared before us in June for agreeing to do so at extremely short notice and before they had had the time to fully consider and discuss the implications of the Bill. Their testimony helped secure more time for consideration.

53. Following the First Minister’s comments, the Parliament went on to approve the general principles of the Bill at Stage 1 (by a majority of 103 to 5, with 15 abstaining).

54. On 29 June, the Parliament agreed without division a motion not to take the remainder of the Bill as an emergency Bill, that the Justice Committee be the lead Committee on the Bill, and that Stage 2 be completed by 11 November. This enabled the Committee to extend the deadline for written submissions to Friday 26 August 2011.

“Sunset clauses” and provision for review of the legislation

55. Early on in the process outlined above, some Members of the Committee explored the possibility of a “sunset clause” being attached to the Bill. In essence, this would mean making provision for the Bill to auto-repeal, as it were, after a particular period of time. The intention was to explore whether this might provide reassurance to those concerned that the Bill was being agreed to without sufficient opportunity for scrutiny that it would have a limited shelf life. In the meantime, there would be opportunity for the Government and Parliament to have a more

considered look at the law and, if necessary, agree another Bill after proper consultation.

56. The Committee now accepts that the time for considering the inclusion of a sunset clause has passed. We are also aware of technical concerns with sunset clauses being used in criminal legislation.25

57. The Minister has indicated26 that she has an open mind about the possibility of making express provision in the Bill for the Bill’s use and effectiveness to be reviewed in due course, if it is enacted. Such provision for review has been made in a number of Acts of the Scottish Parliament. The review usually takes the form of a report prepared by the Scottish Government being laid before the Parliament, setting out statistical data connected with the legislation and an assessment of how effective the Government considers it has been.

58. Committees do, of course, have the general power anyway to review the effectiveness of legislation within their remit.

59. **The Committee notes that the Scottish Government may be receptive to the inclusion of a provision in the Bill requiring the Scottish Government to undertake formal review of the legislation after an appropriate point, should it be enacted. The Committee would welcome the inclusion of a review provision.**

**Overall purpose of this report**

60. As Stage 1 has passed, the opportunity for the Committee to produce a Stage 1 report to the Parliament has clearly passed as well. Accordingly the report does not comment on whether the Committee agrees with the general principles. The Parliament does however, have a final opportunity to consider whether to agree to the Bill at Stage 3, and it seems legitimate to the Committee that we should take the opportunity in this report to revisit some of the key arguments for the Bill from first principles. It is no less important to use the report to consider significant points of detail raised by witnesses, to help inform possible future debates on amendments at Stages 2 and 3. The Committee would suggest that some time therefore be provided in the Chamber to debate the report before amendments at Stage 2 are considered.

61. Thirty-three individuals or organisations gave oral evidence on the Bill (including the Minister for Community Safety and Legal Affairs and the Lord Advocate on two occasions each). We are grateful to all those who gave evidence. The Committee also received 83 written submissions in response to our call for evidence. We regret that not every organisation or individual who expressed a wish to give evidence in person before the Committee could be accommodated. However, it is important to stress that written evidence has equal status to evidence presented in person and that Committee Members considered every written submission carefully.

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62. Four Committee Members attended the Old Firm match of 18 September as guests of Strathclyde Police and Rangers Football Club. Three of the Members attended the police’s morning pre-match briefing, whilst another travelled to the match on the same public transport being used by supporters to get to the game. (Travel to and from a football match is within the ambit of the Bill.) During the course of the day, the Committee Members spoke to fans, stewards and club representatives, as well as to police officers. The visit was very useful in providing an insight into the atmosphere of an Old Firm match, as well the level of preparation required by the authorities to help ensure that it takes place in a safe environment. We want to put on record how very impressed we were by the thorough and thoughtful way the police, stewards and Rangers FC security staff approached their task, and their calm and professional manner in handling any tensions on the day.

63. There was not an opportunity for the Finance Committee to consider and report on the financial memorandum to the Bill in the usual way at Stage 1. However, the Finance Committee did take evidence on the memorandum from Scottish Government officials in September. This resulted in a letter to the Committee from the Finance Committee Convener, setting out the Finance Committee’s observations on some financial aspects of the Bill, which the Committee has noted.

THE SECTION 1 OFFENCE: OFFENSIVE BEHAVIOUR AT FOOTBALL

64. The Bill is a short one, with just nine sections. In essence, it splits into two main elements, consisting of two new offences. However there are complexities underlying both.

Explanation of the section 1 offence

65. The first offence, set out at section 1, requires three elements to be established for a conviction to be secured—

- offensive behaviour;
- the behaviour occurs in relation to a regulated football match;
- the behaviour is or would be likely to incite public disorder.

What is offensive behaviour?

66. Subsection (2) of section 1 defines “offensive behaviour”; it is behaviour—

“(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,
(ii) a social or cultural group with a perceived religious affiliation,
(iii) a group defined by reference to a thing mentioned in subsection (4),
(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 any of sub-paragraphs (i) to (iii) of paragraph (a),
(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,

(d) behaviour that is threatening, or

(e) other behaviour that a reasonable person would be likely to consider offensive.”

67. Subsections (3) and (4) further provide—

“(3) For the purposes of subsection (2)(a) and (b) it is irrelevant whether the hatred is also based (to any extent) on any other factor.

(4) The things referred to in subsection (2)(a)(iii) are—

(a) colour,

(b) race,

(c) nationality (including citizenship),

(d) ethnic or national origins,

(e) sexual orientation,

(f) transgender identity,

(g) disability.”

68. Transgender identity is further defined by reference to five different subcategories.

69. The Committee notes that “sectarian” and related expressions are not mentioned here nor anywhere else in the Bill and that the offence goes wider than most traditional definitions of the term. This has led to considerable discussion. Particular attention has been focussed on the potentially catch-all nature of subsection (2)(e), discussed further below.

70. “Behaviour” is defined widely: it is behaviour “of any kind including, in particular, things said or otherwise communicated as well as things done”. The explanatory notes to the Bill say that banners and T-shirts could, for example, be covered.

“In relation to a regulated football match”

71. The offensive conduct likely to cause public disorder must occur “in relation to a regulated football match”. A regulated football match is defined27 as being one where at least one team is the national team or a team belonging to the Scottish Premier League or the Scottish Football League, or a cup match involving at least one team from those leagues. The Bill further provides that, where a match taking place outwith Scotland involves the Scottish national team or a team belonging to a Scottish football league or association, then this too is a regulated football

27 Via a cross-reference in the Bill to section 55 of the Police, Public Order and Criminal Justice (Scotland) Act 2006
match. There has been some comment on the enforceability of this aspect of the Bill. The Committee expects that the police and prosecutors would only want to make use of the section 1 offence’s extraterritorial applicability in exceptional cases, especially where it is a match outside the UK.

72. The Bill provides a quite complex definition of what is encompassed by behaviour “in relation to” a regulated match. Section 2 provides that—

“(2) For the purposes of section 1(1), a person’s behaviour is in relation to a regulated football match if it occurs—

(a) in the ground where the regulated football match is being held on the day on which it is being held,
(b) while the person is entering or leaving (or trying to enter or leave) the ground where the match is being held, or
(c) on a journey to or from the regulated football match.

(3) The references in subsection (2)(a) to (c) to a regulated football match include a reference to any place (other than domestic premises) at which such a match is televised; and, in the case of such a place, the references in subsection (2)(a) and (b) to the ground where the match is being held are to be taken to be references to that place.

(4) For the purpose of subsection (2)(c)—

(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and
(b) a person’s journey includes breaks (including overnight breaks).”

73. Subsections (2)(a) and (b) above, covering the football ground during match time and its immediate vicinity, appear relatively straightforward in a drafting and policy sense. It is the aspects of the provisions quoted above that cover televised matches and journeys to and from matches that have attracted more comment and concern, as discussed later.

“Likely to incite public disorder”

74. Offensive behaviour in relation to a regulated match is only criminal if it is likely to provoke public disorder or would be likely to incite public disorder. The Committee notes that there is no need to prove that public disorder was actually caused. We understand that this is in order to allow the police to make arrests before any anticipated disorder actually occurs.

75. The “would be likely” formulation inevitably provokes the question, would be but for what? Subsection 1(5) provides the answer: behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

“(a) measures are in place to prevent public disorder, or

76. The Committee understands that the (a) formulation is intended to prevent a defence being led that because effective security measures were in place (for instance a large and visible police presence) there would never have been any likelihood of public disorder breaking out, regardless of how offensive the behaviour was. This is in line with the Scottish Government’s view expressed in the policy memorandum that the simple fact that offensive behaviour (for instance hateful chanting) is taking place in public at a football match, and therefore potentially being broadcast around the world, normalises that behaviour and potentially brings Scotland into shame.

77. In relation to the words after (b), the policy memorandum explains that the aim is to ensure that offensive behaviour at a football match would be criminalised even where supporters of the team at which the offensive behaviour is targeted have left the ground.

78. However, because of the way “regulated football match” has been defined so as to include televised broadcasts of matches, the wording of section 1(5)(b) also creates the possibility of convictions being made in places like pubs, parks (if the TV monitor is portable) or perhaps even hotel function rooms or private clubs. As a journey to or from a match (or indeed to a televised match) is deemed to occur “in relation” to the match, this means that the ambit of the section 1 offence also extends to railway carriages, buses and (at least theoretically) private cars, taxis, international flights, lay-bys, petrol stations, hotels, etc. As noted earlier, a journey to or from a match is defined to include stops, including overnight stops.

79. “Public disorder” is not further defined in the Bill, which means that the courts would be expected to give the term what they consider to be its ordinary meaning. “Public disorder” is to be contrasted with the “fear and alarm” formulation applied both for common law breach of the peace and for the new statutory offence of threatening and abusive behaviour (see below).

Objections in principle to the section 1 offence

80. Shelagh McCall from the Scottish Human Rights Commission remarked to the Committee that parts of the section 1 offence might amount to a restriction on freedom of speech. She said in terms of the European Convention on Human Rights there must be, amongst other things, a “pressing social need” for the provision. She elaborated that—

“If it was challenged, the Government would have to demonstrate why it says that there is a problem. I am not suggesting that that evidence does not exist; I am saying just that Parliament, before it passes the legislation, should be satisfied that there is such evidence.”

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30 As noted earlier, a journey to or from a match is defined to include stops, including overnight stops.
81. We accept that these words frame a key consideration for the Committee in relation to section 1, and in fact much of our evidence has focussed on establishing just whether there is such a pressing social need. Some witnesses doubted that there was. They had objections to the section 1 offence in general.

82. Objections in principle to the section 1 offence tended to fall into two broad categories. First, there were those who thought the Bill was anti-football. They also thought that what problems there were in relation to public order at football matches had been greatly exaggerated. This led to consideration of whether, if there is a problem with Scottish football, the football authorities themselves have done enough. There were also those who thought that the existing criminal law already covered the conduct struck at by section 1 and that duplication would serve only to confuse and complicate. There is a third strain of argument that also requires to be mentioned, which is that the Bill would actually make things worse not better for Scottish football.

83. We summarise all these arguments before concluding with our own views on these matters.

The extent of the problem in Scottish football

84. Celtic Football Club argued—

“The legislation potentially discriminates against the football supporter by reason of that person being a football supporter. It criminalises him or her for being a football supporter and not only because of the nature of his or her behaviour. In other words, exactly the same behaviour could be deemed illegal if performed by a football supporter, while not constituting an offence by anyone not participating in a football environment.”

85. It is undeniable that the Bill makes specific provision to criminalise conduct in relation to football matches rather than any other sport, activity, or event. The question is whether this is justifiable.

86. In the policy memorandum, the Scottish Government explains that the Bill “has been limited to what the Government and partners agree is immediately necessary”, that football is Scotland’s national game with a high media profile, and that “there is something very specific and increasingly unacceptable about attitudes and behaviours expressed at football match whether that [sic] is “sectarian”, racist or homophobic.” Certainly, most of the well-publicised events that have led to the Bill were related to some extent or another to football.

87. Most of the representatives of supporters clubs who provided evidence to the Committee on 6 September believed that the Bill was discriminatory against football fans. The representative of the Aberdeen Supporters Trust who described the provision as “a mallet to crack a nut” probably summed up their general view that it was not a proportionate response to whatever problems the game has. Representatives of supporters clubs generally agreed that club football stadiums

32 Celtic Football Club. Written submission.
33 Policy Memorandum. Paragraph 46.
34 Policy Memorandum. Paragraphs 6 and 9.
were usually very safe places, particularly viewed in an international context,\textsuperscript{37} and were much more family-friendly than in previous generations.\textsuperscript{38}

88. The general view also appeared to be that hateful comments, chants and gestures were not commonplace, but rather the preserve of a small and unreconstructed minority. It was also suggested that this sort of hatefulness was in general decline.\textsuperscript{39} The Committee did, however, detect inconsistencies in this evidence, in that some fans referred to comments thrown at them by rival fans that were deeply offensive to them. The issue for some of them was whether this was a matter for the criminal law.\textsuperscript{40}

89. Celtic and Rangers football clubs both expressed doubts that the section 1 offence was necessary, broadly for similar reasons to the supporters. Both stressed that they had been active in taking steps to address offensive behaviour by their fans and that these had had positive results. Celtic FC referred to the ongoing work of the football Joint Action Group in seeking an improvement and said that legislation should only be “the last step.” David Martin, Rangers FC’s head of security commented—

We constantly refer to the game on 2 March as the "game of shame", but that was actually the 1980 cup final, when fans clubbed each other with beer bottles and fought en masse on the pitch at Hampden. We should give the fans some credit and acknowledge that we have come a long way in 30 years. There are very few instances of fan-on-fan violence, including at old firm games, and we have some of the safest stadia and match-day operations in Europe. In fact, we are widely admired throughout Europe for delivering safe events at football stadia. We have, up to a point, lost sight of that.\textsuperscript{41}

The role of the media
90. Some witnesses from within football pointed the finger of blame at the Scottish media for painting a false picture of Scottish football. A recurring theme was that the media had over-hyped the fallout from the 2 March Old Firm match.\textsuperscript{42} Darryl Broadfoot of the SFA referred to the “game of shame” epithet attached to the match as “a hysterical tabloid headline”,\textsuperscript{43} whilst the Rangers Supporters Assembly described media reactions to the match as “nothing short of a moral panic … designed solely to sell newspapers.”\textsuperscript{44} Graham Spiers of The Times agreed that the media could be powerful, but stopped short of arguing that the media had misused that power to present an exaggerated vision of the problem.\textsuperscript{45}

\textsuperscript{40} Scottish Parliament Justice Committee. \textit{Official Report, 6 September 2011}, Cols 162 and 171
91. The Committee notes the important role the media play in relation to the reporting of Scottish football. This places an onus on the media to use this power responsibly.

*Football as “theatre”*

92. Another point put to the Committee was that the question whether football fans could be offensive or hateful completely missed the point. A football match, the argument went, should not be confused with real life taking place outside the stadium; it was a rowdy and rough-edged species of theatre, and that was its unique appeal. Behaviour that might be considered offensive in another context is normalised precisely because it happens during a football match. One supporter, for instance, feared that the Bill would criminalise behaviour “which is normal ... in terms of letting off stress of a hard week and joy and pride of the team and hatred of the rivals (under football banter), this is normal and not a threat to society in any given form as it takes place within the stadium.”

93. In his written evidence, Dr Stuart Waiton developed this point further—

> “The Football Bill consciously distinguishes football fan activity from the words and behaviour of artists, comedians and other performers. That football rowdiness is arguably part of a ‘performance’ specific to games is ignored. This aspect of the Bill appears to be wholly discriminatory against football fans who would no longer be treated equally under the law.”

94. In evidence before the Committee, Dr Waiton, who said that he doubted the existence of sectarianism as a meaningful social phenomenon, outside of the “pantomime” of football, went on to argue that people who found “poison” at football matches needed “a reality check”. On the role of the media, he sought to turn the tables, arguing that “the most profound prejudice and hatred” came not from the fans towards each other, but from the media (and politicians) towards the fans. He condemned the Bill as a “snobs law” aimed at “rough working-class blokes and lads who shout and sing songs for 90 minutes and then go home to their Catholic wife, Protestant grandparents and so on.”

95. Jeanette Findlay of the Celtic Trust told the Committee that—

> “I have heard plenty of things that offended me. I have heard racist songs sung, although thankfully that seems to be dying out. Basically, if they are hate songs—things that would otherwise be criminal—of course I object to that but, by and large, I do not mind if people want to sing songs that I do not like. Greig Ingram [Aberdeen Supporters Trust] gave an example of a song that is traditionally sung to Aberdeen fans, and there are songs that people sing when they come to Parkhead, about our Glasgow slums and that kind of thing, which I do not like. I do not spend time thinking about that and I would not want someone criminalised for it. Being offended and wanting someone arrested for it are two quite different things. I have heard some things that are

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46 Brian Taylor. Written submission.
criminal but, in the main, I focus on the football—I am there to watch a game of football.”

Opposing views

96. Others very strongly disagreed that Scottish football did not need to put its house in order. Martin Riddell of the Association of Tartan Army clubs, which follow the national team, had given evidence alongside the club supporters. He told the Committee that he thought Scottish club football did have problems relating to offensive behaviour that needed to be dealt with and that, because of this, most Tartan Army members to have expressed a view supported the Bill and section 1.

97. Two well-known writers and commentators on the game, Graham Spiers and Pat Nevin, listened to the supporters’ evidence on 6 September before giving evidence themselves. Mr Spiers said that he had detected an “element of denial” in the evidence—

“I heard some articulate debate this morning from various supporters who said in public that these songs should be stopped, although many of these supporters, in private, quite like the songs and quite like singing them. However, they do not like admitting to it in a public forum such as this. Rangers knows that and Celtic knows that. There is public posturing to a degree by supporters, but a lot of supporters like the old, offensive, bigoted chants around the Old Firm. They do not want the chants to stop.”

98. He pointed to UEFA’s repeated fining of Rangers Football Club for the chants and singing of some of its supporters as evidence that outside of Scotland there was agreement that there was a problem.

99. Pat Nevin said that he was “slightly surprised to hear some of the witnesses say that we do not have a problem and we should not bother being here at all.” He compared the toleration (as he saw it) of offensive behaviour at Scottish matches with that of racist behaviour when he had played in England in the 1980s, which had been largely eliminated through concerted action—

“Whether we choose to deal with such behaviour through legislation or by working with clubs and fans’ organisations, I would like to make it culturally unacceptable. Legislation may well be needed to do that, because I do not think that the problem has so far been addressed. I feel that we—or at least a number of people—do not accept that there is a problem. I do not want to go back to the earlier discussion, but it was suggested that there is not a problem, and that if we let Celtic and Rangers get on with it they will be fine. However, UEFA does not agree with that and we have to find an answer.”

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54 UEFA is European professional football’s governing body, with responsibility amongst other things for running the main European competitions.
100. Both commentators challenged Dr Waiton’s assertion that they were seeking a polite football atmosphere. Mr Spiers remarked that it was not—

“… about sanitising the game or making it a Mary Poppins environment. The banter is critical to football. I just think that racism and religious prejudice should be erased.”

101. The current football season is of course now well underway, without any new law in place. At her last appearance before the Committee, on 20 September, the Minister acknowledged that “there seems to be a shift in behaviour with regard to mass offensive chanting. That is to be welcomed but there is still a long way to go.”

She also pointed to the significant police resources that were needed to maintain order. She told the Committee that it was—

“… critical that every one of us accepts that there is a significant problem in Scottish football, which we must face up to and which existed long before last season. Some witnesses have suggested in previous committee evidence sessions that there is a collective sense of denial among many who are involved in the debate—denial that there is an issue or denial that they have a problem, although they accept that others do. … We need to get beyond that denial.”

Could the Bill have unintended consequences?

102. The Committee heard from Professor Graham Walker of Queens University, Belfast who remarked that many people in Scotland “have a need for identities that seemed to be fashioned to a great extent by the Irish question. He referred to “a strong sense of tribal belonging”. Professor Walker referred to the Northern Ireland peace process and the message that had been conveyed that “you can hang on to your identity without being offensive with it”. In his written evidence, Professor Walker argued that the Bill “in its preoccupation with ‘offensive’ singing, may in fact provoke some supporters to be even more defiant in assertion of their identities as they perceive them.”

103. Professor Walker elaborated on this point in his evidence to the Committee, referring to some fans’ perspective—

“They see the songs as battle hymns that add to the atmosphere—it is in the blood. Attempts to curb them, as well as running into all sorts of difficulties to do with civil liberties, create a defensive mentality and can lead to defiance on the part of football fans. More widely, we are getting into areas of challenging the validity of people’s identity and of the expression of that identity in Scotland.”

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63 Professor Graham Walker. Written submission.
104. Dr Waiton was also concerned that the Bill could create “incredible levels of tension and hatred among different fans, who would then entrench themselves in their football identity.”

105. There is some support for these concerns in the remarks of a representative from the Rangers Supporter’s Trust, who told the Committee that “If we see something that offends us, we will go after the opposition fans in the way that people have gone after us. You reap what you sow—that is the way it is.” It should be added that the witness went on to say that his remarks had been “slightly intertemperate”. However, the Committee notes the overall concern that if the Bill is enacted, there may be some fans who will see it as a device to “go after” their opponents. We expect that the Scottish Government will have reflected on this possibility.

The SFA and the SPL

106. If Scottish football does have a “problem” then it falls to be considered how effectively this has been addressed by those responsible for its governance. We are mindful of the evidence we received that one of the ways to stamp out unacceptable behaviour is to hold clubs to account for the misbehaviour of their followers, as UEFA has already done. We see this issue as a forming part of the overall debate on whether the section 1 offence is needed.

107. The Committee takes the setting up of the Joint Action Group on football earlier this year, as a tacit recognition from Government that there was perhaps a lack of momentum within Scottish football to deal with the problems that had built up, and therefore a need to impose an agenda and timetable from outside. We note the publication of the JAG’s report on 11 July. Time constraints have prevented the Committee examining the report in detail but we broadly welcome its recommendations, which look to be a step in the right direction.

108. There are two main football authorities in Scotland; the Scottish Football Association, and the Scottish Premier League. The SFA is the governing body of football in Scotland. It is responsible for Scotland’s national team and for the Scottish Cup, and has ultimate responsibility for the control and development of football in Scotland. Membership of the SFA is widely drawn from all senior teams in Scotland, as well as members of other affiliated leagues.

109. The SPL is the name given both to the league in which Scotland’s top clubs compete and to the body that administers it. Membership of the SPL (in both senses) is limited to the twelve clubs in the league.

110. At our 13 September meeting, SFA representatives told the Committee that they had adopted a new judicial panel for disciplinary matters. (However, the Committee is not clear from the evidence we received as to whether this panel has to date been convened.) They also clarified that the SFA had fairly wide-ranging disciplinary powers for unacceptable behaviour in football grounds, ranging from

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warnings to annulments and replays or points docking. They said they were also working with the SPL on an agreed code of conduct for clubs, in line with a recommendation in the JAG report. However, from the evidence the representatives presented at the meeting, the Committee understands that the SFA at some point in the past delegated control on disciplinary matters relating to Scottish Premier League Clubs to the SPL, including the power to issue sanctions over the behaviour of a club’s fans.

111. The SFA representatives told us that they were keen to rectify this situation, and were now in the process of renegotiating the delegation of the disciplinary power with the SPL.

112. The SPL, which was not able to send a representative to the same meeting, was asked by letter whether this was also its understanding and whether and when it anticipated being able to hand back the disciplinary power to the SFA. SPL Chief Executive Neil Doncaster replied that he was “unable to confirm that this statement is correct” and that “it would be inappropriate to prejudge the outcome of work to be undertaken”. Mr Doncaster similarly refused to clarify what actions could be taken against an SPL club if offensive behaviour had taken place because this was being reviewed and it would be inappropriate to prejudge the outcome.

113. The Committee also sought clarity on what the SPL does with match delegate reports and what action results from them. (The SPL appoints match delegates to watch and report on each league match.) Mr Doncaster replied that the reports are examined by SPL staff with matters of importance being drawn to the attention of a club’s company secretary and if necessary the SPL board. He indicated that a range of outcomes could result from this.

114. Mr Doncaster also stated, without further elaboration, that any appeal of a disciplinary decision goes to the SFA. This leaves the Committee in some confusion as to where the ultimate authority for disciplinary matters within the SPL currently lies.

115. The Committee is disappointed with the unforthcoming and unhelpful nature of the SPL response. We also draw attention to a lack of openness in sharing match delegate reports with the SFA and the police.

Does the section 1 offence add anything to the current law?

116. A recurring theme in the evidence has been that the section 1 offence would add little or nothing to the current law.

117. The Scottish Government’s policy memorandum sets out the currently available legal remedies. In doing so, it makes the point that there is likely to be substantial overlap between the section 1 offence and existing criminal sanctions but goes on to argue that this can be justified—
“At present, disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant. However, there is concern that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law. Such offensive behaviour might not satisfy the strict criteria for causing ‘fear and alarm’ required to prove Breach of the Peace, or section 38 of the 2010 Act. The Bill, therefore, seeks to put beyond doubt that behaviour related to football matches which is likely to incite public disorder and which would be offensive to any reasonable person is a criminal offence.”\(^{75}\)

118. In evidence before the Committee, the Lord Advocate further elaborated that—

“the definition of breach of the peace requires 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". Under that definition of breach of the peace, there have been cases ... in which a sheriff has ruled that supporters shouting racist abuse at a black player, or another supporter grunting in an ape-like fashion and shouting racist abuse at a black player, did not amount to breach of the peace. The view was taken that "the conduct was over very quickly," that it was not "flagrant", that it took place "in the midst of the cauldron of sound which emanates from any large sports crowd", and that it could not "be interpreted as ... conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances of the football match." In cases involving conduct at football matches, defences have been run that no fear and alarm is caused by offensive chanting and singing and that at the end of the match it was clear that no public disorder resulted.”\(^{76}\)

\textit{Police view}

119. The Government received strong backing from representatives of the four different police organisations from whom the Committee took evidence. A representative view came from Superintendent David O’Connor of the Association of Scottish Police Superintendents, who welcomed the provision as “another string to the bow in dealing with the challenges of football.”\(^{77}\)

120. In its written submission, ACPOS, representing Chief Police Officers, said that the available law “does not always fit with the variety of different incidents now witnessed throughout the football environment.” The submission added—

\(^{75}\) Policy Memorandum. Paragraphs 20 and 21


“there remains uncertainty with conviction and the risk of stated cases impacting on our future reliance of breach of the peace. For that reason it is believed that the common law crime of breach of the peace cannot be relied upon indefinitely and additional legislation should be enacted and that the Bill’s provisions should simplify matters for operational officers.”

121. In questioning before the Committee, however, police witnesses agreed that if the Bill were agreed to, the new offence would be likely to be challenged in the courts. Assistant Chief Constable Campbell Corrigan said—

“Stated cases will come out of the legislation, as has been the case with other acts; the case of the Criminal Justice (Scotland) Act 1980 is similar. I think there will be lots of that. However, the bill certainly covers the famous things that were reported last season, in my opinion, and if I were the officer in the crowd, I think I could use it to effect an arrest.”

Other views
122. Many legal witnesses were dubious that there was a significant problem with the current law. A joint submission from two legal academics argued that “there is already a range of provisions under statute and common law which can, and are, used to tackle sectarianism in football”, whilst the Scottish Justices Association, representing justices of the peace, stated that—

“we remain to be persuaded that the problem which this Bill addresses is not best dealt with by sentencing considerations applicable to existing offences, such as the Crime and Disorder Act 1998 s96 and Criminal Justice (Scotland) Act 2003 s74.”

123. The Law Society of Scotland’s criminal justice committee commented—

“The Committee is of the view that the offence, under Section 1 does not improve on common law breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Rather than result in clarity, the new offences may cause confusion with particular reference to what type of behaviour is to be considered unacceptable at regulated football matches.”

124. This concern over the risk of legal confusion was echoed by, amongst others, the Coalition for Racial Equality and Rights, which said that—

“The test of any legislation is whether it will achieve better overall outcomes than the current legislative framework already in place. Although it is commendable that Ministers are sending out a categorical message that sectarian behaviour will not be tolerated, we would like to highlight that the majority of the Bill’s provisions are potentially already covered by existing legislation such as Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, Section 18, 19, 23 (1)a of the Public Disorder Act 1980, the Public Order Act 1986, Section 96 of the Crime and Disorder Act 1998

80 Dr David McArdle and Dr Sarah Christie. Written submission.
81 Scottish Justices Association. Written submission.
82 The Law Society of Scotland. Written submission.
and Section 74 of the Criminal Justice (Scotland) Act 2003 (all as detailed in the ACPOS Hate Crime Guidance Manual 2010). It is of great concern to us that the current Bill may cause further confusion rather than adding clarity.\footnote{Coalition for Racial Equality and Rights. Written submission.}

125. The Human Rights Consortium Scotland suggested that—

“we need to understand if the problem is with the law or its application in Scotland. So far, there is insufficient evidence to demonstrate that the law is inadequate.”\footnote{Human Rights Consortium Scotland. Written submission.}

126. To some extent this has been answered in the debate played out before the Committee on the effectiveness of breach of the peace. We have had less opportunity to undertake scrutiny of the very new offence of threatening and abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which was conceived in response to concerns that the test for breach of the peace had become too narrow. We address this issue later.

127. A number of submissions said that the Scottish Government, prosecutors and the police should focus on effective enforcement of the current law.\footnote{Eg Celtic Football Club. Written submission. Rangers Football Club. Written submission. William Queen. Written submission.} It does appear to the Committee that there has been a stepping up of police and Crown Office activity to tackle criminality relating to football in recent months. We also note the publication over the summer of a report\footnote{http://www.scotland.gov.uk/Publications/2011/07/22120711/0} into the use of football banning orders, which can be used as part of the sentencing of an accused convicted of a football related offence. The report noted greater potential to use FBOs in Scotland as a means of tackling unacceptable behaviour at football matches.\footnote{For example, the report notes (at paragraph 3.8) that the rate at which FBOs are issued per supporter is some way below that for English premier league clubs. Celtic and Rangers average around 0.5 orders per 1000 supporters, whereas the typical rate for English clubs is between 1 and 2 per 1000.}

128. Publication of the report was followed, shortly after the Committee concluded evidence-taking, by an announcement from the Crown Office of the appointment of a new team of “football liaison prosecutors” for the whole of Scotland, whose role will be to “ensure that there is a consistent and robust response to cases of football related violence and disorder. The FLPs will share their expertise with police and work with them to improve the quality of police reports to ensure that a strong case is made to the court to grant a Football Banning Order.”\footnote{http://www.copfs.gov.uk/News/Releases/2011/09/Solicitor-General-introduces-New-Football-Liaison-Prosecutors} This initiative was one of the recommendations of the football Joint Action Group. So too was the setting up of a National Football Policing Unit, and this too has been recently actioned.

Stigma, public awareness, and improving the recording of hate crimes

129. There is another argument that could be advanced in favour of the section 1 offence that does not turn on whether it is “necessary” in a strict legal sense. Above, we quoted part of paragraph 21 of the Scottish Government’s policy
memorandum seeking to justify the Bill in terms of filling gaps in the criminal law. Paragraph 21 goes on to state—

“Introducing this offence will serve to clarify rather than complicate the law, and will provide reassurance to the public in relation to our collective abhorrence of this sort of behaviour. It will serve to send a very clear and powerful signal to football fans and the public more generally that such behaviour at football matches is simply unacceptable. It will also mean that an offender’s criminal record will clearly show that he or she had engaged in offensive behaviour specifically related to football, rather than any more general offence.”

130. The Minister told the Committee that there was—

“an enormous benefit in people being named for doing what they have done. That is important, because we know that there is a developing stigma around being labelled in that fashion, which, in itself, will become a deterrent. If we do not threaten that, we will remove that deterrent effect.”

131. The Lord Advocate said that—

“Legislation can be transformational. We can think back to the problems that we had with racially aggravated conduct, which was, perhaps, acceptable 15 or 20 years ago. Who can remember the social acceptability of drink-driving and the drive to make it socially unacceptable? ... There is a transformational aspect to legislation; it can change society’s behaviour and its attitude towards behaviour, and that should never be overlooked.”

132. Les Gray of the Scottish Police Federation expressed similar views.

133. Speaking whilst emergency procedures were still being proposed for the Bill, Chloe Clemmons, representing the Church of Scotland, referred to the need for communities to feel some “ownership” of the legislation in order to effect such changes in attitude—

“Law works at its best when the majority of the population think that it represents a collective will. Measures that have been effective, such as the smoking ban, work not because they are enforced but because the passage of the legislation was taken to mean that people supported it—it was seen as the collective position.”

134. Dr Kay Goodall of Stirling Law School, whilst querying some of the detail of the section 1 offence, made the general observation in her written evidence that—

“The decision to create new legislation, even where it overlaps with existing law, can be justified. Creating specific named offences can aid public discussion and encourage public support. Doing this also makes it easier in practice to monitor reporting, recording, prosecution and conviction of the offences. ... Creating more legislation can be justified, even though much of

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what these problems involve is already covered by Scots law. Research suggests that the public may be more likely to hold favourable views of the criminal justice system when they are more informed about offences and patterns of sentencing. Even just a public discussion which provides more information about sentencing may prove useful. It matters that the public feel positive toward the criminal justice system; not least because it is they who report crimes and support the prosecution process throughout.”

135. The Committee pursued the issue of data capture with the Lord Advocate. He was asked whether, under the current law, it would be possible to capture in formal records what type of conduct (e.g. religious bigotry, racism, homophobia, etc) had been prosecuted. He said that it was his understanding that it would be very hard to do so “working within the confines of the current IT system.”

92 (We take the Lord Advocate to be referring to cases where a conviction for an offence involving hateful or offensive behaviour has been obtained but where, for whatever reason, a statutory aggravation was not attached to the charge.)

136. It was put to the Lord Advocate that enacting the section 1 offence would not in itself guarantee increased clarity as to why someone had been convicted under the provision (i.e., for instance, whether they had been convicted for chanting that was racist rather than homophobic). There might for example need to be sufficient precision in the charge before the court for the relevant data to be captured. The Lord Advocate conceded that this was “a valid point” and that he would “go away and think about it” before finalising his guidelines on the Bill.

Committee conclusions on the section 1 offence

137. The Committee believes that there are lasting problems surrounding offensive behaviour in Scottish football that need to be dealt with. Most football supporters are law-abiding; they are passionate about their team without being hateful or offensive. A minority cross the line. The Committee accepts that football matches are not always places for the thin-skinned but arguments that the hatefulness sometimes evident there forms part of a “pantomime” atmosphere are not convincing. There can be no excuse for provocative and hateful displays of bigoted behaviour in any public environment.

138. A majority94 of the Committee support the new offence of offensive behaviour at football. The majority believe that the Government has made the case that there are gaps in the law that do not enable the police and prosecutors to target offensive behaviour effectively.

139. A minority95 do not believe that the Scottish Government has made the case that a new offence is necessary. They believe that a more proportionate response to dealing with the problems around Scottish football would be to give greater consideration to the use of existing laws, effectively enforced, and combined with non-legislative measures.

94 Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; Humza Yousaf MSP
95 James Kelly MSP; John Lamont MSP; Alison McInnes MSP; Graeme Pearson MSP
140. The Committee would welcome clarification from the Lord Advocate as to whether section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is being used this season to prosecute cases of offensive behaviour at football matches. If so, we would also welcome an assessment from the Lord Advocate of the efficacy of that provision in obtaining convictions.

141. The Committee agrees that it is important to label offences so that it is clear whether a hate crime has been committed and, if so, what type of hatred it is. “Naming and shaming” can be an important weapon in the criminal law’s armoury, in helping to change attitudes about what is considered socially unacceptable. The Committee would welcome clarification that the Crown Office and Procurator Fiscal Service are seeking to ensure the right data is captured for football-related offences.

142. The Committee agrees it is important that Scottish football polices itself effectively. This includes taking firm action against clubs elements of whose support bring the game into disrepute. The Committee agrees that the football authorities have failed to take firm action to deal with offensive behaviour at football. Over many years, they have allowed the issue to drift. If firm action had been taken earlier, offensive behaviour at football might have been stamped out, or at least significantly reduced.

143. It is for the SFA and the SPL to determine once and for all who has authority in relation to disciplinary issues concerning the supporters of SPL clubs. We are dismayed that the two bodies do not appear to be close to resolving this issue at a time when clear leadership, and effective joint working, is badly needed. We would expect this matter to be dealt with as a matter of urgency.

The section 1 offence: more detailed issues

144. Some very interesting debates were played out in evidence-taking about the exact meaning and extent of the section 1 offence.

Clarity

145. An underlying concern was that the Bill (including the section 1 offence) should be made as clear as possible. These views came not only from those opposed to the section 1 offence, but also those in favour of it, such as the police.96

146. Some concern has been expressed in the evidence about the degree of certainty the Bill can deliver. Concerns were expressed about a lack of clarity about what would be a criminal offence.97 Neither the Minister nor the Lord Advocate ever sought to argue before the Committee that the Bill could provide complete clarity. Instead, they consistently repeated that, in determining the criminality of behaviour under section 1, context is fundamental. After discussing

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97 Eg Grand Orange Lodge Scotland. Written submission. Harps Community Project. Written submission.
and considering various hypothetical examples during the course of our evidence-taking, this is a proposition the Committee is content to accept.

147. After due consideration, the Committee also accepts the argument that it would be unhelpful for the legislation to identify and proscribe particular songs, chants, banners etc. Leaving aside the possible drafting difficulties inherent in such an approach, witnesses have stressed that, were such provisions written into the Bill, some football supporters would see getting the better of the drafting as an enjoyable challenge, and would quickly find new ways, not covered in the legislation, of expressing the same sentiments. The Committee accepts that this would risk making a mockery of the criminal law.

148. None of this means that the Bill could not be made clearer. There is a general view in our evidence that this needs to be done. When he first appeared before the Committee, the Lord Advocate undertook to make available to the Committee draft guidelines for the police on how to apply the Bill, as soon as possible. Perhaps understandably, given the Government’s subsequent decision to propose a revision to the timetabling of the bill, the Committee did not in fact have sight of the draft guidelines until mid-September. We have since considered these and found these helpful up to a point in fleshing out the detail of the Bill. But uncertainty still surrounds some key issues.

149. The Committee notes a general view amongst 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.

Offensive behaviour

150. The section 1 offence does not merely encompass sectarian behaviour at football, but goes wider, covering ethnicity, race, sexual orientation and so on (at section 1(4)). There were many stakeholders who welcomed this. These include, for instance, Stonewall Scotland, which referred to a 2009 report showing that 70% of football supporters have heard anti-gay language at football matches. Some submissions queried why the definition did not go further by including the two other “protected categories” of age and gender.

151. Others questioned why the Bill had not been more narrowly drawn, given that the Bill had largely been presented as an urgent response to the events of the last

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100 The Committee also notes that if the Bill is passed, the Lord Advocate will also issue guidelines to prosecutors on the Bill as enacted. However, in line with Crown Office practice, this would not be publicly available.
103 As set out in the Equality Act 2010, Part 2, Chapter 1.
104 Eg Equality and Human Rights Commission Scotland. Written submission.
football season, which are widely viewed as being of a broadly “sectarian” character. A comment from Professor Tom Devine encapsulates these views—

“If the problem has been universally specified as being rooted in the sectarian issue, why has the bill been expanded to the extent that it has been in a way that it will cause enormous problems in legal enforcement?”

152. The Committee, however, inclines to the former view. We believe that if there is to be a new offence of offensive behaviour at football then it is appropriate that it does not take too restricted a view of what constitutes “offensiveness”, particularly in view of the uncertainty over exactly what “sectarianism” means. Offensive behaviour is offensive behaviour, whether it involves hatefulness about race, religion, sexuality, disability and so on.

153. The Committee is supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. We invite the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.

“Political sectarianism”

154. Professor Devine’s comments above formed part of a wider critique of section 1 of the Bill, which he viewed as unnecessary. He thought the current criminal law, properly enforced, would be sufficient to address the sectarian problem in Scottish football. He also noted that section 74 of the Criminal Justice (Scotland) Act 2003 provided a mechanism for prosecutors to attach an aggravation of religious hatred to an offence committed in relation to a football match, if they were satisfied that there was a sectarian element to the offence. He described the definition of religious hatred in that provision as “dead easy.” As for the concept of “political sectarianism” (the written submission from ACPOS had commented on the need for the police to have further guidance on the meaning of “political sectarianism”), Professor Devine described it as “a contradiction in terms.” He warned that, by leaving the door open to making it criminal to sing songs with a political or nationalist sentiment, the Bill was “in danger of bringing Scots law in that area into disrepute.”

155. It is clear that in his comments Professor Devine was tapping into wider concerns picked up in our evidence-taking that the Bill could be used to criminalise songs and chants that may be offensive to some but which might generally be considered to have a political rather than a religious element. The Committee

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appreciates that this is a sensitive issue and that these views deserve careful consideration.

156. An important fact that may have been slightly lost in this debate is that the current law does not offer a cast-iron guarantee that “political” songs, chants or gestures would never be criminal; it is not beyond the realms of possibility that they might be prosecuted as common law breach of the peace, or under section 38 of the 2010 Act. As is always the case, it would all depend on context. However, as Professor Devine underlined in his evidence, it does appear unlikely that an aggravation of religious hatred could be proven in relation to any such charge.

157. The Committee also acknowledges that there are those who strongly repudiated in their evidence the premise that “political” songs, etc at football matches should be treated differently from “sectarian” songs, etc if both are equally likely to be considered offensive.\(^{112}\) We leave it to the Scottish Government to reflect upon this whole issue further,

“Behaviour that a reasonable person would be likely to consider offensive”

158. Professor Devine may have been referring in his comments above to section 1(2)(e) of the Bill. There were recurrent concerns about the “catch-all” nature of this provision, which refers to “other behaviour that a reasonable person would be likely to consider offensive.”\(^{113}\) Dr Kay Goodall of Stirling Law School said that the wording was “expansive” and might create too low a threshold for criminal convictions.\(^{114}\) Shelagh McCall of the Scottish Human Rights Commission told the Committee—

“we recommend that the committee advise the Government to delete section 1(2)(e)—the paragraph about behaviour that a reasonable person might find offensive. Offensive speech is protected by article 10 of the European convention on human rights. The European Court of Human Rights in Strasbourg and domestic courts have repeatedly said that not only popular speech but offensive, unpopular, shocking and disturbing speech is protected. I appreciate that the word “offensive” is intended to mean something different in the bill, but it is an immediate flag for a challenge under article 10. There are also issues with the clarity of that provision and whether an individual citizen could foresee that his action would be criminal under that section. That raises issues not only under article 10 but under articles 5 and 7. Article 5 relates to whether someone can be deprived of their liberty and article 7 is broadly described as the principle of legal certainty, meaning that the law needs to be clear in advance.”\(^{115}\)

159. It was put to Ms McCall that guidelines from the Lord Advocate might help clarify the scope of the provision, but she indicated that this did not put the Commission’s concerns to rest as any guidelines to prosecutors would not be in the public domain. It was also put to her that the Article 10 right was not an

\(^{113}\) Eg Dr John Kelly. Written submission. Mark McCabe. Written submission.
\(^{114}\) Dr Kay Goodall. Written submission.
unfettered one. Ms McCall agreed with this but added that interference with the right—

“must be justified by the state. It is not for the individual to defend what he or she did as okay; it is for the state to say why it has criminalised it. There are three tests for that. First, the law must be sufficiently clear in advance; that is one of the points on which we take issue with this section. Secondly, the measure must be directed towards one of the objectives that is allowed under article 10.2 of the ECHR. Here, the bill is directed at the prevention of disorder, but there are issues to do with whether the section would pursue that aim. Thirdly, the measure needs to be necessary in a democratic society. There must be a pressing social need for the provision and it must be the minimum measure necessary to achieve the aim sought.”\(^{116}\)

160. Finally, Ms McCall said that the Commission had particular concerns about section 1(2)(e) because of its interaction with other provisions in section 1 (sections 1(1)(b)(ii) and (5) – discussed earlier) which would appear to enable a conviction for offensive behaviour even when no one was there to be offended.\(^{117}\)

161. The Scottish Government’s defence of the provision appeared to rest mainly on the fact that the test of offensive behaviour was linked into incitement to public disorder. The Lord Advocate said that—

“there must be a link to public disorder—the behaviour in question must incite public disorder. That should not be overlooked”.\(^{118}\)

162. The Government also argued that the test was not based on the subjective view of any individual: it applies an objective “reasonable person” test, with which the law is extremely familiar.\(^{119}\) The Lord Advocate also provided an assurance that the Crown Office was obliged anyway to work within the strictures laid down by the ECHR.\(^{120}\)

163. The Committee invites the Scottish Government to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights.

The section 1 offence: a “victimless” crime?

164. This report has already noted the possibility that the Bill could make it criminal to engage in offence behaviour even although no one was physically present in the vicinity to be offended. In relation to conduct occurring at a football match, where supporters of the rival team are not present, or are too far away to see or hear the offensive behaviour, the Committee accepts the Government’s argument that this conduct may still need to be addressed, most notably where the behaviour occurs at a televised match. We expect that police and prosecutors would only make use of their powers in this way in exceptional circumstances,


perhaps where it is necessary to make an example of a recalcitrant minority of supporters.

165. The more problematic case arises in relation to the inclusion of televised matches, and journeys to matches – or televised matches – within the scope of the section 1 offence. This raises the prospect of all sorts of venues (other than “domestic premises”, the only express exemption) being places where the writ of the offence might run. A number of submissions sought clarification as to the Government’s underlying intentions in respect of this part of the Bill.\(^1\)\(^{121}\) The Christian Institute described it as—

“an extreme sort of victimless crime, and it can be expected to apply in some surprising situations. For example, a small group of fans of a particular club are assembled in the club’s supporters’ association premises to watch a televised match. There are no rival fans present. One of the members of the group, aware he is amongst like-minded individuals, tells a joke about the fans of a rival club that would be likely to offend such fans but is amusing to his companions. In doing so, he could be committing an offence under section 1, despite the fact that he has fully considered his context and been aware that there is nobody present who could be offended. This example goes to show the lack of a mental element to this offence (“mens rea”) – it can be committed without any requirement for intention or even recklessness. It also shows the extraordinary reach of the offence, extending as it does to what is tantamount to private activity.”\(^1\)\(^{122}\)

166. Dr David McArdle of Stirling Law School said that these provisions appeared to be taking the section 1 offence into the territory of creating a hate speech crime.\(^1\)\(^{123}\) His Law School colleague Dr Kay Goodall expressed a similar view, stressing that extreme care was needed to draft such a provision so as not to fall foul of Article 10 of the ECHR.\(^1\)\(^{124}\) Along with Shelagh McCall of the Scottish Human Rights Commission,\(^1\)\(^{125}\) she was not certain this had been done.

167. In his first appearance before the Committee, the Lord Advocate was asked for his views on the application of section 1(5)(b) to a pub where all those present support the same club or to a supporters’ club. He replied that he did not want to rush into providing an answer but hoped to be able to write to the Committee on the issue at a later date.\(^1\)\(^{126}\) At the present time, we have not yet received any further clarification from the Lord Advocate on this point. Nor is the issue covered in his draft guidelines to police officers.

168. The Committee asked a serving police officer, Chief Superintendent David O’Connor, for a view on the provision, especially in relation to licensed premises. He argued that “a licensed public premises will always permit people in who may not necessarily be purely watching the game and I would imagine that there will

\(^1\)\(^{121}\) Eg Law Society of Scotland. Written evidence. YouthLink Scotland. Written submission. Deirdre O’Reilly. Written submission.

\(^1\)\(^{122}\) The Christian Institute. Written submission.


\(^1\)\(^{124}\) Dr Kay Goodall. Written submission.


always be people within the premises who might well be offended"\(^{127}\) but did not comment on members’ clubs.

169. The Minister was not asked directly for a view on these provisions, but was keen to stress in her final evidence that the key concept in relation to the section 1 offence was public disorder. We are unsure if this means that the Government would be disinclined to pursue a vigorous prosecution policy in relation to offensive behaviour manifested largely in private. We do accept that there is a fundamental evidential consideration; if no one is present to be offended at conduct taking place behind closed doors, then there is unlikely to be anyone going to the police to make a complaint. That may perhaps provide some partial assurance to those concerned that the provision unwittingly creates a “hate crime”.

170. The Committee notes the Scottish Government’s assurances that the purpose of the section 1 offence is to protect public order in relation to football matches rather than to create a “hate crime” that outlaws certain behaviour whether or not anyone else is present to be offended or provoked. We seek the Scottish Government’s views on whether this could be made clearer in the drafting of the section 1 offence.

171. The Committee would also welcome the Scottish Government clarifying its views – whether in the legislation or in, for example, the Lord Advocate’s guidance to the police – as to the section 1 offence’s application to venues such as supporters clubs, where it may be presumed that those present would generally be of a like mind. At the same time, the Committee recognises the basic right of all employees to work in a dignified environment, free from language or behaviour that they may consider offensive towards them.

Televised matches

172. Section 2(3) provides that the section 1 offence could be committed “at any place (other than domestic premises) at which such a match [ie a regulated football match] is televised. “Televised” means “shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise.” The explanatory notes to the Bill elaborate that this definition is intended to capture internet streaming or “webcasting”, as well as conventional television broadcasting.

173. We have already commented on the potential for this provision to interact with provisions elsewhere in the Bill enabling the section 1 offence to be committed even where no one is present to be offended or provoked into public disorder. Here we discuss the general issue of the Bill covering televised matches.

174. The policy memorandum explains that televised matches have been included within the ambit of the section 1 offence because “problems of disorder relating to football matches are not solely, or even always, primarily, associated with behaviour at football stadia”\(^{128}\) but can also occur, for instance in pubs and other venues where matches are being televised. This was a view strongly backed up by


\(^{128}\) Policy Memorandum. Paragraph 22.
police representatives giving evidence, and it is a view that the committee fully accepts.

175. The Scottish Beer and Pub Association doubted the need for extra legislation to cover offensive behaviour in licensed premises. They considered that existing criminal law, combined with the requirements of the Licensing (Scotland) Act 2005 adequately covered the situation. The Association said that—

“The belief that further offences need to be legislated for is perhaps the reflection of a perceived lack of an appropriate level of action thus far to address them by the police and by other elements of the criminal justice system.”

176. In relation to enforcement, the Association commented that—

“… we would be concerned that premises licence holders could find themselves being held accountable, and potentially their licences sanctioned, for incidents being committed on their premises which they did not know to be criminal matters.”

177. On the other hand, if the Association is correct that the conduct being prohibited is already covered by the criminal law, then license holders should already be aware that offensive, bigoted and provocative behaviour by pub customers is illegal.

178. In relation to the definition of “televised” itself, the Law Society of Scotland stated that it had a—

“… serious concern about section 2(3) of the Bill in that it appears to apply to any match which is televised at any place (other than domestic premises). This would appear to cover pubs, outdoor arenas, hospital day rooms and TV sales outlets and also mobile TV receivers and computers – such a variety of broadcast possibilities underlines how difficult this provision will be to enforce.”

179. The Minister was invited to comment on the Society’s concerns. She said—

“Our principal concern is with the broadcasting of matches in circumstances in which one could expect large numbers of fans to be present; for example, in pubs or at outdoor large-screen facilities, which are sometimes provided by councils as a general civic duty. As far as I am concerned, the provision is not intended to apply to what is shown on a screen at a television sales centre. As the Law Society has raised the matter, we will carefully consider whether or not we might be inadvertently extending the measure to such situations.”

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129 Scottish Beer and Pub Association. Written submission.
130 Scottish Beer and Pub Association. Written submission.
131 Law Society of Scotland. Written submission.
180. The Committee does note the potential for this provision to require police and prosecutors to make precise distinctions in order to determine whether the section 1 offence is applicable.

Travel to and from the match
181. The Committee has also carefully considered the provisions covering travel to and from the match. In many respects the debate played out before us paralleled that on the inclusion of televised matches.

182. The Government's justification for including these provisions is the same as that for including televised matches: that not all disorder associated with football matches happens at the match and includes travel to and from matches. The Committee has no doubt that this is the case. The Committee is therefore in principle supportive of making appropriate provision in the Bill to deal with these circumstances.

183. Police representatives have told the Committee that they welcome provision being made in the Bill for travel. Superintendent David Marshall from the British Transport Police for instance, told the Committee that he welcomed the increased powers and the increased clarity that the Bill would provide; he said that "the legislation captures with no ambiguity whatsoever those who are travelling to and from the event."  

184. There are others who would challenge that there is "no ambiguity whatsoever" in the provisions on travel. Reference was made in particular to section 2 (4), which provides that—

“(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and

(b) a person’s journey includes breaks (including overnight breaks).”

185. Chief Superintendent David O'Connor of the Police Superintendents Association explained the sort of conduct the provision was aimed at—

“we have experience of people who travel about the country with no intention of going to the football match. Many of these individuals who might travel to, say, Dundee, Inverness or Aberdeen do not have tickets, have no intention of going to the match and instead end up in the city centre pubs and clubs, at which point problems quickly manifest themselves. We have to deal with that kind of dynamic.”

186. The Committee supports the authorities having the appropriate legal tools in their armoury to deal with these situations. However, some witnesses, and some Committee Members, have had difficulty with the concept of being on a journey to a destination without having any intention of going there, and without getting there.

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133 Policy Memorandum. Paragraph 22.
187. In practical terms, this has led to concerns about where the boundaries of the Bill lie where an individual on a journey becomes ‘caught up’ in the behaviour of other people who are on their way to a match (or a televised match).\(^{136}\) It is important to stress that every Committee Member agrees that people who voluntarily join in offensive and provocative behaviour should not escape the consequences of their action just because they were caught up accidentally with a travelling group. There may well be a remedy under the current law anyway. The question is as to whether there is sufficient clarity to provide reasonable certainty as to whether or not a crime has been committed under the Bill.

188. The Christian Institute, on the basis of Counsel’s opinion, called for tighter drafting—

“If the Bill is intended to catch those who travel to matches without tickets, perhaps purely for the purpose of stirring up trouble, it needs to be targeted far more precisely. The current drafting is somewhat contradictory and threatens to bring the law into disrepute because, to the ordinary person, it appears incredible.”\(^{137}\)

189. The Lord Advocate has provided greater clarity in his draft guidance to the police on the Bill. These provide that—

“If the person is believed to have been intending to attend a match, the report must include evidence to support this contention. The offence also applies to persons regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, for example those who travel to football matches solely to indulge in violence or other offensive behaviour.

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

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

190. The guidance is helpful. However it is only advice to the police on whether they should consider making an arrest under the Bill, and does not define the legal parameters of the offence. For this reason, Shelagh McCall of the Scottish Human Rights Commission said that Parliament should take the opportunity to get the drafting right in the Bill so as to avoid any unintended consequences.\(^{138}\)

191. In relation to the fact that breaks, including overnight breaks, are deemed to be a part of a journey to or from a match the Committee simply observes that this

\(^{136}\) Eg Youthlink Scotland. Written submission; Dr Graham Keith. Written submission.

\(^{137}\) The Christian Institute. Written submission

could extend the temporal and geographical reach of the section 1 offence considerably (especially given that matches played outwith Scotland could be within the scope of the Bill). Most of us think that is, on balance, appropriate given the behaviour that can be manifested by supporters travelling to or from football matches. Some of us think that this may take the reach of the Bill too far.

192. As with the provisions in relation to the televising of matches, it appears to the Committee that the provisions as currently drafted could lead to some interesting questions as to what is and is not within the scope of the section 1 offence.

193. In relation to perceived uncertainties with the drafting language used in relation to travel, the Minister and the Lord Advocate both pointed out that the language had been borrowed almost verbatim from the legislation on football banning orders. That legislation has been in force for around five years and the Minister and Lord Advocate both said that they were unaware of any practical difficulties with it.\footnote{Scottish Parliament Justice Committee. \textit{Official Report, 20 September 2011}, Col 316.}

194. The Committee accepts that that is an important point to make. However, it does not rule out the Government taking the opportunity to consider whether the drafting could be improved upon. In this connection, it should be borne in mind that an FBO is imposed on disposal, after a person has been convicted of a criminal charge. The legislation that the committee is scrutinising relates to the factual evidence required to prove that an offence has been committed, an offence for which the maximum penalty is a five-year sentence. It may be presumed that it would be subjected to greater scrutiny and challenge than the legislation concerning FBOs.

195. The Committee acknowledges that offensive behaviour that may provoke public disorder can be a problem in relation to matches televised in public places (pubs for instance), that this sort of behaviour is unacceptable, and that it may sometimes be necessary to apply the criminal law to deal with it. If there is to be a new offence of offensive behaviour at football matches, we accept that it is appropriate that it cover televised matches. But the Scottish Government should consider whether the parameters of the offence in relation to televised matches need to be made clearer.

196. The provisions in the Bill concerning travel to or from matches raise similar questions about whether or not particular situations are covered. We accept that some of the worst manifestations of offensive behaviour that provokes public disorder can occur when fans are travelling to a match (often with little concern about whether they actually get inside the stadium) and that it is appropriate to seek to make provision for this. Again, we invite the Scottish Government to consider whether there is scope to make the relevant provisions any more clear.
Explanations of the Offence

197. The second main element of the Bill is the new offence of threatening communications, set out at section 5 of the Bill.

198. The offence is committed where (a) a person communicates material to another person, and (b) one of two conditions set out in the Bill are satisfied. These are referred to as Condition A and Condition B.

199. The key element of Condition A is the threat of a seriously violent act. To quote from the Bill—

“(2) Condition A is that—

(a) the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons of a particular description,

(b) the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm, and

(c) the person communicating the material—

(i) intends by doing so to cause fear or alarm, or

(ii) is reckless as to whether the communication of the material would cause fear or alarm.”

200. The key element of Condition B is religious hatred. To quote again from the Bill—

“Condition B is that—

(a) the material is threatening, and

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

201. The Bill provides for a defence to the section 5 offence “that the communication of the material was, in the particular circumstances, reasonable.” There has been some debate as to whether this is sufficient to ensure the protection of freedom of speech, as outlined further below.

202. Communication in respect of the offence is defined as communication “by any means (other than by means of unrecorded speech)”. “Material” is given a wide definition: “anything capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form.”

203. The scope of the section 5 offence is therefore significantly wider than that of the section 1 offence, in that it does not require a football connection and in that the key terms “communicate” and “material” are quite widely defined. It is also in
some respects narrower, most notably in that it expressly excludes unrecorded (ie direct) speech and extends a degree of protection against religious hatred that is not expressly provided against, say, homophobic or racist hatred. The section 5 offence is not limited to internet communication (the sending of threatening mail or of a fake bomb would probably be covered by it), but we have noted a tendency to view it as “the internet offence”, as opposed to “the football offence” in section 1, and this is reflected in the balance of the evidence that we have received on it.

Views on the section 5 offence

204. There are some parallels between the debate on the section 1 offence and that on the section 5 offence. In particular, the same question has been asked by some witnesses as to whether the offence is fundamentally necessary.

Legal purpose

205. The Scottish Government’s policy memorandum itself lists three statutory offences that might be used against threatening behaviour, plus two common law offences (uttering threats and breach of the peace) plus two possible statutory aggravations.  

206. The memorandum then goes on to say—

“While these laws are in place they are not always easily applied to this behaviour. The requirement for a “public element” can make a charge of breach of the peace difficult to bring in some cases. It can also be difficult to establish that someone actually intended to carry out a threat or incite someone else to commit a crime in relation to the common law offences of uttering threats and incitement. While the offence of “threatening and abusive behaviour” does not require a public element, it does require that the behaviour must be of a threatening and abusive manner and could not necessarily be used to prosecute threats made with the intent of inciting religious hatred. Finally, in relation to electronic communications, case law has left some doubt about whether the Communications Act offence can be used to prosecute people who create offensive websites or “groups” on social networks, as opposed to sending threatening emails or other communications.”

207. The memorandum continues—

“We believe that a specific offence will bring clarity to the law in this area, send a clear message that such behaviour is unacceptable, and enable the courts to impose stiffer sentences on the most serious offenders.”

208. In his first appearance before the Committee, the Lord Advocate argued that section 5 was necessary because of problems in seeking to prosecute under the Communications Act 2003. He said that in some cases in England, doubts had been raised as to whether posting, blogging or tweeting constituted “sending” a communication within the terms of that Act. He also commented that offences under the 2003 Act were only prosecutable summarily and that he doubted that

140 Policy Memorandum. Paragraph 33.
141 Policy Memorandum. Paragraph 34.
142 Policy Memorandum. Paragraph 36.
this was always commensurate with some of the “vilest” postings that he had seen online.143

209. Some legal experts have doubted the Scottish Government’s analysis.144 In particular, they have suggested that, as with the section 1 offence, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 already provides an appropriate remedy, with an identical sentencing power. The Law Society of Scotland cited the prosecution of a man under section 38 of creating a website where sectarian hate messages were posted about Celtic manager Neil Lennon. This point is also taken up in the written evidence of two legal academics—

“The s38 provisions on threatening or abusive behaviour can also be read to encompass the offence proposed in s5 of the Bill. Section 38 is made out where the accused has behaved in a threatening or abusive manner which is likely to, intentionally or recklessly, cause fear or alarm to a reasonable person. ‘Behaviour’ in this context covers behaviour of any kind including, either as a single incident or a course of conduct, spoken threats, or threats communicated in other ways, and threats evinced through physical acts. If the individual were to have communicated material containing or implying a threat of serious violence, or material which is threatening and intends to stir up religious hatred, that would amount to behaving in a threatening, and no doubt in many cases abusive, manner which would be likely to cause fear or alarm to a reasonable person and so would be caught by that section. The Policy Memorandum queries whether s38 could cover all instances of behaviour intended to incite religious hatred but given the nature of material designed to inflame religious ‘hatred’, it would be hard to envisage a communication which was not sufficiently abusive to cause alarm to a reasonable person.”145

210. These views do appear to have been borne out in a number of well-publicised cases,146 the facts of which were similar to those in the case cited by the Law Society, which have been decided in the sheriff court since the introduction of the Bill. Section 38 of the 2010 Act is the provision on which the prosecution has successfully relied in most or all of those cases, in some cases augmented with a statutory aggravation of religious hatred. At least one of the recently reported cases was successfully prosecuted on indictment, meaning that the maximum sentence could be applied.147

Views from internet experts/stakeholders
211. The Committee heard from Professor William Buchanan, an expert in digital security and cybercrime. He expressed very mixed views on the inclusion of section 5 in the Bill. On the one hand, he said it was a “great thing”148 that the Bill made provision for internet communications because it enabled a debate on the

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144 Eg James P Connolly. Written submission.
145 Dr Sarah Christie and Dr David McArdle. Written submission.
147 Information available via the clerk or the Scottish Courts Administration
whole issue. The Bill was “a step in the right direction”. On the other hand, he was concerned that section 5 was an insufficiently sophisticated “knee-jerk reaction” towards criminalising unacceptable online communications. Professor Buchanan commented that—

“no country really has control of the internet. However, Scotland might have the opportunity to start to define the proper and polite way in which to use the internet. The bill does not define that and just takes a black-and-white approach to matters, to the effect that if someone does something bad, they will be prosecuted, and if they do not, then they will be okay. The bill does not go into enough detail in that regard. As a country, we probably need to say what kind of things are allowed to happen on the internet and what are definitely not.”

212. The Internet Service Providers Association stated in their submission that it was desirable for service providers that there be legal consistency within the UK, unless a divergent approach could be justified under the circumstances. They added—

“While not fundamentally opposed to the new offence, we would welcome further evidence as to why the Scottish Government believe that already existing offences (see p.7f of the policy memorandum that accompanies the bill) that deal with threatening communications (such as the Communications Act) are inadequate. Therefore the new offence needs to be fully justified to ensure that the balance between freedom of expression and protection of users is found.”

Other views
213. A number of stakeholders from the voluntary or youth sectors broadly welcomed the intentions behind this element in the Bill. Given the events of last season, it is also important to record that Celtic and Rangers football clubs both expressed strong support in principle for the section 5 offence. Some of the witnesses who were dubious about the case for the section 1 offence thought that the Government was on stronger ground with the section 5 offence, as a means of tackling football-related hate speech. However, Dr Stuart Waiton reiterated concerns in relation to the section 1 offence that the Bill could result in “an avalanche of offended people using the criminal justice system and the courts”.

214. Childline in Scotland drew attention to the problem of “cyberbullying”, by and of children. Their written submission stated this was a very serious issue that required to be dealt with, but expressed concerns that the section 5 offence could result in—

152 Internet Service Providers Association. Written submission.
153 Eg Victim Support Scotland. Written submission; Stonewall Scotland. Written submission;
Scottish Youth Parliament. Written submission; YouthLink Scotland. Written submission.
154 Celtic Football Club. Written submission; Rangers football Club. Written submission.
Professor Graham Walker. Written submission; Supporters Direct Scotland. Written submission.
“large numbers of children being criminalised for cyberbullying, if they are threatening violence or if that bullying is of a religious or sectarian nature. We do not consider this to be the best way to deal with the problem of cyberbullying and are highly concerned at the implications for an already strained Children’s Hearings System if legislation is created that catches an increasingly common form of children’s bullying behaviour. We would strongly recommend that any accompanying guidance to the Act made clear that any children under 18 would only be referred to the Hearings System or prosecuted under this legislation in the most exceptional circumstances.” 157

The online world and the “real” world

215. A more general theme picked up in evidence is about what might broadly be labelled as “cultural” differences between the ways in which identity is managed and manifested in the virtual and “real” worlds. Professor Buchanan pointed to the instant nature of online communication and the inability to withdraw communications once they had been posted. 158 The Committee is not persuaded that this, in itself, should be a ground for not treating a genuinely threatening and frightening communication as a criminal matter. People can, after all, behave in a threatening and frightening way on the spur of the moment in the real world, and may instantly regret it. But this does not guarantee that the criminal law would not be applied. The most that the Committee would suggest is that we expect the police and prosecutors to handle cybercrime cases arising from a rush of blood to the head in a proportionate and commonsense manner.

216. Perhaps more problematic is the question whether we should apply more lenient standards to apparently hateful and threatening comment online than manifested in, say, a speech, a letter, or a newspaper article. On balance, the Committee would say no. We consider that it is important for the criminal law to be consistent, regardless of the medium of communication. However, we should be mindful that the young in particular may have a different concept of what constitutes appropriate conduct in the semi-public forum of web chat rooms and social media. Once again, context is fundamental. We note, and agree with, the comments of Assistant Chief Constable Campbell Corrigan—

“We must be pragmatic and clear that we are talking about people who peddle hate. … We should ask whether it is reasonable for someone to go to court. For example, we should consider whether it was a joke between two young lads who were sending things about their favourite football team, which is often the reality. Alternatively, we should consider whether there was something like what we had last year: defined and clear threats against a named person, showing marks on his body where he was going to be injured.” 159

217. The Committee supports efforts to prevent hateful and inflammatory communications online and in other types of new media. There is a need to make sure that our laws are robust and up-to-date, in order to deal with this fast evolving milieu. It would be a matter of concern if gaps in the current law prevented the successful prosecution of serious cases of hateful

157 Children in Scotland. Written submission.
communication. Not all Members are wholly convinced that the Scottish Government has made a clear case that those gaps exist, particularly in view of recent successful prosecutions under the current law.

218. However a majority\(^{160}\) of the Committee are prepared to support the proposal for a new offence of threatening communications. The majority notes that the creation of this offence may provide greater certainty to online users about what is and is not legally acceptable under Scots law.

219. A minority\(^{161}\) of the Committee do not consider that the Scottish Government has made the case that additional legislation is necessary.

220. The Committee would welcome the Government (a) giving consideration to our queries and recommendations below on how the provision might be made more effective, and (b) providing further information to the Committee on whether and, if so, why, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is not considered adequate to prosecute threatening online communications, despite a number of apparently successful recent prosecutions.

221. The Committee invites the Scottish Government to note the comments of some organisations about the danger of drawing large numbers of children and young people into the ambit of the criminal law or the Children’s Hearing system via the new offence of threatening communications.

Condition B and freedom of expression

222. The Committee heard some fears that Condition B, concerning communications intended to stir up religious hatred could have a “chilling” (ie inhibiting) effect on freedom of speech. The Committee was interested to note that many of these views came from individuals identifying as Christians or from Church bodies, concerned about freedom of speech generally, but also that the provision that would restrict their capacity to preach or proselytise or to comment critically on the doctrines and beliefs of other faiths.

223. The Christian Institute\(^{162}\) provided a number of hypothetical examples of situations involving the expression of religious belief where, they argued, the Bill as drafted might bring the legality of the conduct into question.

224. In providing these examples, the Institute raised two main points. One was that the concept of “threat” applied in a religious context might have a metaphysical quality (eg such as that a particular person might go to hell) or be a threat of rejection by a person’s community, rather than being a physical threat. Would such “threats” be covered or not? The other related to members of one religion using emotive language to argue that another was in error or quoting controversial or perhaps potentially inflammatory passages from another religion’s scriptures. Was this “religious hatred”?

\(^{160}\) Roderick Campbell MSP; John Finnie MSP; Christine Grahame MSP; Colin Keir MSP; Humza Yousaf MSP
\(^{161}\) James Kelly MSP; John Lamont MSP; Alison McInnes MSP; Graeme Pearson MSP
\(^{162}\) The Christian Institute. Written submission.
225. The Christian Institute quoted counsel’s opinion that—

“even if no prosecution was proceeded with, the fact is that having such a broadly defined offence on the statute book will exert a chilling effect on freedom of speech, with individuals indulging in self-censorship and/or harbour an unwillingness to publicly express their true religious beliefs for fear of running foul of the law”\(^{163}\)

226. The Institute also mounted a broader freedom of speech argument—

“A religious hatred offence could be used by traditional Christians to silence their critics, be they new atheists, liberals or members of other faiths. Condition B could easily be used in this way, but at what cost to free speech?”

227. The Institute argued that the best solution was to strike out Condition B. If not, it argued that the Parliament should insert a “free speech clause”, as had been done with equivalent legislation for England and Wales. In this, the Institute made common ground with a number of other individuals and organisations including the National Secular Society and Dr Kay Goodall of the University of Stirling Law School. Dr Goodall was among those to draw the Committee’s attention to section 29J of the Public Order Act 1986, and what she saw as the very useful political debate that had preceded the agreement of that provision.\(^{164}\) Shelagh McCall of the Scottish Human Rights Commission invited the Committee to consider whether there should be “a specific exemption for artistic expression, peaceful preaching and so on.”\(^{165}\)

228. John Deighan, representing the Roman Catholic Bishops Conference of Scotland commented on—

“the lack of a freedom of expression provision; concern about that is shared by many groups, but particularly Christian groups. The trouble is that free and frank discussion of certain matters that for some people could be offensive, may be caught by the bill. To tackle that would perhaps involve looking at how it has been done in England and ensuring explicitly that people are allowed to express their views freely, especially in terms of religion or belief. It is important to have that safeguard rather than to rely on what is deemed to be reasonable, which can change radically according to the different environments in which people may speak. So, our suggestion is to ensure that there is recognised human rights protection in that regard…”\(^{166}\)

229. The Scottish Government has robustly maintained that Condition B does not threaten free speech. The policy memorandum states—

“The provision is restricted to threats made with the intent of stirring up religious hatred. As such, it does not interfere with the right to preach religious beliefs nor a person’s right to be critical of religious practices or beliefs, even in harsh or strident terms. There was extensive criticism of early

\(^{163}\) The Christian Institute. Written submission.


attempts to criminalise incitement of religious hatred in England and Wales on the grounds that provisions extending to insults and abuse as well as threats could inadvertently criminalise comedians and satirists who make jokes about religion, or even religious texts themselves. We believe that the Bill avoids those problems and does not restrict legitimate freedom of expression.”

230. In her final appearance before the Committee, the Minister broadly reiterated these comments and drew attention to the defence of reasonableness to a charge under section 5. She indicated, however, that she would have an open mind were the Committee to suggest the addition of a “freedom of speech” clause. The Lord Advocate said that such a provision “would have only a declaratory effect because, in any event, Articles 9 and 10 of the European Convention of Human Rights would apply.” Whilst the Committee acknowledges that the Presiding Officer has stated that she considers the Bill is within the competence of the Scottish Parliament, it is not the case that, because the ECHR “applies” to any Act of the Scottish Parliament, any Act is ECHR-compliant; the Scottish Parliament must seek to ensure that any Bill it passes is ECHR compliant.

231. The Committee notes that the Scottish Government is open to considering the inclusion of a provision protecting freedom of speech in relation to the new offence of threatening communications, to provide assurance that section 5 of the Bill does not inhibit the free, open and, perhaps at times offensive expression of views on religious matters. We would welcome such a provision.

Widening the ambit of the section 5 offence?

232. The policy memorandum explains that the section 5 offence has been drafted so as to encompass violent threats (Condition A) because of a perceived lacuna in the common law crime of issuing threats, meaning that the courts are unlikely to convict if there is an insufficiency of evidence that the threat was likely to be carried out. Condition B (threats involving religious hatred) was included in the Bill because—

“It brings Scotland into line with England and Wales, where threats intended to stir up religious hatred are criminalised by the Public Order Act 1986, as amended by Racial and Religious Hatred Act 2006 (and both Northern Ireland and the Irish Republic have also legislated to criminalise inciting religious hatred).”

233. Some witnesses have queried why the Bill has not gone further. They have compared section 5 to section 1, which covers offensive behaviour in relation to matters such as homophobia, race, nationality, disability, and so on. Stonewall, for instance, argued that this part of the Bill should also cover hatred on grounds of sexual orientation and transgender identity, referring to statistics on hate crime against gay men, lesbians and transgender people, and giving examples of hate speech available online, some of which might be an offence under Condition A but

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167 Policy Memorandum. Paragraph 41
170 Eg Inclusion Scotland. Written submission; Equality Network Scotland. Written submission; Human Rights Consortium Scotland. Written submission.
some of which might not. Stonewall said that they were in favour of having a free
debate around issues such as same-sex marriage or homophobic bullying, but that
“these conversations should be conducted in temperate and reasonable terms and
from a level playing field, without some voices being accorded a greater protection
than others within the debate.” 171

234. In his first appearance before the Committee, the Lord Advocate was invited
to comment on whether Condition B should be widened. He replied—

“I would like to take time to consider the issue. I am aware that there is UK
legislation that covers offensive comments such as racist comments that are
made on the internet, and I would need to look at it to find out whether that is
already covered, or whether the bill would be improved by inserting in section
5(5) the list that is provided in section 1(4).” 172

235. When the Minister and Lord Advocate made their final appearance before the
Committee they were asked if their thinking had progressed on this issue. The
Minister explained that—

“I have no huge antipathy towards expanding the second offence to cover the
same categories as are covered by the first. If the committee feels that such
a move would be helpful and useful, it can recommend as much. We will be
open to looking at the proposal’s practicalities and whether that approach
would work just as well with the second offence. We made the exclusion in
the early part of the process simply to keep the bill as tightly drawn as
possible in light of the short timescale that was originally mooted for its
consideration.” 173

236. The Lord Advocate said that he agreed; the matter was ultimately a question
of policy rather than law.

237. The Committee recognises differing views on whether to widen section
5 to cover other categories of protection and acknowledges that this is an
issue that would require more consideration. The Committee therefore
invites the Scottish Government to consult on widening section 5 at an
appropriate point should the Bill be passed.

The exclusion of unrecorded speech
238. Some witnesses queried why unrecorded speech was expressly excluded
from the definition of “communication” in section 5, thereby meaning that threats
conveyed by means of unrecorded speech would not be criminal under the Bill.
(The Committee takes unrecorded speech to mean direct speech and also live
speech streamed online, although the latter might benefit from being clarified.)

239. The Scottish Government’s policy memorandum explains why they decided
to take this approach: they had considered the including live speech carefully,
but—

171 Stonewall Scotland. Written submission.
“A primary consideration in reaching a conclusion on this issue is that the [sic] criminalising offensive behaviour related to football will cover verbal threats and the expression or inciting of religious hatred at, or on the way to and from, a regulated football match at any public place where such matches are televised where those threats are likely to lead to public disorder. The most significant consideration, however, is that verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour which gave rise to the need for this Bill and the wider implications of such an extension deserve fuller consideration.

The Scottish Government has, therefore, sought to ensure that the Bill is tightly drawn to tackle specific issues rather than ranging more widely to cover other issues relating to sectarianism or other forms of hatred which may be equally offensive and equally deserving of a firm legislative response but which were not part of the specific impetus for this Bill. The Government is clear that Bill covering a much wider range of attitudes and behaviours and introducing a wider range of measures would not have been justified without fuller consultation and engagement.”

240. Shelagh McCall of the Scottish Human Rights Commission told the Committee—

“We question why unrecorded speech is not included. If it is intended to exclude private conversations between two individuals, it could be more narrowly drafted. At the moment, it seems also to exclude the streaming of live speech over the internet. It may also exclude a rally run by an extremist group where the speaker is speaking through the microphone but is not being recorded. It may be that the Government intends to catch those sorts of things but exclude private conversations. Further consideration could be given to that point because, in freedom of expression terms, the fact that speech is recorded or unrecorded is not a critical factor.”

241. In her evidence on 20 September, the Minister pointed out that if unrecorded speech were included within the ambit of the section 5 offence then this might give rise to increased concerns about freedom of speech. Written evidence from the Christian Institute has also pointed out that an offence under section 5 may be committed on domestic premises (unlike the section 1 offence). Extremely careful consideration should be given to approving any legislative measure that would criminalise a private conversation taking place in someone’s home.

242. The Committee would not support the widening of the section 5 offence to include unrecorded speech, because we recognise the civil liberties implications of creating a law that, perhaps unwittingly, has the potential to criminalise private conversation or conversation within domestic premises.

243. The Committee would welcome clarification as to whether a live stream of a speech or conversation would be deemed to be “unrecorded speech” under the Bill.

174 Policy Memorandum. Paragraphs 55 and 56.
Enforcement of section 5: finding the culprit

244. In his written evidence, Professor Buchanan raised some practical concerns about tracing online communications and finding a sufficiency of robust evidence to make a conviction. These included—

- technological issues such as the existence of malicious software that could do things on a user’s behalf without their control or a lack of rigour in the collection and preservation of digital data, 177
  
- cultural issues, such the differences in the way identity is managed in the real world and online, and
  
- enforcement issues, such as a lack of strong understanding of the internet within the Scottish police and prosecution services.

245. Professor Buchanan was clear that these should not be seen as insurmountable obstacles, but rather issues to which careful concern needed to be given in framing a new law. Professor Buchanan was invited to elaborate on some of these concerns in his evidence to the Committee. He referred to a general problem with the reliability of evidence in relation to cybercrime—

“The internet is a free world. Everybody can get into it and can post whatever they want. My signature does not exist on the internet, so how can you identify that it was I who sent you an e-mail? Anybody can spoof my e-mail address, anybody can pretend to have my identity and anybody can take my identity.” 178

246. Professor Buchanan’s view was that this underlined the need for reliable corroboration of evidence in cybercrime cases, 179 and for the jury to be properly informed of the risk of evidence being unreliable. 180 He was concerned that the police and prosecution services and Scotland were not generally up to speed on cybercrime, although he singled out the Scottish Crime and Drug Enforcement Agency for praise. 181 Overall, he saw merit in there being a panel of experts, drawn from academia, business and banking, as well as the police and the law, to support the enforcement of this part of the Bill, reviews its effectiveness, and provide risk assessments.

247. In relation to corroboration and proof of authorship of a threatening remark, Professor Buchanan indicated that the same sort of circumstantial evidence that the courts were accustomed to dealing with in more “traditional” cases could be used; evidence, for instance that someone was at home, or that their car was parked outside, when a posting was made. 182

248. Assistant Chief Constable Campbell Corrigan was asked about how the police would approach their new responsibilities under section 5—

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177 An example of the latter is provided by the Scottish Council of Jewish Communities (Written submission)
“Before we set sail on the new challenge, we will have to train more people in internet investigation, but I suggest that we would probably have had to do that anyway, because the world is moving towards a position in which everything is done on the internet. The people whom we train will be multifaceted. I do not think that they will be dedicated entirely to the investigation of sectarianism; they will learn how to deal more effectively with wider issues.”

249. Les Gray of the Scottish Police Federation said that he doubted that the police would have sufficient resources to spend much time investigating the likes of individuals’ Facebook entries. The police would inevitably concentrate only on a few important cases.

Extraterritoriality

250. Section 5 provides that the offence may be committed by a person outside of Scotland who is a British national or by “any person from outside Scotland if the person intends the material communicated to be read, looked at, watched or listened to primarily in Scotland.” The Committee notes the potential wideness of this latter provision in particular. However, there is some expertise available in this area, as has been used, for example, in relation to cases involving paedophilia or drugs or people trafficking.

251. Professor Buchanan was asked to take the Committee through the technical steps involved in tracing the culprit where the threatening remarks appeared to have been posted outside of Scotland, Portugal for instance. Professor Buchanan said that this could be “very difficult”. He elaborated—

“From a technical point of view, internet service providers in the United Kingdom keep a trace for up to two years of all internet traffic coming from homes. It is therefore possible for the police to go to the ISP to determine whether someone posted something at a specific time. I worry that it is not possible to tell who posted. In my home, four people use the internet; no one could tell which person posted a specific thing because all would come from one network. Identification is possible, but legislation is not the same all around the world. I do not know whether an ISP in Portugal would log the details of communications.”

252. Further difficulties that Professor Buchanan identified were that tracing a foreign communication could be labour-intensive for the police, that there would need to be a consideration of the data protection and investigatory laws of the foreign jurisdiction, and that a foreign arrest warrant might ultimately be needed. On balance, however, he considered that the inclusion of a provision on extraterritoriality was “a good step but it probably needs to be couched with some guidelines on how to investigate such communications”.

253. There were others who had some doubts about whether the extraterritorial aspects of section 5 could be made to work. The Law Society suggested that

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187 Eg Dr Kay Goodall. Written submission.
they were “unprovable” and “unlikely ever to result in successful prosecution.” The Lord Advocate, however, pointed out that similar provision had been made for other criminal legislation, for instance on paedophilia.

254. The Committee notes the resource implications of section 5, if it were enforced to its full extent. We consider that this points to the likelihood of it being used for “exemplary” purposes to deal with extreme cases of threatening behaviour online. The Committee would welcome the Scottish Government clarifying what resources and training are being provided to law enforcement services to deal with online crime generally. We note the suggestion that an advisory committee of experts might be appointed to assist in the development of effective law enforcement in the online sphere.

255. Given the absence of clear national barriers online, the Committee accepts the case for an extraterritorial provision in respect of the offence of threatening communications. The Committee expects that use of it would be restricted to exceptional cases, where it is considered in the national interest to pursue a conviction and there is reasonable prospect of it being successful.
ANNEXE A: CORRESPONDENCE FROM THE FINANCE COMMITTEE

Letter from the Convener of the Finance Committee on the Financial Memorandum of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

At its meeting on 14 September the Finance Committee took evidence from Richard Foggo and Peter Conlong, members of the Scottish Government Bill Team, on the Financial Memorandum ("FM") accompanying the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill ("the Bill"). The Committee agreed to forward the key themes arising from that evidence session to the Justice Committee.

Members raised a number of issues concerning the cost estimates in the FM relating to the policing and prosecution of individuals under the terms of the Bill. The full details of these discussions can be found in the Official Report.

Members wished to highlight, in particular, the following:

General
The Committee explored the financial impact of the Bill on the justice system. It noted, for example, that there were differing views on the estimated policing costs and the extent to which the FM had allowed sufficient funding for this area of activity. While the Committee accepts that the costs set out in the FM are estimates, it would welcome regular review of these figures to ensure that they reflect the reality of policing and prosecuting individuals under the Bill.

Preventative Spending
The Committee has agreed to focus on preventative spending in the scrutiny of the forthcoming draft budget 2012-13 and spending review. Members were therefore keen to explore the extent to which the Bill might contribute to this agenda and sought to compare the costs directed at the prosecution of sectarian offences with the funding directed at preventative action.

Deterrent effect
Members recognised that the Bill, if effectively implemented, could over time have a deterrent effect on the number of offences committed under the Bill. It was accepted that this, in turn, could lead to a reduction in policing and prosecution costs.

Changes to the current charging system
Members noted that, in estimating the costs associated with match day policing, the FM relied on the current charging system. The Committee heard in evidence, however, that these charges could be reviewed as part of the forthcoming review of the Police (Scotland) Act 1967. Any changes to these charges would therefore need to be reflected in the cost estimates for the future implementation of the Bill.

Risk and probabilities
While recognising that the costs provided in the FM are estimates, Members wished to explore the risk analysis that had been conducted to assess the financial
impact of an unexpected event, such as a resource-intensive investigation and prosecution, and whether there was sufficient funding to accommodate such an event. Members also sought to establish the estimated costs for unsuccessful prosecutions.

The Committee wishes to see the costs associated with the implementation of this Bill kept under review.

I hope you find these comments helpful.

Kenneth Gibson MSP
Convener
16 September 2011
ANNEXE B: EXTRACTS FROM THE MINUTES

2nd Meeting, 2011 (Session 4), Tuesday 21 June 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Committee took evidence from—
Roseanna Cunningham, Minister for Community Safety and Legal Affairs;
Assistant Chief Constable Campbell Corrigan, Chair, ACPOS Football Sub-Committee;
Les Gray, Chairman, Scottish Police Federation;
Dr David McArdle, Senior Lecturer, Stirling Law School;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreddie, Deputy Director of Law Reform, Law Society of Scotland.

Meeting, 2011 (Session 4), Wednesday 22 June 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Committee took evidence from—
Chloe Clemmons, Scottish Churches Parliamentary Officer, representing the Church of Scotland;
Tim Hopkins, Director, Equality Network;
Neil Doncaster, Chief Executive, Scottish Premier League;
Ronnie Hawthorn, Head of Safety, Security and Operations, and Robert Howat, Company Secretary, Celtic Football Club;
David Martin, Head of Security and Operations, Rangers Football Club;
Stewart Regan, Chief Executive, Scottish Football Association;
Frank Mulholland QC, Lord Advocate;
Michelle Macleod, Head of Policy Division, Crown Office and Procurator Fiscal Service.

4th Meeting, 2011 (Session 4), Tuesday 28 June 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private): The Committee considered its approach to further scrutiny of the Bill and agreed: (1) to invite all previous witnesses to provide supplementary written evidence; (2) to circulate the call for written evidence to a number of additional organisations; (3) an initial list of witnesses for its first meetings in September; (4) to commission a SPICe briefing on football-related disorder elsewhere in the world and how it is dealt with; and (5) to request permission from the Conveners Group for some members to make a visit in connection with the Bill.

5th Meeting, 2011 (Session 4), Tuesday 6 September 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Committee took evidence on the Bill at Stage 2 from—
Mark Dingwall, Board Member, Rangers Supporters Trust;
Jeanette Findlay, Chair, Celtic Trust;
Dr Neil Havis, Secretary, ERIN Hibernian Supporters Trust;
Greig Ingram, Board Member, Aberdeen FC Trust;
Martin Riddell, Edinburgh Tartan Army representative, Association of Tartan
Army Clubs;
Derek Robertson, Board Member, ArabTRUST (The Dundee United
Supporters Society);
Derek Watson, Chair, Heart of Midlothian Supporters Trust;
Pat Nevin, Broadcaster and former professional footballer;
Graham Spiers, Sportswriter, The Times;
Dr Stuart Waiton, Lecturer in Sociology and Criminology, University of
Abertay, Dundee;
Graham Walker, Professor of Political History, Queen's University Belfast.
John Finnie declared that he is a member of the Heart of Midlothian
Supporters Trust.

Offensive Behaviour at Football and Threatening Communications
(Scotland) Bill - witness expenses: The Committee agreed to delegate to the
Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any
expenses of witnesses on the Bill.

Work programme (in private): The Committee considered its work programme
and agreed (1) the scheduling of witnesses for the last two days of evidence taking
on the Offensive Behaviour at Football and Threatening Communications
(Scotland) Bill at Stage 2. [ … ]

6th Meeting, 2011 (Session 4), Tuesday 13 September 2011

Offensive Behaviour at Football and Threatening Communications
(Scotland) Bill: The Committee took evidence on the Bill at Stage 2 from—
Chief Superintendent David O'Connor, President, Association of Scottish
Police Superintendents;
Temporary Superintendent David Marshall, Protective Services, British
Transport Police;
Andy Niven, National Teams Administration, Competitions and Matches
Manager, and Darryl Broadfoot, Head of Communications, Scottish Football
Association;
John Deighan, Parliamentary Officer, Bishops Conference of Scotland;
Chloe Clemons, Scottish Churches Parliamentary Officer, representing
the Church of Scotland;
Professor Tom Devine, Senior Research Professor in History, University of
Edinburgh;
Dr Bronwen Cohen, Chief Executive, Children in Scotland;
Tom Halpin, Chief Executive, Sacro;
Dr Kay Goodall, School of Law, University of Stirling.

The Committee agreed to write to the Scottish Premier League on matters arising
from the evidence heard, and agreed to delegate to the Convener final authority to
sign off the letter. The Committee agreed to write to the Lord Advocate requesting
information on implementation of section 74 of the Criminal Justice (Scotland) Act
1973 (offences aggravated by religious prejudice).

7th Meeting, 2011 (Session 4), Tuesday 20 September 2011
Decision on taking business in private: The Committee agreed to consider in private at future meetings the main themes arising from evidence received on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2; its subsequent draft report on the Bill at Stage 2; […]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: The Committee took evidence on the Bill at Stage 2 from—Shelagh McCall, Commissioner, Scottish Human Rights Commission; William Buchanan, Professor of Computer Security and Digital Forensics, Edinburgh Napier University; Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs; Rt Hon Frank Mulholland QC, Lord Advocate; Richard Foggo, Head of Community Safety Unit, Scottish Government.

8th Meeting, 2011 (Session 4), Tuesday 27 September 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private): The Committee considered the main themes arising from evidence received on the Bill at Stage 2 in order to inform the drafting of its report.

9th Meeting, 2011 (Session 4), Tuesday 4 October 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private): The Committee considered a draft report on the Bill.

10th Meeting, 2011 (Session 4), Wednesday 5 October 2011

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private): The Committee agreed its report on the Bill.
ANNEXE C: INDEX OF ORAL EVIDENCE

2nd Meeting, 2011 (Session 4), Tuesday 21 June 2011

Roseanna Cunningham, Minister for Community Safety and Legal Affairs;
Assistant Chief Constable Campbell Corrigan, Chair, ACPOS Football Sub-Committee;
Les Gray, Chairman, Scottish Police Federation;
Dr David McArdle, Senior Lecturer, Stirling Law School;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreadie, Deputy Director of Law Reform, Law Society of Scotland.

3rd Meeting, 2011 (Session 4), Wednesday 22 June 2011

Chloe Clemmons, Scottish Churches Parliamentary Officer, representing the Church of Scotland;
Tim Hopkins, Director, Equality Network;
Neil Doncaster, Chief Executive, Scottish Premier League;
Ronnie Hawthorn, Head of Safety, Security and Operations, and Robert Howat, Company Secretary, Celtic Football Club;
David Martin, Head of Security and Operations, Rangers Football Club;
Stewart Regan, Chief Executive, Scottish Football Association;
Rt Hon Frank Mulholland QC, Lord Advocate;
Michelle Macleod, Head of Policy Division, Crown Office and Procurator Fiscal Service.

5th Meeting, 2011 (Session 4), Tuesday 6 September 2011

Mark Dingwall, Board Member, Rangers Supporters Trust;
Jeanette Findlay, Chair, Celtic Trust;
Dr Neil Havis, Secretary, ERIN Hibernian Supporters Trust;
Greig Ingram, Board Member, Aberdeen FC Trust;
Martin Riddell, Edinburgh Tartan Army representative, Association of Tartan Army Clubs;
Derek Robertson, Board Member, ArabTRUST (The Dundee United Supporters Society);
Derek Watson, Chair, Heart of Midlothian Supporters Trust;
Pat Nevin, Broadcaster and former professional footballer;
Graham Spiers, Sportswriter, The Times;
Dr Stuart Waiton, Lecturer in Sociology and Criminology, University of Abertay, Dundee;
Graham Walker, Professor of Political History, Queen's University Belfast.

6th Meeting, 2011 (Session 4), Tuesday 13 September 2011

Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents;
Temporary Superintendent David Marshall, Protective Services, British Transport Police;
Andy Niven, National Teams Administration, Competitions and Matches Manager, and Darryl Broadfoot, Head of Communications, Scottish Football Association; John Deighan, Parliamentary Officer, Bishops Conference of Scotland; Chloe Clemmons, Scottish Churches Parliamentary Officer, representing the Church of Scotland; Professor Tom Devine, Senior Research Professor in History, University of Edinburgh; Dr Bronwen Cohen, Chief Executive, Children in Scotland; Tom Halpin, Chief Executive, Sacro; Dr Kay Goodall, School of Law, University of Stirling.

7th Meeting, 2011 (Session 4), Tuesday 20 September 2011

Shelagh McCall, Commissioner, Scottish Human Rights Commission; William Buchanan, Professor of Computer Security and Digital Forensics, Edinburgh Napier University; Roseanna Cunningham MSP, Minister for Community Safety and Legal Affairs; Rt Hon Frank Mulholland QC, Lord Advocate; Richard Foggo, Head of Community Safety Unit, Scottish Government.
ANNEXE D: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

Action for Children Scotland
Action for Children Scotland (supplementary submission)
Amnesty International
Anderson, Robert
Association of Chief Police Officers in Scotland Football Sub Group
Association of Directors of Social Work
Ballingry Celtic Supporters Club
Brennan, Martin
Buchanan, Professor William
Campbell, James
CARE for Scotland
Catholic Church
Catholic Church (supplementary submission)
Celtic Football Club
Celtic Supporters Association
Celtic Supporters Trust
ChildLine in Scotland
Children in Scotland
Christian Institute
Christie, Dr Sarah and McArdle, Dr David
Church and Society Council of the Church of Scotland and Faith in Community Scotland
Coalition for Racial Equality and Rights
Cochrane, Paul
Connelly, John
Connolly, James P.
Council of Ethnic Minority Voluntary Sector Organisations Scotland
Easdale, John
Equality and Human Rights Commission Scotland
Equality and Human Rights Commission Scotland (supplementary submission)
Equality Network
Evangelical Alliance Scotland
Furey, Daniel and Elizabeth
Gallagher, Professor Tom
Goodall, Dr Kay
Grand Orange Lodge Scotland
Hadfield, M.
Halliday, Margaret
Hannah, Dr John
Harps Community Project
Human Rights Consortium Scotland
Inclusion Scotland
Internet Services Providers’ Association
Jackson, Gordon
Keith, Dr Graham
Kelly, Dr John
Law Society of Scotland
Law Society of Scotland (supplementary submission)
Leonard, Alan
McAree, John
McCabe, Mark
McKay, Bob
McKelvie, Tony
McKelvie, Tony (supplementary submission)
McKnight, John
Minoque, Tom
Muslim Council of Scotland
National Secular Society
Nil by Mouth
O’Reilly, Deirdre
Playbusters
Queen, William
Ramsay, Margaret
Rangers Football Club
Rangers Supporters Assembly
Rooney, Kevin
Sacro
Scottish Beer and Pub Association
Scottish Catholic Observer
Scottish Community Justice Authorities
Scottish Council of Jewish Communities
Scottish Episcopal Church
Scottish Football Association
Scottish Human Rights Commission
Scottish Justices Association
Scottish Police Federation
Scottish Youth Parliament
Stonewall Scotland
Supporters Direct Scotland
Taylor, Brian
Victim Support Scotland
Waiton, Dr Stuart
Walker, Professor Graham
YouthLink Scotland

Other written evidence

Lord Advocate’s draft guidelines on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (125KB pdf)
(Please note: the Lord Advocate advises that these are draft guidelines which will be altered to reflect any amendments made to the Bill during the passage through Parliament and will not be finalised until after Royal Assent. Prior to the commencement of the Act the guidelines will be distributed to Chief Constables)
Letter from the Lord Advocate to the Convener (10KB pdf)
Letter from the Scottish Premier League to the Convener (157KB pdf)
Scottish Parliament
Justice Committee
Tuesday 21 June 2011

[The Convener opened the meeting at 10:00]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

The Convener (Christine Grahame): Good morning. I welcome everyone to the Justice Committee’s second meeting in the fourth session of the Parliament. I remind everyone to switch off mobile phones and other electronic devices as they interfere with the sound system, even when they are on silent. No apologies for absence have been received, although James Kelly will be a few minutes late as he is declaring his interests at the first meeting of the Scotland Bill Committee.

Item 1 on the agenda is consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. This is the committee’s first evidence session on the bill. Before we begin, I thank all the witnesses, including the minister, for agreeing to give evidence at such short notice. I put it on the record that among those we invited were representatives of the Catholic Church and Celtic Football Club. Understandably, at short notice some witnesses are not able to attend, although I understand that the Catholic Church will put written evidence to the committee.

I welcome the first panel of witnesses: Roseanna Cunningham, the Minister for Community Safety and Legal Affairs; Richard Foggo, head of community safety; Gery McLaughlin, the bill team leader; Heather Wortley, from the Scottish Government legal directorate; and Willie Ferrie, from the office of the Scottish parliamentary counsel.

I thank all the witnesses for attending, and I invite the minister to make a brief opening statement.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): Thank you, convener. I thank the committee for the opportunity to be here this morning.

I welcome the committee’s scrutiny of the bill, albeit that that has to be done as quickly as it is being done. I know that the committee has moved quickly to ensure that it will take evidence from a number of expert witnesses before stages 1 and 2. I am sure that the Parliament’s consideration of the bill will benefit from that, and I look forward to seeing the outcome. The Government welcomes the measures that the committee is taking to ensure that the Parliament’s scrutiny of the bill is informed, effective and responsive.

All I want to do at this stage of the proceedings is briefly remind everybody what we saw during the last football season—scenes that I hope none of us ever wishes to see repeated. The scenes were broadcast throughout the world, and they shamed Scotland.

Football is our national game. Millions of people are passionate about it, but we really cannot tolerate the complete corruption of that passion into hate. Whether it is mass sectarian chanting or bullets and bombs in the post, we all know that it must stop.

The bill is intended to tackle head-on the recent problems that we have all witnessed. First, on offensive and disorderly behaviour at football matches, it is now abundantly clear that that behaviour has wider consequences for our society. We can no longer tolerate seeing and hearing hatred expressed on the terraces when we know that it has such consequences. Secondly, on threatening communications, we must make it clear that we will not tolerate threats of serious harm or threats that incite religious hatred, whether they are sent through the post or posted on the internet.

The Government is committed to putting the new legislation in place in time for the new football season. It is essential that we make it clear that the scenes of last season must never be repeated. We believe that the bill sends a clear message to the people of Scotland—I think that they expect a response to what was witnessed over the past few months—that we have had enough of the bigots who have blighted our football and damaged Scotland’s reputation, and anyone who does not heed that message will feel the full weight of the criminal justice system.

I know that sectarianism is not confined to football. It is a much wider and deeper problem for Scotland, and this Government is committed to rooting it out. The bill is therefore only part of a much wider programme of actions against sectarianism. It is, however, a vital first step in the Government’s programme in this new session of Parliament. It is about paving the way for a fresh start for the game and about ensuring that everyone is clear about what is expected for the 2011-12 season and beyond. If we can start the new season with the legislation in place and with a shared commitment to stamp out the unacceptable bigoted behaviour that appalled us last season, we can avoid a repeat of those scenes.

I welcome the support for the introduction of the bill from the football authorities, the police and
other partners. I believe that the way that the bill addresses the important issues that we face will ensure Parliament’s support, too.

The Convener: Thank you, minister. I invite questions on the first part of the bill, which deals with offensive behaviour at regulated football matches. We will then move on to questions on the second part, which deals with threatening communications.

Graeme Pearson (South Scotland) (Lab): I declare an interest at the outset as a former officer with Strathclyde Police and a match commander for five years, and as someone who has retired from the Association of Chief Police Officers in Scotland.

Although the minister has outlined the position as she sees it, a large group of advisers have come forward with reservations about the circumstances that have led to our current considerations. We already have the breach of the peace offence, the Crime and Disorder Act 1998, the Criminal Justice (Scotland) Act 2003, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and the Criminal Law (Consolidation) (Scotland) Act 1995. There is a view that we have a sufficiency of enforcement and prosecution powers in relation to the kind of conduct about which the minister has reservations. What flaws are out there that made the Government decide to offer the bill to Parliament for its consideration?

Roseanna Cunningham: The first is the continuing problems, which were clearly not being tackled by existing legislation. If legislation has not dealt with a problem, in any objective sense one must consider that it is insufficient.

In relation to the first offence, there is growing concern that breach of the peace is becoming more and more narrowly defined and less of a handy tool operationally. It is a common-law offence and has always been useful in Scotland. However, as we know, Scottish law is no longer operating on its own, and the undefined nature of breach of the peace is beginning to cause issues. We felt that we could not go forward on the complacent basis that breach of the peace would simply do when we could see increasingly that that was not the case.

We have tried to take the original essential elements that are required to prove breach of the peace, to turn it into a specific offence. The new offence will not tackle hugely different behaviour; we are turning breach of the peace into a more concrete offence so that people are clear about what is being tackled. The breach of the peace offence was beginning to cause some concern. I have used before the example of 25,000 people chanting something at the 25,000 people on the other side of the football ground who are chanting back at them. Whose peace is being breached? That offence began to raise questions, and we have to tackle them. The new offence to be created by the bill is about tackling those questions.

Graeme Pearson: I hear what the minister says, but a strong view has been offered by many with experience in such circumstances, including the Law Society of Scotland, that indicates otherwise. She spoke about enforcement of the existing legislation and whether it has been sufficient. At present, there are around 100 football banning orders. That does not quite reflect an energetic commitment to dealing with the problems that the minister outlined.

Roseanna Cunningham: No, but the bill is not the only action that we are taking. We are also working with the police and other partners, through the football action group, to try to toughen up other available measures. Football banning orders will continue to be part of that armoury.

When a piece of legislation is introduced, there is always a discussion about whether it is required, and I know that there is a debate about the bill. In all the circumstances, we felt that the job would be better done than left undone.

Alison McInnes (North East Scotland) (LD): We have a written submission from Dr Sarah Christie and Dr David McArdle who make the point that “the new legislation adds little to the existing criminal legal remedies”.

They go on to say:

“A more appropriate response would have been to consider how the existing laws can be enforced more effectively, rather than rushing through legislation which adds very little to what is already available.”

I draw the minister’s attention to the fact that, following a game on 2 February 2011 between Celtic and Rangers, more than 229 people were arrested for breach of the peace and racist or sectarian offences. It seems to me therefore that it is possible to use the existing legislation.

Roseanna Cunningham: Someone may be arrested and charged, but that does not necessarily mean that the courts will uphold the case. In some cases, rather awkward decisions have been made. I do not want to quote which case was involved, but I think that I am right in saying that a sheriff has already decided that certain chants were offensive because they were about religion, but also that they were not offensive because they were about politics or something else. In all fairness, we cannot sit back and allow that situation to continue.

Being charged with breach of the peace will have been a salutary experience for the
address it.

I have only had about 10 minutes to look at the paper from Sarah Christie and David McArdle so I have not been able to go through it in detail. Their line is that the existing legislation is sufficient. That is a matter of opinion rather than absolute fact and the Government is of a different opinion.

The Convener: I understand that the minister cannot provide examples of cases in which a breach of the peace charge has not been sustained. It would be useful for the Scottish Parliament information centre to provide the committee with a note of cases in which there was a charge of breach of the peace but no conviction or, for whatever reason, the prosecution was not successful. Are members content with that?

Members indicated agreement.

Roseanna Cunningham: It is also important to look at cases in which the decisions about what constitutes a breach of the peace have begun to change. That is one of the issues that we have to deal with. Historically, the general nature of, or imprecision in, the definition of breach of the peace was regarded as a great strength in Scotland. Against the backdrop of a completely different argument that is going on in another place, that is less acceptable to people who consider that there should be precision when we are talking about criminal offences. A tension is beginning to arise there, and we will have to address it.

The Convener: I refer you to and give you the submission in third paragraph on page 2 of the submission from Dr Christie and Dr McArdle that the definition of breach of the peace in the policy memorandum is wrong. I am not expecting a response just now.

Roseanna Cunningham: I can give you a brief response on the record just now.

The Convener: In relation to the cases mentioned?

Roseanna Cunningham: We will write back to the committee. One of the difficulties reflects the difficulties for lawyers in relation to a policy memorandum. The public disorder aspect is implicit in the policy memorandum’s discussion of breach of the peace because that was the context of that discussion. I look at the critique in the submission and say that the policy memorandum is not a legal textbook. Breach of the peace is discussed in the policy memorandum within the context of public disorder rather than the context that is being described in the submission.

However, we will write to the committee with a longer explanation.

Alison McInnes: I go back to the minister’s answer to my earlier question, when she noted that it would be interesting to know how many of the 229 arrests resulted in a prosecution. Before she considered introducing new legislation, would it not have been appropriate to review that information?

10:15

Roseanna Cunningham: With the greatest respect, we are talking about not just 200-odd arrests in February 2011 but events in the years before that. Obviously, we have looked at the impact of the existing legislation, and we consider that it is not reaching where it needs to reach, so we have to look at the issue again. However, I do not know how much longer we in Scotland can continue to review and discuss and not actually take any action. People can be criticised—in my view, they are almost damned if they do and damned if they do not, and I think that we are in that position here. We have had years and years of something not achieving what it is supposed to achieve.

The problem with focusing on the February match is to do with defining where the arrests took place. The problem was over the whole of the force area, as I understand it, not necessarily just specifically at the match. It is not always easy to define football-related things, which is why we have tried to put the new criminal offence in the context that we have. It is always easier to look at negatives. I understand that, because in a sense that is what the job is, but it has been suggested to me that one advantage of doing things in this way is that we will begin to define the category of offences that are football related, and we will then see that there is potentially another category of sectarian offences that are not football related. People will then become more understanding that this is not just a football issue. The football aspect is important and we have to tackle it, but we know that sectarianism is not just a football issue. The tool in the bill—paradoxically—allows us to emphasise that even more.

Alison McInnes: I do not doubt the minister’s good intentions; indeed, I share her desire to tackle the issue. She has acknowledged that the problem has been around for a long time and she said that the Government wants to take some action. However, all the written submissions that we have received so far express serious concern about the speed at which we are legislating. Surely it is worth taking just another month or two to get the legislation right.
Roseanna Cunningham: But it would not be just another month or two. It would run over the summer and into the period when we come back in September; we would be halfway through the next football season before we were able to put any of this into operation. I know as a politician—and I think you know as a politician—that if the new season picked up where last season left off and we ended up with the same sorts of scenes being repeated, people would be back in front of politicians with microphones demanding to know why we had not acted when it was possible to do so.

We have narrowly defined what we think is appropriate in the short space of time that we have allocated for the bill. I acknowledge that a much greater amount of time is always ideal and I do not rule out the possibility of revisiting the situation with legislation in a few years’ time. We have proposed two new offences—only two—and introducing them in a short timescale is not only feasible but desirable. We have kept the bill as tight as possible, so there will be some objections that it does not go far enough—I have heard that. However, I think that we have made the right choice in the available timescale.

I need to point people back to the fact that the bill has been supported by the football authorities and the police.

The Convener: Right. We will be testing that as well and pressing them on the matter.

John Lamont and Humza Yousaf have supplementary on the same line of questioning.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Good morning, minister. My point is on the same issue, but from a slightly different perspective. Given the history of the laws and your frustration that they are not working to achieve your objective, how many people do you anticipate will face prosecution once the bill is enacted? Clearly, that is not in the Government’s control, but you must have a feeling for how many people will face prosecution under the new laws who escape prosecution under the current regime.

Roseanna Cunningham: I cannot possibly answer that, I am afraid, because it will depend entirely on circumstances that arise at matches and decisions that are made by match commanders and the police on the ground. If you were to ask me what the Government is hoping for, it is for there to be immediate and early arrests in situations where there is disorder, but we hope that, over the piece, the bill will act as a deterrent as much as anything else and that there will not be hundreds or indeed thousands of arrests week in, week out. We are hoping that the legislation will be used by the police in the early part of the season and that it will be needed less as time goes on.

The Convener: John is itching to come back in.

John Lamont: With the greatest respect, minister, that is the critical point. Surely the point about deterrence is that it works when people fear the prospect of being arrested and prosecuted under new legislation. Currently, such deterrence is not there. If you are not able to tell me how many more people are going to be prosecuted, surely that is a fundamental hole in your proposal. If you are not able to say that X number of people are going to face prosecution, what is the deterrence?

Roseanna Cunningham: I am sorry, but how can I possibly answer that? I cannot possibly say. For the first three months there might be absolutely no disorder at any single football match.

John Lamont: But you have the history of previous cases.

Roseanna Cunningham: With the very greatest respect, I cannot answer your question. It would perhaps be better to ask the police witnesses what they believe is the likely extent to which they will be able to use the legislation. All I would be able to do is take a wild guess, but I am not in a position to do that. We are obviously not expecting the police to arrest 5,000 people, but if disorder of the kind that we have seen kicks off, we expect the police to use the legislation, where they consider it appropriate. It will still be a matter for the police on the ground to make those decisions, because they are operational issues. We hope that early use of the legislation will result in enough salutary lessons being learnt by football fans to ensure that its use is needed less in the future.

The Convener: If John Lamont does not mind, we will perhaps put that question to the police witnesses. I call Humza Yousaf. Is your question still on this line, Humza?

Humza Yousaf (Glasgow) (SNP): Yes. My original point related to Alison McInnes’s point, but, on deterrence, I do not imagine that the number of people who might be prosecuted, should the bill become law, will necessarily be the biggest deterrent factor. I imagine that the five-year sentence and other penalties in the bill would act as deterrents.

The Convener: That is not a question; it is a statement. I would like a question.

Humza Yousaf: The minister hinted at this in her answer to Alison McInnes’s question. Is the Government willing to look at putting a sunset clause in the bill? It is certainly something that was mentioned in a number of submissions.

Roseanna Cunningham: There has been considerable discussion of a sunset clause. We are looking at a variety of possibilities for how the
legislation might be reviewed over time. There is concern that a sunset clause would not be an appropriate mechanism to use in relation to criminal offences, but that does not rule out the possibility of some other form of review. We are considering that.

The Convener: You said that having a sunset clause in relation to criminal offences might not be appropriate. Can you expand on that?

Roseanna Cunningham: There could be a situation where criminal offences had ceased to be criminal offences but people were still charged with said criminal offences because they had been charged prior to the sunset clause coming into force. In such circumstances, perhaps a different form of review might be more appropriate. We are currently discussing that. Our minds are not closed to the idea of reviewing the legislation; we are simply not certain that using sunset clauses, as we currently know them, is the way to manage that.

The Convener: Humza, do you have further questions?

Humza Yousaf: No. I am satisfied with that answer.

The Convener: Graeme Pearson has a supplementary.

Graeme Pearson: I return to the issue of enforcement and the nature of the proposed legislation. In its submission, the Law Society of Scotland cites the 2009 case of Mark Harris v HMA and states:

“the Appeal Court held that breach of the peace simply requires some serious disturbance to the community.”

The submission then goes through some of the other legislation that is available to be enforced at this time.

I am really concerned that in our haste to deal with an activity that we all agree is abhorrent by introducing new legislation, we will create more confusion and more enforcement difficulties. The speed with which we are pushing the bill through Parliament gives us no time to consider those matters more deeply.

Roseanna Cunningham: I do not see why the bill should make things more difficult or confusing. One might reply that the bill is simply one more tool in the armoury when people are considering the most appropriate offence that an individual might be charged with. In our view, the bill clarifies a developing situation, particularly in connection with breach of the peace offences, which courts are starting to construe more narrowly in response to pressures from elsewhere. I do not see that what we have produced in relation to the first offence creates any more difficulty than might, at best, be experienced now; indeed, we feel that it will provide the police with another and better tool.

You have quoted from a submission that I have not been able to read. We will look at what the Law Society has to say, consider its suggestions and take on board anything that we consider to be well founded.

The Convener: Is John Finnie’s question on this issue or on enforcement, on which I also have a question?

John Finnie (Highlands and Islands) (SNP): I will be touching on enforcement, convener.

The Convener: Well, you ask your question and I will ask mine if you do not deal with the issue that I want to raise.

John Finnie: First, I declare an interest as a former police constable.

The shorthand is that this legislation deals with sectarian matters. However, paragraph 4 of the policy memorandum states:

“What is crucial about the measures in this Bill is that they do not rest on any such definition.”

The minister commented that there is to be further legislation. Will that legislation define the term “sectarian”?

Roseanna Cunningham: I did not say that there would be further legislation; I said that we would not rule out further legislation if we thought that it was required. I have been tasked with the big job of tackling sectarianism over the Parliament’s fourth session, and if at some point I consider that more legislation is required I will not hesitate to argue for it. However, I cannot sit here and say that there will definitely be further legislation.

We have at the moment good reasons for not attempting to define the term “sectarian”. In Scotland, sectarianism is a shorthand term for a particular form of interaction between Protestants and Catholics and Catholics and Protestants. However, a definition of sectarianism in Scotland could hardly be confined to that interaction and, once we try to define the term, it becomes quite difficult to do so over a much broader piece. The definition might be used colloquially but, as I say, trying to define the term in legislation will be quite difficult and might lead us into all sorts of bother that, in the circumstances, we might not wish to be in. It would be precisely the kind of thing that would make this bill quite difficult to take through Parliament in a very short space of time.

John Finnie: Can you tell us in how many breach of the peace cases in which the original charge contained a sectarian element that element was dropped when they went to court?
Roseanna Cunningham: Offhand, no, but I will endeavour to get back to you with that information.

The Convener: I have a couple of follow-up sweepers. Is sweeping up a football term? I am not too familiar with the sport.

I want to pursue the use of the term “in relation to” in section 1(1), which refers to “A person” committing “an offence … in relation to a regulated football match”.

That phrase is defined in section 2(2), which states “a person’s behaviour is in relation to a regulated football match if it occurs … in the ground where the regulated football match is being held … while the person is entering or leaving … the ground … or.”—
more interestingly—
“on a journey to or from the regulated football match.”

Section 2(4)(a) goes on to say “a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match” and also covers “breaks”. It seems to me that, evidentially, those provisions will be very difficult to enforce.

10:30

Roseanna Cunningham: Certain evidence will always be required; I suppose that people may be picked up in circumstances in which it is clear that they have been at a football-related activity. We should not forget that the legislation applies not just to matches at stadiums, but to other places such as pubs and any outdoor venues where matches are broadcast.

The definition is taken from football banning orders, so we have not invented a new definition: we have taken the terminology that applies to the orders and applied it in this legislation. The terminology exists and is already being used. It will presumably be familiar to the police, and will already have been tested in the ways that you are talking about.

The Convener: I am just concerned—for example, I have seen supporters’ scarves sticking out of cars when people are driving about, and there might be a football team slogan on the back of the car. Those people are not going to a match—there might not even be a match on—but they might be pulled over by the police who say that they are breaching the legislation. I hate to raise the issue again, but there might be difficulties with the European convention on human rights in relation to not only the right to freedom of speech but the right to freedom of movement.

Roseanna Cunningham: We have to find a way of dealing with the hooligans who travel to and from matches but who do not necessarily even go to the matches. Football banning orders are already in place, and I am not aware that there has been any challenge to the detail of them.

I repeat that we are using the terminology that already applies to football banning orders; it has not been invented for the bill. There is an existing test that applies to banning orders, and we want to apply it under in the bill.

Graeme Pearson: You indicated that you have been reluctant to provide a definition of “sectarian” because of the difficulties that arise. The convener made the point about journeys and fans moving about the country. That indicates how difficult an area this is with regard to the proposed legislation, and takes me back to my original point about the legislation that is currently in place.

That aside, the 100—or thereabouts—banning orders that are currently invoked indicate, as I said earlier, the current impetus on the authorities to deal with such matters. We need to return to that enforcement element and ensure that we take it forward. I am sure that the police will comment on that later.

You said to John Lamont that you had no knowledge of what the future might hold in terms of prosecutions, which I well understand. Have you allocated enough financial resource to support the police and the authorities in implementing the legislation? If you think that you have, how much is it?

Roseanna Cunningham: The financial memorandum applies, and yes—we have allocated enough resource. We have considered the policing aspects of the legislation, but we are working with the police in respect of the work that they will need to do.

I remind members that the police are involved in the football action group, which is currently examining a number of aspects of what happens at football matches. The group will not report until July, so we are still in a fast-moving situation. I understand that it is difficult from the committee’s perspective: the timing is difficult for us all, because Parliament goes into recess in a couple of weeks. However, in our on-going work with the police, we have considered an amount of between £0.7 million and £1.5 million per annum, which I think is in the financial memorandum. The Government will keep that figure, as it would any such figure, under constant review.

John Lamont: The minister will be aware of the words of the song “Flower of Scotland” and those of the British national anthem. Can you envisage the singing of either of those songs becoming offensive behaviour under the act?
Roseanna Cunningham: The glib answer to that is no, of course not. However, in terms of a criminal offence, all the surrounding facts and circumstances might turn that into something problematic. It might have been more appropriate to consider, for example, “Rule, Britannia”, which I understand is frequently sung on one side of the terraces in Scotland and which I would not regard as being an offensive song. However, we do not define which songs are offensive and list them, because whether something is offensive is a matter of the facts and circumstances of the case.

I have seen hundreds of Celtic fans gesticulating across an open area to Rangers fans by making the sign of the cross in a manner that I can only describe as aggressive. The sign of the cross is not, in itself, offensive, but I suppose that in circumstances such as Rangers and Celtic fans meeting on a crowded street, it could be construed as being so, which shows why the circumstances are so important.

My immediate answer to your question is no, of course not. However, no matter how inoffensive an action, the response must always be qualified with the caveat that it depends on the circumstances.

John Lamont: Just to be clear, is the minister saying that if supporters want to be absolutely sure of not falling within the definition of the act, they should probably avoid singing those songs?

Roseanna Cunningham: I will not be drawn into making that kind of statement, Mr Lamont. You know perfectly well what I am saying, and so does everybody else.

The Convener: I will move on. I want to get on to the second part of the bill, so let us have short questions so that we can do justice to it.

Humza Yousaf: My point is short and is related to John Lamont’s question. It is on section 1(2)(e), on the “other behaviour that a reasonable person would be likely to consider offensive.”

How do we prevent that from straying into matters of freedom of speech, and what would be the mechanism for measuring what is likely to be considered offensive?

Roseanna Cunningham: At the end of the day, that will always be—as it is now—an operational decision for the police in the circumstances that they are assessing. We could spend hours trying to define scenarios that would or would not be offensive; behaviour that is not a problem in one place may be a problem somewhere else. Without being able to define every single circumstance, we cannot say what will be considered offensive.

I remind members that the first offence is directly connected with football and that in the second offence we are not tackling speech, precisely because of the arguments and concerns to which that gives rise.

The Convener: I hope to move on to the second part of the bill shortly and I think that many of the questions are on evidential issues, which I have strayed into, so it will also be useful to put those issues to the police. Members should therefore bear in mind our timescale.

Alison McInnes: I have two brief follow-up questions. John Finnie spoke about the definition of sectarianism. My concern about the bill is that it has quickly become known as “the sectarianism bill”. It is drawn more widely than that and would be more appropriately described as a hate crime bill, because it rightly includes many other categories, under section 4. It is important for the public to be aware of that, so that aspect should perhaps be discussed more.

I turn to the concern that the convener raised about how broadly drawn is the provision on travelling to and from football matches. The bill is very broadly drawn both in that regard and in relation to the definition of places where a televised match is being shown. The Law Society of Scotland’s submission states:

“The Committee expresses serious concern about” the definition, which “would appear to cover pubs, outdoor arenas, hospital day rooms and TV sales outlets and also mobile TV receivers and computers—such a variety of broadcast possibilities underlines how difficult this provision will be to enforce.”

You spoke about the imprecision of the offence of breach of the peace. Surely the definition in the bill is also imprecise?

Roseanna Cunningham: We will consider the specific issues that the Law Society raises in relation to whether or not those situations are caught within the definition. As you can imagine, a number of questions of this sort arise, and we will find a way of saying what the position is, if necessary. Our principal concern is with the broadcasting of matches in circumstances in which one could expect large numbers of fans to be present; for example, in pubs or at outdoor large-screen facilities, which are sometimes provided by councils as a general civic duty. As far as I am concerned, the provision is not intended to apply to what is shown on a screen at a television sales centre. As the Law Society has raised the matter, we will carefully consider whether or not we might be inadvertently extending the measure to such situations.

I repeat that the issue is about football-related violence. Provisions for all other potential offences
are still available for any situations of the sorts that we have been discussing. The question is whether or not they fall within the ambit of the criminal offence under the bill. However, if it is felt that an offence does not fall within the bill’s ambit, that does not necessarily mean that it does not constitute a criminal offence.

The Convener: I suggest to Alison McInnes—the minister can perhaps agree to this—that we could perhaps obtain a fuller written response to the Law Society’s concerns regarding those other areas before our meeting on 28 June. We could then put our questions to the minister on the 28th. Would that be possible?

Roseanna Cunningham: I was not aware that I was going to be here on the 28th.

The Convener: I was about to say, “Ye ken noo,” but that is not very polite.

Roseanna Cunningham: No, it is not.

The Convener: I accept that. You appreciate that the committee is trying as best it can. I thought that the minister was aware that we intended—[Interruption.] It has been confirmed to me that your office has been informed that we are having you back on 28 June. That will be very useful for the committee, in the interests of hearing a more expansive explanation of that particular area. We wish to be of assistance to the minister in this regard.

Roseanna Cunningham: We will do what we can in the available time. The short timescale imposes certain difficulties for us, too, in giving as much information as we can.

The Convener: Indeed. As I am sure the minister appreciates, the Justice Committee is being put in a very difficult position in wishing to examine the bill on behalf of the public at large—not just the footballing public. In fairness to the minister, we are trying to expose all the arguments in advance of the final debate at stage 3. We wish to be helpful in that regard, as I have said.

I ask John Finnie and Graeme Pearson to make their questions short. We must get on to the second part of the bill.

John Finnie: My question is about the term “a reasonable person”. I accept that sectarianism is a nationwide problem. Do we imagine that there will be regional variations within Scotland in respect of what is a “reasonable person”? Can training be given to police officers and sheriffs to ensure uniformity? That could be essential.

Roseanna Cunningham: The use of the term is absolutely standard throughout the law. The reasonable person is always assessed in all the facts and circumstances of the case. Whether there is regional variation is not necessarily just up to the police; it is also up to the sheriffs in their deliberations. We are working with the police and will try to ensure that there are not massive variations throughout Scotland, but we cannot impose uniformity, either on police forces or on courts.

The reasonable person test is pretty well understood in Scots law, and I do not think that it will cause an enormous amount of difficulty. I suspect that what we have seen emanating from football over the past six months horrifies about 95 to 99 per cent of the population. The reasonable Scot is probably already wondering why we are still having to deal with this problem.

Graeme Pearson: The minister has mentioned two particular clubs. I hope that she will join me in acknowledging that the kind of thuggish behaviour that we are discussing can be replicated at many clubs across Scotland.

Roseanna Cunningham: Absolutely.

Graeme Pearson: We should not gravitate to a notion that it is a particular west of Scotland problem, with just two clubs being involved.

I invite the minister to share with us any expectations that she has of club management and the football authorities in delivering on a better Scotland for the future.

10:45

Roseanna Cunningham: That work is continuing through the joint action group, whose final report we will receive in July. The joint action group’s deliberations will be made public on 11 July, and I do not want to pre-empt what the group is discussing at present. You are right to reiterate that the problem is not confined to two football clubs and that neither is it confined to only one part of Scotland. Despite the fact that many people would like to describe it in that way, that is obviously not the case. One of the biggest problems that has been raised is the difficulties that arise out of travelling support, which can be much harder to track. That takes the issue much more widely around Scotland than people might comfortably describe.

The Convener: The minister has been here for a long time and I would like to move to the second element of the bill and questions on threatening communications.

James Kelly (Rutherglen) (Lab): Good morning, minister. I am interested in the resources that will be allocated to dealing with threatening communications. According to the financial memorandum, the police work will be pulled from existing resources. The fact that the bill is being processed in such a short timescale demonstrates—you have outlined this—that you
feel that it is a major issue to ensure that legislation is in place for the start of the new football season. What specific police resources are you going to allocate to monitoring and tracking down offensive and threatening behaviour on the internet?

Roseanna Cunningham: The provisions are designed for serious cases, to deal with the problem that we have seen and to improve practice in relation to internet crime, although the problem is not confined to internet crime. You will have Campbell Corrigan in front of you as a witness at some point to discuss the matter. We are confident that the police can encompass the work within what they are already doing. As I said, we are working with them on strands of activity to ensure that that continues to be the case.

James Kelly: Can the minister give a bit more detail on what strands of activity the police will pursue if the bill is passed by the Parliament next week?

Roseanna Cunningham: The best people to ask about what the police will do are the police; I expect that you will do that. We are working with the ACPOS football and hate crime sub-groups to ensure that the police are in a position to enforce the new provisions from the outset. Those two groups will also oversee longer-term improvements in policing practice. We must deal with the issue both in the short term and into the longer term, and that work is on-going.

James Kelly: It is still not clear to me what specific strands of work are going to be pursued if the bill is passed, but let us move on. How would offences be identified? Do you expect offences to be reported to the police and the police to react to that, or do you expect a more proactive approach from the police arising from any monitoring that they may undertake?

Roseanna Cunningham: I expect that, in the early stage, it is most likely that the police will act as a result of matters being drawn to their attention, but that does not, of course, rule out the bringing in of more proactive policing practice in the longer term. I guess that that is exactly how the police came across some of what has developed over the past few months.

James Kelly: On practical implementation of the bill, what is your understanding—based on discussions that I am sure you have had with information technology experts and the police force—of how people can be tracked down? Many people post comments anonymously. What expert facilities are available to the police to track down the identities of people who post comments on the internet?

Roseanna Cunningham: That is not a new problem, and it is not a problem that is confined to the particular aspect of potential criminal law that we are discussing; it exists even when people put pen to paper. The anonymity of people who make threats has bedevilled everybody, but software is available. The police already have tools available, and I understand that people have been charged with earlier offences, so it is possible to find out who individuals are. I regret to tell Mr Kelly that the situation in Scotland is such that many folk do not feel at all abashed about appending their names and addresses to such things, so it may be possible in a number of cases to track people down simply because they have made it quite plain who they are.

Graeme Pearson: You will have gathered that we have grave reservations about the backdrop to the legislation. A number of submissions have raised issues to do with the jurisdiction of Scottish prosecutions in terms of any international links that are identified in connection with offences that will be created by the legislation. Do you feel confident that, if breaches of the legislation are identified and the offenders live overseas, you will be able to bring them to justice in Scotland?

Roseanna Cunningham: The problem confronts the authorities when people are abroad regardless of their offence. That will not be any different under the bill. The fact that the person is abroad does not mean that they will not have committed an offence in Scotland if things are posted in Scotland. The offence will have taken place in Scotland, and they will therefore be subject to Scots law. The extent to which we can track them down will depend entirely on policing. In that sense, this will be no different from any other area of criminal offence in which folk who are outwith our current jurisdiction can be dealt with.

Graeme Pearson: So, you do not expect that the European arrest warrant process, for instance, will create a challenge in relation to the legislation.

Roseanna Cunningham: I presume that a European arrest warrant may be appropriate in some of the circumstances that we are talking about, but it may not be in others. As you know, the European arrest warrant is a tool to be used. Whether it is a practical tool to use over the longer term is a different matter.

Graeme Pearson: I also know that presumption can be a dangerous weapon, and it is very difficult in such circumstances.

Roseanna Cunningham: We are not presuming anything. Some of the difficulties that we now face have arisen from pressures on our legal system that have come from the European end.
Graeme Pearson: Finally, has thought been given to what a “seriously violent act” is, and to how it differs from a violent act?

Roseanna Cunningham: I suppose that one might turn that around and say that there are, as you know, varieties of assault and various types of infliction of bodily harm—

Graeme Pearson: There are definitions of those differences.

The Convener: Let the minister finish.

Roseanna Cunningham: The measure simply falls into that category. My officials have helpfully handed me the bill. Section 6(5) states:

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

Graeme Pearson: So it is something that would amount to a serious assault or serious injury.

Roseanna Cunningham: Yes.

The Convener: We will now have questions from John F—I have to say that, as we have two Johns—Humza Yousaf and then Alison McInnes.

John Finnie: I return to the term “reasonable person”, which appears in section 5. Was the issue of perception, as it applies to hate crime, considered as a factor?

Roseanna Cunningham: I am sorry. What do you mean by that?

John Finnie: As I understand it, post the Macpherson report, a measure was introduced under which someone is racially abused if they perceive that they are being racially abused. Did you consider applying the same provision in the bill?

Roseanna Cunningham: We talk about material being “likely to cause a reasonable person to suffer fear or alarm”, so we are applying the reasonableness test to that. The offence is also about the intention to stir up religious hatred: there has to be a proven intent to stir up religious hatred. Therefore, inadvertence or whatever would not fall into that category. We do not foresee threatening communications happening in a casual way.

The Convener: For the record, I ask the minister to clarify that section 5 is not only about religious hatred. We will take evidence from equalities people, so it is important to raise that issue.

Roseanna Cunningham: Yes, but the second offence is all connected to religion.

The Convener: Condition B is connected to religion, but condition A is not.

Roseanna Cunningham: Yes.

The Convener: The bill states that condition A or condition B must be satisfied, not that condition A and condition B must be satisfied. I read the bill at breakneck speed, but my reading is that section 5 is about communications generally that stir up hatred and cause offence, fear or alarm. They could be to do with sexual matters, gender or a spectrum of issues. I make that point so that we do not miss it in asking our questions.

John Finnie: Section 6, which is the interpretation section, defines the term “material”. Will you confirm that graffiti would be covered by the term?

Roseanna Cunningham: My reaction is that, yes—graffiti would be covered. The term could also include T-shirts or posters. That is why I say that the offence is not connected only to the internet or electronic crime. In theory, it could be applied to other things. In practice, I guess that it is less likely to be applied to such things than it is to some of what we have seen on the internet. However, graffiti could fall within the ambit of the bill.

For the avoidance of doubt, although the bill does not cover speech, it covers recorded speech. The recording of speech would bring it into the ambit of the bill.

John Finnie: Would a tattoo be covered?

Roseanna Cunningham: I suppose that, arguably, if somebody tattoos a death threat all over their body, that would potentially fall within the ambit of threatening communication. However, I caution the member against reductio ad absurdum.

The Convener: I hope that nobody is about to demonstrate that they have tattoos. Members should not feel that they have to declare an interest if they have a tattoo, offensive or otherwise, or one that is liable to be offensive.

11:00

Humza Yousaf: The bill has been introduced in the context of what happened last season. Can you clarify where the Government perceives gaps in current legislation? Many submissions make the point that bullets sent in the post or pictures...
riddled with bullet holes are covered by current legislation. Where are the main gaps in legislation that the bill attempts to cover? My question relates to threatening communications.

Roseanna Cunningham: I understand that. First, most of the current offences relate to the sending of something. You are right to say that the sending of something can be caught. The difficulty is that people do not send things when they put them on blogs, Facebook or Twitter—they put them up or post them, but that would not necessarily be construed as sending. That was one issue that we had to consider.

Secondly, the current Scots law on uttering threats—for those who are not lawyers, uttering does not mean only words—requires one to prove an intention to carry out a particular threat. For example, if someone puts up a Facebook page that says that they want to kill someone, it is arguable that, currently, we would have to prove an intent to carry out that threat.

We want to define intent as intent to threaten and "to cause fear and alarm", so that we do not have to go to someone’s house to establish whether they have bought and sharpened the axe and put the home co-ordinates of the person concerned into their sat nav. The bill makes much clearer that the threat to cause fear and alarm and with the intention of inciting religious hatred is the offence, so it is not necessary to prove that someone physically intended to carry out that threat. In 99.9 per cent of cases, that is not the case, because the intention is to frighten people.

Alison McInnes: I have two separate questions.

The Convener: Given that you have asked so nicely, may I just let you have them.

Alison McInnes: Thank you, convener. My first question relates to condition A, which is set out in section 5, and concerns the definition of "reckless". The term may be well defined; I am new to the justice brief and am not a lawyer. However, during the height of the problems earlier in the year, Metro reproduced material from the internet. The bill makes much clearer that the threat to cause fear and alarm and with the intention of inciting religious hatred is the offence, so it is not necessary to prove that someone physically intended to carry out that threat. In 99.9 per cent of cases, that is not the case, because the intention is to frighten people.

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John Finnie: I ask the gentlemen their views on the bill. Is this good legislation?

Assistant Chief Constable Campbell Corrigan (Association of Chief Police Officers in Scotland): I think that it is good, because it focuses on a horrendous problem. Believe it or not, I do not think that a police officer should deal with the technicalities of legislation; I think that we should deal with the legislation that we are given and make best use of it. There will be many questions about this legislation—we always question any new legislation—but I find it incredible that we are talking about how many people we will arrest, rather than whether we can prevent people from doing these things in the first place, which is the most important part of the issue for me. If the legislation stops one person on the terraces or the internet doing what we saw people doing last season, I will be happy.

The Convener: Mr Gray, would you like to respond? Before you answer, could you say whether you have a title that you use?

Les Gray (Scottish Police Federation): Mr Gray is fine.

The Scottish Police Federation’s joint central committee—which, as Mr Finnie is well aware, is our national executive—will make a written submission on the bill by Friday. Although it will cover all our questions and concerns, I am more than happy to comment before that.

We welcome the bill. As you know, I was well quoted in the media several months ago in relation to sectarianism and the human and financial cost of football before, during and after the games. Clearly, the police service in Scotland could not continue on that downward spiral and I guarantee that members of the public would not like that situation to continue either.

We are aware that the timing is not great and we acknowledge the concerns about the legislation perhaps being rushed through, but we honestly do not believe that there is an option. The legislation has to come into effect for the start of the football season if it is to have the proper impact.

James Kelly: The financial memorandum states that the costs of tracking down offenders under the bill are to be met from existing police resources. What are your feelings on that? Is that adequate, or do the police need more resources to deal with the provisions of the bill?

Assistant Chief Constable Corrigan: I will always accept extra resources—that is my starting point. If we are to give the legislation the energy that it will require and that the community wants us to give it, we will need police officers to do that. In answer to your earlier question about the resources that would be tied up in internet-based investigation, I can say that significant resources are already tied up in that. We will have to develop specialisms in relation to the legislation, as it concerns an area in relation to which we arrest very few people inside football grounds at the moment. Such arrests tend to be in single figures, but if we were to take action on the new offences to the level that we could, we could deploy many more resources to deal with the issue.

We must understand that there must be proportionality in all this. On a Saturday, we might be dealing with a crowd of 60,000 people, with 20,000 people singing. The match commander’s primary concern is safety and we do not intend to destabilise a crowd by wading into it and trying to take out large numbers of fans. We will have to use different tactics, which we have at our disposal, but they will take significant resources. As for whether enough resources have been set aside for the bill, we will have to judge the situation very carefully as the season progresses. Should we require more resources I will, on behalf of ACPOS, make strong representations to that effect.

Les Gray: Since the bill was introduced, I have been quoted all week in the media. I have absolutely no doubt that the financial memorandum is way off the mark and I do not think that either £0.5 million or £0.7 million will scratch the surface of what is required. From my 31 years’ police experience, I believe that Mr Corrigan is right. The two serving police officers and three former police officers in the room will remember the Criminal Justice (Scotland) Act 1980, which introduced the banning of alcohol at games and all the other associated offences. For want of a better phrase, we absolutely hammered that legislation with education and enforcement measures. We had—and still have—all these offences in relation to people trying to get into matches with drink and that legislation, which was very similar to this, had to find its own level. That meant having extra police officers at all the games; searching everyone; and taking forward dozens of test cases involving everything from quenchy cups and Capri Sun pouches to flasks, medical or otherwise. All these things were tried and tested in the court, and it will be the same with this bill.

In any case, my direct answer to your question, Mr Kelly, is that I do not believe that the financial memorandum goes anywhere near covering the potential costs. Over the past two years, in particular, the police service has been actively removing police officers from football grounds in order to reduce costs. In order to enforce this legislation properly, we will have to reverse that trend and bring in more officers to police these games before, during and after matches and, for
example, check out public houses. In the past, we have sent two, three or sometimes four police officers into a public house and if order has been generally acceptable they have left things at that. However, if we go into a public house to enforce this legislation—which we will have to do to ensure that it works—those two, three or four police officers will simply not cut it; we will need 20 or 30 because it would not be safe to send in any fewer. As a result, we believe that there will be more costs than are stated in the financial memorandum. Does that answer your question?

James Kelly: Indeed. That was a very clear and direct response. It is one thing for legislators in the Scottish Parliament to pass such a bill, but it is the police officers on the front line who will have to implement its provisions.

You will have heard the discussion with the previous panel about relevant offences, the songs that would be regarded as offensive under the bill and so on. Are you comfortable that the bill as drafted is clear enough to allow you, come the first day of the season, to brief police officers on what constitutes offensive behaviour and what songs are offensive and could lead to arrest and prosecution?

Assistant Chief Constable Corrigan: That is an interesting point. That was an issue prior to the introduction of the bill, because we were always being asked which songs would constitute a breach of the peace with a sectarian aggravation.

I have only had access to the bill for several days but, after an initial reading, we are without question quite clear about certain things that will be included. However, as Les Gray will agree, it is for individual police officers to understand and come to grips with legislation. We will provide training and detail about, for example, reasonable persons and what constitutes sectarianism under the bill; however, it will be up to an officer standing at the side of a crowd to convince himself or herself that the crime has been completed and that an arrest should be made. There is enough in the bill at the moment to allow us to make a start on 23 July, but many things in perhaps greyer areas in relation to sectarian matters will have to be tested.

During the previous panel’s evidence, a point was made about whether a T-shirt, for example, could communicate hatred. I suggest that a court will ultimately decide on that. Stated cases will come out of the legislation, as has been the case with other acts; the case of the Criminal Justice (Scotland) Act 1980 is similar. I think there will be lots of that. However, the bill certainly covers the famous things that were reported last season, in my opinion, and if I were the officer in the crowd, I think I could use it to effect an arrest.

The Convener: John Finnie indicated that he has a question. Is it a supplementary or another line of questioning? I have a list of members.

John Finnie: It relates to the operational side, so I will ask it now if I may, convener.

The Convener: Yes. Then I will come to Graeme Pearson, John Lamont and Alison McInnes.

John Finnie: Mr Corrigan, all police workers assess risk. You rightly identified that the primary concern of the match commander is safety. When you talk about not making mass arrests, for want of a better term, I presume that the same would apply to the circumstances that Mr Gray outlined in relation to public houses. There is no inference that every public house in any location will be subjected to that. A risk assessment will be done based on operational demands and other needs.

Assistant Chief Constable Corrigan: Yes. I approach the issue from the preventative point of view. If someone is looking at the forthcoming season as a football fan who is, shall we say, prone to this type of activity or has been involved in it, I hope that that individual, whether they were going to watch a match on Sky in a pub, or were going to the game, would understand that the bill allows the police to tackle them and that there is potential for quite a serious sentence to come from that. We will not always decide to go into a pub near one of the two big stadiums in Glasgow, for example, because at that moment in time we might not have enough officers to do that as we have deployed them elsewhere. That will remain the case and safety will be paramount. That is the first question that any police officer, never mind the match commander, should consider.

John Finnie: Is it your view that the legislation that banned alcohol from sports stadia has been a success?

Assistant Chief Constable Corrigan: Yes.

John Finnie: Thank you.

The Convener: Before we move on, you said that guidance on operational matters would be given to your front-line officers. I have raised the matter of section 2, on “Regulated football match: definition and meaning of behaviour ‘in relation to’ match” and particularly the provisions on travelling. It seems to me that they are pretty wide. Section 2(4) states:

“(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and

(b) a person’s journey includes breaks (including overnight breaks).”
Will there be difficulties with using that? It is almost like a stop-and-search power, is it not?

Assistant Chief Constable Corrigan: I commented at the point when the question was asked that I had picked up on the “whether or not the person ... intended” part of the provision. That will form part of my written feedback because I would like to clarify the provision. We can probably deal with the case where someone is travelling to a match and there is an overnight break. Simply put, it will take a bit of investigation; we will have to acquire the evidence that supports a chain of events without a break in the middle, if you like. That is a matter of investigation, albeit that it is different from what we might do at the moment. However, I share your view that there needs to be more clarity on the bit about “whether or not the person ... intended to attend the match”.

The Convener: So we might need to seek clarification on that from the minister, or even to have it amended. Does the provision go a bit too far?

Assistant Chief Constable Corrigan: The point is that it applies whether the person intended to attend the match or not. We will be seeking clarification of that.

The Convener: Thank you. I call Graeme Pearson, to be followed by John Lamont and then Alison McInnes.

Graeme Pearson: First, I realise that from ACPOS’s point of view you want to be positive about new demands that are made upon you—ACPOS is a can-do organisation. Secondly, I have seldom heard a police officer who did not welcome additional powers. I do not think that the fact that the police welcome additional powers is, in itself, a virtue.

The Convener: Gamekeeper turned poacher!

Graeme Pearson: Absolutely, but I have always thought that. I am more interested in a free community than in a community that is policed to the nth degree.

Before I ask my question, let me take you back to the financial memorandum, which states:

“The Scottish Government does not envisage significant additional costs associated with the introduction of these measures.”

I know that the police have introduced a new football monitoring group; I believe that it started business last week. You commented about pubs near Glasgow, but this situation extends right across the country, as you know, and substantial numbers of officers will be needed to address it. What arrangements have you made for training officers and briefing them about the requirements? How will that training be rolled out? How many officers will you be able to brief between now and the start of the season? What do you do about the officers who have not been briefed yet, given that the bill has no significant financial implications?

11:30

Assistant Chief Constable Corrigan: I take you back to my point that a proportionate response must be the way forward. Yesterday, as part of the joint action group that is tackling violence in football, including sectarianism, we set up a national football unit, which is based in my force at the moment. It will be responsible for getting the new legislation to as many police officers as possible prior to 23 July, and my feeling is that that should be every officer who will be deployed. We have identified four clubs in particular that have a problem, although it is not exclusive to those four clubs. If I were choosing which officers require to be trained first—accepting that I could not train every single officer in Scotland by then, although I might be able to do that—it would be those officers. That will be one of the first tasks for the national football unit, which is headed by a superintendent who is, as we speak, going around the country speaking to chief officers and giving our take on what the bill will involve.

There is no question but that is costly. If I am instructed to work within my existing resource, which is reasonable to an extent, then my response will be proportionate. I have to balance what the community wants us to tackle, which is not just this problem, so I will use only a reasonable number of officers. For example, I do not intend to triple the number of officers who will go to certain games. We need to be a bit more sophisticated about how we do things.

Members of the committee might be aware that we recently introduced an anti-sectarian initiative at each of our big fixtures. That is a small, specially-trained group of officers with body-worn cameras, whose sole role is to go into crowds to record and gather evidence that might prove some of the offences in the bill.

I completely agree, however, that we would not be able to use many, many more officers on the basis of existing resources.

The Convener: Mr Gray, do you want to comment?

Graeme Pearson: Could I leave Mr Gray for the moment to save a bit of time?

The Convener: I leave it to the witness to say whether he wants to come in.

Les Gray: No, I am quite content, convener.
Graeme Pearson: It was publicised that 1,000 officers covered one game. The prospect of trying to train 1,000 officers in a short space of time is challenging—it would take months. One does not train 1,000 officers in a couple of weeks. You heard the earlier discussions about the difficulties and you are aware of public concern about the rush that we are involved with the bill.

The bill sets out that officers will be able to differentiate between an offence, a joke, proselytising—that will be a good one—free speech and satire.

The Convener: That is in the policy memorandum, not in the bill.

Graeme Pearson: That is right. Given that that is the level of concern and intricacy, do you really feel that the officer on the street, who might well have to take a camera into a crowd, will be well prepared and protected to deliver on the provisions in the bill?

Assistant Chief Constable Corrigan: You make a relevant point. I read with interest the same points about the decision of an officer, because it will boil down to an individual officer deciding whether people crossing themselves, for example, in one set of circumstances as opposed to another, is an offence or is liable to incite serious violence. I can tell you that in certain circumstances it might incite violence.

The key for us will be to train officers quickly. You are aware of our internet-based training, with which we will reach a great number of officers quickly. Your point is absolutely right, however; the officers will be going to matches on 23 July and who need to understand the intricacies of legislation will be those we were talking about in relation to the anti-sectarian initiative. They will receive a different type of training, and as much as we can give them. It will boil down to understanding whether an action is a joke or, because of the circumstances, has gone beyond a joke and is liable to incite violence.

In essence, we are where we are with this. We will be required to train officers by 23 July. I am absolutely confident that I can do what I am describing. Would I like to train officers more so that they have a real grip of and an understanding of the legislation? Yes, of course I would rather have more time, but we are where we are.

The Convener: John, you have bid for a supplementary. Is it on training?

John Finnie: It is on training.

Assistant Chief Constable Corrigan: You are briefed the day before, or sometimes two days before. The officers do not just turn up at a football match; they are briefed extensively before the match. In relation to the big games—old firm games—they are briefed the day before, or sometimes two days before. The officers covered one game. The prospect of trying to train 1,000 officers in a short space of time is challenging—it would take months. One does not train 1,000 officers in a couple of weeks. You heard the earlier discussions about the difficulties and you are aware of public concern about the rush that we are involved with the bill.

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The Convener: John, you have bid for a supplementary. Is it on training?

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The Convener: It has to be specifically on training, because John Lamont has been waiting quite a while.

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before, and information is cascaded down. I imagine that we will have extended football briefings. I hark back to the 1980 act: we got a couple of hours of briefings over two days for that, and it was completely new.

I have every faith that my members will exercise their common sense and discretion in relation to these offences and the definition of “a reasonable person”. A reasonable person is a credible witness, and has been ever since I joined the police 31 years ago; that has not changed. I have every confidence that our members will be trained and ready for the new legislation. It will find its own level, which will be dictated by the test cases that come to court and the stated cases.

The Convener: Thank you. We have dealt with training, so I will let in John Lamont. You have been very patient; I do not often say that to you.

John Lamont: Thank you, convener. I will focus on the effect and deterrence value of the bill once it is enacted, starting with the same point that I made to the minister. How many people who have effectively escaped the sanction of the criminal justice system so far will face arrest and possible prosecution once the bill is enacted?

Assistant Chief Constable Corrigan: Those people who have escaped, or, rather, they are tolerated. We need to face the facts. We have for many years policed football very safely, especially inside the ground—there are very few arrests, and we have to a large extent eradicated alcohol and its effects inside the grounds. There has, however, been widespread sectarian singing for many years. We—not only the police, but our community—could decide that we want to deal with that by having the police service arrest as many people for committing the offence as we can literally get our hands on. In some instances, I have heard singing that would definitely be an offence under the bill. I suggest, however, that we do not want to do that. We want to influence crowd behaviour by publicising the fact that these new powers exist and carry a significant sentence. When we decide to go in, even if we do so after the fact by using closed-circuit television to capture those who are responsible or were leading the charge, we will publicise those arrests. We will publicise that those people have received football banning orders, and that they have been banned by their clubs—an important point that we have not yet talked about.

It is about creating a deterrent rather than saying that we are going in to arrest everybody. That is definitely not the solution; it should be about football.

John Lamont: For clarification, what is the new offence that is not currently covered by a breach of the peace or by section 38 of the Criminal Justice and Licensing (Scotland) Act 2010? What additional powers are you getting? I want you to pinpoint exactly what the additional offences are.

Assistant Chief Constable Corrigan: First, I should say that I am not a lawyer. I am encouraged that under the bill people can get a football banning order when they are travelling to and from the match or watching the football in a pub, which is not currently the case.

There are certain circumstances in which the stretch of breach of the peace and our applying—as we do in every instance—for a football banning order, may result in the sheriff saying no. The bill, however, is quite clear that if the person is watching the football in a pub or is on the way to or from the match and we charge them with the offence, it would attract a football banning order. That is one of the obvious things.

The other thing is the sentence that the offence attracts, which comes up when I speak to my colleagues and to members of the public. I have not seen anyone given five years for a breach of the peace in many years. As I say, however, I am not a lawyer.

John Lamont: That would require an arrest, would it not? You say that you do not anticipate having to arrest many more people, but to get that sanction you would have to arrest the person.

Assistant Chief Constable Corrigan: Absolutely yes, in that case.

The Convener: I read into your answer that while the existing legislation—I am talking about breach of the peace common law—does many other things, the bill is in balance a preventative measure, rather than giving you more powers.

Assistant Chief Constable Corrigan: Yes.

The Convener: You have mentioned a few differences, but I read into that that you will implement it in very much the way that you implement the legislation now, except that it is more of a threat and a deterrent. Is that a fair way to look at it from the police point of view?

Assistant Chief Constable Corrigan: We will use the legislation effectively as required, but we will be proportionate about it. You will not see us destabilising crowds in order to arrest people at a time of large-scale sectarian chanting, for example, but we will use other methods to arrest those people after the fact. The legislation will be about deterrence.

11:45

Alison McInnes: My question follows neatly on from that. There seems to be a disconnect between what the minister expects—she said today that she expects such behaviour to stop on
23 July—and what you are saying, which is that you will police in the same way as you do under the current legislation because your first interest is in maintaining public safety and public order at football matches. Surely, the problem is not that we need new legislation but that we need a different way of enforcing it. Given what you have said this morning, is there not a real risk that the bill could fall into disrepute from the very start if, in the first two or three games of the season, the sectarian chanting continues?

Assistant Chief Constable Corrigan: Perhaps I did not make myself clear. We will use the legislation from the start of the season. The difference between a couple of seasons ago and the end of last season is that we now have a dedicated, well-trained team whose job is to deal with this aspect and nothing else in the match. The anti-sectarianism initiatives will be rolled out across Scotland and you will see the legislation being used—I am quite confident about that.

I would fear the worst if we measured success by the number of people whom we arrested for sectarianism. As part of the joint action group we are doing many other things to influence whether people sing sectarian songs at football matches. Whether breach of the peace with an aggravation worked or whether the new legislation works, we will use all the tools at our disposal and, because we are launching an anti-sectarianism initiative entirely for that purpose, you will see more arrests this year—there is no question about that. Will that be success? I do not think so.

Alison McInnes: Let me turn the question around, then. What would be a failure?

Assistant Chief Constable Corrigan: We will use not only the legislation, but a wide range of measures that the joint action group is proposing should be used from the start of the season, which will involve the clubs and the supporters in educating people about what is and is not allowed. If all those things failed and, at the end of the season, we did not see any difference in the stadiums, that would be failure.

Humza Yousaf: Good morning, gentlemen. Thank you for coming. It is important to have you at the first committee meeting at which we are looking at the bill. Mr Gray made the point that the financial memorandum is, in his opinion, way off the mark. Where would you judge the mark to be? What do you think the cost should be—I expect that you will put it in the written submission that you will submit by Friday—and on what do you base that figure? Assistant Chief Constable Corrigan suggested that there will not be floods of new officers in addition to those who are at grounds already, stabilising crowds. Where do you think that the extra resources will be deployed and what do you see the financial cost being?

Les Gray: We will require extra police officers at games. If we want to do it right, we will require police officers stopping supporters buses—as we did in the 1980s under the Criminal Justice (Scotland) Act 1980—and going into public houses. I believe that there should be an enforcement/education process whereby a stigma is attached to people who are charged and convicted. That will make the difference. Before, when people were charged with breach of the peace, it would not have made many headlines. I hope that there will now be a stigma attached to people who are charged with sectarian and racist offences. I hope that the media will report the matter and that those people will be known in their communities as being sectarian and racist.

You mentioned breach of the peace. We have always had such powers, but breach of the peace has been under attack recently in some aspects of the law and we have had the ridiculous scenario whereby people have been let off because it was only two police officers whom they swore at. That is how it was laid out in the stated case. It is not a breach of the peace to stand and swear at two police officers—how ridiculous is that in today’s society?

That is why I am pleased with the bill. Article 7.1 of the European convention on human rights states that offences should be clearly defined. A lot of people walk away from court when that is not the case. For example, two police officers could be standing at a corner, and somebody might come out shouting, bawling and swearing during a match, or at any time, but the courts will not take it up. That is just crazy in my commonsense view. I hope that most reasonable people think the same.

I believe that we cannot enforce the anti-sectarian provisions with the same amount of police officers. On behalf of my members, I hope that we will have more police officers on the ground enforcing the provisions and more police officers hitting the public houses so that, in the first few months, members of the public get the message loud and clear that anti-sectarian behaviour is not acceptable to normal people in our society.

Success for me would be the same as it would be for Mr Corrigan—by the end of the season, sectarian chanting and so on would be greatly reduced. We will not be able to do away with it altogether within a year or so; it will take time. However, if it is greatly reduced, that would be success. We should not measure success according to the number of people who are charged. The police’s first priority is to prevent crime. I agree with Mr Corrigan 100 per cent that if we can prevent sectarian acts from being committed in the first place, that would be a success.
Humza Yousaf: The first part of my question for Mr Gray was that, if the figure in the financial memorandum is way off the mark, what do you judge the mark to be? The second point is whether, given what Assistant Chief Constable Corrigan said, there is a difference of opinion about what the approach should be. Mr Gray made it clear that we should put more officers into grounds and public houses. Am I right in saying that Assistant Chief Constable Corrigan does not think that that would be the right approach? I do not expect the two bodies necessarily to be convergent on that issue, but will it need to be discussed?

Les Gray: If I could give you an answer to that, Mr Yousaf, I would probably be in line for another promotion. I do not honestly know the answer.

Assistant Chief Constable Corrigan: If you give the right answer, you might be in line for promotion.

Les Gray: I will be putting on this week’s lottery numbers.

However, my 31 years in the police service tells me that the policing of games and the fantastic work that Strathclyde Police and other police services did at the end of the football season in reaction to the escalating old firm nonsense—it can only be described as nonsense—come at a cost. The police pot—this is where I get on my federation soapbox—is finite and the budget, like everyone else’s budget, has been hit. In order to police sectarian behaviour in the way that it needs to be policed, we will have to rob Peter to pay Paul.

If on-duty officers are brought in at no cost to the football side of it, those officers are not in their community. If officers are brought in on their day off, they are not getting paid but they will still have to have their day off further down the line, so the community will suffer from that. If officers are brought in on overtime, there is obviously a financial cost. Whatever way it is policed, there will be a cost.

Mr Corrigan is right that the online offences, which the committee will come on to, will grow arms and legs. As anyone in the police service will tell you, you might start off an online inquiry with one thing, but that will grow. For instance, with paedophilia inquiries, you start off with one person’s computer being seized, but before you know it you are looking at 100 or 200 people. It will be the same with an online inquiry in this case: it will grow arms and legs.

My instinct from 31 years in the police service and my common sense tell me that the financial memorandum’s cost estimate of £0.5 million to £0.7 million will not touch the real cost and that extra funds will be needed. However, that could be reviewed every year. If we are successful, the policing cost could come down, just as it did for policing the alcohol ban at football matches. Many moons ago, we used to have four cops at every turnstile for that, but we do not have that now. We have reduced the numbers of police involved because the crime is not there. The long-term goal in this case would therefore be to reduce policing in such a fashion that the cost will come down.

The Convener: Do you agree that if the bill was successful as a preventative measure, it could be a spend-to-save matter, in that we would have fewer prosecutions, fewer applications for legal aid and so on? With fewer prosecutions, perhaps fewer people would be paying fines or be in jail. If the bill’s provisions operated as a preventative measure as well as in giving the police more clarity—that is not my view but your view, I believe—it might be possible to save money for the public purse in other areas, including hospitalisation and so on.

Les Gray: Absolutely. I have been saying for many months that crime costs money across the public sector. For example, it affects not just the police but hospitals. Anyone who goes into Glasgow royal infirmary or any other hospital after an old firm match sees the cost to the national health service and social services. There is also a cost to education, private employers, public employers and the courts—a raft of areas. In my view, if we spend to save in the first year and hammer it, for want of a better term, and enforce it—that is the only way to put it—

The Convener: We are trying to get away from violence, Mr Gray, but we will take that metaphorically.

Les Gray: If we enforce it properly and there is a deterrent, which Mr Lamont is looking for, without a shadow of doubt we will save money in future years.

The Convener: We will have a question from Graeme Pearson, after which I would like to move to the second part of the bill.

Graeme Pearson: As I said in the justice debate last week, if we are announcing a fanfare deterrent, that is one thing. We all want to be identified as being against sectarian hate crime and hate crime in general. I leave that as being completely supported.

I do not wish to labour the point about training, but we do not want to experiment on the public. The last thing we need is to have ill-advised officers applying a law that is not clearly understood, and a law that is challenged by the public in the media glare. There is a whole issue around public confidence, not just as far as the police are concerned but as far as the authorities are concerned generally.
You mentioned football banning orders, and you heard me rehearsing some points about them with the minister earlier. Why has there been what I would identify as a fairly low pick-up on banning orders? What is your view regarding the future?

Assistant Chief Constable Corrigan: On your first point, please be assured that we will never allow police officers to experiment on the public. We police the community with the community and for the community. That is it—there is no other deal.

Officers will be trained to a standard where they are able to do their job to the level that they should be at. The test that may be applied thereafter—I am sure that it will be—will be at court, where I hope that rigour will be applied, as is right and proper. From that, we will get some clearer definition around certain parts of the new provisions. That is normal—I am sure that that will be the case.

There is never a scenario in which we walk into policing a new law without a sense of learning as we go. My entire desire is for us to be reasonable and proportionate around this whole agenda. My job, which is slightly different from Les Gray’s job, is to balance priorities, and we will do that, but we should balance them in such a way as to make the provisions reasonable in their implementation, rather than going into football grounds to take a hard, heavy-handed approach and—

Graeme Pearson: “Hammer it”?

Assistant Chief Constable Corrigan: Well, I would certainly not use a word like “hammering”.

The Convener: You were getting on so well, Mr Gray and Assistant Chief Constable Corrigan. Mr Gray made a good pitch for promotion earlier—but I think that we will move on.

Assistant Chief Constable Corrigan: I absolutely promise you that there will be a very reasonable, proportionate response to the measures. We will indeed learn as we go, as that is the very nature of such measures.

Sectarianism will not be cured through people being arrested inside football grounds. There are currently 124 football banning orders in place. If we balance that against the number of arrests that are made, we see a fairly decent picture. Very few arrests are made inside football grounds. Referring to the point about the bill possibly supporting other people becoming subject to football banning orders, I suggest that the number might go up.

I can assure the committee that we ask for a football banning order on every occasion now. Training is undertaken by both the police and sheriffs, and we are getting to grips with the new legislation around football banning orders. On the basis of the bill, I suspect that we will be asking for them more.

The Convener: I want to move on to the second part of the bill, on threatening communications. I invite questions on that aspect—although we have also been discussing resources, and members may develop that area, too, if they wish.

John Finnie: We have heard about the sex crime investigations that take place, Mr Corrigan. Can you give an indication about any other forensic examinations that take place? I presume that a resource is available for the purposes of dealing with proceeds of crime and so on. I am asking about inquiries of a forensic or IT nature.

12:00

Assistant Chief Constable Corrigan: Internet investigators are specialists within the service. They are not always police officers—they are people who are gifted in the field of IT and the internet. A good lower-level example of what they do would be Strathclyde Police’s operation access, which tackled gang violence and the posting on Facebook, by young men, mainly, of pictures of themselves carrying weapons such as machetes, often in public places. Through an internet investigation, we identified them and cases went to court at which they were charged with possession of offensive weapons in a public place because we could prove, through those photographs, that the offence had been committed in a public place. The people who progressed those inquiries were police cadets. We had three police cadets in our building who were highly gifted in the use of Facebook. They devised the strategy for what we did thereafter. That is the lower end.

At the top end, when we are talking about international money laundering and fraud, there are covert internet investigators in the Scottish police service who carry out such investigations. In the context of the bill, we are talking about a varying scale, from the posting of simple, horrific examples of sectarianism on internet notice boards to, at the other end of the spectrum, clearly defined threats to kill individuals.

Before we set sail on the new challenge, we will have to train more people in internet investigation, but I suggest that we would probably have had to do that anyway, because the world is moving towards a position in which everything is done on the internet. The people whom we train will be multifaceted. I do not think that they will be dedicated entirely to the investigation of sectarianism; they will learn how to deal more effectively with wider issues.

The Convener: Will you comment on the fact that the bill goes wider than sectarianism? I feel
that we are overlooking issues, as condition A is not to do with sectarianism. What is the situation when someone puts on the internet something that is offensive and which is an incitement? What is the current legal position? Is that an offence under the communications legislation, or is it just a common-law offence?

Assistant Chief Constable Corrigan: It could be a number of things. It might be a breach of the peace—depending on the circumstances, breach of the peace might be the most appropriate offence with which to charge someone who had caused alarm, annoyance or disturbance to a member of the public. In other circumstances, when a message has been sent by text, it may be a statutory breach of the peace under the telecommunications legislation. It would depend very much on the circumstances.

Equally, if a threat were sent over the internet that was real, was intended and which could be carried out, it could come under the common-law crime of threats; indeed, it could range as far as conspiracy to murder or anything else. It would very much depend on the circumstances.

The Convener: I am trying to recall what the minister said. I think she said that, for a serious crime, it was necessary only to demonstrate intent to cause fear and alarm but that the threat need not necessarily be carried out. I think that that is the distinction that she made between the position in the bill and the current position. Is that correct?

Assistant Chief Constable Corrigan: With regard to the crime of threats, specifically, someone must be able to do, or intend to do, what they say that they will do, whereas with the proposed new offence, I think that the minister said that that was not necessary.

Humza Yousaf: Whenever proposed legislation is discussed that deals with offence, fear and alarm, or the intent to cause them, there is always a worry, especially on the part of the public, about the potential for powers to be misused. Nowhere is that more evident than with the terrorism legislation, which I remember being used against an 80-year-old gentleman who heckled at a political party conference—in the spirit of being consensual, I will not mention what political party that was. There is a worry that that could happen here. How will you look to quell those public concerns about freedom of speech, particularly in relation to demonstrations, rallies and so on?

Assistant Chief Constable Corrigan: That is a key point. There must be a balance in relation to both the offences in the bill. We must be pragmatic and clear that we are talking about people who are threatening and who peddle hate. Given the number of people that we will be able to deal with, we are talking about people who are threatening and who peddle serious sectarianism or racism or whatever. The first test that should be applied is through internal supervision in the police service. We examine what our officers do in relation to what goes to court. We should ask whether it is reasonable for someone to go to court. For example, we should consider whether it was a joke between two young lads who were sending things about their favourite football team, which is often the reality. Alternatively, we should consider whether there was something like what we had last year: defined and clear threats against a named person, showing marks on his body where he was going to be injured. We first need to consider that internally in the police service, and we have measures in place to do that.

The second test that it is right and proper to apply is through the Crown. In Scotland, the Crown decides whether a crime has been committed. If we had the horrendous scenario that the member describes, the area procurator fiscal would come back to us and say, “Not only is there not a crime, but this is a complete abuse of your powers.” It might be recommended that disciplinary proceedings be initiated against the officers. That is the everyday reality. The point is important, because we are in the territory of people’s views, politics and religion. Those matters have to be carefully policed. That is why I continuously use the word “proportionate”. Our response must be proportionate.

Les Gray: Various concerns have been voiced, although nobody has yet used the term “civil liberties”. The bill will not be an attack on anyone’s civil liberties in Scotland—far from it. Apart from anything else, the police do not have sufficient resources to look at people’s Facebook pages and this, that and the next thing. The people who will be targeted are those who have been highlighted in the past few months. They are the people on whom we need to concentrate. There are various well-tested and documented procedures to allow people to complain against the police and other people in authority. I have absolutely no concerns about that. The police will not form roadblocks and stop every car and bus that might be going to a football game, when in fact they are going to the supermarket. It will be quite the opposite: the police will use the bill in the way that it is intended to be used. There will be no infringement of anyone’s civil liberties.

Humza Yousaf: I more than have faith in the internal processes, and we also have the independent Police Complaints Commissioner for Scotland.

I have been on anti-war demonstrations and other demonstrations during which people have burned effigies of politicians or people with a public profile. I should say that I distance myself
from such actions. That could cause fear and alarm to the person with a public profile or to other people who are around. Would such an act be prosecuted under the new law? I hate to throw examples at you, as that is probably not the best way to conduct proceedings.

Assistant Chief Constable Corrigan: There is a famous policeman’s saying that we should take every case on its merits. The answer to your question is that it would depend very much on the circumstances. To return to breach of the peace, there is a notion of conduct that is likely to provoke a breach of the peace. That would be down to the prevailing circumstances. For example, if a crowd would be incensed or up in arms and would react violently as a result of a person burning an effigy, the individual police officer who was there at the time would consider the situation and decide whether the crime was complete. That is right and the way that it should be.

However, we could never say definitively what the only circumstances are in which a crime could happen. In some circumstances, it might not cause the slightest bit of offence to allow somebody to burn an effigy, especially if it happened in a self-contained community, as is often the case at a rally. If such things were going on, the police officer who was on the scene might decide that it was better not to do anything.

Humza Yousaf: Is that not the point behind the legislation? As I understand it, police officers do not feel that they have the power to go into a self-contained group of 30, 40 or 50 fans of a certain football club singing a song with no other opposition, rival football fans or members of the public present and make arrests or, indeed, do anything at all about it. Does what you are saying contradict that notion?

Assistant Chief Constable Corrigan: No. I understand exactly what you are saying. The legislation will allow us not only to do exactly as you have described, but to make decisions based on circumstances. If it appears unreasonable to act in such a way, police officers will not do so. It is certainly not what the community would want us to do.

With regard to internet-based crime, it is probably worth mentioning that we often apply to service providers to find out people’s identity. A Government watchdog—the Scottish Information Commissioner—polices our policing of the internet and would scrutinise our applications to check whether it was reasonable, proportionate or necessary to ask for such information. If we were acting beyond where we should have been, that would be picked up.

The Convener: With regard to e-mail communications, if I understood the minister, she said that under section 5 if an e-mail sent by one individual to another for their eyes only implying “a threat, or an incitement, to carry out a seriously violent act against a person or against persons” but no one else apart from the recipient—who will no doubt not be unhappy about receiving it—sees it, it would not be an offence. However, if the recipient puts the e-mail into the public domain, it is the recipient not the individual who originally sent it who will be guilty of the offence.

Assistant Chief Constable Corrigan: That is my understanding of the minister’s comments.

The Convener: Might that not cause you problems with evidence? The original individual might simply say, “It wisnae me, guv, it was him what sent it out into the public domain.”

Assistant Chief Constable Corrigan: That is the run of things in normal investigations. We would normally proceed on the understanding that the person had posted the communication. However, when we interview that person, they might well say, “No, it wasn’t me—it was actually Les who did it.”

The Convener: And you were doing so well, Mr Gray.

Assistant Chief Constable Corrigan: At that point, the investigation would take a different turn and we would have to evidence the fact that Mr Gray had posted that material. In other words, we would have to find corroborated evidence to support our case and allow us to send it to the procurator fiscal.

The Convener: Will it not cause difficulties if the recipient of the e-mail posts it in the public domain and you have to establish that they did not have the sender’s consent to do so?

Assistant Chief Constable Corrigan: Perhaps I can draw a comparison with offences involving the kind of threatening texts that are now and again sent to people. In some of the cases that we are called to investigate, an individual has actually left their phone down and someone else has sent the text but such offences are similarly difficult to investigate and prove. This is not unheard of but it is unfortunately the way things go with internet and telecommunications-based crime.

The Convener: I am trying to find out whether it is the case that where there is a will, there is a way to get round the law. No doubt we will see what happens in due course when the legislation is in place.

If there are no other questions—[Interruption.] I knew that this would happen. I said to the clerks, “If I say ‘There are no other questions’, a hand will go up.” I call James Kelly.
James Kelly: I am sorry, convener, for stopping you in full flow as you were about to end the session.

I have only one question. With regard to condition A, which, as section 5 sets out, is that “the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons” are you confident that there is enough in the legislation to help you differentiate between a “seriously violent act” and just a violent act?

Assistant Chief Constable Corrigan: Police officers will go straight away to definitions and the definition that was read out in the previous evidence session is exactly what should be used. I was interested by that question, because it raised a point on which I myself would have sought clarification. As I say, given the basis of that definition, I would advise police officers to use that.

James Kelly: Thank you.

The Convener: I thank the witnesses for their helpful evidence and for attending at such short notice. I suspend the meeting for one minute only for a witness changeover, so members should stay put.

12:15
Meeting suspended.

12:16
On resuming—

The Convener: I welcome our third panel of witnesses, who have been very patient and have listened to a lot of the evidence: Dr David McArdle from the University of Stirling’s law school; and Bill McVicar and Alan McCreadie from the Law Society of Scotland. As before, we will move straight to questions.

Roderick Campbell (North East Fife) (SNP): Dr McArdle, if we accept for the moment that paragraph 21 of the policy memorandum might not adequately deal with the conjunctive test in relation to the public element and the threat of disturbance to the community, and that there is an overlap between section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and breach of the peace provisions, can I challenge you on the comment in your submission that “The only feasible justification for this measure is that it draws the attention of the media, the public and football’s international authorities to the fact that something is being done to address ‘Scotland’s Shame’”? Do you agree that that is a legitimate policy objective for this Parliament?

Dr David McArdle (University of Stirling): Absolutely. I do not disagree with that at all. However, we need to be robust and confident enough to say that that is why we are doing what we are doing. If we are happy to do that, as a policy basis, that is absolutely fine.

Alison McInnes: Dr McArdle, towards the end of your submission, you say:

“given that criminal sanctions already exist to cover these issues, the better question would have been how to facilitate their enforcement in appropriate instances”.

Will you elaborate on what else you think that we could have done?

Dr McArdle: Yes, but let me give you a little background first. In the past 12 months, I have spent an unhealthy amount of time doing some research on behalf of the justice analytical services division of the Scottish Government on the use of football banning orders and the perceived reluctance of sheriffs to use them as frequently as people expected that they would use them. That is what has informed my thinking on this area. I am not Scottish, I am not a criminal lawyer and I am not a football fan—it is a silly game that should be banned.

The Convener: I think that you have just dug yourself into a great big hole.

Dr McArdle: That is fine. I am saying that I do not have an agenda. However, over the past 12 months, I have heard evidence from sheriffs that they are willing to use the existing breach of the peace laws and to impose football banning orders in appropriate cases if they perceive that the general mood in wider society is for them to be used more robustly than they have been.

As a consequence of the game on 22 March—at which, we should remember, it was the behaviour of the players and managers, not the fans, that precipitated people’s concern—and the subsequent public debates, there would have been in any event a greater willingness on the part of the judiciary to use football banning orders and to impose sentences of imprisonment.

Two months ago, we heard a case that involved a Celtic fan who was visited with three months’ imprisonment and a five-year FBO—FBOs are invariably a maximum of one year up here—for directing the N-word at a black Glasgow Rangers player. The fan was picked up not by the match day stewards or the police, but by other supporters, who brought his identity to the attention of those authorities. We need to remember that the police are not the most effective means to deal with such behaviour in grounds and that the first line for dealing with such offences is not the stewards, who are paid perhaps £30 a pop for attending a match, but other fans who say, “I’m not willing to put up with...”
you doing or saying that.” If people hear that from others who sit next to them week in, week out, that can be a strong deterrent.

The clubs, sheriffs and prosecuting authorities would have been more proactive anyway as a consequence of what happened in March, and we would have seen a lot more convictions and a lot more use of football banning orders under the existing law without the need for the new regime.

That was a long-winded response to a short question. I am sorry about that.

Alison McInnes: No. That is fine. That is very helpful. Thank you.

The Convener: I want to pick up on deterrents and summarise what has been said. I think that the police said in evidence that breach of the peace is a wide thing that people do not really recognise or understand, and that putting a name or label in the bill may or may not add to what we already have or it may duplicate it, but by doing that there will be a deterrent element or preventive measure that does not exist so much at the moment. Perhaps that picks up on Rod Campbell’s point. That deterrence exists in some respects, but the bill would add to it. What are the panel’s views on that?

Dr McArdle: I take the point that that is a perfectly legitimate policy aim, but prosecutors and sheriffs like certainty. If someone is facing with perhaps 70 guilty pleas on a Monday morning in Glasgow sheriff court, I think that the default position will be to consider what the police, the prosecuting authorities and the sheriff are comfortable with. In the first few months, we will see the new provisions being used a lot, as they will be brand new and shiny, and everybody will try to work out what they can do with them, but I think that people will fall back to what they know will work. Perhaps we will see breach of the peace, for example, being used more robustly, but I expect that by Christmas or perhaps by Easter at the latest we will see the old provisions being used more than they are in the first few months.

For what it is worth, I expect that we will see less of a problem next season, as such things are cyclical. There were two or three bad matches last year, which the media rightly got hold of, but there is no reason to think that the same problems will emerge next year as well. We might have a quiet period and people might say, “The legislation’s been successful,” but after two or three years, something else will happen and we will have new legislation to deal with it. That is how policing football fans has been for 130 years.

Bill McVicar (Law Society of Scotland): I agree with Dr McArdle. The Law Society of Scotland’s view is that the efforts that have been put into the talks and discussions on advancing new legislation have been entirely commendable and worth while, as they have highlighted the fact that there is a serious problem that needs to be addressed. Our issues are to do with technical arrangements, whether the legislation is necessary, and whether it will add anything to the armoury at the disposal of the police and the prosecution authorities.

A couple of points require to be borne in mind in considering the competency of dealing with crimes that are committed abroad. That can be done, but in my experience prosecutions of crimes that were committed abroad have tended to focus on much more serious crimes, such as serious sexual offences against children. The provisions that are currently on the statute book in relation to such crimes require an element of dual criminality—that is, the crime has to be a crime abroad and in the prosecuting jurisdiction. Paragraph 37 of the explanatory note states:

“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).”

That might cause technical problems, so some thought might be necessary in relation to that aspect of the bill.

There are also difficulties with regard to proving actions that take place abroad, and getting the necessary witnesses to come to Scotland, along with the accused, if they happen to reside abroad. The bill deals with what has been called Scotland’s shame. We cannot have people who are affiliated to Scotland behaving in that reprehensible fashion abroad. However, I question whether it is actually possible to prosecute people who are abroad for this kind of thing.

The Convener: I will let Graeme Pearson come in on that.

Graeme Pearson: Thank you, convener. I thank the panel for their submissions, which I found extremely helpful. They gave candid responses to the earlier evidence about the efficacy of what is proposed.

Dr McArdle mentioned the game in March that created a great deal of heat, and not a great deal of intelligence and understanding thereafter. We are now visited with the situation here. You commented on the current legislation and the fact that, to some extent, it has lost its glamour in terms of its being enforced with the enthusiasm that one might have hoped for.

We also saw that occur in relation to drinking at sports grounds. Initially, there was, as Les Gray would have said, the hammering of the issue to the extent that the behaviour in the fans was noticeably affected. However, to a degree, alcohol has returned to the ground scene.
Earlier, I tried to elicit whether people were surprised at the number of banning orders. I know that it was around 100. Given that the legislation has been in force for about four years—

Dr McArdle: Since September 2006, I think.

Graeme Pearson: Nearly five years, then. Are you surprised at the lack of enthusiasm for engaging with that element of legislation? What does that tell you about what we are going to do with the bill?

Dr McArdle: I have to choose my words carefully, because although the report is written—it has been ready to go for about two months—it is still not in the public domain, and I am really wary of saying things that I should not about what we have discovered vis-à-vis sheriffs and football banning orders. When the report is out, I will happily have a beer and a coffee with anybody—

Graeme Pearson: In the generality, then.

Dr McArdle: The generality is no, I am not surprised, because the sheriffs see banning orders as a regime that was developed down south to deal with a peculiarly English problem. One of the sheriffs said, “It is an English act with a kilt on it.” It is of limited utility in Scotland, but I think that that will change.

The Convener: Is there a timescale for the publication of the report on banning orders?

Dr McArdle: The last date that I heard was late May or early June.

The Convener: That is now. Perhaps someone else wants to ask about that.

John Finnie: I want to ask either of the gentlemen from the Law Society about their submission. Like Graeme Pearson, I am grateful for both the helpful submissions. I found the third paragraph on page 2 of the Law Society’s paper, about section 1(5)(b) of the bill, to be particularly helpful. I ask you to expand on your concern that

“there does not require to be anyone present to be incited to public disorder.”

Bill McVicar: This is where we consider section 1.

John Finnie: It is the comment in the third paragraph on the second page of your submission.

Alan McCreadie (Law Society of Scotland): I am happy to take that question. I should say thank you for the opportunity that has been afforded to us to present oral evidence to the Justice Committee this morning.

The concern is to do with the fact that it appears to be something of an offence in the abstract. I think that it is meant to cover a situation in which there has been offensive behaviour within a football ground but the other fans have left or there is an insufficient number of other fans.

For the purposes of section 1(1), the issue is not behaviour that incites public disorder but behaviour that is likely to or would be likely to do so. There is concern that the bill defines such behaviour as behaviour that

“would be likely to incite public disorder if public disorder would be likely to occur but for the fact that ... measures are in place to prevent public disorder”—

I assume that that means that there is a sufficient police presence—

“or ... persons likely to be incited to public disorder are not present”.

I am not sure about the provision. The overall situation is that the behaviour could be dealt with adequately under existing legislation, perhaps as a breach of the peace, because it is likely that someone would be there. There are also issues around provability and enforcement, but the point is that there may be no one there to take offence at what is happening.

12:30

John Finnie: Ironically, what you view as the downside is meant to be the upside of the bill. If the intention is to tackle behaviour that would be unacceptable, the mere absence of the people who would take offence at it should not stop the behaviour being classed as unacceptable. Is that not beneficial? Is it not a serious improvement on the current situation?

Bill McVicar: It is not an improvement, in the sense that it does not add anything to the law as presently stated. I assume that the provision is meant to cover disorderly conduct in a public place. It refers to conduct that

“would be likely to incite public disorder”,

so there must be some sort of public element to the conduct. That means that it falls within the definition of breach of the peace—it is not one of the private situations that are excluded from that, which led to the introduction of section 38 offences. The concern that we have expressed relates to whether the provision is necessary, because it does not add anything.

John Finnie: Let us take the example of a situation in which there are two factions, one of which is some distance away from the other, around the corner, with police officers present. Do you see no benefit in applying the bill’s rigour to people from one faction who say something that would be wholly offensive to others who, by good fortune, are around the corner?
Bill McVicar: I see that there is potential benefit in the situation that you describe, but I reiterate that the provision adds nothing to the present law. One concern that we have tried to raise is that the bill, rather than being innovative, in many ways simply restates the law that already exists. We are concerned that there should not be two different sets of law that apply. Why should the law that applies to non-football situations—for example, a disturbance in the street involving people who have been at a rock concert or something of that sort—differ from that which applies to circumstances related to football, especially given that the common law covers both instances? People say that breach of the peace is not a serious crime, and perhaps in some circumstances it is not, but at the end of the day it is a common-law offence for which an unlimited penalty is available. In a sense, the bill restricts the level of punishment that a court could impose in appropriate circumstances.

John Finnie: Earlier, we heard from police officers about the dilution of breach of the peace. I understand that using the F-word to patrolling police officers is no longer deemed to be a breach of the peace. Does that not suggest to you that there is inadequacy in breach of the peace as life goes on?

Bill McVicar: I am not sure that using the F-word to a police officer would necessarily fall within the definition in the bill. With respect, it is not a good comparison to use.

John Finnie: My point relates to how breach of the peace has altered over the years. At one time, what is known in your profession as a two-cop breach would have been a reasonably common offence, but there has been a dilution of breach of the peace. Do you not accept that the bill is intended to address that?

Bill McVicar: I do not think that section 1(5)(b) covers the specific example that you have in mind. Breach of the peace was recently redefined—perhaps that is the best way of putting it—to make clear that there has to be a public element. That was what the Harris case was about—it was about something happening in a public place. If someone is shouting obscenities at a police officer in a public place, it is arguable that there is a breach of the peace, depending on the circumstances. I do not see how section 1(5)(b) would change that.

John Finnie: I should have added the caveat that I am not a lawyer, although I have some passing knowledge of the law. The pertinent point is that the public are not present; only police officers and a faction are present.

Bill McVicar: The faction is the public, for the purposes of the definition of breach of the peace, is it not? If someone is doing something in a crowd of people, the public are present.

John Finnie: I am envisaging a situation in which there are 30 people in a group and someone is saying something that other people might find offensive but which none of the other 29 individuals in the group finds offensive. That is where the gap is.

Dr McArdle: I take the point entirely, but let us be clear: what we are doing here is criminalising hate speech when nobody is present to be offended by it. I do not have a problem with that. In lots of mature democracies, it is not unusual to say of a word that is offensive to the wider community, “You cannot use that word—end of.” I have no reservation about our going down that route. My concern is that this conversation should be taking place over a period of months, not a couple of days—that is, if my reading of section 1(5)(b) is correct.

Bill McVicar: I agree with Dr McArdle on that, for what it is worth. Our concerns and reservations relate to the length of time that has been allowed for the process.

My colleague Mr Clancy wrote a paper, which he has not submitted to the committee, in which he drew attention to the high points of the Scottish system of bringing about new legislation. He referred to a review—I have lost the place in my notes; please give me a second.

The Convener: Can I ask for clarification on section 1(5)(b)? My thoughts are knitting together rather badly. Section 1(5) provides:

“For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

(a) measures are in place to prevent public disorder, or
(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.”

Let us say that I am in a supporters club and we are busy singing something that might well fall within the ambit of being offensive and stirring people up to some kind of race or gender hatred. If I am doing that and everyone else is doing exactly the same, I do not fall within the ambit of the bill. Is that correct?

Dr McArdle: I think that you do fall within the ambit of section 1(5)(b).

The Convener: Why?

Dr McArdle: Because although nobody else is present who would be offended by the behaviour and you are not provoking fear and alarm among other people—because everyone is of a like mind—the police, the Crown and ultimately the sheriffs might take the view that you have said something that simply should not be said.
The Convener: Okay, so I am reading the section wrongly. I am happy to be corrected on that. The point is that even if everyone is very happy with what they are singing, they will fall within the ambit of the bill. I am putting aside evidential requirements; strictly speaking, they will fall within the ambit of the bill.

Dr McArdle: I add the caveat that I had two hours with the bill yesterday morning and I could be wrong. Like you, I am willing to be corrected.

The Convener: Mr McVicar, can you clarify the position?

Bill McVicar: I do not know that it is necessarily easy to clarify. I go back to what I said earlier: if someone is in a supporters club and all the supporters are singing an offensive song, they are in a public place. The club is a place to which the public have access—the public being the members of the club. If someone was in their front room with their family, shouting and bawling at the telly, I dare say that there probably would not be a breach of the peace, but if they were with other members of the public in a place to which the public had access, it seems to me that there would be a breach of the peace.

That does not answer the specific question about section 1(5)(b), but what I am saying is that the conduct that you have in mind is criminal in any event, so unless it can be shown that section 1(5)(b) would bring additional benefit and catch criminal activity that is not caught by the existing law, it might not be necessary to bring the bill into force. It is difficult to understand what is intended by the bill. It seems to me that the law that we have been operating for a number of years is relatively straightforward and clear, although the odd glitch occurs from time to time in relation to things that happen in private.

The Convener: I do not think that I am clear, but I will have to read what you have both said. I am not clear in my mind whether it would be an offence to sing in a supporters club—with nobody else but supporters present—a song the singing of which in other circumstances would be considered to breach the law. I am not clear whether, if nobody else was present and everybody was content, that would fall within the ambit of the bill. There is the “but for” in section 1(5). I am not clear about that, but maybe it is just late in the day.

Bill McVicar: Perhaps we have to look back to section 1(1)(b)(ii), which states:

“would be likely to incite public disorder.”

The issue is the link between that and section 1(5)(b), which we identified in our submission.

The Convener: That is a fair point.

Bill McVicar: I think that that is what section 1(5)(b) is intended to catch, but it is trying to catch something that is already a criminal offence.

We suggest that it might be helpful to take more time to look at what it is necessary to legislate for, once one has analysed what the existing law provides for. As Dr McArdle said, it might be that more strenuous use of the existing law and the existing penalties, such as football banning orders, would have a greater effect than legislation of this sort, which is rushed. I do not blame anyone for that, because there is a matter that requires to be dealt with, but I wonder whether more haste might mean less speed.

The Convener: Rod, is your point on the same problem?

Roderick Campbell: Yes. I think that we have rather laboured section 1(5)(b), but do you accept for the moment that, rightly or wrongly, it might be intended to take the law beyond the decision in Harris v HMA?

Bill McVicar: That might be the intention.

The Convener: For those of us not familiar with Harris v HMA, can you tell us what the decision was?

Roderick Campbell: It was about the public element. The case failed because the rude remarks to the police were not made in public.

I record that I found the submission on section 2 helpful, and I will be interested to see what the Government makes of it when it has the opportunity to consider the matter, so thank you for that submission.

Bill McVicar: Thank you.

The Convener: Alison, is your question on the same public/private point?

Alison McInnes: Yes. The lack of clarity in the past 10 minutes demonstrates exactly why it is dangerous to be taking the bill through Parliament at such a ridiculous speed. I want to hear the panel’s views on whether they think that the emergency legislation procedure is warranted in this instance.

Bill McVicar: My view is that it is not warranted in this instance. I readily understand that there is a requirement for debate, consideration and discussion of the problems, but I do not know that the bill, of itself, will help. Indeed, it may cause confusion, because it seeks not to replace or clarify the existing law but to add another layer of law, which is not always the best way to approach things.

Alan McCreadie: There is nothing that I can usefully add to that.
Dr McArdle: Likewise, I agree with Mr McVicar. It is not Cadder.

Humza Yousaf: My question is on a slightly different tack. All your submissions contain the idea of including a sunset clause and reviewing the legislation. I think that everybody on the committee—I suppose that I should not speak for the whole committee but, nonetheless—

The Convener: I would stop there. Speak for yourself, if you want to last.

Humza Yousaf: I have heard from the discussions that we all have concerns about the speed at which the bill is going through, but there is an understanding that legislation can be reviewed, looked at and updated. The police, as well as the politicians, are very keen to get something on the ground before the football season starts.

I am not sure whether you were here when the minister gave her evidence and we questioned her, but she said that there is a problem with sunset clauses in relation to criminal cases. Do you accept that there can be problems with enforcing sunset clauses for criminal offences? If so, what other review structures could be put in place?

12:45

Bill McVicar: A sunset clause is one that brings an end to the effect of a statute at a particular point in time. It is not common for such clauses to be a feature of criminal practice. However, I do not see any reason why they could not be included in a statute, provided that there were sufficient transitional provisions to deal with what comes at the end of the period specified. There may be a device that would allow the legislation to continue subject to whatever voting procedure may be thought appropriate. Alternatively, there might be provision that prosecutions that have been commenced before the sunset clause takes effect are to continue.

I return to two points. First, it seems to me that what the bill seeks to criminalise is already an offence. If I am right in my analysis that it is not adding a new crime, the sunset clause is to some extent redundant, because the offence would continue to be criminal at common law in any event. There could be a common-law prosecution even at the end of the sunset clause.

The second and perhaps more fundamental point is why, if we are dealing with criminal legislation, we are considering whether there is a need for a sunset clause. That of itself indicates that we are bringing in criminal legislation with too much haste.

Criminal legislation is very important to those who are affected by it. It is important for the police, the public and those who happen to be accused of breaking the law. There has to be a degree of clarity so that everybody knows where they stand. My concern is that if the bill is enacted in its present form, there is likely to be a degree of confusion for a time. It might be better to resolve any matters that could be capable of causing confusion before the bill is enacted.

Humza Yousaf: Is such confusion not quite common with most pieces of legislation, on which there are test cases? The police did not suggest that there was huge confusion; they thought that they would be able to train their officers—or at least a significant portion of their officers—in time to implement the legislation. Is it not common for all pieces of legislation to develop and evolve, regardless of how long it takes to pass them?

Bill McVicar: Not in my experience.

Humza Yousaf: Test cases come through. The prohibition on drinking at football grounds was the example that Mr Gray gave. He said that there were test cases involving flasks, quenchy cups and so on. However, you do not think that that is common.

Bill McVicar: My experience is that, when new legislation is enacted, it is usually reasonably clear what is intended. There might be a few people making the odd esoteric point from time to time, but careful thought about what you are putting in place in legislation should serve to defeat any of the more esoteric challenges that might be thought up.

I return to what I said before. The law is reasonably clear at present. I do not see that there is any great confusion at present about what the courts, the prosecutors and the police can do, although, as I have said several times already, the fact that we are talking about the issue is welcome, because it raises its public profile and allows people to state their concerns and the public to become better informed about the situation.

Humza Yousaf: I want to make one final point about that. The two things that I have taken away from this meeting—I will rephrase that because I have taken away a lot more than two. One of the two main things that stick in my mind from this evidence session is that the offences that the police did not feel they had the powers to deal with were the ones that John Finnie touched on earlier, which involve breach of the peace without anyone whose peace is being breached being present. Actions in those scenarios can still be prosecuted even if those present are like-minded supporters.
The other point was about the intention to cause fear and alarm. In your experience, do provisions exist to tackle that?

A third point is about threatening communications. I think that the minister said that sending e-mails and letters can be prosecuted, but posting things on a blog perhaps cannot be, because the blog is not being sent out. That was my reading of what was said.

Will you touch on those points?

Bill McVicar: I do not know whether what the minister said about the third category is correct. I am not terribly well acquainted with blogs and suchlike.

Humza Yousaf: So that might need some legislation.

Bill McVicar: I do not know whether that needs to be done, to be frank. If we had more time to consider the matter, we would be able to give you a better answer. If we could get back to you in writing on that, that might be more helpful to you.

As I understand the law, the first two scenarios that you raise are already covered by the law in its present form. I do not think that there is a need to legislate to increase police powers as you suggest.

Dr McArdle: In the several years for which we have had on the statute book the racial and religious prejudice aggravations of breach of the peace, only one case—Walls v Brown—has, on appeal, gone to the High Court by way of stated case. I would be astonished if we were suddenly to see masses of cases being appealed under the new legislation, because the law simply does not work in that way. We will get the occasional isolated example of somebody trying it on, but the situations in which there are important issues of law to be clarified are and will continue to be few and far between.

The Convener: I have a supplementary question about sunset clauses, which I considered early on as a protective measure for the Parliament and the committee. Many committee members share the concern about legislatin in haste and facing litigation at leisure because of unintended consequences.

The line in your written submission about a sunset clause is interesting. The minister touched on the questions of what would happen to people who were already imprisoned and what would happen to people who were in the middle of a prosecution—whether the case was still running. You say that we would still have all the other common law in place for protection. However, the sunset clause would apply to the entire bill, including the areas that you have raised issues about, such as its application in other jurisdictions.

If that is one of the options for the Parliament, is that not better? At least the legislation would come back to the Parliament and either it would fall or the Government would have to do something to keep it running, which would protect us.

Bill McVicar: I agree that it would be helpful for that to be included in the bill if it were necessary. One would hope that sufficient time would be allowed, but I appreciate that it is not going to be in this case. A sunset clause is better than nothing and is a good second choice.

The Convener: Let us assume that the bill is going to proceed as emergency legislation. Stage 1 is on Thursday, so we are already in the position of having stages 1, 2 and 3 on the same day. The committee shares many of the concerns about that. If we had the Government in that position, we would at least have given the Parliament some control.

Bill McVicar: I agree.

The Convener: James Kelly will now take a completely different tack.

James Kelly: Let us turn to section 5. I do not know whether you were present earlier when we discussed the offence of threatening communication. Section 5 lays out two conditions, A and B. Condition B is specifically about "religious hatred", but condition A makes no reference to either football or religious hatred and potentially goes much wider than the Government intends it to be drafted. What are your thoughts on that? Is the provision relevant as drafted, or should it be narrowed down to deal with football or religion-related offences?

Alan McCreadie: We talked earlier about section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which is mentioned in the Law Society's written submission. I add the caveat that, as you will appreciate, the submission was made as a result of the truncated bill procedure. Nevertheless, my understanding is that section 38 of the 2010 act would cover that.

Condition A—as James Kelly rightly stated—seems to apply to any type of behaviour; confer condition B, which deals with a situation in which there is intention to stir up religious hatred. There is a difference between the two. Under condition B at section 5(5) there must be intention, and it may allow for the situation in which something is said that perhaps should not have been but there was no intention to stir up religious hatred. Condition A is wider than that, in that, although it specifies intention at section 5(2)(c)(i), at 5(2)(c)(ii)—to which the minister alluded in her evidence—it refers to whether a person

"is reckless as to whether the communication of the material would cause fear or alarm."
I am of the view that common-law breach of the peace and section 38 of the 2010 act, along with the statutory aggravations of breach of the peace, would cover such situations. However, to go back to the general point, I am not sure whether it takes you any further forward.

James Kelly: Does Dr McArdle want to comment?

Dr McArdle: I really could not. I did not have time to look in any depth at section 5 and at the discussion document from my colleague Sarah Christie, so I would not feel comfortable adding anything to her comments.

James Kelly: I appreciate that. If you have any reflections on it and want to give us a further written submission, that would be helpful.

Dr McArdle: That is very kind.

The Convener: Just write to me as convener and the submission will be distributed to the committee.

Bill McVicar: I want to make one point before we leave—

The Convener: You are not leaving, because I have someone waiting to ask a question.

Bill McVicar: Before we leave section 5.

The Convener: Okay.

Bill McVicar: It occurred to me that section 5 is perhaps more restrictive than breach of the peace. Section 5 appears to require either intention or recklessness as a critical element of the offence, whereas common-law breach of the peace is an offence that is defined not by intention but by the effect of the conduct. One wonders whether that therefore restricts the offence that would currently be dealt with as a breach of the peace. I made a note of that earlier and I have just deciphered my handwriting.

The Convener: Does it not add to the offence, because it runs along with breach of the peace?

Bill McVicar: But you have to prove intention or recklessness, and that is not always easy. The effect of conduct is easier to prove, so breach of the peace is an easier offence to prove in that sense.

The Convener: Yes, that is evidential, but that is not what I am talking about. I am saying that the test in section 5 is that someone intends to do something, whether or not they do it. It adds to the set of offences. If someone intends to do it, notwithstanding that they do not do it, that is sufficient for an offence in itself. The effect is also an offence, so there is an additional bit. I accept that the evidential is another matter. Do you agree?

Bill McVicar: I can see that argument.

The Convener: Is Roderick Campbell still in? I have Graeme Pearson on the list as well.

Roderick Campbell: I am out for the moment, convener—I will let you know if I want to come back in.

Graeme Pearson: On the sunset clause issue, it is a matter of record that committee members, including me, were so concerned about the speed with which we were moving forward that we made representations to the convener—which she thankfully supported—on the necessity of holding these conversations.

I put a point to the police earlier about experimenting with the public by introducing the bill. Given all that you have said about the current state of the law, would you advise that we take some time at this point and seek to revitalise our current approach, rather than state up front that we have our reservations but will put in a sunset clause so that we can revisit what we are inventing in haste?

I am trying to put together a logical stance in my mind. I genuinely want to deal with the issue, but at the same time I want to improve our situation rather than making it more confusing. Although I was initially attracted to the notion of having a sunset clause as a breathing space, it appears that we might end up making things more complex and more difficult to manage. Given your experience, what is your view in that respect?

13:00

Bill McVicar: My initial view was that the bill should be postponed so that we would not have to worry about sunset clauses. However, given that this is going to come about no matter what I say, my choice—if I have one—is that there should be a sunset clause in any bill that is being put through in haste to ensure that any difficulties arising from such haste can be dealt with.

Graeme Pearson: But the purist in me is saying that the Parliament decides whether there should be legislation.

Bill McVicar: Absolutely.

Graeme Pearson: So this will not come down the track without the agreement of Parliament after considering—as we are now—the best advice available.

Bill McVicar: Indeed.

The Convener: In winding up, I want to clarify that the stage 1 debate is being held this week and that stages 2 and 3 are next week. I might have sounded confused, but I was not—the words just came out of my mouth wrong. We are not
doing it all in the one day—as we did, in fact, with the Cadder legislation.

Do any of the witnesses wish to add anything that we have not asked about?

Alan McCreadie: For the benefit of committee members, I want to raise a small technical point that is not included in the Law Society’s submission but which I picked up after looking at the bill again this morning. The definition of “regulated football match” in section 2 is cross-referenced with section 55(2) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, but I am not entirely sure whether that covers a match between two foreign teams in Scotland. I will investigate the matter further.

The Convener: Please feel free to think on the matter and write to us with your views. We will put the question to the minister.

That ends the session. I close the meeting.

Meeting closed at 13:02.
Scottish Parliament

Justice Committee

Wednesday 22 June 2011

[The Convener opened the meeting at 12:16]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

The Convener (Christine Grahame): Good afternoon. I welcome everyone present to the Justice Committee's third meeting in this session. I remind everyone to switch off mobile phones and other electronic devices, as they interfere with the sound system even when they are switched to silent. No apologies have been received.

Item 1 is consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. This is our second evidence session on the bill. Before we begin, I thank all witnesses for agreeing to attend at such short notice to give evidence on the bill. I also thank those who have made written submissions.

I welcome our first panel of witnesses: Chloe Clemmons, Scottish churches parliamentary officer, representing the Church of Scotland; and Tim Hopkins, director of the Equality Network. I thank Mr Hopkins for his written submission. Given that we have received no written submission from Chloe Clemmons, I invite her to make a short opening statement to outline the Church of Scotland's position.

Chloe Clemmons (Church of Scotland): The Church of Scotland recognises the seriousness of the problem of sectarianism and is absolutely committed to challenging it locally and nationally. To do that, we work closely with our churches on the ground in parishes, many of which work with local Catholic churches. It is very much an ecumenical effort. It is not about us and them—it is about all of us together, working to solve the problem. We are pleased that legislation is being put in the context of that wider plan and that longer-term work will be done in the next couple of years.

We agree that there is a need to clarify the legal process and acknowledge some of the problems that have been identified. However, we are concerned that there are two clear difficulties with the speed at which the process has been initiated.

First, we do not think that it is possible within such a tight timeframe to make legislation that is as clear and robust as it can be. We are particularly concerned by the fact that live speech will not be included because it merits wider consideration, not because there has been a policy discussion. It is worrying that such decisions are being taken simply because of time, without looking at the wider issue of what is necessary. We are very concerned about how you generate ownership of legislation in that way.

Secondly, the Government has called for support from across civic Scotland. We would like to be part of that process, but the Government has not given civic Scotland a chance to engage with the issues and to work out whether the bill is the best way forward. Law works at its best when the majority of the population think that it represents a collective will.

Measures that have been effective, such as the smoking ban, work not because they are enforced but because the passage of the legislation was taken to mean that people supported it—it was seen as the collective position.

People chose to stop smoking because of the legislation, and, more important, people chose to ask the person next to them to stop smoking because of it. If we want to use legislation to tackle sectarianism, we should aspire to that level of commitment from the population. We should seek to introduce legislation to prompt people in the communities that are experiencing the problems to say, “I understand that my society has a problem with this, and I’ll think about that”, and to say to their peers, “You shouldn’t do that while I’m here”.

If we want to have that level of ownership over the legislation, we need the communities that are affected by the issue to be in here, having this conversation. I am a professional policy officer, and I can drop everything at three days’ notice to be here. However, I had very much hoped to be able to bring some representatives of local projects to come and discuss the ways in which the legislation would impact on their work, but that was not possible in such a short timeframe.

We are not in a position to answer questions such as, “Do you think this legislation will deter your client group?”, and until those questions are answered, we do not know whether the legislation is the right thing. It may be the right thing, but maybe something different would be better, and we have not had the opportunity to have that discussion.

In its financial memorandum, the Government says that the legislation is a minimal change and that it is not seeking to prosecute new offences or to increase the number of prosecutions significantly. That very much suggests that this is a public relations statement to communities about what the Government wants them to do, but we are not asking those same communities to come
and be part of that process and make a collective statement. We need to slow the process down, and get more people involved in the conversation.

The Convener: Thank you. I have one correction: I exonerate the committee from having anything to do with the process. That was a matter for the Parliamentary Bureau, and we are with belt and braces trying to compensate for it.

We will move to questions.

John Finnie (Highlands and Islands) (SNP): Ms Clemmons, you talk about getting the population’s commitment. What timeframe would you say should be applied to ensure that that happens?

Chloe Clemmons: The normal parliamentary process works very well, and it is understood well by a lot of organisations in our communities. The normal method of introducing the legislation and putting out a call for evidence with a three-month timeframe enables people to engage with it in their own groups and then to present their views in a clear and coherent fashion, and to see one another’s views. Debate happens when you see more than one view and then take part in the evidence sessions.

The Convener: Mr Hopkins, please indicate if you want to come in. You mentioned that in your submission too, so you may wish to respond.

Tim Hopkins (Equality Network): Yes, that is right. I am grateful to be invited here today, but I have to say that I am unable to give the same level of consideration and evidence as I normally would when giving evidence to a parliamentary committee. We have not been able to consult lesbian, gay, bisexual and transgender people and groups throughout Scotland in the way that we usually would.

Chloe Clemmons is quite right: we would usually have a pre-legislative phase of consultation by the Government—the normal standard for that is a minimum of three months. That gives us time to go out quite widely and discuss the legislation with other LGBT people and groups, and other equality organisations. The legislation would then be introduced and there would be a lengthy stage 1 phase.

A lot of LGBT groups and equality organisations in Scotland have an interest in the legislation, because it is not just about sectarianism. As Alison McInnes said at yesterday’s meeting, it is really a hate crime bill that covers racist, religious, homophobic, transphobic and disability-related hate crime. It was just by chance that I and my colleagues had time on Friday and Monday to spend several hours looking at it; a lot of organisations have not had that time given the very quick process that the bill is going through.

John Finnie: Are there instances when you think that a time imperative would apply? What factors would override that consideration?

Tim Hopkins: As I understand it, emergency bills have usually dealt with a sudden problem that has arisen with the law, often because of a court case such as the Cadder case. It is usually because the court has struck down a piece of legislation or has found a real problem that needs to be dealt with as an emergency.

We do not think that the bill needs to be dealt with as an emergency. Arguably, something needs to be put in place before the start of the football season, and section 1 of the bill relates to football; section 5, with which we have a big problem, does not directly relate to football matches, so the urgency is perhaps not there in that regard.

However, as other witnesses have said, it is rather unclear whether section 1 introduces new substantive criminal offences or whether it is about clearly restating the law. It is very valuable to be clear about the law, but if the bill is not introducing new crimes and if the sort of things that we are talking about are already offences, which generally they are, it could be argued that it is not really an emergency that requires the legislation to be brought in by whatever the season starts—by 29 July, I think.

The Convener: I seek clarification from the Church of Scotland. Was there no contact whatever from the ministerial team or the bill team at any stage with regard to the bill? I accept that we have not gone through the usual process, but was there no contact whatever? Were there any communications?

Chloe Clemmons: We have had briefings on the bill. I think that the first one was on 8 June. However, that was very much about the content of the bill. The briefings were helpful and I appreciate the minister taking the time to meet me individually; because I represent other churches, too, that meant that I was able to pass the information on. That was welcome. There was a further meeting last week with the Moderator of the General Assembly of the Church of Scotland, which was also welcome.

However, consultation with community groups takes more time than that. Even if we had been able to go out and consult the day after the briefing, we would not have had enough time, because people who are not policy staff have other things to do; they are not able to drop everything.

Tim Hopkins: We had heard nothing about the content of the bill until it was published last Friday morning, despite the fact that it covers sexual orientation and transgender identity specifically.
The Convener: Yes. I see that from your paper. Thank you very much.

John Finnie: Would it be possible to establish who were the recipients of advance briefings?

The Convener: We will ask—again, at breakneck speed. I think we are testing our clerks and they have proved themselves worthy so far.

Humza, is your question on consultation?

Humza Yousaf (Glasgow) (SNP): Very much so.

The Convener: Is yours a separate question, Colin?

Colin Keir (Edinburgh Western) (SNP): It is actually very similar to the previous one.

The Convener: Right. You can come in now; you were on my list first.

Colin Keir: Thank you, convener.

I know that the legislation that we are discussing is new, but if we are being honest, we can also say that it addresses a rather old problem that has come to a head. You have talked about consultations with different groups. Given that the general problem has been around for quite some time, what discussions have you had with the different church groups and other stakeholders, and what determinations have you come to? Do you think that any of the things that were discussed in the past—but which are not in the bill—would be a way of taking things forward?

Chloe Clemmons: The work that the Church of Scotland has done has been at local community level. A big piece of research and policy setting was done in 2002, at which point a number of recommendations were made. That was primarily for local churches. Particularly in the Glasgow area, there has been a lot of community-based work, primarily ecumenical. We have tried hard not to do such work just as the Church of Scotland.

It is about changing attitudes. There is work going on at the bridging the gap project in Glasgow, which is about going into schools—both non-denominational and Catholic—and getting mixed groups to work on the issues together. It is also about measuring the difference in attitudes that such work produces. The work has been very successful and there has been Scottish Government funding for quite a lot of it. We think that we should carry on with that approach. What we need is more funding for more work, because if you catch people before they have committed an offence, you will have fewer problems going forward.

Tim Hopkins: We and our colleagues at Stonewall have done work on homophobia in football. Stonewall has worked with the Football Association down south and the Scottish Football Association to start addressing that problem. The SFA and the clubs have started to address homophobia in football. We have worked with the police and procurators fiscal in some areas of Scotland to start addressing it, using the existing legislation. Some research work has been done by way of surveys of football fans and football professionals about the extent of homophobia in football. For example, such work has found that seven out of 10 fans and professionals said that they had experienced homophobic chants at football matches.

So, we know something about the extent of the problem, and moves to address it have started to be made. What we would like to do, however, is consult LGBT people about the specifics of the bill. That is what we have not had the opportunity to do.

12:30

Colin Keir: I am really interested to know what is happening through the churches in particular on this issue. As I said, this is a very old problem. Given the work that has been mentioned, which I think is sterling and certainly have no problem with, has anyone from your community of churches come up with any definitive legislative way forward that we are not getting in this bill?

Chloe Clemmons: I have not been party to any discussion on content but, then again, that would not necessarily be the first thought of a local church doing work in its community. That is why it is important to consult on the legislation. If we say to people, “This option is on the table”, they might say, “That’s a great idea” or, “It might be a great idea if you made this or that change”. That is exactly the question that I cannot answer.

Colin Keir: Do you know of any national view?

Chloe Clemmons: It has not been discussed recently, and certainly not in the time that I have been in post.

Humza Yousaf: I thank the Equality Network for its submission and I am sure that as we go on we will touch on some of the points that it raises. With regard to consultation, I know that you do not accept the premise that this is necessarily an emergency but what processes do both organisations have in place to consult with stakeholders about emergency legislation or any proposals for emergency legislation that might be brought forward? I assume, of course, that you have such processes.

Tim Hopkins: We have a network that we talk to by e-mail and obviously we have Facebook pages and so on. In the past three days, we have been using those mechanisms with regard to this
legislation. By the time we had seen and digested the bill, it was about 5 pm on Friday night. We then e-mailed our network to ask for examples of homophobia in football and instances when homophobic hatred had been stirred up, which are two key points in the bill. However, only a small number of people were able to respond in the timescale. Such electronic mechanisms are really the only things that are available to us, but I have also had helpful e-mail conversations with my policy colleagues in the other national LGBT organisations—Stonewall Scotland and LGBT Youth Scotland—and, indeed, some of what I have to say is based on information that they have given me. Usually, however, we have meetings to discuss with people exactly what is being proposed and what the effect might be, which is a much more effective way of getting feedback than simply sending out a mass e-mail and hoping that people will reply.

Chloe Clemmons: We do not have any emergency process for consulting churches on policy matters. Churches are inherently relatively slow and bureaucratic organisations and, by and large, do not think of policy as an emergency matter. This is my first experience of needing an emergency consultation. Usually, we would identify people who we know work on particular matters. Most churches have reporting processes that show which churches are working in which fields, and we would approach them and often ask individual questions. It always takes weeks. I am not sure that we could do it faster because very often the people we talk to are volunteers and do a different job from policy work. My role is to be available and make consultation easy, but that does not necessarily mean that I can make it fast.

Humza Yousaf: Might there be a need to make it faster? You have said that it is difficult, but there must have been cases in the past in which, because of the will of the people or whatever, there has been a need to address an issue and push legislation forward in a particularly tight timeframe. Would that ever be a priority?

Chloe Clemmons: That is a very difficult question—I am trying to picture an example. We do what we can. In this situation, an urgent matter with a tight timescale emerged for consultation and the reality was that I was unable to carry out that consultation in four days. Even with an extra couple of weeks, I would have had a better outcome that I had in four days.

The Convener: I think that we have exhausted the issue of consultation but to give the Government some balance—which is new for me—I wonder whether you accept that the bill was trailed substantially before last week. In fairness to the Government, we knew that it was coming, even though we might not have thought that it would come this way.

Tim Hopkins: We knew that it was coming but I have to say that when we saw it on Friday morning it came as quite a surprise to us—it was quite different from what we were expecting. The inclusion of the offence of stirring up religious hatred, in particular, was not trailed at all—we had certainly heard nothing about it. The offence is actually quite substantive and, indeed, created a huge amount of debate down south when it was proposed. That is where we think the biggest problem lies.

The Convener: That is a fair response. We will now move on to a different topic.

James Kelly (Rutherglen) (Lab): I turn to section 1 of the bill, which deals with offensive behaviour at regulated football matches. At yesterday’s committee meeting, there was quite a bit of discussion about the practical implementation of that section and how it will be used by the police and prosecutors. I do not want to rerun yesterday’s discussion, but one of the difficulties would appear to be interpreting what acts and songs fall under section 1. What are your comments on that section? As drafted, is it fit for purpose?

Chloe Clemmons: I would struggle to respond to that level of detail. I understand the reason for not defining the offence, because behaviour evolves and you have to allow the professionals who are enforcing the legislation a level of discretion.

Tim Hopkins: The offence is similar to breach of the peace, so arguably it does not extend the law very much. Homophobic and sectarian behaviour at football matches can already be prosecuted as a breach of the peace aggravated by one of the statutory hate crime aggravations. It has been said that breach of the peace is too broad and the boundaries of the law are not clear. Because the offence is very much based on breach of the peace, and is about behaviour that is likely to incite public disorder, the same problems arise.

Whether the use of certain homophobic words would be an offence depends entirely on the context. The same word being used in two different contexts might or might not be a criminal offence. The same applies to sectarian behaviour. Perhaps that is a problem that cannot be solved.

We quite like section 1. It might not do much more than restate offences that are already crimes, but I agree with what the minister said yesterday, that it restates them in a concrete and specific way. There is a lot of value in that.
When the previous hate crime bill—now the Offences (Aggravation by Prejudice) (Scotland) Act 2009—was going through Parliament a couple of years ago, the same point was made. People said that the same could be achieved under the common law, but we and a lot of other people felt that, by setting out in statute what particular behaviour was unacceptable, we would clarify the law and make it more likely to be enforced—and enforced consistently—across the country, and that we would make it easier to record that the law had been enforced and to record convictions. Arguably, section 1 will do that, even if it does not extend the law beyond what is already covered by breach of the peace. That is a positive.

Obviously, we particularly like the inclusion of sections 1(2)(a), 1(2)(b) and 1(2)(c), and the fact that they cover expressions of hatred on all the grounds that are currently covered by hate crime law. There was a lot of debate in the predecessor of this committee, and the Equal Opportunities Committee took a lot of evidence on the last hate crime bill, and there was consensus that hate crime law should cover race, religion, sexual orientation, transgender identity and disability. That is exactly what section 1 covers—it defines those things in exactly the same way as they are defined in existing hate crime law, so we very much welcome that.

I would like to make one technical point about the definition and use of the word “hatred”. The statutory hate crime aggravations in the existing legislation use “malice and ill-will” instead of “hatred”. As a non-lawyer, I do not know whether “hatred” means exactly the same as “malice and ill-will”. However, as a layperson, it seems to me that a group of supporters could chant a sectarian song that is malicious and expresses ill-will but which might not be said to express hatred. Perhaps “hatred” is a higher test than “malice and ill-will”. We are concerned that, paradoxically, by using “hatred” rather than “malice and ill-will”, which is the term used in the existing legislation, section 1 might make the law less effective, because it will catch fewer offences. It would be useful to have clarification from the Government of whether “hatred” means exactly the same as “malice and ill-will”.

The Convener: That is now on the record. The debate is tomorrow afternoon, and I am sure that someone will raise that point.

James Kelly: You endorsed sections 1(2)(a), 1(2)(b) and 1(2)(c). Section 1(2)(e) refers to “other behaviour that a reasonable person would be likely to consider offensive.”

Do you have any views on that provision?

Tim Hopkins: Obviously, it is very broad, but it is, of course, limited by section 1(1). The behaviour must be “likely to incite public disorder”, which arguably would already be a breach of the peace. Therefore, the provision is not excessively broad. Arguably, section 1(2)(e) would allow offensive behaviour that is targeted at one of the groups that is not covered by current hate crime law to be included as well.

The Convener: Let us accept, for the sake of argument, that section 1 really rehearses breach of the peace. Yesterday, the police, I think—although it might not have been the police—put the argument to us that the bill is called the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, and that somebody who was convicted of such an offence would have the specific offence of offensive behaviour on their conviction. If, for the sake of debate, we are looking at the bill as a deterrent in some respects, a stigma would attach to a person who was convicted under it, because they would not be able to say, for example, that they were convicted of breach of the peace when they fell down, kicked over some buckets and woke folk up. Let us set aside consultation and problems with the detail of the bill. Is there any merit in that argument?

Tim Hopkins: Yes, I think that there is. That is one of the points that we made about the previous hate crime legislation. A stigma is attached to having such a conviction, and there is evidence that people who were accused of crimes under the oldest hate crime legislation—the racially aggravated offences legislation—sought to have the aggravation element dropped from the charge, because of the stigma that was attached to it. There is evidence that stigma is associated with a hate crime conviction and that there is therefore a deterrent effect, so I agree with that point.

Graeme Pearson (South Scotland) (Lab): Thank you for coming. I am grateful for the paper from the Equality Network that was supplied ahead of this meeting.

My question is largely for Mr Hopkins. What is your estimate of the challenge that your community faces from threats and fears that it faces in attending football matches? Is the answer to that question within your knowledge?

Tim Hopkins: We have not worked on that matter directly, but in September 2009 our colleagues at Stonewall conducted a survey of 2,000 fans and professional footballers throughout Britain. Seven out of 10 of those who were surveyed said that they had experienced homophobic chants at football matches, and more than half of them thought that the football
associations and clubs were not doing enough to address the problem. Staffordshire University conducted an online study of 2,000 fans from throughout Britain, and 93 per cent of them said that they disapproved of homophobic abuse, although how representative they were of football fans in general is slightly unclear, as the study was an online study.

It seems clear that homophobic abuse is widespread, but only a minority of fans engage in it. Perhaps one thing that indicates that the problem is significant is that, as far as I know, there are currently no openly gay professional footballers in England or Scotland. The only openly gay footballer to work in Scotland was Justin Fashanu, who eventually, as you know, committed suicide.

Graeme Pearson: You mentioned the view that was expressed that football clubs and associations were not responding sufficiently. From the data, was there any indication of what was expected of the clubs and authorities?

Tim Hopkins: Not that I have a record of. There are a couple of indications of what clubs and the SFA are already doing. When the work was being done, the SFA representative certainly said that tannoy announcers were saying at the beginning of matches that certain kinds of behaviour were unacceptable and that homophobic behaviour was mentioned, but I do not know how widespread that practice was. If the bill is passed and implemented, it will be important to make such announcements at the beginning of matches.

12:45

Graeme Pearson: This is a general question for both witnesses. You have talked about the consultation process and the difficulties that you perceive in responding. You will know the interests of both of your communities and how much discussion and response an issue such as the bill would create—if you do not, I am happy to accept that you cannot estimate it. Would the bill generate a great deal of discussion in your communities and a desire to feed back, or would there be a low-level response? Can you give any indication of that?

Chloe Clemmons: I think that people would like to be involved in the discussion. Sectarianism is often perceived as a religious issue more than it actually is a religious issue, and I think that Church of Scotland members would be interested in getting involved in further discussion.

Tim Hopkins: I agree. I do not know what proportion of LGBT people follow football, but I know that many LGBT people see football—and sport more widely—as one of the few areas in which homophobia is still acceptable and expressed. We have already had wide discussion with LGBT people on the offence of stirring up hatred, which is covered in section 5. That discussion has been going on for years, because for some time England has had an offence covering religious, racial and sexual orientation hatred, as have both parts of Ireland. We have been discussing the issue with people for many years, and there is a lot of interest in it.

Graeme Pearson: Thanks very much.

The Convener: Have you got a new line of questioning, John? If you have not got one, I have got one. We will have a supplementary question from John Finnie, and then John L—I must find another way of describing you—will start a fresh line of questioning.

John Finnie: Ms Clemmons, I noted all that you said about the timeframe. What efforts have you made to gauge your members’ views?

Chloe Clemmons: I have spoken to a number of the projects that the church is involved with, and everybody has told me that they need time to think about how the provisions would apply to their work. I have made as many phone calls as I could reasonably make in a day.

John Finnie: Forgive me, but my understanding is that the church has various committees. Is there not an opportunity to get representative views via those?

The Convener: Let me stop this, if I may. We have dealt with consultation and I really want to move on to some specific issues that have been raised about the timescale. We have got only a short time and we have not touched on them, although we really need to get them on the record. Forgive me, John. John Lamont is next.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): My question is directed to Ms Clemmons. At the start of your evidence, you spoke about not having enough time to consider your views on the bill. We all share similar concerns. You also referred to the need for community buy-in and the fact that the bill will perhaps not achieve the objectives that it is designed to achieve. Do you share my concern that there is a wider problem beyond sectarianism at football matches—sectarianism works in different shapes and forms in different communities—yet the bill addresses only one aspect of it? Is that what you were alluding to? Can you flesh out your concerns a bit more clearly?

Chloe Clemmons: My concern is that the process of buy-in is a process. You cannot say, “The Government has announced that the community now thinks this.” The bill may be absolutely fine, but it is not about whether the bill
is the right or the wrong answer; it is about a process of ownership—its becoming our own—and that takes time. It may be that, at the end of the process, no changes will have been made, but people will be able to say, “I’ve been included, I’ve participated and I’ll follow this now.”

I can see why football-related offences are included in the bill—I am not arguing that they should not be. I also acknowledge that the Government has said that further work on sectarianism will continue and that community work may be part of that on-going work. I am challenging not so much the limited scope of the bill as the lack of capacity for engagement on it.

The Convener: That takes us back to the issue of consultation. If you do not mind, John, I will move on to Alison McInnes, who wants to ask about something completely different.

Alison McInnes (North East Scotland) (LD): Mr Hopkins, in the written submission from the Equality Network, you say that you have concerns about the broad nature of condition B in section 5 of the bill. You state:

“We think that the issue of freedom of speech needs further consideration.”

I would be grateful if you elaborated on that.

Tim Hopkins: We have two concerns about the condition B offence. First, it is not broad enough, as it covers only religion and not sexual orientation as the equivalent offence in other parts of the UK does. Secondly, issues such as freedom of speech are not addressed explicitly in the bill, and we think that they need at least more discussion.

The English legislation that corresponds to section 5(5) is the Racial and Religious Hatred Act 2006, which was discussed at length at Westminster. It is very similar to section 5(5), except for the fact that, because of the discussions about freedom of speech that took place during the passage of the bill, Westminster decided that a rider stating that the legislation would not prevent certain things was required.

Section 29J of the Public Order Act 1986—which is quoted in the Scottish Parliament information centre briefing on the bill, so I will not read it out now—ensures that the rule on banning the stirring up of religious hatred does not impinge on proselytising, on trying to convert people from one religion to another, or on the ridiculing of religion, which is something that comedians do a lot. It even says that you can abuse religion, which is something that I do not think you should do, but which Westminster felt should not be a criminal offence.

Alison McInnes: Is it your view that by singling out religious hatred in condition B in section 5(5), the Government is—perhaps inadvertently—creating a sort of hierarchy of equality, and saying that something sits above all the other equalities?

Tim Hopkins: That is exactly what we think. I noticed that the Scottish Council of Jewish Communities used exactly that phrase—“a hierarchy of discrimination”—in its submission. It was important for us to go through the process of the hate crime legislation in the previous session of Parliament to ensure that all of the different kinds of hate crime—all of which are common, unfortunately—were covered by hate crime law.

Since I submitted our written submission on Monday, we have gathered from our colleagues in LGBT Youth Scotland some more examples of threatening behaviour on the internet, which is exactly the kind of behaviour that section 5 covers. The examples concern specifically homophobic threatening behaviour. For example, LGBT Youth Scotland does a lot of support work with young LGBT people in Scotland, and it has helped many people to deal with the alarm and fear that has been caused by threatening communications on the internet, such as Facebook groups called “Kill the gays” and threatening and homophobic e-mail messages.

Those things happen, just as they happen in the religious, sectarian and religious-hatred cases. We think that it sends entirely the wrong message not to deal with them at the same time. The simplest solution would be to amend section 5(5) so that it covers the same kinds of hate crime as are covered by section 1 and the rest of Scottish hate crime law.

The Convener: Chloe Clemmons said that the bill does not cover unrecorded speech, and Tim Hopkins also touched on that. Could you develop your points? In her written submission, Chloe Clemmons asked whether the proposed new offence should cover unrecorded speech, and I would like to hear more about that. I had not noticed the issue until it was raised today.

Tim Hopkins: My understanding is that the offences in section 5 cover any form of communication except unrecorded speech. The English offences of stirring up racial, religious and homophobic hatred cover unrecorded speech, except where it happens on domestic premises. They do not catch hate speech happening in a house, but they catch hate speech happening in, for example, a public hall.

In our written submission, we gave the example of an event or rally at which a speaker was stirring up hatred before a like-minded audience. For example, a speaker might be stirring up Islamophobic hatred before an audience of members of an Islamophobic organisation—the same situation could arise with a racist or homophobic speaker and a racist or homophobic
organisations. Currently, it is not clear that that would be an offence in Scotland, although it is in England, because it is covered by the rule on stirring up hatred. The issue is that it might not be a breach of the peace in Scotland, as it might not incite public disorder, because the people hearing it are people of like mind with the speaker. Arguably, however, it should be an offence for someone to stand up at a meeting of people who belong to an extremist organisation and stir up religious, racist or homophobic hatred.

The Convener: Before we hear from Ms Clemmons, I am interested in the Equality Network’s defence of free speech. This is a very difficult area. Suppressing views that—entirely rightly—you do not agree with might undermine democracy. I am not sure about the answer. It is difficult to judge someone’s right to say something that you disapprove of totally.

Tim Hopkins: I completely agree that freedom of speech is an extremely important issue in the context of the offence in the bill, but I do not think that limiting the offence so that it does not cover unrecorded speech is the right approach to freedom of speech. That would leave us in the situation in which it would not be an offence to say a thing publicly, but it would be an offence if it were written down and reported on the blog of the person who said it, or if the organisation that the person was a member of reported it on its website, or if someone recorded it on a mobile phone and made a YouTube video out of it. That would not make sense.

Arguably, if something is within the scope of free speech when it is said just to a crowd of people, it should also be within the scope of free speech when it is shown as a YouTube video on the internet, so it seems to me that restricting the offence so that it does not cover unrecorded speech is not the right way to deal with freedom of speech. There needs to be more discussion of exactly where the boundary lies between acceptable free speech and the incitement of hatred by doing something that is threatening.

Chloe Clemmons: Given that we are talking about a bill to tackle sectarian behaviour, one of the things that we need to ask is how that behaviour manifests itself. I do not know the answer to that question, but it is one for people who have experienced such behaviour or who have been convicted of it. We need to know whether it was a matter of someone saying something to someone. Until we know the answer to that question, we will not know whether the bill will work without such a provision.

The Convener: As members have no other questions, I have a final question about an aspect of the Equality Network’s submission. Am I correct in thinking that you are looking for section 5, on threatening communications, to be taken out of the bill altogether?

Tim Hopkins: For the reasons that we have discussed, we think that the big problem with the bill is the condition B offence in section 5, which relates to the stirring up of religious hatred. We think that there are a number of possible solutions. We are not suggesting that the whole of section 5 should be deleted, because the condition A offence is fine—it covers all sorts of crimes.

The Convener: Perhaps this is for the ears of committee members only, but I draw your attention to the fact that if an amendment sought to delete section 5, it would not be a competent amendment, as it would take away half the bill and would be seen as a wrecking amendment, given that the bill is described as

"An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material."

The bill has two parts, so an amendment that sought to take away one of those parts might not be competent, although members could take advice on that. It is up to members to decide whether they want to test that.

Graeme Pearson: If I understood your evidence correctly, it seems that you would be more comfortable with the retention of the condition B offence in section 5 if reference were made to section 1(4).

Tim Hopkins: That is absolutely right. Just to clarify, we support the condition A offence in section 5, so we are not suggesting that the whole of section 5 should go; we are suggesting that just section 5(5) should go. Another solution would be to amend it by extending it to cover sexual orientation, transgender identity and disability so that it matches section 1(4).

Graeme Pearson: If the list of things that are referred to in section 1(4) were included under condition B, would you be more comfortable?

Tim Hopkins: That would remove our main objection.

Graeme Pearson: I am not saying that it would satisfy you completely, but it would make you more comfortable.

Tim Hopkins: Yes, it would.

The Convener: If neither of the witnesses has anything to add, I bring the session to a conclusion. Thank you very much for dealing with the issues at break-neck speed. We have found your evidence extremely useful. It will, we hope, be available in print form tomorrow, certainly in time for the debate on the bill.
Michelle Macleod is head of the policy division of the Crown Office and Procurator Fiscal Service. Mulholland QC is the Lord Advocate, and Michelle Macleod is head of the policy division of the Crown Office and Procurator Fiscal Service.

Before we move to questions, I should say that we are all very grateful for your accelerating yourselves along here today. I appreciate that some people have to be away by 2 o’clock. I see that it is Mr Regan who has to go by 2 pm. Others could stay if necessary, could they? In some respects, I wish I had not said that, as you will all think that you can take as much time as you like. Anyway, we will try to speed along to 2 pm, although we have a little latitude.

James Kelly and Humza Yousaf will ask the first questions.

James Kelly: Good afternoon, gentlemen.

The Convener: And lady.

James Kelly: Thank you, convener—apologies, Michelle.

For the purposes of clarity, I ask the football representatives whether the clubs requested the new legislation, and whether they requested that its provisions be put in place by the start of the forthcoming season, or did the Government approach the clubs and propose that the new legislation be put in place by the start of the season?

David Martin (Rangers Football Club): The first that Rangers heard was when the First Minister announced that he planned to rush some legislation through before the start of the next football season—notwithstanding that we are all members of the joint action group that was set up after the summit. I have to say that Rangers was somewhat surprised about it.

Robert Howat (Celtic Football Club): Although, like Rangers, we had been involved with the joint action group working parties, the actual introduction of the legislation came fairly late on in the process, with details of the bill coming towards the very end. As regards the detail that was announced last week, we did not see anything any earlier than anyone else.

James Kelly: To be clear, you did not approach the Government asking for legislation; it was the Government that brought forward the legislation.

Robert Howat: There are elements of the bill, particularly on threatening communications, on which we had been keen for some form of different approach to be taken, given the particular situation with our manager, but the way in which the bill has been rolled out was not something that we called for at the time.

Stewart Regan (Scottish Football Association): The police, the Government, the football authorities and the clubs have been part of what is termed the joint action group since early March. All parties were asked to go away and consider steps that they might take to improve the situation and to consider the issues that came out of the joint action group. The Government was part of that process, and clearly it has come back with its ideas. The legislation is something that the Government has brought to the table as part of the joint action group.

The Convener: No other witness wants to comment on that point.

Humza Yousaf: My question is related to James Kelly’s question. Even though the clubs, the SPL and others might not have called for the legislation, is it important to have the legislation in place by the start of the football season rather than introduce it halfway through the season? The police suggested at yesterday’s meeting that, logistically, they would welcome the legislation being in place before the start of the football season. Would it be more difficult to implement the legislation halfway or three quarters of the way through the season? Is it therefore probably imperative to have it in place for the start of the season? Do you have a different view?

Neil Doncaster (Scottish Premier League): It was helpful to have a briefing this morning on some of the gaps in existing legislation that create a need for better clarity going forward. I think that we would all welcome clarity as soon as is reasonably practicable. Alongside that, we would welcome guidelines as to how the legislation will work in practice, and there are assurances that such guidelines will be forthcoming. We hope that that will mean more clarity as soon as possible, and before the beginning of the season.

Stewart Regan: The start of the season is a natural time to put in place a series of measures to try to address some of the issues that we faced...
last season. All parties have considered measures that could be put in place, and all have a series of initiatives. To introduce something new part of the way through the season would be challenging—it would lose its impact. I therefore welcome the new legislation. If we can put elements of it in place, with a practical understanding of how they will be managed—the Lord Advocate’s comments this morning at the pre-meeting were helpful in that regard—we should be able to take positive steps.

The Convener: You have just heralded the Lord Advocate, who might be prepared to share with us some thoughts and guidance that might assist.

The Lord Advocate (Frank Mulholland): Yes, convener. I will start with the need for the legislation. I have read that some people have said that legislation is already in place that covers the conduct that caused lots of problems last season. I will deal first with offensive behaviour.

Over the past few years, the common-law crime of breach of the peace has been developing as a result of the European convention on human rights, which requires that a citizen knows what is criminal and what is not. The argument is that breach of the peace is ill defined and that the limits of the crime are not well enough defined for a citizen to know whether certain conduct is criminal or not. For example, recently—that is, in the past couple of years—it has been held that for breach of the peace to apply there must be a public element to it. For example, conduct in a private dwelling house can no longer be a breach of the peace, although it was treated as such in various cases in the early 1960s.

Further, the definition of breach of the peace requires 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".

Under that definition of breach of the peace, there have been cases—I do not want to name names, but I am quoting from case reports—in which a sheriff has ruled that supporters shouting racist abuse at a black player, or another supporter grunting in an ape-like fashion and shouting racist abuse at a black player, did not amount to breach of the peace. The view was taken that

"the conduct was over very quickly."

that it was not “flagrant”, that it took place

"in the midst of the cauldron of sound which emanates from any large sports crowd", and that it could not

“be interpreted as … conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances of the football match.”

13:15

In cases involving conduct at football matches, defences have been run that no fear and alarm is caused by offensive chanting and singing and that at the end of the match it was clear that no public disorder resulted.

The bill seeks to define offensive behaviour so that the police and the courts can apply that definition to the conduct itself. Breach of the peace could still develop, because breach of the peace is a common-law crime, as a result of further cases and further jurisprudence. That deals with the current law and breach of the peace.

The problem with threatening communications is that the issue is covered by the Communications Act 2003. As a result of case law, particularly down south, doubt has been expressed about the definition of sending a communication—because that is what is criminalised—and whether sending includes posting, blogging or using or accessing Twitter. The second part of the bill seeks to put an end to that doubt.

Furthermore, offences under the Communications Act 2003 are prosecutable only summarily. I do not want to get into the specific circumstances, as that would not be appropriate in this forum, but I have seen some of the vilest postings on the internet—postings that glorify someone’s murder or contain threats to kill someone, with details of what that would involve. Although it is a matter for the courts, you may say that such communications may be worth prosecution on indictment. Even if a prosecutor takes that view, we cannot currently prosecute on indictment, because such offences are prosecutable only summarily. The bill therefore seeks to extend the penalty and, as I said, put an end to any doubt about the definition of sending.

As I alluded to at this morning’s meeting of the joint action group, and as you would expect, the Lord Advocate will give guidance to chief constables on what the offences are intended to cover, and I am anxious to share the draft guidance with the committee. It will remain draft guidance unless and until the act comes into force, but we hope to be in a position to share it with the committee. I have spoken to Michelle Macleod and we think that that can be done by Friday of this week, so you will have it for the debate in the Parliament and for perusal by the committee.

The guidance makes it clear that, as with breach of the peace, everything is determined on facts, circumstances and, most important, context. It also makes it clear that the offence—that is, the
offensive behaviour—is not intended to cover peaceful preaching or to restrict freedom of speech, including the right to criticise or comment on religious or non-religious beliefs, even in harsh or derogatory terms. It is not intended to criminalise jokes or satire about religious or non-religious beliefs. It is not intended to criminalise the singing of national anthems in the absence of any other aggravating behaviour. It is not intended to criminalise the making of religious gestures while national anthems are being sung in the absence of any aggravating behaviour.

It is very important that the courts have a set of facts and circumstances and the context in which the behaviour took place, to determine whether something is criminal—that is what the courts are there to determine. I will give an extreme example. If I take a banana from a bowl of fruit, unpeel it, eat it and throw the skin into a bin, that is clearly not criminal. However, in the context of a regulated football match, if someone unpeels a banana and throws the skin towards a black player, the context in which the behaviour occurs criminalises behaviour that, in a different context, would of course be non-criminal. That is the point that must be grasped. We are not intending to proscribe this behaviour or that behaviour; it all depends on the facts, the circumstances and the context.

We will make the draft guidance available to the committee, for parliamentarians to debate next week, and if the Parliament passes the bill—whenever that might be—we will finalise the draft guidance for chief constables. I hope that my preliminary remarks have been of assistance.

The Convener: They were of a great deal of assistance. In particular it will assist us to have the draft guidance before we proceed. By the way, I must correct myself. I think that the stage 1 debate will take place tomorrow morning—it is just as well that I realised that, or I would not have been there.

I am sure that members have lots of questions.

Alison McInnes: Lord Advocate, you said that a citizen needs to know what is criminal and what is not. That is absolutely right; good law must make that clear. However, the bill contains at least three areas that seem to me to be unclear. First, it suggests that behaviour is sometimes criminal in public places and sometimes not. Surely it is not good law to say that someone may chant or sing songs in a public place but may not do so in a football ground. Secondly, there is disquiet about the wording on travel to and from a match even if the person does not intend to go to the match, which seems vague. Will you deal with those points?

The Lord Advocate: On your first point, if you read the bill you will see that it criminalises behaviour at a regulated football match that is likely to incite public disorder. Behaviour is then defined as

“expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,

(ii) a social or cultural group with a perceived religious affiliation,”

or a group that is defined by colour, race, nationality, ethnicity, sexual orientation or disability. The definition also includes

“behaviour that is threatening, or ..., that a reasonable person would be likely to consider offensive.”

I would be reasonably comfortable that the legislation would survive a challenge under ECHR that it was inspecific and not sufficiently defined.

I hope that it will help the committee if I add that four years ago a prosecution was raised in Edinburgh sheriff court—again, I do not want to name the case—on a charge of breach of the peace, after a person chanted homophobic remarks at a football player in an Edinburgh derby. The decision of the sheriff, which we all respect, was that the behaviour did not amount to a breach of the peace. Such behaviour would be covered by the provisions of the bill, because it stirs up hatred against a person or persons, based on their membership of a group that is defined by sexual orientation. I wanted to make that point—I certainly have not read any comment in the media about it.

You had a second point—

The Convener: It was about travelling without intending to go to the match.

The Lord Advocate: The definition in the bill about travelling to or from a match or watching a match being televised is taken from the football banning order legislation that is in place. I will give examples of that—

The Convener: Sorry to interrupt, but when you talk about someone intending to watch a match being televised, I presume that you are talking about people travelling to a pub to watch it or going to watch it in a public area on a big screen. Is that correct? Is that what football banning orders cover?

The Lord Advocate: Yes, with football banning orders, the definition of a regulated football match covers that. Section 2 of the bill includes behaviour that occurs

“while the person is entering or leaving (or trying to enter or leave)"

a stadium, or

“on a journey to or from the regulated football match”,

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and in
"any place (other than domestic premises) at which such a
match is televised".

You might ask why we need that in legislation. Well, what if, for example, a match is being televised in a pub and disorder breaks out involving the type of behaviour that is covered under the bill, because people are delivering sectarian abuse at a former old firm player? That is why the bill goes beyond a regulated football match and includes

"any place (other than domestic premises) at which such a
match is televised".

Alison McInnes: My point was about the
phrase

"whether or not the person attended or intended to attend
the match".

That seems to me to be a strange provision.

The Lord Advocate: Somebody might intend to
go to a match, but not get there for a particular
reason. That might be because they engage in the
type of offensive behaviour that is covered by the
bill. The bill is wide enough to cover that.

Alison McInnes: If I might, convener, can I ask
a follow-up question?

The Convener: I just want to ask the Lord
Advocate for clarification. Are you telling us that
we must read section 2(4)(a) alongside section
2(3), because the term "regulated football match"
includes a place at which a match is televised? So
when the bill talks about

"whether or not the person ... intended to attend the match",
that means a regulated match or, in other words,
one that is being televised. That constrains the
provision—it is not just at large.

The Lord Advocate: Section 2 is entitled:

"Regulated football match: definition and meaning of
behaviour 'in relation to' match".

Section 2(2) states:

"For the purposes of section 1(1), a person’s behaviour
is in relation to a regulated football match if it occurs ... in
the ground where the regulated football match is being
held"—

which is common sense—

"on the day on which it is being held",
or

"while the person is entering or leaving (or trying to enter or
leave) the ground where the match is being held, or ... on a
journey to or from the regulated football match."

The Convener: I am talking about the next bit, which states:

"references in subsection (2)(a) to (c) to a regulated
football match include" circumstances in which a match is televised. Is that right?

The Lord Advocate: The bill states:

"references ... to a regulated football match include a
reference to any place (other than domestic premises) at
which such a match is televised".

So that includes attending a pub to watch a match.

The Convener: Yes, and therefore, where the
bill states in section 2(4)(a) that

"a person may be regarded as having been on a journey to
or from a regulated football match whether or not the
person attended or intended to attend the match",
it means a journey to where the match is actually
happening or to where it is being televised.

The Lord Advocate: Yes.

The Convener: So the bill is narrower than I
read it originally.

The Lord Advocate: That is the way that I read
it.

The Convener: Okay—I think I understand.

The Lord Advocate: Of course, ultimately, it is a
matter for the courts.

Alison McInnes: The Lord Advocate has made
great play of the fact that the Government has
lifted wording from the football banning order
legislation. We heard yesterday from Dr McArdle
about a concern that the orders have not been as
effective as it was hoped they would be and that
he has carried out research for the Government on
that. It would be useful to have that research
published as soon as possible. I understand that it
is finished and is with the Government. Can you
comment on that?

13:30

The Lord Advocate: No. I know of the
research, but I cannot comment on the date of
publication.

On the wider question of the number of football
banning orders, the assistant chief constable of
Strathclyde Police said this morning that there
were round about 120-ish in Scotland.

We have what we call a designated football
procurator fiscal depute, who deals with cases
arising from disorder relating to football matches,
who is well aware of the power of the courts to
impose football banning orders, and who will
regularly remind the courts of that power on
conviction. Ultimately, it is a matter for the courts
which, when sentencing, must determine whether
it is appropriate to impose a football banning
order—having regard to the precise terms of the
defence for which the person has been convicted.
The Convener: Do any of the representatives of football organisations wish to comment on any points that have been raised on football banning orders, or on whether a person is intending to go to a match when they are intending to watch it on a screen that is not on domestic premises? I think that we have resolved the latter issue.

I see that no one wishes to comment further.

Humza Yousaf: I have one question on the same lines, and one on—

The Convener: You are not allowed to ask the second one, because there is a queue.

Humza Yousaf: My question is not on football banning orders, but on unintended travel issues. I wonder whether the Lord Advocate could offer a little more clarification. I want to consider the case of a group of fans from X football club who are travelling to a match by train. I know that we should not use hypothetical examples, and that it is very bad of me to do so—and that this is the second day in a row. The fans are singing songs that would be an offence under the bill. Someone hops on the train halfway through the journey, who did not intend to go to a public screening, to a public house, or to the match, but intended to go to the town for their shopping. If that person joined in the chanting, would there be grounds for prosecution?

The Lord Advocate: Everything depends on facts, circumstances and context. We would need to consider the person's intention, what they were doing, and what evidence there was.

Humza Yousaf: What if the person had no intention of going to the football match, or of watching the match at a public screening, but was going somewhere completely separate?

The Lord Advocate: Again, it would all depend on facts and circumstances. For example, if there was disorder among persons who had no intention of attending a football match but who were travelling to the surrounding area with the intention of causing disorder, that would certainly be covered.

The Convener: I think I have got more muddled. I thought I had sorted it out in my head, but now I realise that I have not. We will just have to read it all and think very hard.

John Lamont: I have a supplementary question to the one that was asked by Alison McInnes on the need for clarity. The Lord Advocate spoke earlier about guidance and about the singing of national anthems, and you said that everything would depend on circumstances. I want to suggest some scenarios. Can you imagine a situation in which an individual is at a football stadium or somewhere else among a crowd of Celtic fans—a similar situation could apply the other way round—and he or she decides to sing the national anthem, “God Save the Queen”, or a situation in which an individual among a group of English supporters decides to sing “Flower of Scotland”? Are those the kinds of circumstances in which the person could be prosecuted under section 1?

The Lord Advocate: I do not think that it would be right for me to answer that question, because it is about a hypothetical situation. It is necessary to consider the facts, the circumstances and the context. Let me answer your question by giving an extreme example. If someone at an old firm match were to leave, say, the Rangers end, run across the pitch and, in front of the Celtic fans, sing the national anthem, the context could, arguably, make that act criminal because the intention was to cause public disorder. On the other hand, if a rugby player, for example, were to sing the national anthem before a match, that would not be a problem. That is what the guidance makes clear. I do not want to be drawn into considering this or that situation; as I have said, guidance will be given to chief constables.

It is not about criminalising people in the example that John Lamont gave; it is all about the context in which the behaviour takes place. I therefore do not think that it is helpful in this debate to say, “I’ll give you another example. Would that be criminal?” or, “I’ll give you another example. That wouldn’t be criminal.” What I am saying is that we will look at the facts, the circumstances and the context. We will look at the provisions in the bill, and we will make a judgment on the evidence as to whether behaviour meets the definition in the legislation. If it does and there is credible and reliable evidence, it is ultimately a matter for the courts, and that is what the courts are there to judge.

The Convener: Humza Yousaf has a supplementary on the same issue. Please make it short, as I have a long list of members with questions.

Humza Yousaf: It is a minor point. Most of us would agree that some of the headlines this morning have been incredibly unhelpful, but I want to touch on the process. My question is probably directed to Michelle Macleod. In the circumstances that have been described, it is not just a split-second decision by the police officer, because the Crown would be involved, as would the procurator fiscal, and essentially it would be up to the courts. Will you talk us through what the process might be and how it would work?

Michelle Macleod (Crown Office and Procurator Fiscal Service): The process for any offences under the new legislation will be exactly the same as the process under any other legislation. If the police think that the conduct is sufficient to justify reporting a case under one of
the provisions, it would go to the relevant procurator fiscal in the jurisdiction where the offence occurred. The fiscal would then apply the guidance that the Lord Advocate mentioned. Guidance will be given to the chief constables but, in addition, prosecutors will have their own guidance. They will apply the facts and circumstances to see whether there is sufficient evidence for the offences. If there is, proceedings will be initiated and thereafter, as the Lord Advocate suggested, it will be entirely a matter for the court to determine whether there is sufficient evidence, beyond reasonable doubt, for a conviction. A different procedure will not apply to this offence compared with any other offence.

The Lord Advocate: I will just add to that point. In addition to guidance for chief constables on reporting of the offences, there will be prosecutorial guidance for our procurators fiscal. We do not make such guidance public, but I assure you that the approach is routine for any new offence. For existing offences, we have a detailed set of guidance for prosecutors as to when it is appropriate to prosecute and when it is not.

The Convener: I am sorry, but I am still struggling with section 2(4)(a). It states:

"a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match".

How can a person be on a journey to or from somewhere if they have no intention of going there? How can they be on a journey to or from a regulated football match if they have no intention of going to it?

The Lord Advocate: That provision is to cover the situation in which among a group of supporters—the vast majority of whom have tickets for a football match and intend to go to it—there are a couple of persons who do not have tickets and who have no intention of going to it, obviously because they do not have tickets. They are part of a group—it is an example; we are dealing with a hypothetical situation—that might be involved in such disorderly behaviour. The argument, or the policy, is about whether that behaviour should be criminalised. As the bill makes clear, if people engage in the type of offensive behaviour that is set out in section 1, the behaviour should be criminalised.

The Convener: Right. I am going to leave it there and chew that over. We will move on. Maybe it has just been a long day.

John Finnie has a different line of questioning. After him I will call Graeme Pearson and James Kelly.

John Finnie: Thank you all for coming along today. My question is for the Lord Advocate. It is about section 1(5). If I understood correctly a number of representations that we have heard—I accept that I might have misinterpreted them—we have been told that that section is already covered by the law on breach of the peace. My understanding is that it is to cover a situation where there is a single group or faction and the conduct is deemed unreasonable. Will you comment on that? Would that constitute a breach of the peace? Is this a refinement or is it something new?

The Lord Advocate: Is that section 1(4)?

John Finnie: It is section 1(5).

The Lord Advocate: The definition of breach of the peace is conduct that is “severe enough to cause alarm to ordinary people and threaten serious disturbance to the community”.

As I have said, in a number of cases the defence has been run that no fear or alarm was caused by sectarian chanting because everyone surrounding the person was doing the same thing. The argument has been run that one could not say that the conduct would be likely to incite public disorder because no public disorder resulted—for example, the stadium may have been three-quarters empty.

Section 1(5) is intended to deal with that type of defence, which we see from time to time in football-related breaches of the peace, because it provides that "For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

(a) measures are in place to prevent public disorder"

—in other words, there are a lot of police there who have stopped public disorder—

"or

(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers."

John Finnie: Thank you, Lord Advocate. We heard yesterday from the Association of Chief Police Officers in Scotland and from the Scottish Police Federation that they welcome the legislation. In layman’s terms, would you understand that welcome to be because paragraph (b) of section 1(5) will fill a gap in the existing provision?

The Lord Advocate: I was gratified to hear from the assistant chief constable of Strathclyde Police, Campbell Corrigan, who attended a joint action group this morning. He assented when I set out the position in relation to the existing legislation as opposed to what the bill covers. On the point about filling the gap, that is, as I understand it, welcomed by the police.
James Kelly: I will take the Lord Advocate back to his earlier explanation of the reason for section 1 and why it has been drafted in that way.

You spoke about how the current breach of the peace laws are inadequate in some ways, particularly in relation to private dwellings. You also cited some case law, which I do not think—you can correct me if I am wrong—related to the matches at the end of last season.

The Lord Advocate: No.

James Kelly: Can you explain the need for section 1 to be in statute for the start of the new football season?

The Lord Advocate: There are two elements to your question. There is a need to make clear what the offence covers and to define it. Although breach of the peace is developing in ECHR terms and seems to be contracting, we need to have an offence which specifically covers the type of behaviour that we have seen all too often last season and in previous seasons. That is certainly welcome, and I welcome it as a prosecutor. It will make the job of the police and prosecutors easier and—more important—it will let citizens of this country know what is criminal and what is not. It defines the limits of the offence itself.

You asked why section 1 needs to be in place before the football season. It does not necessarily have to be in place before then; it is for the Parliament to consider the matter. Personally, I would like to see it in place before the beginning of the football season so that there is a clean break between the events of last season and, looking forward, the next season’s events. It will let the public, spectators, police, prosecutors and defence lawyers know what the law is as we move forward.

I do not think that it is helpful to look back; we should look forward. The bill will certainly be a tool in the box for police and prosecutors. However, to give due respect to the Parliament, it is for the Parliament to decide whether the bill should be passed within the timeline that the Government has sought.

13:45

James Kelly: I have one brief point, convener. I accept that it is the job of Parliament to give a strong signal, as we did with the Domestic Abuse (Scotland) Act 2011, but it is important to get the legislation right. We took some time to consider the Domestic Abuse (Scotland) Bill. You said recently that it is the job of Parliament to pass laws and that we should just get on and do it. Do you not think that we would have been able to produce better definitions and more competent legislation if we had taken a bit more time, rather than rushing the bill through in time for the start of the football season?

The Lord Advocate: It is a short bill that will create two criminal offences. As you know, it is for Parliament to consider whether there is a need for it. In my view, there is a need for it and there is a need for it to be in place before the beginning of the football season. That is my judgment, but ultimately the decision rests with you, as parliamentarians. I would certainly like to see the legislation in force before the beginning of the football season—I say that on the public record—but I fully respect that that is a matter for you.

Graeme Pearson: First, I apologise to Mr Regan. I am sure that he has a lot to do. We do have questions for the football authorities and the clubs, but we are following a particular line of questioning at this time.

The Convener: On that basis, and especially considering that Mr Regan has to leave, if members have questions to put to the clubs, please put them now—you have 13 minutes.

Graeme Pearson: I want to follow the logic of what we are dealing with just now.

The Convener: Okay, as long as we have time. I want Mr Regan to have the opportunity to answer questions.

Graeme Pearson: Of course.

Thank you for coming, Lord Advocate. I would be a fool to try to cross swords with you on legal matters, but there are a number of issues that need to be put to you. You said that the bill is short, with only a few sections, but you would also admit that it is a huge issue for Scotland.

The Lord Advocate: Of course.

Graeme Pearson: It is one that needs some clarity. We received evidence only this morning about the importance of taking the public with us and giving them the opportunity to understand fully the issues that are involved and to be included in the outcomes that we in the Parliament seek to achieve. The fact that we have had such a long discussion with you this morning indicates the difficulties that accrue in such circumstances; the timescales have made things very difficult.

We received significant evidence in a number of submissions, including from Dr Sarah Christie, Dr McArdle and the Law Society of Scotland, which expressed a view that is different to your own about the current environment and the legislation that is available to us, both common law and statute. There is a strong lobby indicating that there is the ability to enforce—

The Convener: May I press you to get to a question? I am sorry. I am sure the Lord Advocate
is aware of all that. I am aware of the need to get questions for Mr Regan.

Graeme Pearson: I want the Lord Advocate to know the context of my question.

The Convener: Yes, but still—

Graeme Pearson: You mentioned football banning orders. There was an indication, in particular from Dr McArdle, that perhaps there is not the energy and commitment to the current legislation that might have brought about many changes that we have sought in the past few years, both in enforcement and the involvement of the courts and prosecutors. How do you feel about that view, which was expressed to the committee yesterday?

The Lord Advocate: I disagree with it. There is a huge commitment to tackling hate crime. We have a robust prosecution policy in relation to all aspects of hate crime—crime that is religiously or racially aggravated. If there is sufficient credible and reliable evidence, there is the strongest of presumptions that we will take proceedings. While I remain Lord Advocate, that will continue. We have a real focus on hate crime, so I do not agree that we are lacklustre in dealing with it.

Graeme Pearson: I mean in particular in connection with football matches and football events.

The Lord Advocate: We have a football-dedicated depute in Glasgow. That sends the message that we are determined to use expertise and to take a consistent approach. That is what we aim to do and are doing. So no, I do not agree with any suggestion that the Crown is lacklustre in relation to criminal behaviour or football matches; that is certainly not the case.

Graeme Pearson: Can I maybe—

The Convener: No. I want to be fair. You can come back—

Graeme Pearson: I was saying that I want to stop there. I might come back in later.

The Convener: I will think about it, but your questions should be short.

Graeme Pearson: Thank you.

The Convener: We have Mr Regan and other football representatives here, so can we focus on that so that everyone can have the opportunity to deal with them, and they do not feel that we have missed anything? Mr Regan, perhaps you would like to tell us something that we have not asked about.

Stewart Regan: We were called here to give evidence and we are here to listen to any questions and points of clarification. We had a productive meeting this morning with the joint action group. It answered a lot of questions and gave clarity on how the legislation will be implemented and how the practical concerns that we have expressed before today will be addressed.

The Convener: It would be useful if you would tell us your practical concerns that have been addressed. That is a good place to start.

Stewart Regan: There was a perception that the bill was about sectarian chanting, which was the one thing that was hitting the headlines. This morning we covered the fact that we are talking about unacceptable behaviour—in particular, threatening and offensive behaviour. The Lord Advocate has given some very helpful examples of where the new legislation will fill existing gaps. We are starting to see how, in working with the police and our colleagues in the leagues, we will be able to address some of the unacceptable behaviour that we want to stamp out.

The Convener: I am going to ask members to come in now, but if anyone wants to expand a point, it would be helpful to the committee. Along with the police, you are at the coalface on this matter, and difficulties must be presented by having to enforce legislation among 20,000 people—I am afraid that I am never at a football match; perhaps I should have said that sotto voce—and ensuring that that enforcement does not become provocative, which it might do. I am interested to hear about those practicalities. I know that the clubs do a lot themselves. Let us move on along that line.

John Finnie: My question is to Mr Hawthorn and Mr Martin, as representatives of their clubs. Gentlemen, both your clubs are commercial organisations and terminology such as “customer” is used. Have you surveyed your customers for their views on the proposed legislation?

Ronnie Hawthorn (Celtic Football Club): I can answer for Celtic. No, we have not had the opportunity to do that. In fact, we have had quite a short time to consider the bill in detail. We all welcome the principle of the bill. There is no question but that Celtic Football Club in particular has always been open to all and we stand strongly against religious sectarianism, whether it be at football or elsewhere in society.

The timescale has been a little tight for us to meaningfully consult internally, let alone widely among our fans.

David Martin: In a similar vein, last week there was a meeting of Rangers supporters clubs at the stadium, but unfortunately it was prior to publication of the bill. As you can imagine, there was plenty of speculation.
We were kindly provided with a link to the bill by members of the Scottish Executive’s support team, and we circulated that to key supporter groups to give them an opportunity to contribute to the debate in writing if they have any comments to make before the Friday deadline.

John Finnie: There is on occasion a quick turnaround for ticket sales for matches, and clubs all have their databases. Will you take the opportunity to consult widely on this? However the bill comes out in the end, customer buy-in—to use that cliché—is important. Will you comment on further consultation and on the level of buy-in that you expect from your customers?

Robert Howat: As part of the joint action group work in the lead-up to the bill, we were asked by the Scottish Government to arrange some meetings with our supporters groups this week. We had intended to hold a meeting yesterday and, to that extent, we were in touch with the main representatives of the three key supporter organisations. Unfortunately, partly because of the time of year, partly because of the speed of all this and partly because these evidence sessions were taking place, we were unable to have that meeting, whose aim would have been to discuss with our supporters issues such as this, and other issues related to joint action group activities.

From our point of view, consultation with supporters is critical because, at the end of the day, they are the group that will mainly be affected by the bill. However, the speed of the bill has been such that it is difficult to get people together and go through the issues as meaningfully as we might want to in normal circumstances.

As Ronnie Hawthorn said, we have not had an awful lot of time to consider the bill. Even the dialogue this morning makes it clear that there are a lot of questions from the committee, as I am sure there will be from supporters. Guidelines will be issued that will undoubtedly inform that. However, as a club, we want to ensure that there is adequate opportunity to engage with those who will be affected so that our role in it all can be clear. The general view is that we all want to ensure that we get it right, because these are fairly significant issues. Rushing the legislation would be a concern for us as a club.

The Convener: I pause there. Mr Regan, thank you for your attendance, which has been extremely useful. Thank you for coming along at such short notice—you are an extremely busy gentleman.

I will take Colin Keir next, because he has not been in for a bit.

Colin Keir: It is a shame it was not a few seconds ago, because Mr Regan might have been able to answer my question. However, Mr Doncaster might give his perspective.

My question is about ultimate sanctions by the Scottish Football Association and the Scottish Premier League. You would probably not consider this due to the fact that the clubs seem co-operative, but what are the ultimate sanctions that could be brought to bear on clubs that do not control their supporters’ actions and indeed the actions of their senior officials?

Neil Doncaster: That is a good question. Our rules on unacceptable conduct are unlimited in terms of their application to how clubs can be punished, but that is in terms of clubs’ behaviour and issues under their control, which might include the actions of their officials. It is important to draw a distinction between what is within a club’s control and what it can do to make instances of unacceptable behaviour by supporters as unlikely as possible. On the other hand, things outwith their control might include the actions of an individual or groups that are intent on misbehaving in some fashion. That is a difficult thing to police. The Union of European Football Associations has a stance on it, which it believes is right for its competitions. We have a different stance on it. We believe that it is right to deal with clubs for things that are within their control but that those things that are outwith their control ultimately may be a police issue, which is the way in which the bill is framed.

Colin Keir: I am not up to speed on the differences between UEFA’s articles of association and your own. Could you clarify them?

14:00

Neil Doncaster: Under the UEFA regime, clubs are held responsible for their supporters’ conduct, even if the clubs have little or no ability to influence that behaviour. I find that an unattractive approach for a league body. It is important that we work with clubs; indeed, the clubs and the league carry out an awful lot of positive and proactive work to deal with behaviours in society that we might not want but which are attached to football. However, holding clubs responsible for things that they have not done is a worrying prospect.

The Convener: John, is your question strictly a supplementary one?

John Lamont: Absolutely.

The Convener: The test will be in the question.

John Lamont: Indeed.

Clearly, we would prefer not to be bringing the bill to Parliament this week. Are the football clubs able to reassure us that they have done everything possible to address this problem and these
concerns? Are you able to say that, with regard to your fans’ conduct, you have done everything possible to address this issue?

Neil Doncaster: I am not of that view. Football as a whole can do more. Indeed, one of the very beneficial aspects of the joint action group process is that all involved have turned their minds to that question and a number of positive outcomes from that process will ensure that more is done. I am certainly not of the view that, to date, football has done everything that could have been done, but I am hopeful that we are moving in the right direction.

The Convener: I do not want any fisticuffs at the table, but do you wish to answer the question, David?

David Martin: I tend to agree with Neil Doncaster. As with any walk of life, business or interest, you can always do more. However, I still remember the bad old days of the 1970s when alcohol was such a huge factor and football-related violence was the main problem for police in the wider community when any big games were played.

We constantly refer to the game on 2 March as the “game of shame”, but that was actually the 1980 cup final, when fans clubbed each other with beer bottles and fought en masse on the pitch at Hampden. We should give the fans some credit and acknowledge that we have come a long way in 30 years. There are very few instances of fan-on-fan violence, including at old firm games, and we have some of the safest stadia and match-day operations in Europe. In fact, we are widely admired throughout Europe for delivering safe events at football stadia. We have, up to a point, lost sight of that.

I have had only one season with Rangers. In that year, we have featured very prominently in the press for all sorts of different reasons, some positive, some negative, but I have been hugely impressed by the amount of work that the club is doing to tackle the types of behaviour that the bill is endeavouring to address. I make the offer here and now to everyone around the table to come to Ibrox and see the tremendous work that we have done over the past 10 or 15 years. Of course, there is still work to be done; otherwise we would not be sitting around this table. The club accepts and welcomes any new legislation that is designed to tackle the behaviours that we are trying to stamp out. My one concern, which Mr Pearson will have already raised if he has looked at previous or existing legislation, is that we need to commit resources to enforcing this legislation. That is where we have come unstuck—we have not enforced existing legislation as far or as consistently as we could and should have. We have done it well up to a point in Glasgow but, once you leave that city, the sectarian issue largely passes the rest of Scotland by. They do not understand or recognise it and hence they do not deal with it.

The Lord Advocate: Could I—

The Convener: Before we move on, I should let Celtic say something on the same basis.

Ronnie Hawthorn: Having listened to David Martin and others—

The Convener: I notice that you and Mr Martin are both heads of security and operations. What exactly does that post entail?

Ronnie Hawthorn: Our main task involves safety; security is a close second. If we have 50,000 or 60,000 people coming to a stadium, we want to ensure that they watch the game and go home safely. That is a fairly complicated issue on a match day.

With regard to security, the aspects that are involved in that speak for themselves. We are involved with the security of our fans when they travel, of our staff and of our players. In that regard, we are like any other big organisation. The operations part tends to concern the logistics of dealing with matches in the United Kingdom and in Europe. We need to plan for those events and ensure that safety is given the proper priority. In among all that is the need to try to enforce club policies in relation to behaviour.

To answer the first question, I point out that Celtic, Rangers and many other clubs have policies that are continually reviewed and education programmes and initiatives that are continually refreshed. There is partnership working between Rangers and Celtic and with other clubs. There is also enforcement, which is the aspect that today’s meeting is about. That is a difficult area that we have to face up to. The bottom line is that there is no room for complacency.

The Convener: Lord Advocate, I believe that you wanted to respond as well.

The Lord Advocate: There is a point about the linkage with alcohol. A study was conducted between 1 January 2004 and 13 June 2005 that examined aggravation by religious prejudice in criminal conduct convictions. It concluded that 45 per cent of the people who were convicted of that crime in that period were significantly under the influence of alcohol, which I think is quite an important statistic.

The study also examined the place of residence of the people who were convicted of that crime. Some 57 per cent were from Glasgow and 23 per cent were from Lanarkshire. Interestingly, 30 per cent of those convicted lived outside Glasgow and Lanarkshire.
The Convener: That is helpful.

I should inform everyone that I aim to close the meeting at about 20 past 2. We will allow Roderick Campbell and Alison McInnes to ask questions next. Graeme Pearson and Humza Yousaf, you have had good kicks of the ball today—to use parlance that is suitable to the day—so I will see whether we can fit you in after that.

Roderick Campbell (North East Fife) (SNP): Mr Martin, you said that resources must be available. I take it from that that there is no specific problem with the timescale for the passage of the bill, before the start of the season.

David Martin: Sorry, I did not mean club resources. I meant that the club will, obviously, sign up to whatever legislation is passed and will endeavour to promulgate that among the fans groups. I was specifically referring to police resources. This is all taking place against a backdrop of the police having been trying to reduce their numbers at football matches over the past two and a half years. That approach has been taken for all the right reasons, but it will make it more difficult to enforce the legislation if they are there in fewer numbers.

Alison McInnes: Mr Martin, you said that the “game of shame” was in 1980. Did the Government introduce emergency legislation after that match?

David Martin: My memory is good, but it is not as good as that—

The Convener: You were just a wee lad then.

David Martin: I know that the Government brought in the Criminal Justice (Scotland) Act 1980.

Alison McInnes: But that act was not brought in under emergency procedure, in a week.

David Martin: I do not think so.

Alison McInnes: I suspect not.

I want to explore the extent to which football clubs think that they are responsible for the good behaviour of their fans. We are not considering a bill that addresses offensive behaviour at sports matches; the bill is about offensive behaviour at football matches. Why is that?

David Martin: The bill is not about offensive behaviour at public processions either, is it? It is specifically about football. You will find as many instances of sectarian chanting and singing in the streets of Glasgow, Lanarkshire and Ayrshire over the coming months as you will ever find at a football match.

Alison McInnes: That is a fair point. Do you mean that people will ask why there is confusion?

David Martin: I do not know that people will be confused by the bill. Football fans are football fans—they are the same across the country. The vast majority of fans will recognise that there is a need for something and support the bill. However, the Parliament needs to take the fans with it. There must be buy-in from the fans; they need to understand the bill. I have no doubt that the vast majority of Rangers fans and football fans across the country will have no difficulty with the bill.

The Convener: The committee accepts that. We should move on, because time is pressing.

Graeme Pearson: I will make my question brief. First, I acknowledge the great work that has been done over the past two decades in football, particularly by security in various clubs. Given the Government’s intent in introducing the bill and moving at a swift pace to change the landscape in which you operate from the start of the new season, what changes, if any, can we expect from the authorities and the clubs from today forward? Do you plan to make changes that will action a positive response?

Neil Doncaster: A range of different measures will be taken, which will come out of the JAG process. Rather than try to summarise many pages of fairly dense text of recommendations that have come out of the process, I refer you to the process. There is certainly no suggestion that anyone who is involved in the game is sitting on their hands. I think that everyone has engaged in the process fully and we will end up with a series of recommendations that have been drawn from the clubs, the authorities and the police, which will address the issues that the Government is keen for us to address.

The Convener: By “the process”, do you mean the joint action group?

Neil Doncaster: Yes.

The Convener: Will something be published at the end of the process?

Neil Doncaster: I believe so.

The Lord Advocate: I am not involved in the joint action group, other than when I addressed it this morning, but I understand that a report will be published in July. I might be wrong about that.

David Martin: I understand that the last meeting will be on 11 July and that the group will publish after that.

The Convener: That is the answer to the question, then.

Graeme Pearson: Will the clubs take steps?

Neil Doncaster: The clubs are part of that.
The Convener: You have intimated that there will be detailed recommendations, so we will find out more when the joint action group’s plan comes out.

Humza Yousaf: Before hearing from this panel of witnesses, we heard from a representative of the Equality Network. The network said in its written submission and reiterated in oral evidence that this is not, in its view, an emergency. Will Mr Doncaster and the clubs tell us whether the events of last year were destabilising and, if so, what effect they had on individual clubs? Mr Regan is no longer here, but perhaps Mr Doncaster can say what effect the events had on Scotland’s reputation as a footballing nation, be it internally, nationally or internationally.

Neil Doncaster: That is another good question. When I came to Scotland two years ago, I was struck—and I remain struck—by how much negativity there seems to be in this country about its game. The reputation of Scottish football outside these shores is very high and I think that the rest of Europe looks to Scotland on numerous occasions. Scotland has a good reputation in the European Professional Football Leagues association, so I do not recognise the view of Scottish football that is described to me by many people on these shores. I think that we beat ourselves up a lot about things that, in most instances, we should be very proud of. The reputation of Scottish football abroad is extremely high. It is not necessary to search too far and wide on the internet to find instances of real disorder around Europe that make what happened here last season look totally immaterial—that is not to diminish how seriously we should take last season’s events. The response by the football authorities, along with the police, demonstrates that we are taking them seriously, but many things are going on elsewhere in international football that are staggering.

14:15

Roderick Campbell: I have a very short question for the Lord Advocate. Can I take it that the draft guidance for chief constables will include guidance on section 5, on threatening communications?

The Lord Advocate: Yes.

The Convener: I have a final, brief question for the Lord Advocate about the “but for the fact” provision in section 1(5)(b), which relates to circumstances in which “persons likely to be incited to public disorder are not present or are not present in sufficient numbers.” Would that cover a public house where there were lots of supporters who all supported the same club or a supporters club? Would it be a defence that someone was in such a place?

The Lord Advocate: I would hate to rush into giving you an answer.

The Convener: Would that possibility exist?

The Lord Advocate: If it is all right with you, I will take time to reflect on that point and will write to the committee as soon as I can.

The Convener: It would be useful to find out about the situation involving supporters clubs or pubs where there were supporters of one team who were not offending anyone on the premises.

Graeme Pearson: In evidence that we took earlier, the comment was made that condition B in section 5(5) would be improved if, instead of referring only to religious hatred, it also referred to the various hate crimes that are listed in section 1(4). Do you have a view on whether the inclusion of that list in section 5(5) would improve condition B?

The Lord Advocate: I would like to take time to consider the issue. I am aware that there is UK legislation that covers offensive comments such as racist comments that are made on the internet, and I would need to look at it to find out whether that is already covered, or whether the bill would be improved by inserting in section 5(5) the list that is provided in section 1(4).

Graeme Pearson: Would you respond to the convener, if you have a chance?

The Lord Advocate: Yes.

The Convener: As I am about to bring the session to an end, I say to all the witnesses that, if you feel that there is anything that we have not touched on or which, on reflection, you wish that you had brought to our attention, please feel free to put it in writing to me, as convener, and it will be disseminated to the rest of the committee. It would be extremely useful to receive any such additional comments before the final stages of the bill, which are to be held next week.

I thank all the witnesses very much for attending; I also thank committee members, who were beginning to think that they were nailed to their chairs, and the official report, for getting the reports out. It is beginning to sound like an Oscars speech, so I will close the meeting there.

Meeting closed at 14:18.
Scottish Parliament
Justice Committee
Tuesday 6 September 2011

[The Convener opened the meeting at 10:03]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

10:03

The Convener: Item 2 is the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Following the extension of the timetable for the bill, the committee agreed to take further evidence at stage 2. This is the first of the committee’s three evidence sessions. I will explain for everybody the layout and why we are doing it this way. Before we move to questions, we will have declarations of interest from members.

The meeting is a slight deviation from our normal format because of the number of witnesses. Our seven witnesses are—whether they like it or not—interspersed among MSPs, which it is hoped will allow for a more open discussion of the bill. Our second panel will follow the usual seating format. I advise the witnesses that my intention is to throw out a general question and that they should indicate if they want to comment. You do not need to press the button in front of you: the light will come on if you are the one who is speaking.

I will keep a list of witnesses who want to speak and will give them notice that I am coming to them. The idea is that witnesses will interact. In addition, members will ask questions, although there will be less interference from them to start with, if I can put it like that. I am sorry—that did not go down well. I will keep a separate list for members.

Before we start, it is appropriate for me to ask whether any members have loyalties or ties to particular football clubs to declare.

John Finnie (Highlands and Islands) (SNP): I am a member of the Heart of Midlothian Supporters Trust, although I have had no direct communication with the organisation on the bill.

Humza Yousaf (Glasgow) (SNP): Although I am not officially part of any supporters trust, I am a keen Celtic fan—I had better put that out there before someone else does.

Colin Keir (Edinburgh Western) (SNP): My position is rather like Humza’s, except that it is Hearts that I tend to follow.

Roderick Campbell (North East Fife) (SNP): I am a not-very-active supporter of Hibernian. [Laughter.]

The Convener: I do not know how that went down with Hibernian supporters elsewhere.
Mercifully, I have nothing to declare on the matter of football support.

We have looked at the written evidence from witnesses who sent us some—thank you very much indeed. The first question is rather like the “Discuss” question that you are asked at school. Broadly, the witnesses seem to think that the bill is not a very good idea. Discuss. To start the ball rolling, who wants to comment on whether the bill is a good idea?

Mark Dingwall (Rangers Supporters Trust): I think generally—

The Convener: I beg your pardon. Before you answer, it would be fair of me to say who the witnesses are. Mark Dingwall is a board member of Rangers Supporters Trust; Jeanette Findlay is the chair of the Celtic Trust; Dr Neil Havis is secretary of ERIN Hibernian Supporters Trust; Greig Ingram is a board member of Aberdeen FC Trust; Martin Riddell is an Edinburgh Tartan Army representative of the Association of Tartan Army Clubs; Derek Robertson is a board member of ArabTRUST—the Dundee United Supporters Society; and Derek Watson is chair of the Heart of Midlothian Supporters Trust. We have with us a great sprinkling of supporters clubs.

Mark Dingwall: The first thing that has come back from our members and from members of other supporters trusts and associations is that the debate on the bill has been conducted in an air of slight unreality, with regard both to behaviour at football clubs and to the nature of Scottish society. We would say that Scottish society is settled and that, in the words of the First Minister, Scotland is “the best wee country in the world”, yet there is a hysteria around football that paints Scotland as a very dark place to live and which hypes up the violence and the prejudices in society. I do not think that that marries up with most people’s life experiences.

Jeanette Findlay (Celtic Trust): I do not want just to repeat everything that is in our submission, but, to summarise, we do not think that any case has been made for separate legislation to deal with the issue. I should make a distinction between the part of the bill that relates to offensive behaviour at football matches and the part that relates to internet threats; I am addressing the first part of the bill. Nothing that happened last season—or, indeed, in any recent times—justifies separate legislation that is aimed solely at football supporters.

The climate in which the debate has been conducted publicly has been very unhealthy. People who have no connection with football and who never go to a football game would think that hundreds of people are being arrested at football grounds, that violence is widespread and that football grounds are extremely unsafe and dangerous places to be around, but that is absolutely not the case.

I will give one example. Even at the so-called shame game on 2 March at Celtic Park between Celtic and Rangers, which appeared to kick off the debate, there were some red cards on the park, there was a slight argument between the two managers at the side of the park and there were 34 arrests in the ground, none of which was for violent offences.

We think that the climate in which the debate is being conducted is unhelpful and paints a false picture of what it is like to be at a football match. There is no case to be made for creating separate legislation. The bill, as it is drafted, is unworkable because it is unclear exactly what types of behaviour would be criminalised.

The bill is also unhelpful in that it would basically criminalise football fans, which would, largely, mean young men up to the age of about 25, who are already disproportionately present in the prison population. They would most likely be charged with offences that they would subsequently be found not guilty of committing, because the legislation, if it were to be enacted as it stands, is so poorly worded that it would be subject to appeal. Nevertheless, they would spend time overnight in a police cell and would continually have to go back for court appearances and so on. We think that the legislation is dangerous, that it is anti-football and that it has no justification. We also think that the more serious behaviours that the bill ostensibly seeks to address are already covered in existing legislation, which should be applied.

We find the other part of the bill less problematic, and there may well be a case for it. Current legislation would cover such behaviour, although the sentencing powers are relatively light. All that the bill would do is allow for a heavier sentence, but even then the heavier sentence would be applied only in the most serious cases.

As somebody who has been in debate and discussion for over 20 years on various websites, I have to say that never once has anybody laid a hand on me. Threats have been made, but I would certainly not have wanted anybody to be locked up for five years for being stupid enough to write something on a website. However, when it comes to the more serious threats, I do not think that such behaviour is a good thing and people should be discouraged from it. Legislation to address that might therefore be a good thing, but people should be careful about criminalising stupidity, because an awful lot of people might fall under that, in addition to football supporters.
Greig Ingram (Aberdeen FC Trust): The other day I read in another context that when a politician sees a problem, their solution is another piece of legislation.

The Convener: Excuse me—not this politician and not others round this table. We are here to test the legislation.

Greig Ingram: Okay. Point taken. Nevertheless, you asked in your initial question why we are against the bill and that would be an explanation. Why should legislation set offensive behaviour solely in the context of football? As Jeanette Findlay and Mark Dingwall have said, that approach probably relates back to events at a particular game last season, which maybe resulted from the teams’ overexposure to each other over the seven fixtures involving Celtic and Rangers last season, so there might also be a football solution to the problem.

As an Aberdeen supporter, the bill tends to come across to me as an attack on all football supporters and it may be a case of a mallet being used to crack a nut.

The matters that the legislation deals with in relation to football seem to be covered by a range of other legislation, so why is there duplication simply for the football context? Can you define a criminal activity solely in the context of football? If it is legislation to deal with a particular problem, why not address that problem instead of there being the fog of all the other legislation and other issues around it? The legislation should be about not only football, but about matters that are not covered in relation to offensive behaviour in our society in general.

Jeanette Findlay said that there seem to be two parts to the bill: the offensive behaviour at football part and the threatening communications part. The threatening communications part seems to have great merit, but it is only concerned with “religious hatred”. Why have that context in one part of the bill and a catch-all in the other part of the bill? A catch-all approach is taken only in the context of football.

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10:15

There was recent press coverage of a poll that found that 90-plus per cent of people want something to be done about sectarianism. If a bill is aimed at addressing an issue that is related to sectarianism, why does it not cut to the chase and do that? That would require the law to have a much clearer definition of sectarianism and the related offensive behaviour, but as I see it the bill does not provide a clear definition of those. That will result in police commanders at games making subjective decisions about what is and is not acceptable, which will put a tremendous onus on them. I am sure that it will also result in inconsistency and leave the police open to accusations of unfair treatment.

The lack of definition in the bill will also result in considerable difficulties in bringing charges and securing successful convictions. In another context and another career, I was always told not to make a rule that I could not enforce. There is a danger that the bill is unenforceable.

Derek Robertson (ArabTRUST (The Dundee United Supporters Society)): I agree with some of what Greig Ingram said. Our main concern is that, although the offensive behaviour part of the bill covers all forms of offensive behaviour, some sections of the media have already christened it the “bigotry bill”. That is where the focus of attention has been up to now and where it will be for many supporters. However, sectarian songs and chants are not defined anywhere in the bill. Therefore, interpreting those provisions will be open to personal opinion, which runs the risk of sending out an indistinct and irregular message to supporters.

As well as having been involved in the trust movement for about 12 years now, I was director of communications at Dundee United Football Club for about 10 years, so I have seen the matter from the perspective of clubs and fans. Politicians must be absolutely sure to give a clear and distinct message to supporters, otherwise they will not understand what the politicians are trying to do. You need to clarify that, because the law could fail at the courts and in the message that it is trying to get across to supporters.

The Convener: Does anyone else from the supporters groups want to comment before I invite questions from members?

Dr Neil Havis (ERIN Hibernian Supporters Trust): I reiterate the comments that my fellow trust members made. I also have a comment that has not been made so far on the bill’s enforceability. We have concerns about how the police would identify individuals who were singing proscribed songs and how they would take action against certain individuals in a packed football stadium. We cannot see how that would be workable.

Martin Riddell (Association of Tartan Army Clubs): The Association of Tartan Army Clubs by and large supports the bill on the basis that something must be done, because our national game is being tarnished. As has already been mentioned, however, parts of the bill will be difficult to enforce and it will be difficult to identify offenders, which might leave the police in a tricky position. However, the clubs, the supporters groups and football in general seem to be doing very little. There are various initiatives, but they
are not working at the moment and the problem continues.

The Convener: Will you tell us what the initiatives are? Give us an example of some that are not working.

Martin Riddell: Time and again I have heard Rangers and Celtic supporters say that the club is working to improve things and to try to get rid of people who behave offensively, but it is clearly not working because we have seen what has happened in the past year or so. The Association of Tartan Army Clubs is glad to see the Scottish Government making some kind of attempt to make changes.

James Kelly (Rutherglen) (Lab): Leading on from that and from Mr Ingram’s point about politicians seeing an issue and thinking that legislation is the answer, do the witnesses accept that offensive behaviour, as I will call it, is a problem in football? What do they think the clubs and supporters groups should do to tackle and resolve the issue so as to avoid the need for legislation?

Martin Riddell: As a Scotland fan, I can say that Scotland fans had a fairly bad reputation in the 1970s and 1980s, predominantly when we travelled south to play against England in the oldest international football match. That rivalry seemed to bring out some bad aspects of the Scotland supporters. I do not think that we ever had the outright thuggery that is evident in some parts of football supporting—it was more mass alcoholism that brought about that behaviour.

A couple of things happened in the 1980s and early 1990s that improved the reputation of the Scotland fans. The first was the England fans and English teams being banned from Europe. Supporters of the English national team were causing trouble abroad, which meant that Scotland fans almost appeared to be some kind of antidote to the behaviour of our rivals—because England is generally our rival team. When Scotland played in the international arena—when we went off on tours or away from home—we left a good impression everywhere we went.

The second thing was that we introduced a form of self-policing. It is difficult to come up with a blueprint to give to the clubs to say, “Here you go. This is what we want you to do.” It came down to respect, and to older or more mature members of the support pointing out to immature or younger members that they were out of line. I do not necessarily want to tarnish younger members; as Jeanette Findlay pointed out, there is a disproportionate amount of them in prison as it is. It is about having respect and, when people step out of line, older and more mature members trying to make them stop. Somebody has to take a lead in the support when they see something unacceptable happening. That is certainly what has happened for the Scotland fans. Most of the trouble has been eliminated and Scotland fans are largely welcome wherever they travel in the world.

The Convener: Do you agree that there is offensive behaviour? How can football cure itself, as it were?

Jeanette Findlay: I would say more or less the same thing as Martin Riddell. Celtic fans are welcome everywhere in Europe. Sometimes I think that we are more welcome in Europe than we are in Scotland. We have a good reputation. As Martin Riddell said, when there is an overwhelming mix of alcohol and testosterone, wiser heads usually help to calm down the situation.

We have had a long-running discussion with the club about allocation of tickets. If tickets are allocated through supporters clubs, rather than individually, supporters clubs have a connection to everyone who has been allocated a ticket. You come to know them, you come to identify with each other and you are able to engage in the kind of self-policing that Martin Riddell was talking about. The way in which tickets are allocated, particularly for away games or European fixtures, could help to improve the level of self-policing because it would create that connection among fans who are travelling.

On whether I believe that offensive behaviour takes place, sometimes I am offended, but I do not necessarily think that I have a legal right not to be offended—I am not sure that anyone does. Sometimes I do not like what people sing—sometimes I find it unpleasant. Sometimes I also find things out with football unpleasant. I sometimes find things that I read in the press—in the tabloids—unpleasant and offensive, but I do not necessarily think that they should be banned or have legislation applied to them. I am not as sensitive as that.

Where there is clear evidence of hate crimes, racism or extreme bigotry against any group, that should be dealt with. However, I am not sure that it is dealt with, which is maybe part of the problem. What is not needed is new legislation. Perhaps you should just enforce the existing legislation and deal with that.

There is nothing in the bill for Celtic supporters, because they do not engage in mass hate singing against any of the groups that are identified in the bill, so in that sense we do not have a problem with it. However, the problem that we have is that we think that the legislation is so lacking in clarity that it would be unenforceable and so in the meantime, while it is being proven to be unenforceable, lots of young football supporters will fall foul of it and will be damned.
The Convener: At this stage we are, of course, dealing with the bill as introduced. We do not expect you to be technicians about this, but it is possible to amend the bill to tighten it up. What we are really discussing at the moment is the principle of the bill. Do you think that, in principle, we need the legislation? There may be difficulties in enforcing it, and it is quite right to talk about difficulties in enforceability and definitions.

Jeanette Findlay: We do not think that the first part of the bill—the offensive behaviour part—is necessary or justified, or has been motivated in any proper way. Can I just say something about the statistics around that? I said earlier that people who do not go to football probably get a picture of hundreds of people being arrested for violent offences at every game. I have rarely seen any sort of violence whatsoever at a football match. I take my children and I have no difficulty in doing that, so I think that there is a problem with that picture.

I think that there is also a problem with the statistics that have been bandied around relating to other types of violence away from football grounds. In particular, there has been a discussion around domestic violence that says that it somehow spikes during certain types of games, which may be true. The Celtic Trust made a freedom of information request to Strathclyde Police for statistics, and they showed that the biggest spikes in domestic violence are around Christmas and new year. The committee may also want to look for evidence—we do not have it as part of that FOI request, because we did not ask for it—that concerts at Hampden result, I understand, in more criminality than do football matches, but nobody is talking about having legislation directed at concertgoers.

Derek Robertson: Can I ask a question, because I agree with what Jeanette Findlay said?

The Convener: You can ask a question of another witness, but not of us.

Derek Robertson: Okay.

The Convener: We are not here to give evidence.

Derek Robertson: Well, I will try to pose the question in a way that is maybe not a direct question. I agree with what Jeanette Findlay said. When I first read the bill, my first impression was that much of it is covered by existing legislation. Then I read the explanatory notes that came with the bill, which indicated that the existing legislation might not be sufficient to cater for the offences. However, I am not a lawyer, and I do not understand why that should be the case.

Mark Dingwall: Mr Kelly asked whether there is a problem with football. Obviously, there is a problem. There has been and always will be a problem at football games. There have been problems at football games, mostly because of young men with too much drink in them, for 150 years. However, let us not beat ourselves up in Scotland. We have very safe grounds and we have arrest, ejection and prosecution rates that are the envy of European football.

On the enforceability of the proposed new legislation, we already have the necessary powers. If you think that there is a problem with the police not doing their duty, get the match commanders in and talk to them. However, I think that you will find that the match experience for most fans is that they get to the game and go home from the game, and in between they are not particularly offended or subjected to threats, and are in particular not subjected to violence in any great degree.

The Convener: If you will allow me, I will now let some members come in. Graeme Pearson will be first, then John Finnie, whose point might be connected to Graeme’s, but let us see.

Graeme Pearson (South Scotland) (Lab): First, thank you very much for the submissions that we have received, which were very helpful. I am sure that all the committee would agree that there is a lot of food for thought there. I was very interested in what Mr Riddell said earlier about the change in culture for Scotland fans travelling, which was achieved without any amendment to legislation. I hope that later we will come on to the responsibility of the authorities and so forth. However, I want to return to a particular notion.

If you have experienced a problem within football—I think that we acknowledge that there are problems—do you feel that the current arrangements for enforcement whereby, I think, police officers have to a large extent withdrawn from stadia and left enforcement to stewards, have played any part in that? In your experience, is there sufficient enforcement of the current legislation?
The Convener: But has it happened? That is what we are asking you.

Mark Dingwall: It has happened. The training of the stewards can be somewhat haphazard because stewards tend not to come under police discipline, so there can be occasions when people are not briefed, are misbriefed, or do not understand the instructions from the police. Perhaps that can be tightened up. If there is disorder, given the surveillance by the stewards, the police and the clubs themselves, most of the major grounds in Scotland are very safe. There is no history over the past 20 years of much violent disorder within the grounds or the precincts of the grounds.

The Convener: Perhaps somebody would be good enough to tell us what the stewards do. What is their role? What exactly do they do and how many would be at a match? If you could give us an idea, that would be very helpful. Ms Findlay is indicating that she can answer that, but I will let somebody else in first, if they want—not that I am indicating that she can answer that, but I will let no one else wants in.

Jeanette Findlay: The role of stewards at a football match is almost exactly the same as the role of the police, which is to facilitate the arrival of fans to the ground, to make sure that they are seated and everything is fine and to facilitate their exit at the end of the match. I happened to be in a meeting yesterday with the match commander responsible for Celtic Park, who said that there are minimal problems in terms of arrests and arrestable offences at Celtic Park. In fact, the police have withdrawn slightly and have left it more to the stewards.

The issue is not whether enforcement should be done by police or stewards but how police or stewards conduct themselves. Where police or stewards conduct themselves in a confrontational and aggressive way, they will create tension. Where their motivation is—as it should be—to facilitate the attendance and safe entry and exit of fans, far fewer problems arise. Graeme Pearson is right to talk about the training of stewards and having properly trained stewards and police officers who are properly instructed by the match commander. That is by and large what we observe. I attend every Scottish Premier League ground, but that is certainly what happens at Celtic Park.

Derek Robertson: I think that you will find that the stewards at football games now all have to be licensed. The difference in what they are capable of doing now compared with what they were capable of doing a few years ago is quite significant. At some of the lesser-category games—games that do not involve the old firm clubs or games that are not derbies—you will find, I hope, a reduction in the number of police compared with the number of stewards employed by clubs.

John Finnie: I want to give a little preamble before I pose a question, if I may, convener. We have heard phrases—if I have noted them correctly—such as “air of unreality”, “climate of the debate” and “attack on football supporters”. I am delighted that the supporters groups are here, because I think this issue is key. I am a regular attender at football matches. I am a season ticket holder and I go to the occasional away game, too.

We have heard from the Lord Advocate that there is a gap in the legislation. We have heard from the Association of Chief Police Officers in Scotland that the police are capable of enforcing the bill. We have heard from the rank-and-file officers’ representatives, the Scottish Police Federation, that they are very happy with the bill; they would like some more money but, as a former federation man, I know that we always ask for more money. We have also heard that the bill is unenforceable, but that is clearly not the view of the professionals.

As a football supporter who goes to matches with his son and daughter and, occasionally, his grandchildren, I have nothing to fear from the bill. I would like to hear from each of the groups what specifically they fear from the bill as individual supporters.

The Convener: Ms Findlay is indicating that she can answer that. I am delighted that you are here, because you have made great contributions.

Jeanette Findlay: As I think I have already said, my fears about the bill relate to its lack of clarity. You might say that the Association of Chief Police Officers in Scotland and rank-and-file officers believe it to be clear, but all the submissions from law professionals and other groups have made it clear that there are problems of interpretation with the bill. I do not think that it is clear. What we have to fear is exactly what I have already highlighted: largely young men between the ages of 16 and 25 being arrested as a result in the first instance of a police officer’s interpretation of the bill under guidance. It is not nothing to be arrested. Those young men will be held overnight; they might then have to attend the sheriff court, possibly on three or four occasions as a result of the delays that can sometimes happen; and they might lose their job as a result. That will happen to quite a lot of people before we finally work out that the bill is not good.

You can have as many pieces of legislation as you like that prevent people from being racist, bigoted and homophobic. We do not have a problem with that, because we do not engage in attacks on any of the people in those categories or
in offensive singing of that type. That said, although we do not fear that in principle, we fear how the bill will be applied and its undue impact on a particular group of what might well be young people.

**Greig Ingram: The point is that an activity or something that someone does at a football match could be deemed offensive and, as Jeanette Findlay has pointed out, end up in arrest. However, if someone committed the same act outwith the football context, they would not be arrested. As a result, a person could be criminalised for their activities at football alone.**

I am interested in the claim that the law is enforceable. There is a huge gap in the definition of what might constitute offensive behaviour. For example, I am an Aberdeen supporter; if someone were to chant about my predilection for or alleged activities with farm animals, would that be offensive?

**The Convener:** I am so glad you put it that way. [Laughter.]

**Greig Ingram:** I suppose that some reasonable person might deem that to be offensive. Are match commanders going to start arresting people who chant such things? There is a whole range of different things constituting offensive behaviour and applying such definitions will be a minefield.

**John Finnie:** On Greig Ingram’s initial point, I hope that the supporters accept that individual officers are already exercising discretion with regard to, for example, offences such as breach of the peace. My specific question was about what the individual supporters around the table have to fear from the legislation. Jeanette Findlay’s comment that she, personally, fears nothing and that it is a matter for others ties in with Martin Riddell’s comment about self-policing. Will there be an opportunity for more self-policing to take place?

**The Convener:** I will come back to that, because it relates to James Kelly’s question about football solutions. James, do you want to come back in with a supplementary to John Finnie’s question?

**James Kelly:** My question is not on that—I simply want to drill down into the detail of what constitutes offensive behaviour. Over the summer, we as individual MSPs certainly received a lot of representations about what might be described as the songs debate. Do the representatives here think that certain songs that are sung at football matches are unacceptable? How should we root out the singing of such unacceptable songs and what role might the bill play in that respect?

**Mark Dingwall:** The bill refers to any “reasonable person”. Earlier, Martin Riddell wondered what the fans organisations have done with clubs apart from pontificating from a perceived position of superiority as the fans who actually go to the games. With Rangers, once we became aware of the mood music in Scottish society, we had meetings with supporters clubs to tell them that, under the proposed legislation and, probably more important, under the enforcement of the current legislation by the police, anything can be deemed to be offensive.

Part of the background is the ceasefires and the decline of the troubles in Northern Ireland. Overtly paramilitary songs are now very rare at Ibrox, and other songs and chants that were generally deemed to be offensive have been ripped out. However, our fans and their organisations have started to say that, if we are going to clean up our act, everybody else needs to do the same. We can all swap anecdotes about what other supporters have sung but, in general, if that is going to happen to our repertoire, it must happen to everybody’s. Therefore, everything that is offensive that is sung by the supporters of any football club—whether it is under the guise of a regional or sporting rivalry or just winding up the opposition—has to go. If it is going to happen to us, it should happen to everybody.

Therefore, there is almost an incitement to people to escalate their offendedness. I can deem that I am genuinely offended by a banner or chant and can argue to a police officer that they need to do something about it. If they do not, they will be subject to disciplinary procedures and all sorts of professional problems. That is where we have got to. There is an air of unreality, to the extent that people are asking where we can take this in football.

**Martin Riddell:** Mark Dingwall makes a good point. The football supporters who are here as witnesses today are all big boys and girls and we can take any flak that we hear against us at football games.

I would just be concerned about the fans I represent; I could not really care less about any other club’s or country’s fans. Earlier, I pointed out that, in the 1980s and 1990s, Scotland fans went out of their way to be seen as the opposite of our rivals, the England fans. There is an opportunity for Rangers, Celtic, Hibs or Hearts fans, or whoever, to say, “Look how good we are,” and not to concern themselves with anybody else. They should concentrate on what they can change, which is their supporters.

**The Convener:** I see that Mr Dingwall is frowning.

**Mark Dingwall:** Mr Riddell is in essence saying, “We’ll decide for you. We’ll put your house in order, but you don’t get to question our set of
fans.” Well, I am afraid that Rangers fans, collectively, have decided that that will not be the case. If we see something that offends us, we will go after the opposition fans in the way that people have gone after us. You reap what you sow—that is the way it is.

Derek Robertson: That makes it more important to have a definition of exactly what constitutes offensive behaviour, certainly in relation to the sectarian and religious part. Everybody knows what hate crime is. However, I have lived all my life in Dundee in the east of Scotland and have never been exposed to offensive sectarianism. Maybe it is just because of my background, but I could not even recognise a sectarian song or chant, apart from the extreme and well-known ones. For example, last week, I was surprised to read that the police say that singing “The Sash” is not offensive, when I had always assumed that it was. There lies the rub. I cannot be the only one who feels the same and who comes from that background. Unless we define the offensive behaviour, the bill will be difficult to enforce. As another witness said, we run the risk of criminalising innocent people who do not know what they are doing.

The Convener: The clerk has confirmed to me that the Lord Advocate promised that he would issue guidelines for prosecutors on what constitutes an offence. I put it on the record that the committee will want to have those guidelines delivered to us in an accelerated way and put in the public domain to assist with the definitional problems in the debate that witnesses have rightly raised.

10:45

Humza Yousaf: I appreciate the fact that supporters have come to the committee. It cannot be easy to be articulate on such a difficult subject.

I am interested in self-policing, but it only works if people believe that what they are saying or doing is wrong. There was a good example last season with a well-documented case of a couple of Celtic fans who went to the police to document and highlight a case of racial abuse by one of their own fans that they said was unacceptable. That is a good example of self-policing, but it only happens when people clearly believe that what they are doing is wrong.

Perhaps that is not the case currently, and a couple of examples of that have come out during this evidence session. The Celtic Trust submission says—and Jeanette Findlay has reiterated the point—that

*Celtic supporters do not engage in mass singing of any songs of hate for any other group of people on grounds of religion, nationality or any of the other categories listed in the Bill.*

I am a Celtic supporter and I go to some of the games where I hear hundreds, if not thousands, of people singing, “Go home ya Huns”. If the word “Hun” does not refer to nationality, religion or any of the other categories that are listed in the bill, on what basis is that song sung?

Mr Dingwall said that Rangers fans will go after any of the opposition that goes after them. If that is the nature of the self-policing that is going on, it has not worked and it is not going to work. That is why I think that we need a mixture of self-policing, legislation, and education. Perhaps I am looking at the issue incorrectly and certain elements of supporters and supporters trusts are not in denial but, from an outside perspective, there seems to be a question about whether self-policing would work when it clearly has not worked so far.

Jeanette Findlay: I am quite happy to answer that. I do not know how long Mr Yousaf has been going to Celtic matches but, in all my life, the term “Hun” has never been used to apply to a Protestant or any member of a religious group. It refers to a Rangers supporter. Until about two years ago, Rangers supporters referred to themselves as Huns. I have heard Andy Cameron on television referring to himself as a Hun, and people saying things such as, “I am a Hun,” and, “This is a good Hun shop”—

Humza Yousaf: Hearts supporters have been referred to as Huns as well.

Jeanette Findlay: It is just applied as a football rivalry term. It does not have any religious connotation whatsoever; it never has had. In the same way, we are referred to as Tims, and I do not take offence at that—it just means that I am a Celtic supporter. It is a term of rivalry. I have never heard it used or understood it in any way other than to refer to Rangers supporters.

It is sometimes used to refer to Hearts because we call them the wee Rangers.

The Convener: It is a new world.

Mark Dingwall: This is where we enter the Gobi desert of the theology of football fans. Quite simply, Celtic fans refer to Airdrie fans as Lanarkshire Huns, Hearts fans as Edinburgh Huns, and so on. There is obviously a problem with the use of the word and Celtic fans obviously see it as a derogatory term. Perhaps I used slightly intemperate language earlier when I talked about going after the opposition. Nevertheless, if other fans do not accept that they, their behaviour and their songs are subject to the law, and they say that it is always someone else who is in the wrong, that is up to them, but times have changed and, if a club has a song repertoire that other
people find offensive, the bill is giving a specific warning that, although they could have been done for a breach of the peace under current law, Scottish society will now come after them. That is what we are talking about.

The Convener: Do some people not just sing the songs because they like the tunes and they do not mean to offend? Surely a mix of people sing these songs. One of the academics talks about how being at a football match is like being part of the theatre of the sport, and how the singing of the songs and so on is part of the game. It is audience participation, in a way. I do not want to minimise really offensive behaviour, but is there not a mix of things happening rather than just a whole group of people behaving in the same way?

Mark Dingwall: I do not want to minimise the effect of the issue, but a lot of people use the word “Hun” without knowing where it comes from or what it means, and some people just go along with what their friends and relatives have sung. Take, for instance, Manchester United fans. One of their most popular songs talks about burning Scousers and Manchester City fans and murdering people from Yorkshire. Why are they not subject to some of the Union of European Football Associations strictures? Let us be frank: we can find such examples at virtually every club in the United Kingdom and abroad.

Derek Robertson: I have to agree with Jeanette Findlay in this instance. Every club in Scotland will sing, “Go home ya Huns”. It is a derogatory term, but there is a distinction between derogatory and offensive in what the bill is trying to achieve. Frankly, if someone is as easily offended as that, they should not go to a football game.

Greig Ingram: This provides a perfect example of where the confusion comes in: the interpretation of what is offensive and what is not. There must be a clearer definition. There is so much fog around the part of the bill that deals with offensive behaviour at football and so many different behaviours that would require to be defined that it is a minefield. If the bill is really about sectarianism—which is what it was sparked by—why not just cut to the chase and define sectarianism and its related behaviours and deal with it?

The Convener: Not in a football guise—is that what you are saying?

Greig Ingram: Well, in general. Sectarianism is unacceptable whether it is at a football match or anywhere else.

Humza Yousaf: My question follows on from what has just been said. I appreciate the feedback, Mr Ingram, but I do not think that it necessarily highlights confusion over the bill; it highlights confusion over what would happen if we were to rely only on some sort of self-policing. Some people’s self-policing would not be up to the standards that other people would expect in dealing with offensive behaviour.

It will be useful for the politicians, the supporters trusts and the football clubs to see the Lord Advocate’s guidelines on what constitutes an offence. However, it may be difficult to note down specific songs, chants or terms that might be offensive because those things will probably always be adapted—the tunes and the titles of the songs will change. In the context of racial aggravation and the use of racist language, for example, if we had written down that the N-word is unacceptable in referring to a black person, people would not have been prosecuted for monkey chants and so on. These things evolve and people tend to use other means. As a breed, football fans and those who go to sports can be quite canny in evolving language should they need to, and that is where the difficulty comes in proscribing certain songs or chants. I would be interested in following up on the Lord Advocate’s guidelines.

The Convener: I think that you were giving evidence there rather than asking a question, Humza, but I will let that pass.

I am conscious of the fact that we have not heard much from Hearts and Hibs, although matches between those clubs are usually seen to be in the same category as Rangers v Celtic matches. You are being a bit coy. Are we being precious about language? Are there no problems? Is all happy on the Hearts-Hibs front?

Derek Watson (Heart of Midlothian Supporters Trust): I think that it more or less is. I have been going to Tynecastle for 40-odd years. It was quite a frightening place for a little while, but the club evolved, the stadium became all-seated and I feel very safe taking my kids to the stadium now. I am rarely if ever offended at Tynecastle.

The Convener: Is that because you have toughened up?

Derek Watson: No, not at all. The behaviour of both the Hearts supporters and the visiting supporters has improved dramatically over the past 20 or 30 years and there is a much safer atmosphere now. The Hearts-Hibs rivalry is not in the same boat as the Rangers-Celtic rivalry, although that might be an age thing—it might be because I know a lot of Hibs fans and do not have any problem with them. These days, I do not see any trouble at Hearts v Hibs matches, which there used to be 20 or 30 years ago. Part of that could be the result of self-policing; part of it is down to the change in Scottish society; and part of it is people recognising what is expected behaviour.

I think that there has been a great improvement at Hearts, which I hope will continue. At
Tynecastle last year, somebody from the press phoned me and talked about the number of arrests that there had been. In the whole season, there were about 14 arrests, all for very minor offences such as trying to get into the stadium while drunk. I remember when 10 times that number of arrests were made at one game. That was 30 years ago, but behaviour has improved greatly since then.

My personal view is that the first part of the bill is probably using a sledgehammer to crack a nut.

Dr Havis: I agree with what Derek Watson said. Obviously, we went through a fairly bad patch at the end of the 1970s, when hooliganism was a problem, but if you look at television pictures of Hibs v Hearts game prior to that, you see that the crowd was completely mixed—there was no segregation.

The whole atmosphere around a Hibs v Hearts match is completely different from that of an old firm one. We do not have the media attention and hype that go with those games. You see people going to the game together, splitting up for it and meeting up afterwards. The policing outside the ground is different as well. The streams of fans can cross over and mix when they come out of the ground. The whole atmosphere is completely different in how the match is policed—there is no tension.

Graeme Pearson: John Finnie was accurate about the three submissions that we received about enforcement. I said at a previous committee meeting that Governments love introducing new legislation and police always love enforcing it but that does not mean that it is right. We have about 70 other submissions that are not in sympathy with the view expressed in those three. It is interesting to see the overlap between the various supporters club reps from the clubs. Would you expect the football authorities and clubs themselves to do more in the current situation, or do you feel that they have now extended as far as they can and that it is therefore unsurprising that the Government needs to step into the vacuum?

Greig Ingram: That has to be part of the scene: there must be solutions within football. Mr Yousaf mentioned education, which is a big part of it as well in the long haul. There are lots of programmes already in education that should be enhanced, and within football there is the respect agenda, which should be emphasised as well.

There must be football solutions. If UEFA can fine clubs for racism and indeed ban or fine them for chants that are unacceptable, why can the Scottish football authorities not do the same thing? There is now a referee’s observer at every football match. Could the observer not decide whether there is unacceptable singing at a game and, if so, issue a report at the end of the game that says that the club will forfeit any points that they gained in the match? The supporters who are doing damage would then be doing damage to the club that they purport to be supporting. There are football solutions that should be looked at.

The Convener: Are the clubs actively seeking those solutions? They have known that this bill was coming down from the Government, so are the leagues coming to the Government with alternatives?

Nobody knows. We will need to ask the Government, as it is something that we would like to know. We need specifics—Greig Ingram has kindly given us a specific idea.

Martin Riddell: I echo Greig Ingram’s points that more has to be done by the football associations. I know that it is not the job of the Scottish Parliament to tell the Scottish Football Association or the SPL how to run their game, but you can pretty much bet that if there were meaningful fines, points deductions and games ordered to be played behind closed doors with no fans in attendance, a lot of the problems would stop, probably in their entirety.

Alison McInnes (North East Scotland) (LD): I have a couple of follow-on questions. Mr Dingwall sounded quite aggrieved, and I got the impression that he thought that the bill was aimed at him. He used the phrase “coming after us”; will he clarify that?

I want also to ask Jeanette Findlay to follow up on something. She said that she has been going to football matches for 20 years or so—or longer than that—and that she has not been offended by anything. Are there things that are chanted or shouted at a football match that she would be offended by in any other situation?

11:00

Jeanette Findlay: I did not say that I was not offended. In fact, I specifically said that I have heard plenty of things that offended me. I have heard racist songs sung, although thankfully that seems to be dying out. Basically, if they are hate songs—things that would otherwise be criminal—of course I object to that but, by and large, I do not mind if people want to sing songs that I do not like. Greig Ingram gave an example of a song that is traditionally sung to Aberdeen fans, and there are songs that people sing when they come to Parkhead, about our Glasgow slums and that kind of thing, which I do not like. I do not spend time thinking about that and I would not want someone criminalised for it. Being offended and wanting someone arrested for it are two quite different things. I have heard some things that are criminal but, in the main, I focus on the football—I am there to watch a game of football.
The Convener: Singing those songs within the context of a football match has a different impact from singing them in the street, at a bus stop for example. You are saying that certain things are part and parcel of going to a match and that there is no problem.

Jeanette Findlay: That would be more frightening. If I was standing next to someone at a bus stop and they began singing some of the songs that I have heard at matches, I would be concerned for my safety. If I am standing in a football match, I have no concerns whatever for my safety.

The Convener: That point about the context—about where the singing is taking place—is important.

Mark Dingwall: The way in which the debate has gone in the past few years, Rangers was the club that took most of the bashing. However, now that the debate has been expanded into offensiveness in general and not just offensiveness by Rangers fans, many supporters of other clubs have had to be dragged kicking and screaming to face up to their own behaviour. For instance, there are the Aberdeen fans with their repertoire about the Ibrox disaster. They said, “That’s football banter.” Is it? They have had to be dragged to the point at which they admit to that.

The political defence that Celtic Football Club tried to put up because of the problems with its fans singing Irish republican songs at away games has collapsed. The message went out from the usual suspects to the Celtic support saying, “That has got to go because this club will end up in front of a court one day attempting to justify it.” That is not a place that the club wants to be.

The Convener: You said that the club would be up before a court. Would it not be the individuals?

Mark Dingwall: It would be a bit of both, but what happens if a club attempts to justify behaviour on the grounds that the songs are political, even though they are about an organisation that has murdered hundreds of people on the sole basis of their religion? It is a bit difficult to go in front of a court and say, “We are non-sectarian because we murder Catholic police officers.”

Graeme Pearson: If people have come to understand that such songs are unacceptable and if they issue directives that they should not be sung, is that progress and self-policing?

Mark Dingwall: It is certainly progress. However, are we reaching a stage at which every football club in Scotland can be held to ransom by a handful of crackpots who will take their sentence and never darken the door again, while the ordinary fan who pays his or her money and behaves decently will be punished as well, because of the behaviour of that handful of crackpots? That is what we are talking about.

The statistics tell us that most of the time, Scottish football fans behave well, and that the grounds are almost unbelievably safe compared with the grounds in every other major footballing nation in western Europe. Are we beating ourselves up too much about this? Rather than talking Scotland up, and talking about the good things that we do in Scottish football, are we talking Scotland down over what I would say is a relatively minor issue?

The Convener: There is a distinction between safe and offensive.

Mark Dingwall: Offensiveness is something that can put people in a state of fear and alarm. That is common sense. Your colleagues Mr Pearson and Mr Finnie would no doubt have found, hundreds of times in their police duties in a former life, that they had to make those decisions. Perhaps the common sense of the average Scottish police constable is a better guide than the eminence even of this committee.

The Convener: Heavens! I will let that pass. You are being hard on us—you do not know what we are capable of.

John Finnie and Humza Yousaf want to come in, but I will take Colin Keir first as he has not yet asked a question.

Colin Keir: In view of the problems that have been pointed out in the bill in the last wee while, particularly with regard to context—for example, how someone might feel when they see or hear these things at a bus stop rather than in a stadium—and given the opposition that I am starting to hear to the bill itself, are we effectively saying that there should be different standards of behaviour of any kind simply because we pay money to go into a football ground? I would like to hear supporters’ comments on that because, at some point, that discussion will have to be had. Is the standard different? Do we lower our standards or do we raise them to the same level as outside? Where are we going with this?

As for the game of shame that has already been mentioned, I should point out that, whether we like it or not, over the years—and indeed, as a number of people have pointed out, back in the 70s and 80s—things have been an awful lot worse. For example, we had the Hampden park incident, with the use of horses at a cup final and all that sort of thing; I remember going to not very pleasant Hearts-Hibs games in the 70s and 80s. Given what has happened over the past number of months to certain individuals, one of whom is a former member of this place, should we not be looking at this matter and, instead of saying what
we cannot do, trying to be a bit more positive about what we should be able to do and aim at?

The Convener: You have raised several issues, Colin, but you began by asking whether there should be different criteria for behaviour in different places. For example, if people pay to get in somewhere, they behave differently from how they would behave in an ordinary public place.

Colin Keir: In particular with football, which is obviously a very passionate game; indeed, supporters get very passionate. Someone has already mentioned the introduction of all-seater stadiums. In the days when we were all crammed into football grounds, people were definitely more passionate in their singing and all the rest of it—and some of it was not terribly nice.

The Convener: It was not like sitting in the audience for the royal ballet or something.

Colin Keir: It is certainly a lot quieter now. Are we, in effect, giving people licence to behave differently simply because they pay money to go into a football match?

The Convener: John, do you want to ask your question on the same matter?

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): My question is sort of connected to Colin Keir’s point, but it was actually prompted by the analogy that Jeanette Findlay drew with bus stops and the context in which statements are made. Clearly the bill is aimed at behaviour in football grounds and connected with football matches. Does sectarian behaviour take place in Scotland only in that context or do you have any other examples of such behaviour outwith the context of a football match? If so, are you concerned that by passing this bill we are saying that sectarian behaviour within the context of a football match is unacceptable and that anything outwith that context is perhaps not as serious?

Jeanette Findlay: I will return to Colin Keir’s question in a moment, but in response to John Lamont I should point out that nowhere in the bill is the word “sectarian” mentioned. It simply does not appear. Indeed, I am unclear about that matter.

If you are asking whether the manifestation of sectarianism at football is the problem, my answer would be no. It is only the most visible place where it is manifested. In Scotland, the term is inextricably linked with an ethnic background—in other words, a national origin coming from Ireland. There is already legislation in place to deal with discrimination on that ground.

The Parliament’s Public Petitions Committee has been considering for some time why a disproportionate number of Catholics are in prison. One of the submissions to the committee told us that that is the case because Catholics are disproportionately represented in the poorer areas and show up badly against other social indicators, so the problem clearly goes wider than football. The Parliament might want to have a look at that. Sectarianism might manifest itself more visibly in a footballing context, but in a way that is probably overstated.

To return to Mr Keir’s question about whether different standards of behaviour are acceptable in different places, that is what the bill is saying. It is saying that it is okay to say certain things outwith a football ground but that it is not okay to say them inside a football ground. My response is that that is what the bill is saying, and that that is wrong.

However, it is certainly the case that in other areas of law, such as employment law, the context is everything. In some workplaces, certain behaviours are accepted by everyone and that is okay, but in other workplaces they are unacceptable. The law recognises that. It is perfectly acceptable to sing “Baa, baa, black sheep”, but you certainly cannot sing it at 2 o’clock in the morning underneath someone’s window. That is different—that is a breach of the peace. Context is everything—behaviours that are acceptable in one place are not acceptable in others, and we all recognise that.

The Convener: I will wind up the session in exactly four minutes because another panel is waiting. I ask John Finnie and Humza Yousaf to put their questions and then we will stop on the button at 11.15—I will not stop people mid-sentence, of course, but I ask for short questions.

John Finnie: My question is for Mr Watson and it touches on what Dr Havis covered. I fear that Mr Watson paints a glowing picture of the club that I hold dear. I was going to give a specific—

The Convener: I want a question, John.

John Finnie: Do you think that the response from a minority of Hearts fans in the aftermath of the unprovoked assault on the Celtic manager at Tynecastle stadium indicates that there is not a sectarian problem at the club?

Derek Watson: There has always been a small minority of fans who present a sectarian problem for the club. They are a relatively small group, but it is very hard to force them out. The trust and the Hearts board, as it was—a committee sits now, which is slightly different—have tried to work out how to solve that problem. It arises in the ground, in the lower part of the stand towards the away end. We all know where we are talking about. It is a question of how to force those people out or to get them to change their behaviour. I do not think that they will change their behaviour because they have behaved in the same way for years. We are
Humza Yousaf: I am not sure that there will be time for my question to be answered.

Evidence from the Scottish Government and even from the police showed that there might be gaps in the current legislation. If there are not enough people present to be caused fear and alarm, it is difficult for the police to enact breach of the peace measures. Do you believe that if supporters of your clubs sing songs, whether in pubs or on coaches, that fall into the religious aggravation category or any of the other categories in the bill, and that is not challenged by law authorities, that normalises the behaviour? If so, is that a matter on which the Parliament and the Government should step in?

The Convener: Do you think that it normalises the behaviour? We touched earlier on the point that it just becomes part of the atmosphere and, therefore, one is immune to the offence, but what if the behaviour is somewhere else?

Greig Ingram: We are back to the point about defining offensive behaviour or behaviours solely in the context of football. Is that context simply inside a stadium or does it include a bus going to the stadium?

To take it away from football and return to Mr Keir’s point, the bill seems to be driving the interpretation of behaviour solely in the context of football. Is a better standard of behaviour expected outwith football or unacceptable inside it? That is the problem. The bill defines behaviours solely within a football context and that is extremely difficult to do.

The Convener: Let us say that people take it as read that a song is all right within the stadium. How is that different? Is the behaviour acceptable outwith football or unacceptable inside it? That is the problem. The bill defines behaviours solely within a football context and that is extremely difficult to do.

The Convener: Let us say that people take it as read that a song is all right within the stadium. However, what if a big group sings the same song on public transport—say, in a train carriage? Is there a distinction? Should they be prosecuted for singing the song in one place and not the other?

Derek Robertson: It goes back to the definition of what is offensive and what is not.

The Convener: So they might be prosecuted for singing a song on the Glasgow to Edinburgh train because people are upset, but not for singing the same song at the stadium. Is it just a matter of where they sing it. Is that a fair assessment of context?

Jeanette Findlay: If a person went into a train carriage or bus where there was a large number of ordinary travellers, women or children, and shouted, stamped their feet and sang in the travellers’ faces, it would not matter whether they were singing a Patsy Cline song or something else. That would be quite alarming for people. It depends on the way that people sing.

All that is already covered. Breach of the peace is a very wide-ranging offence and can be used in many circumstances. It has a large maximum sentence. As we have just been discussing, it is debatable whether the fear and alarm standard can be reached. That is not the standard that is meant to be reached. Breach of the peace can already be used and is used where it is appropriate.

That seems to me to cover the matter. If somebody behaves in a way that upsets people to the extent that they feel alarmed for their own safety, that clearly should be addressed. However, I am not aware that anybody inside a football ground is alarmed for their own safety at any time. I certainly never have been.

The Convener: The clerks have reminded me that we are concerned with the singing of songs—or whatever other behaviour—going to or from a football match. That takes us back to Mr Ingram’s point that the bill would criminalise behaviour only in relation to football.

I am sorry that we have to leave it there. Your evidence was extremely interesting. I was going to ask whether you wanted to say anything else to us that we had not asked. I am sure that you do. Please write to the committee if you have afterthoughts or if you listen to other evidence that we take, not only from the next panel of witnesses but from other panels and, indeed, the minister in charge of the bill. We would be happy to hear any further comments that you have to make because, if the bill proceeds, it will affect you most of all. Thank you very much indeed.

I suspend the meeting for five minutes.
11:18

Meeting suspended.

11:30

On resuming—

The Convener: I welcome the second panel, many of whom sat through the previous evidence session. Pat Nevin is a broadcaster and former professional footballer; Graham Spiers is a sportswriter at The Times; Dr Stuart Waiton is a lecturer in sociology and criminology at the University of Abertay Dundee; and Graham Walker is professor of political history at Queen’s University Belfast. I thank those who gave us written submissions, which were extremely useful.

This will be a little different from the previous session, as the witnesses will contribute in a panel format. Members will come straight out with questions; if the witnesses wish to respond they should indicate that to me. I will call them to respond, and their microphone will come on automatically. If other witnesses also wish to contribute, I will let them know that they will be called after that.

Humza Yousaf: I thank the witnesses for turning up and sitting through the previous session. My question, which is probably for Mr Spiers or Mr Nevin, became clear in my mind before the meeting and was confirmed by the previous session. Is there a collective paranoia among supporters—a denial that this is a problem and that it can be sorted by self-policing only? Is that an issue?

Graham Spiers (The Times): There has been dragging of feet by many supporters. The bill is aimed principally at the old firm, where the substantial problem exists—not to exclude other clubs. There has been some denial and supporters groups have had to be dragged to the table kicking and screaming to get certain songs banned.

We have been talking about self-policing. I have watched football for nearly 40 years, throughout my childhood, as a teenager going to games and then as a journalist covering games. I grew up supporting Rangers—I was steeped in Rangers as a kid—so I followed the Rangers case closely. On two or three occasions, Rangers has been clobbered by the European football governing body, UEFA, for offensive chanting by its supporters. Every time we think that we have crossed the Rubicon, we go backwards. When UEFA punished Rangers in 2006, the club had campaigns and acted commendably by getting supporters on board, but it was perfectly obvious from the debate on the internet that many supporters did not want to come on board. They wanted to keep singing offensive chants. The same applies to Celtic, but on two or three occasions, a governing body in Switzerland has had to come into Scotland and punish Rangers for offensive chanting because the Scottish authorities could not do that. We had that in 06 and 07, and there was a recent case of Rangers being rebuked by UEFA for offensive chanting. Every time we have had those decrees by the European governing body, we think we have made progress and crossed the Rubicon. We think the songs have stopped but they have not, because there is an element of denial and some supporters have been dragged kicking and screaming to the debate. I heard some articulate debate this morning from various supporters who said in public that these songs should be stopped, although many of these supporters, in private, quite like the songs and quite like singing them. However, they do not like admitting to it in a public forum such as this. Rangers knows that and Celtic knows that. There is public posturing to a degree by supporters, but a lot of supporters like the old, offensive, bigoted chants around the old firm. They do not want the chants to stop. There is some denial and people have been dragged to the table.

To answer Christine’s question—

The Convener: Please refer to me as the convener.

Graham Spiers: I beg your pardon. The answer to the convener’s question is that I am in favour of this bill in principle. If someone asks whether I want to live in a country where thousands of people can shout about the Pope and say “F the Pope”, I say that I do not want that in a football stadium in my country. In principle, I am in favour of the bill.

Pat Nevin: During the previous evidence session, I was slightly surprised to hear some of the witnesses say that we do not have a problem and we should not bother being here at all—we should all just go home. I strongly disagree with that.

I agree that some clubs have had a problem with accepting the degree of the problem that we face just now. Historically, Rangers practised what we could call religious apartheid until 1989, which to me was very wrong. Over the past few years, Rangers has addressed that and further problems, arguably following the UEFA ruling, and the club has spoken out about the problem, making comments in the press and programme notes and so on.

Graham Spiers talked about people being dragged towards the legislation. I am slightly disappointed in the attitude of some people in the Celtic camp. I should say that I was a Celtic supporter for 30-odd years. I was brought up in the east end of Glasgow, in the Irish Catholic
diapora, so there is no reason for me to be biased or bigoted against Celtic in any way at all. I supported Celtic for most of my life, but one day, I found myself sitting in the stand with my son, who had started to take an interest in football, hearing the song “Ooh ah, up the RA”. I could not accept bringing up my son alongside that, so I was driven away from the club that I loved. I was very disappointed about that.

Earlier someone asked what other organisations have been brought in to talk to the clubs. Nil by Mouth was one, and Celtic Football Club started the bhoys against bigotry campaign, which I was delighted with at the time because it was needed. I am not convinced that the initiative has been followed through for some time. During the past few years, Celtic’s refusal to accept that there are problems has disappointed me. Someone once said to me that Celtic had the moral high ground and has now lost it. I did not make that argument myself, but I thought that it was interesting.

I am now in the position of feeling slightly intimidated. A number of people within the Celtic family—certainly, a number of supporters—e-mailed the BBC to ask that I be sacked from my job because, during a cup final, I suggested that I was disappointed with the sectarian singing. That became a semantic debate about what “sectarian” means. The song went something like: “As a young man, I’m going to join the IRA (provisional wing)”. It offended me and I do not want to hear it at a football ground. I was shocked and surprised that Celtic Football Club and a great number of fans complained to the BBC, because I expect to hear them say that they do not want to hear that sort of song at their ground. It is a football ground; it should not be a political ground.

The Convener: Dr Waiton, I suspect that you have a different view.

Dr Stuart Waiton (University of Abertay Dundee): There is so much confusion in the debate. I would really like the previous two speakers to spell out what they are talking about. One of the issues that needs to be nailed down is what we mean by “sectarianism”.

Also, why is it just football? For me, the fact that a discussion of sectarianism is almost always to do with football suggests that, if we look at it sociologically, or in terms of a dynamic in society, it does not exist. If we were to talk about racism, and the only examples of racism that we could find were at a football ground, we would say that it was a strange social phenomenon. Of course, we do not just find racism at a football ground. We find Pakistanis being beaten up constantly and issues around immigration, deportation, police harassment and so on. If sexism existed only at football grounds or was connected only to football, we would ask why. Surely it is related to the home, discrimination in the workplace and so on.

However, whenever we talk about sectarianism, we talk about Celtic and Rangers; that is it. That is because sectarianism does not exist at any social or sociological level.

So we are talking about etiquette. Graham Spiers wants fans to be polite, because he is offended by words that are chanted by Rangers fans. Similarly, Pat Nevin seems to want the correct etiquette. Arguably, shouting an IRA song is a political thing—it is debatable whether it is sectarian at all. A form of west-end dinner-party etiquette is being demanded at football. That is genuinely what is happening. The bill is potentially a snob’s law. It targets football fans specifically, and not comedians or anybody else. It is aimed at rowdy football fans, which means rough working-class blokes and lads who shout and sing songs for 90 minutes and then go home to their Catholic wife, Protestant grandparents and so on.

It is farcical to think that the bill is anything to do with a genuine social problem of sectarianism, or the shame of Scotland. I genuinely believe that, if the media, politicians and police did not make such a big deal about the problem of sectarianism, we would not discuss it any more, because all we would be talking about is Celtic and Rangers football fans, who hate each other in a tribal rivalry that exists in football. We should recognise that that is what football is about. A lot of the time, the point about being a football fan is to be offensive. That is why the bill is so problematic, because that is what people do at football—they offend the opposition, the players and so on. We might not like that, but that is how football operates. As far as I can tell, for the vast majority of football fans, the tribal rivalry is part of the excitement and their love of football.

The Convener: Before I let Graham Spiers or Pat Nevin back in, Professor Walker wants to say something.

Professor Graham Walker (Queen’s University Belfast): I preface my remarks by saying that I am a Rangers fan, and have been since the days of Jim Baxter—it never got any better than that.

Many people in Scotland, particularly but by no means exclusively in the west of Scotland, have a need for an outlet for identities that seem to be fashioned to a great extent by the Irish problem. One main theme on which I would like more discussion is the way in which the Irish question interacts with Scotland, culturally and socially. There is a strong sense of tribal belonging, Rangers and Celtic are a football or sporting expression of that, but it goes deeper; it is a social subculture in Scotland. Many people have fears
that the proposed legislation is designed to curb expression of those identities.

We can talk about the offensiveness and crudity of certain songs. I endorse what Graham Spiers said about the fans’ perspective. They see the songs as battle hymns that add to the atmosphere—it is in the blood. Attempts to curb them, as well as running into all sorts of difficulties to do with civil liberties, create a defensive mentality and can lead to defiance on the part of football fans. More widely, we are getting into areas of challenging the validity of people’s identity and of the expression of that identity in Scotland. Again, I am talking about the impact of the Irish question. Many people in Scotland have Irish roots and connections.

**Graham Spiers:** I hope that Stuart Waiton has a habit, either in his work or socially, of representing people’s views more clearly than he has just done in trying to represent mine. He gave a complete misrepresentation of what I said and think. He might think that I want a polite atmosphere at football, or a kind of west-end luvvies party, but nothing could be further from the truth. That was a ludicrous misrepresentation of my world view on football.

I have probably been to 100 times more Scottish football games and old firm games than Stuart Waiton has and I have repeatedly said that football needs a ribald atmosphere, banter, songs, chanting and counter-chanting. I do not want at all a Mary Poppins atmosphere at football—that would be terrible and would kill the game. We can do without some of those ludicrous misrepresentations of what people are saying.

11:45

I take Graham Walker’s point. I have a lot of respect for what he has written and said on the subject. There is tribalism, political baggage and cultural traditions at football clubs, which we should not try to erase, delete or sanitise, because that would kill football. My point is that, in forging the bill, it would be good if we could make a concrete distinction in this country between disparaging or offensive chanting that might be acceptable and downright discrimination or prejudice. Religious discrimination is not banter or even disparaging: it is downright prejudice. Racism is not just disparaging or banter: it is downright prejudice. I want to maintain the ribald atmosphere of football, but we should kick out offensive behaviour at a committee meeting rather than at football.

**The Convener:** You have really stirred things up, Dr Walton, but I will let you back in later.

**Pat Nevin:** I do not know—

**Dr Waiton:** I apologise if I offended you both.

**The Convener:** No, no—let Mr Nevin speak.

**Pat Nevin:** I do not know when they moved Easterhouse, where I was brought up, to the west end. Actually, a lot of my attitudes were possibly born a wee bit nearer the west end, where I was educated, but they also come from moving out of Scotland and going to live in England. In 1983, in one of the earliest Chelsea games that I played in—I scored the winning goal—as one of our players came on the park he was booed by our own fans for being black. There was a racist problem within our club—there was a massive problem within the game of football in England.

I stood up afterwards and spoke not about the football but about how disgusted I was with the racist problem within the game. I was abused by various people who said, “You can’t do that. You’re only a footballer. You don’t have any right.” In fact, a similar thing was said to me before this meeting: that I do not have any right to be here. When I was at Chelsea I stood up and said—it is important that someone says this—“You need to start somewhere.” However, I was told—I also heard this at the previous meeting of this committee—“You’ll never change this. It’s always been the way.” That is what I was told about racism in England.

Well, we can now see the effect that the campaign around racism has had on the English game. It is unacceptable in the English game for racist chants to be made—it has been all but torn away. The campaign has not had the effect on society that I greatly hoped it would have, but it has certainly had nothing but a positive effect. That is the answer to the question why we should try to have an effect on sectarianism. Such campaigns have an effect on society. I heard it said that sectarianism does not exist in Scottish society, but I do not believe that and am stunned by that view.

**The Convener:** You have a right of reply, Dr Waiton.

**Dr Waiton:** I have clearly offended both Mr Spiers and Mr Nevin, although—

**The Convener:** It was in the context of offensive behaviour at a committee meeting rather than at football.

**Dr Waiton:** Exactly.

I suppose that I was really lumping together what I think is the essence of the bill rather than just what the two previous speakers said. Pat Nevin’s point about the racism example is
interesting because you could say that the expression of racism at football games was an expression of a wider problem of racism in society. In the 1980s, racism was a significant problem involving riots, police actions, political nationalism and so on. You can find similar examples of significant discrimination in housing, employment, police action and so on against Catholics rather than Protestants, you might have a point that there is an issue. However, I would still not agree that you should try to police the problem out of existence.

Roseanna Cunningham’s point in the newspaper regarding the recent poll was interesting. The poll said that 85 per cent of people think that sectarianism should be illegal or a criminal offence. Roseanna Cunningham jumps in on that and says “There you go. That just shows what people think.”

Of course, the fascinating point is that Roseanna Cunningham is saying is that we should have a thought crime—it should literally be illegal to be sectarian or think or say sectarian things. That is a serious problem, if that is the line that we are going down. The word “hate” is always attached to crime, but I think you can see that there is a profoundly intolerant underpinning to a lot of the arguments that are being presented, which is “I don’t like these ideas.” I do not like these ideas either; I have been an active anti-racist and have campaigned against prejudice my entire life. I have always been on the left of politics and so on. I do not like these ideas, but in this context you have to get a grip of what we are actually talking about. If you are saying that sectarianism is a serious problem in society, you have to prove it. Does banning things and using the law to stop people’s thoughts and words help us to have a democratic, tolerant society? I would argue that it does not; it does the opposite.

The Rangers guy who was in before expressed beautifully what is being created here. He said that he has become the chronically offended Rangers man who is going to trawl through websites and look at every possible offensive thing that other people are saying to try to show that he is offended by fans from Aberdeen or wherever. You could create an avalanche if the most thin-skinned, chronically offended individual is being encouraged to complain and run to the police. As far as I can see, that would just create incredible levels of tension and hatred among different fans, who would then entrench themselves in their football identity. That does not help anybody; it creates a more and more authoritarian and illiberal climate, as far as I can see.

Professor Walker: I would not like the committee to take from what I am saying that I do not want things to change in the way that Graham Spiers and Pat Nevin have suggested that they should change. All of us here would probably agree that we want things to change in that way. The issue is how we do that and whether the bill is the best way of doing it.

I think that you have to cut with the grain, if I may use that term. I will draw on my experience in Northern Ireland to try to illustrate my point. I have lived and worked in Northern Ireland for 20 years and I attend Northern Ireland international football matches. Not so long ago—in the 1990s—they had a real problem there. There was the well-documented case of Neil Lennon—again—turning out for Northern Ireland and being abused by a small minority, but nonetheless a significant number, of Northern Ireland fans. However, a matter of weeks ago, a Celtic player called Paddy McCourt was given rapturous acclaim when he played for Northern Ireland—his name was chanted from the stands and so on. That was from a crowd that, by and large, is drawn from the unionist community in Northern Ireland. A lot has happened in Northern Ireland in the intervening period in terms of education, community projects and getting the message out to people that you can hang on to your identity without being offensive with it. In Northern Ireland they have done that in a number of very interesting ways from which we can learn. It is another aspect of the Northern Ireland experience on which we should be drawing.

The Convener: Will you develop for us the interesting ways in which Northern Ireland has done that? You appear to be suggesting something other than legislation. Perhaps you are not—I do not want to put words in your mouth.

Professor Walker: They appointed someone who turned out to be very good at his job—a man called Michael Boyd—who went out to the supporters associations and into the most hard-line areas. He was not daunted by that or by the scale of his task. The team that he built up was probably quite modestly funded. There was also a message about self-policing, which we heard about earlier. The message went out—I think that this is a comparable case to that of the tartan army, which we heard about earlier—that the Northern Ireland fans could go and have a good time and leave a good impression and, at the same time, proclaim the identity that they say that they possess. They did that through constructing numerous songs, such as “We’re not Brazil, we’re Northern Ireland”, which took the place of other songs that were borrowed from over here. You have an example very close to home, with all sorts of parallels. We have to look at such examples.

The Convener: I will let some members ask questions now, but I will certainly come back to the witnesses if they would like to return to that theme.
Roderick Campbell: I will follow up on three themes that were developed in the earlier session. I would like to hear the panel’s views on the suggestion by the Rangers representative in the previous session that by legislating we are using a sledgehammer to crack a nut, and any comments on the context and clarity of the legislation, particularly from Graham Spiers and Pat Nevin.

Graham Spiers: There is probably some substance to that complaint. As much as I wish the bill well, it seems to me—although I am not an expert on the statute book—that there are already contingencies in place such as religious hate crime law, breach of the peace, and other laws that give the police powers such as banning orders to apprehend supporters. There is a lot of stuff currently on the statute book that could deal with many of these problems, so I am a bit mystified as to why we must have an extra load of law—if I can put it in that way—to deal with the issue.

I suppose I need to qualify that by saying that I have been aware this morning that a lot of people are complaining about the anomaly between crimes that are committed in a football stadium and crimes that are committed in the street or in a bus shelter. People have said that that is odd, but a part of me says that it is not. I have been going to these games for decades, and there can be a particular poison in a football stadium. The expression of that may be found out in the street, on the factory floor or wherever, but it nonetheless finds particularly acerbic expression in a football stadium, so a part of me wants some type of specific law to deal with that.

That answer is perhaps as clear as mud, but I hope that you get what I am trying to say.

Pat Nevin: Whether we choose to deal with such behaviour through legislation or by working with clubs and fans’ organisations, I would like to make it culturally unacceptable. Legislation may well be needed to do that, because I do not think that the problem has so far been addressed.

I feel that we—or at least a number of people—do not accept that there is a problem. I do not want to go back to the earlier discussion, but it was suggested that there is not a problem, and that if we let Celtic and Rangers get on with it they will be fine. However, UEFA does not agree with that and we have to find an answer.

If that means passing a version of the legislation, I believe—much like Graham Spiers—that this is your gig and you must take care of it yourselves, but I hope that good legislation can be passed that will not involve using a sledgehammer to crack a nut. I have read many things that tell me that if we do not get the legislation right, the wrong people will suffer viciously for it. I understand and accept the point, but I hope that this place can provide good legislation.

The Convener: I see that Dr Waiton wants to answer that specific question.

Dr Waiton: Graham Spiers’s point is interesting. He said before that he does not want to change the atmosphere, and he distinguished between someone being disparaging or offensive, and being downright discriminatory. Now he makes the point that he goes to games and there is a sense of poison. One can create a sense of poison by being offensive and disparaging, so there seems to be something else there, which is a sense of venomous hatred.

I therefore wonder whether that distinction is necessary. The bill does not discriminate: section 52 relates to any form of behaviour that can be deemed as offensive and could lead to a public order issue. It states that the bill will target behaviour that will

“incite public disorder related to football as well as any other behaviour likely to cause public disorder related to football which would be offensive to a reasonable person in Scotland.”

It relates not only to sectarian behaviour, but any form of behaviour.

The Convener: I think that you are talking about the policy memorandum, because there are not that many sections in the bill.

12:00

Dr Waiton: Yes. It relates to any form of behaviour that could be viewed as offensive and could lead to public disorder. For example, I go to Sunderland games. I am filled with poison if we are playing Manchester United, whom I hate. I do not hate them when I am not at Sunderland games, but I do when we are playing them. If we are playing Newcastle, I obviously detest Newcastle. I will swear, shout and point, and I will be red in the face. If I have my kids with me at a game, I will try to keep my swearing to a minimum, but I might explain to them that I may blurt out a swear word at some stage if, for example, we get beaten by Blackpool 2-0 at home even though we have 37 shots on target. That is what football is like. I do not then leave the stadium filled with poison and go to search out a Blackpool fan or a Newcastle fan. I live in North Shields; all my friends are Newcastle fans.

When you see poison in football grounds, you need to have a reality check. It is a pantomime. There are a few idiots who might take it further, but there is a problem if—as is going to happen—we are saying that thousands of people singing in an aggressive manner a song that includes the line
“up to our knees in Fenian blood” is a crime. To me, that is a profound problem and a misunderstanding of what is happening at a football ground. It is not criminal behaviour. If someone is standing in the street, shouting a similar thing in my face, we could argue that a criminal offence is taking place because it is a violent personal act. In a crowd of 50,000 people, shouting whatever you like at another crowd should not be a crime. The fact that potentially thousands of people will be criminalised seems a problem.

I am sorry to go on, but I set up a petition against the legislation and within a couple of weeks more than a thousand people had signed it. There seems to be a fundamental problem in the morality and legitimacy of law in this country if there is a significant minority—which I think that there is; arguably, there is more than that—who think it is wrong to put people in prison for up to five years for shouting an offensive or abusive song. Not only that, a lot of people do not think that it should be a crime. If that is true, which I think it is, it seems to be a fundamental problem for the legitimacy of the law.

Graham Spiers: By poison within football grounds, I was referring to sectarianism and bigotry. Stuart Waiton has used the phrase “thought crime” and said how dangerous that is and that we are going to punish people for thought crimes. No freedom is unfettered. I do not want to live in a country where we have the freedom to stand up, shout and be anti-Semitic, anti-Catholic or racist. If somebody deems that a thought crime and refers to how awful it is to be punished for a thought crime, I say that I think that some thoughts should be criminalised.

I must repeat this: nobody wants to sanitise football. I am steeped in football and I love the game. Disparaging chants are part of the colour, appeal and atmosphere of football, but if we are saying that the bill is ridiculous and that we should have thousands of people happily chanting “F the Pope”—a problem that Rangers FC has had—I say, “No thanks.” No freedom is unfettered, so let us have legislation to stop such behaviour.

The Convener: This is a difficult area, as we knew it would be, on the balance of freedoms and civic responsibilities. We will keep arguing on this theme, which is what the bill is really about. Before I take a question from Humza Yousaf, John Finnie will ask a supplementary question.

John Finnie: Thank you, convener, and thank you, Dr Waiton. I enjoyed your submission, and I think that it is important that we have a wide range of views. I dissent from many of yours but, nonetheless, I think that it is important to have a wide range.

In your submission, you state: “substantial sections of the population do not see” the legislation “as appropriate or valid.”

I do not see a reference to where that is drawn from, but over the page you cite a Glasgow City Council survey and draw conclusions from that.

In the last few days, we have received a submission from Action for Children Scotland, saying that it is one of the UK’s leading charities, working with 156,000 children on 420 projects. It points out:

“47% of those who participated in the survey confirmed that sectarianism was a big problem within their community, and 65% said” it was “increasing in Scotland” and so on. Is it genuinely your submission that there is no issue with sectarianism and that you genuinely believe that shouting and screaming at a football match will be made a serious criminal offence?

Dr Waiton: I am glad that you referred to the Action for Children Scotland submission, which I read with interest. The report that I cited from Glasgow is also interesting because, again, you need to question why sectarianism is seen as such a problem. In fact, I want to look at and carry out some research on that issue. In Glasgow, something like 75 per cent of people said that sectarianism was a problem and a similar percentage said that they thought that it was increasing. That is interesting. After all, Pat Nevin has already pointed out that up to 1989 Rangers would not have a Celtic player—

Pat Nevin: A Catholic player.

Dr Waiton: Sorry—a Catholic player. There was also a hugely significant conflict in Ireland. As someone who had sympathy for Irish freedom at the time, I can tell you that raising the issue in England, in particular, was like calling yourself a paedophile. If people think that sectarianism is actually increasing now, they must have very short memories.

As I said, the Action for Children Scotland submission is interesting. It does indeed say that 47 per cent believe that sectarianism is “a big problem”; however, when you look at the quotations from the survey that it carried out, you find that they are all related to football. One respondent asked:

“Why can’t you just be allowed to support your team?”

Another said:

“It’s only friendly banter, don’t take it so serious”.

To the question:
“Is sectarianism a big problem in your community?” someone replied,

“Only when the Old Firm are playing” and others made comments such as

“It’s terrible what’s happening with Neil Lennon”,

“It’s just a game, get on with it” and

“You need to look at the role alcohol plays, in the build up to matches”.

Just about every single comment about sectarianism relates to football. In fact, what they are talking about is football rivalry and kids being unpleasant towards each other about Celtic and Rangers. There is not a single comment on other forms of discrimination, on housing, on things their parents have faced, on pogroms and so on—this is a football issue that comes in the guise of sectarian language, clothes and so forth. Again and again, that seems to be the reality. People might not like that but it does not mean that sectarianism is genuinely a wider political and social problem in Scotland. I simply do not believe that it is.

The Convener: If, as you are suggesting, the issue is de minimis in the wider community, does that not support the introduction of a bill specifically connected with football stadia and travelling to and from football matches?

Dr Waiton: If, as I would argue, sectarianism is not a problem, that means that, with football, you must be looking at something else. You are, in effect, looking at football rivalry. If you want to criminalise fan culture, that is fine—just come out and say that. After all, the bill is targeting not just sectarianism but offensive behaviour that could create public disorder. If the police want to look at and target all aggressive, obscene and unpleasant football behaviour, they would all, as far as I can tell, fit into that.

Football is a pantomime. These people are not criminals; the vast majority of them are not even sectarian. This bill is criminalising the behaviour of ordinary people who are not criminals.

The Convener: Could it not be argued that this is the last port for sectarianism, that it has been dealt with in wider society and that this is where it is now, as it were, corralled? Is that not why the bill has been introduced?

Dr Waiton: That could be an argument, and it is the argument that you would have to pursue. If there is very little evidence of sectarianism anywhere else, all that it suggests is that that is football. At football, supporters shout what will offend the opposition. If you are Manchester United supporters, you wave money at Liverpool supporters because they are poor; Liverpool supporters might sing a Munich air disaster song. That is what you do. Fans offend each other—that is the point of it. If a fan can say, “You hun” and know that it offends, they will blurt that out. The nice middle-class people there might have been educated and be aware that they are not meant to use such words, but a lot of working-class lads will blurt out those words or sing those songs in the passion of a football game. They could then be arrested and put in prison for a substantial amount of time, but they are not criminals.

Pat Nevin: I am slightly surprised by that argument about lads not knowing what they are saying and it being just a bit of banter. Substitute the words “black” and “racism” and you would not say any of those things. Your argument sounded hugely similar to some of the arguments that I heard in the 1980s that, although someone was shouting the n-word or throwing bananas, they were not really a racist. I am concerned about that. I understand your argument—although Jeanette Findlay would disagree strongly with your suggestion that there has been no discrimination—but it worries me and, from living in the community that I was brought up in, I am not sure that it is true.

Graham Spiers: Are witnesses allowed to ask fellow witnesses questions?

The Convener: Yes, but you are not allowed to ask us MSPs questions—we are relieved of that.

Graham Spiers: Okay. I have got the rules. Stuart Waiton depicts an image of banter and fans slagging each other off. Within that lovely, colourful, bantering atmosphere, does he think that it is okay to shout anti-Semitic, racist or anti-Catholic slogans? Does he think that is okay or not okay?

Dr Waiton: I do not think that it is okay, but I do not think that it should be a crime. I would like to develop a culture in which people challenge such things themselves and they become unacceptable—which is what has happened with racism. Racism has become a substantially less-politicised issue than it has been historically.

I throw the question back to you. You said that some thoughts should be criminalised. I hope that you realise the profoundly authoritarian and anti-democratic nature of that argument. It says that, if you are a racist or a sectarian, you should be arrested because we do not like your thoughts. The whole point of tolerance historically—in the philosophy of John Locke and John Stuart Mill—is that we tolerate ideas that we dislike so that we can challenge them. That is what liberalism was built on. We challenge people’s ideas if we do not like them; we do not make them illegal. We do not make religions or political views illegal; we
challenge them. It is profoundly authoritarian to argue that thoughts should be criminalised.

**Graham Spiers:** Every instinct that I have is liberal, and the argument against the bill is that it is illiberal. However, my liberalism does not go so far as to say that I want to live in a country where we are free randomly to shout prejudice, bigotry, racism, anti-Semitism and anti-Catholicism. I am not so liberal that I want that. I do not think that freedom should be that unfettered.

**Dr Waiton:** It is called living in a free society and a democracy.

**Professor Walker:** There is a sense of righteousness about what Graham Spiers is saying that is at odds with the social reality that we have to face up to. At the risk of sounding repetitive, I refer to the fact that Scotland did not go the same way as Northern Ireland. Maybe one reason for that was the fact that politics in Scotland was, to a great extent, conducted along social class lines. The debates tended to break down around class—around the Conservatives, Labour and so on.

12:15

When the Labour Party was the dominant party—which it was until its spectacular meltdown—it seemed to contain the issue of sectarianism. It did that in two ways. On one hand, it made space for it—which, by Graham Spiers’s lights, might sound dodgy. On the other hand, it tried to combat it by offering the alternative of the politics of social class and class interest. It did that with a great degree of success. The fact that it did not expunge the sectarianism that Graham Spiers is complaining about should not detract from its achievement or prevent us from saying that, in many ways, that is what made Scotland different from Northern Ireland.

I do not think that it is helpful to go on a righteous crusade. The reality is that people value their orange and green identities and we have to find ways of accommodating them. That is the big challenge in the new political context, with the Scottish National Party as the dominant party. It is up to the SNP to show that this Scotland is one in which there are many cultures and identities, and that those cultures and identities include those that are involved in the age-old problem that we are discussing, as well as newer immigrant and ethnic groups.

**The Convener:** This is lovely. It is like a Radio 4 debate. We are expanding it out into a wonderful discussion. I thank everyone on the panel for that. The discussion is extremely interesting.

**Graeme Pearson:** We are entering into fascinating areas here, particularly with regard to the Northern Ireland experience. As I understand it, Northern Ireland has not gone down the road of introducing legislation of the character of the legislation that we are discussing. That is interesting in itself. Listening to what Graham Spiers and Pat Nevin have had to say in that regard has raised some challenging issues.

I am a Glasgow man. I was brought up in Glasgow, living in an area in which some of the sheds and factories were occupied exclusively by Catholics and others were occupied exclusively by Protestants. I have also dealt with crime in the east end, where people were being stabbed and occasionally murdered because of the side of the turf that they came from. I am very much in the same court as Graham Spiers and Pat Nevin when they say that this cannot be tolerated. My problem concerns whether legislation is the way in which we can bring about social change and a liberal approach without despoiling the game that we love.

Earlier, we heard that UEFA had taken strong action but that the Scottish football authorities could not do so. Is it that they cannot or that they will not? We talk about football as if it is some sort of romance, but it is a multi-million pound business and, if it was a nightclub, we would shut it down. If you were given a magic wand that would enable you to dictate the future, would you introduce legislation or would you want the football authorities to take responsibility for what happens?

**The Convener:** Or both?

**Graeme Pearson:** Or both.

**Graham Spiers:** There were various elements in your question. First, what could the Scottish football authorities do? UEFA has had to step into Scotland’s patch and sort out Scotland’s problem.

**Graeme Pearson:** Once in a blue moon.

**Graham Spiers:** The Scottish football authorities have been cowardly about this issue. They have been scared to act. Nothing would make supporters stop being bigoted in the arena more than the thought that their clubs might be docked points. You would have to be the most dim person not to stop and think, “Hang on a minute. I love my team. Why should I hurt them by causing them to be docked points?” I think that that would be a deterrent to fans who love going to the games. Banning orders would also be a great deterrent. If you say to a football fan who wants to shout about the Irish Republican Army, the Pope or whatever, “You can’t come back here for three years”, that will work as an extremely strong deterrent. As I understand it, that provision is currently on the statute books.

Professor Walker criticised me. I will kindly compliment him in return. I take on board what he
said. The Northern Ireland situation has been interesting. I am not an expert on it but I have spoken to people who, like Graham Walker, have said that the progress that has been made in the past five, six or 10 years on the deep-seated problem of prejudice among followers of football in Northern Ireland has been almost miraculous. That might be something that we should consider more closely. Doing so might mean that you guys can escape the sledgehammer-to-crack-a-nut syndrome that you are being accused of.

The Convener: The committee is not being accused of that; it is the Government.

Graham Spiers: Yes. Docking points is one idea. Imagine if Rangers or Celtic were threatened with having points deducted. I cannot be absolutely sure about this, but I think that that has been done in at least one other league in Europe. That would certainly be a strong deterrent.

Pat Nevin: You have to consider some way of affecting the fans. It comes down to the clubs to some degree. They need to make statements on websites and programmes and in the media. They should not deflect the problem and say, “They’re worse than us” or, “Oh, look at that lot over there.” If they have a problem, they should accept that they have a problem, even if it is a small one.

I do not want to sound holier than thou. When I was chief executive at Motherwell, we had a problem there. Someone asked earlier how you can arrest all those people. I work in the television industry now and, trust me, the cameras can pick up problems very quickly. It is not just TV cameras—the closed-circuit television cameras that the police use can do it as well. We had a problem: much like the Hearts fans that were mentioned earlier, some supporters placed themselves down beside the away supporters. We targeted them—we got some spotters in there and we got rid of them. We banned them for life and ensured that they did not come back.

The clubs have probably done that, but on top of that you have to make it clear that you will not tolerate racism, sectarianism or sexism in your club. You have to put it on a mission statement in your programmes—not somewhere in the back—and make it clear that this is something that you will fight against. It would help if it was clear that the clubs believed that and wanted to push it through. That will have a cultural effect on the fans. However, if the fans hear excuses, wriggling or spinning, others will join them and have that argument with them.

I know that, as usual, I will get abuse on the websites for saying that, but I think that that approach would help the clubs. You will find that a better family atmosphere develops and that people are not driven away, as I was in the past. We will have a healthier environment in which our sport can be played. Remember, chaps, that it is a sport.

Professor Walker: I want to make a point about websites, which have been mentioned. We have concentrated a lot on what are, I suppose, obvious expressions of offensiveness or what people think are offensive. We have talked about songs and chants and so on in football grounds. There is no evidence to suggest that the songs and chants that we are all familiar with, and that maybe we all deplore, are the cause of the kind of deplorable events that happened last season. I am talking about really serious matters such as items sent in the post and so on. Again, it is only an opinion, but I think that the way in which web culture has developed has a lot to do with that.

I would caution against going for the obvious, which is to deduce that people will be more influenced by a blatantly offensive posting. In fact, I would say that the postings on blogs and websites that are perhaps more dangerous are the ones that are not using intemperate language—the ones that are, on the face of it, quite reasonably argued but have concluded, “Our group is being victimised,” “They are doing it to us,” or, “Scotland does not like us.” In recent years, such phrases have crept into the vocabulary of the debate among Scottish football supporters. I do not think that it is any coincidence that the rise of the internet happened at the same time. Over the past few years, I have detected a change in the language and the concepts that are used in debates between football fans. Claims of victimhood are now sprinkled throughout the debate, which I think is leading to a dangerous situation in which people believe that they are being persecuted.

The Convener: Can I take it from your comments that the second part of the bill might have merit?

Professor Walker: I said in my written submission that I thought that the framers of the bill were on stronger ground with the second part of the bill, because it chimes with what I have just explained is my impression. However, that is not to say that it will be a straightforward case of picking out people who have put up offensive postings. In fact, I think that postings that are argued in quite a complex way, without using intemperate language, could be more to blame.

Dr Waiton: It is not just this law. The problem is that this law builds on existing legislation and just seems to push the boat even further. To all intents and purposes, there seems to be a shift towards arguing that if something offends, it should be illegal. That has profound implications for the basic harm principle, which is that, unless somebody physically puts you at threat or attacks you, there
should be a free society in which people are able to say what they think. We are now shifting towards words becoming illegal, so if you say something online that can be deemed to be offensive, you can be arrested.

We can therefore get the strange situation that arose last week when a 12-year old and a 14-year-old girl were investigated by the police for putting a racist comment on Facebook. I do not want a society that is racist or sectarian, but that is a fundamental shift relating to speech, words and language.

I can say that I am offended. As our Rangers friend tells us, once you start down that line, you will have an avalanche of offended people using the criminal justice system and the courts, and a potentially massive amount of time, energy and police resources will be used up on all sorts of people who are offended by all sorts of things. That seems to be a problem and it does not seem to resolve wider problems in society, to the extent that they do exist. It also creates an extremely illiberal framework, in which people are frightened about what words they can and cannot use in their everyday life. That does not seem very helpful in creating a vibrant, liberal or tolerant culture.

**The Convener:** I am mindful of time. I certainly do not want to truncate the debate and some members are waiting to ask questions, so I ask Colin Keir and James Kelly to ask their questions and those will be answered. Humza Yousaf and John Finnie also have questions. I will take members in pairs, if that is okay, so that we can try to get through our questions within our timetable—otherwise we will go way beyond it and we have other business today.

**Colin Keir:** The questions that I was going to ask have been answered.

**James Kelly:** I will touch on an issue that has not yet been raised: the role of the media. To an extent, the journey that we are on today started on 2 March at the cup game at Parkhead. It was the pictures of Ally McCoist and Neil Lennon squaring up to each other being run and rerun on television that caused a lot of public outrage and drove us down the road to legislation. I know that there were other more serious matters after that, but that was the start of it. To an extent, that shows the power of the media. What role can the media play in the debate to influence a positive change in attitudes and in culture?

12:30

**Graham Spiers:** The media can be very influential. The old cliché about the power of the pen contains a lot of truth. Because I have written about this problem so much during the past 10 years, I have been accused of misusing my power, or writing in an inflammatory way about the bigotry problem. Other people have taken a contrary view.

For example, I have written a lot about Rangers, which was my team when I was a kid, because it has had a significant problem. In my experience of Rangers trying to fix the problem, the media’s role was influential because, in a way, Rangers were prodded into action by humiliation in the media. That is what happened. These songs were being sung, and I was aware of them for decades, but when parts of the media began to highlight the issue at Rangers, it became embarrassing for the club. I know for a fact that UEFA was alerted to what it regarded as the Rangers problem by what was written in the Scottish papers—to my great surprise, that was explained to me by someone at UEFA five years ago.

The media can have an influence, and if people say that I or Pat Nevin or anyone else can misuse that power, they might, at times, have a point. I plead guilty to sometimes lampooning bigots in print in my column. People would say to me, “Graham, you shouldn’t really do that.” Maybe they were right, but I got so fed up with making no progress. Someone said to me that people do not like being ridiculed or lampooned, and I was guilty of that. The media can be powerful and I dare say that we have to exercise that power carefully. Maybe I have not always done that in my own field.

**Pat Nevin:** James Kelly suggested that, to use footballing parlance, it seemed to kick off after the little McCoist-Lennon kerfuffle. Some of us feel that it was happening before that. Two months before that incident, I went to Radio 5 Live, for which I make documentaries, to say that I felt something different was happening up here, that I felt a change, and that things were getting uglier. It was very hard to explain, but I wanted to make a documentary to look into the causes of that. We never got it together in time before the current situation kicked off, but the station came to me and said, “That’s amazing.” I said that people on the ground felt the change coming. All this is therefore not just a knee-jerk reaction to what happened on that night. I felt it coming before then and, in my defence, I took it to Radio 5 Live and said that it should look into the issue from both sides to see the reasons for it.

There is a wide field in the media and we are all individuals within it. We do not have one set voice and can only say what we believe. Although I feel slightly embarrassed by the word, I am seen as a pundit. A pundit is someone who gives their opinion on something and it can be no more than that. I hope that what I have said can be seen for what it is—it is about making our society better.

**Dr Waiton:** I am going to make friends and influence people again, as usual.
The Convener: I could see it coming; you were rubbing your hands together. Your body language was a giveaway.

Graham Spiers: He is loving this.

Dr Waiton: Which offence should I take?

We are talking about prejudice and all the rest of it, but I genuinely think that the most profound prejudice and hatred that I have seen expressed in this whole issue have come from the media and politicians and been directed towards ordinary football fans. What Pat Nevin is describing almost has the sense of a pogrom. If you read The Guardian or know any Guardian readers, you will be well aware—or perhaps not, if you are a Guardian reader—that there is a kind of moral—

The Convener: You are not trying to offend the committee as well, are you? Well, why not? Go for it.

Dr Waiton: Yes, The Guardian is a good paper; what can I say?

I often ask my students, “If you are at a dinner party, what is something that you must not be today?” and the answer that they usually cotton on to is racism. You should not be a racist—that is an absolute. If you went outside and shouted, “Hands up everyone who defends sectarianism!” probably no hands would go up. It is a great thing to stand on—it gives a great sense of moral righteousness and superiority, which I think the press are drenched in. The idea that there is a kind of pogrom out there—

Graham Spiers: We need names—name names.

Dr Waiton: Pat Nevin just talked about this.

The Convener: Are you glad that you are in the middle, Professor Walker? You are like a referee.

Graham Spiers: Professor Walker agrees with Dr Waiton.

Dr Waiton: Pat Nevin talked about the sense of impending doom that he feels. As far as I can see, that is probably because he reads The Guardian too earnestly and has lost any genuine sense of what people are like at Celtic and Rangers games. As far as I am aware, violence inside and outside the ground has decreased rather than increased, so let us get a handle on the issue. Ally McCoist and Lennon had a bust-up—big deal. Andy Goram made the point that there was a fight at a darts match, something happened at a rugby match and such-and-such happened at another match but nobody cared, yet when those two guys throw a few handbags at each other, it is seen as a big deal.

Then, of course, the BBC had to apologise. That is where the danger lies. Because being against sectarianism is such an accepted absolute, we end up with problematic and prejudiced reporting. The BBC had to apologise to Ally McCoist because of its depiction of him laughing. He was asked a question about violence at old firm games and the pictures were switched so that he was shown laughing when the question was asked. He challenged the BBC about it and the BBC had to apologise for the editing of that piece. That is the problem. It has become the case that there is such a profound prejudice and such an absolute moral certainty among the cultural elite that almost anything seems to go. If you want to know what the problem is with the media, that is the problem.

Finally—I talk far too much, for which I apologise—I will give an example of that. The verdict in the Hearts case was really interesting. I wanted to know why the guy in question got off with assault. To start with, I could not find out from anything that I read whether he had been charged with assault, aside from the sectarian aspect. I thought that the jury had not found him guilty because they were not convinced that he was sectarian. Ironically, as usually happens in such cases, it turns out that the guy’s father was a Catholic and his child was christened a Catholic. That shows the nonsense of what that means in that context.

I still do not know why the jury said no to assault because, as far as I am aware, not a single media outlet has explained what happened in court or what the arguments for and against conviction were. They have all just been shocked and outraged at the jury. Why did the jury reach its decision? The presumption is that the jury must all be bigots of some description and that there is something wrong in Scottish society. I have no idea why the case played out in the way that it did because, as far as I am aware, no one has reported on the ins and outs of the arguments that were made about assault. That shows the problem with the media.

The Convener: I think that that is simply because jury deliberations are and always have been—and, I suspect, always ought to be—private.

Dr Waiton: I am not talking about the deliberation. I am talking about the arguments in court. There must have been many arguments by both sides as to whether it was assault.

The Convener: I presume that the case was heard in open court and that if you had sat there, you would have heard the arguments.

Dr Waiton: I would have, but I would have hoped that someone would report on those arguments, and I have not seen any such reporting.
The Convener: Perhaps that will happen now and we will get the details. There were reports about the case, of course, but I do not want to get into that because we are into extra time. I do not want to use too many football metaphors, but I will blow the whistle shortly.

I want to get to Humza Yousaf—I am sorry; Professor Walker would like to comment on the role of the media, which is an important issue.

Professor Walker: It is just a quick point. I want to come back to what Graham Spiers said, because there is a danger of saying that all the people who indulge in sectarian behaviour at football matches are numskulls. That is not the case. In my experience, they are highly intelligent people who—I support Stuart Waiton here—let themselves go at football matches.

The Convener: Perhaps they read The Guardian.

Professor Walker: Perhaps they do.

Graham Spiers has a reputation for going for Rangers fans. He has explained why he has done that, and that is fair enough. However, what he neglects to take into account is that those fans have a right to come back at him and say that the issue is wider than some sectarian ditty that he is constantly going on about. It connects, for example, with the issue of segregated schools—I am sorry, but I have to raise it—their impact on wider Scottish society and the attitude that they form. The issue is huge and I think that we are spending too much time on a few songs sung by fans in a particular context.

The Convener: I must move to the final two questions. I apologise to members but we have a lot more business to conclude. What is your question about, Humza?

Humza Yousaf: I suppose I will just ask it.

The Convener: Oh! That is a bit impertinent. It seems that, if you have both sets of fans going on you and saying that you were on the other side, it might indicate that you are somewhere right in the middle.

I am interested in the incitement side of things. Dr Waiton—and indeed Pat Nevin—suggested that there are either thoughts or actions. That seems to me a very linear, simple and base way of looking at the world and does not take into account such a thing as incitement. Although he did not quite get there, Pat Nevin—or perhaps it was Graham Spiers—seemed to be drawing an analogy with German fans shouting anti-Semitic remarks or saying that they were knee deep in Jewish blood and suggesting that that might be seen as an offence but not as a crime. However, I really struggle to see how that would not be seen as incitement and I would be interested to hear your thoughts on the matter. After all, the bill refers to incitement rather than to offence or just action.

I wonder whether the witnesses can expand on a point that was made by Professor Walker. None of us is suggesting that this bill is, by any stretch of the imagination, a magic bullet but in what respect are politicians not being brave enough in tackling the wider issue? Are there certain institutions on which we should be, but are not, focusing? In the debate that we had on the bill just before the summer recess, my colleague John Lamont made a very brave speech that tried to touch on some of those issues.

Dr Waiton: The incitement issue is very interesting. On the website for the anti-sectarian authoritarianism petition, people can write things—I liked in particular the comment from Ryan Muldoon. You need to follow the logic of the argument, but he said:

"Stupid law. Theoretically, the perpetrator could stab the person they're directing the chant at and get a lighter sentence."

He means that if someone in a football ground were to stab a person who had been chanting "You Fenian bastard" over and over in an aggressive manner, the person doing the stabbing could end up with a year in prison while the person doing the chanting could, arguably, get five years in prison. That is remarkable. By having been incited to stab the other person, the first person they're directing the chant at and get a lighter sentence.

Professor Walker: It is about some of the wider aspects that Professor Walker raised, but it is more to do with the incitement element in the bill.

The Convener: Is your question about the same thing, John?

John Finnie: It is about one of the specific provisions in the bill.

The Convener: Okay. I did not really mean that you were being impertinent, Humza. I am tired—it has been a long morning. You are a lovely person. On you go.

Humza Yousaf: Thank you very much.
bottle over his head. That, to me, seems to be a profound problem.

An important distinction has always been made between words and actions. You should be free to argue, shout and do various things—

**Humza Yousaf:** So, in your opinion, incitement does not exist in society.

**Dr Waiton:** It certainly does. If I were to run up to you and start swearing in your face and you were to hit me, I would expect you not to be charged. However, if you are standing 100yd away, shouting “Sunderland are crap” or something much more offensive, and I go and smash your face in, it should be me, not you, who gets done.

12:45

**Humza Yousaf:** So where is the boundary between those who should be charged with incitement and those who should not?

**Dr Waiton:** It is a personal, aggressive offence. If I am shouting in your face, that is a borderline act of violence. The question is whether there is violent intent in the action or whether you could understand that there is violent intent. If I am swearing in your face and being racist and you defend yourself, it would be seen as self-defence because there is a potential for violence. If I am 100yd away, shouting “Your team is a joke”—

**Humza Yousaf:** So it is a question of distance and intent.

**Dr Waiton:** There is no evidence that I am going to smash your face in if I am shouting at a football ground. Otherwise, let us just arrest all fans because they shout things that are offensive and because you think that that might be incitement—which is basically what the bill is leading to.

**Humza Yousaf:** I think that the bill—

**Dr Waiton:** That is a fundamental difference—

**Humza Yousaf:** I think that the bill touches—

**Dr Waiton:** —which you know yourself. You have been to football games. Do you think that, because someone is shouting at you and taking the piss, they will come and smash your face in?

**Humza Yousaf:** I think that the bill—

**Dr Waiton:** No, you do not, because you are not frightened.

**The Convener:** Do not talk over each other. I want you to debate, but not to speak over each other.

**Humza Yousaf:** The incitement provision in the bill purposely touches on those areas of a person’s characteristics that they would feel threatened about—colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity or disability, as noted in section 1(4). I think that you would agree that if someone was shouting at you about those types of things, you would—

**Dr Waiton:** You would take offence at that, but that does not mean incitement to violence.

**Humza Yousaf:** Not just take offence at but, regardless of the distance between you, you would see it as a deep personal attack rather than just a shout that your football team is crap.

**Dr Waiton:** That is right: you would find that extremely offensive verbally, but that is not incitement.

**Humza Yousaf:** So, if the shouts were on a personal characteristic, such as those that are categorised in the bill, that would not be seen as incitement.

**Dr Waiton:** If someone was shouting something extremely offensive that you found personally offensive and you went over, found the person and glassed them, I would put you in prison and not the person who was shouting a stupid song.

**Humza Yousaf:** That was not the question I was asking.

**The Convener:** There is also the issue of incitement in degrees. Incitement can be general, but people may also specifically incite by what they are doing, well aware that they are persuading or driving somebody towards taking such actions.

**Dr Waiton:** That is possible, but you are infantilising fans: you are making fans become childlike and not responsible for their own actions.

**The Convener:** No, I am not doing that. I am saying that fans are not a collective. There can be people in the match—individuals or certain groups—who are inciting with the deliberate purpose to have an action taken, and there can be others who, by what they are singing for example, may be inciting in a general way but are not aware of it. There can be purpose behind certain actions: deliberate incitement. In those circumstances, like Humza I would make a distinction. You said that it would be just the person who wields the knife or hits the blow who commits an offence, but I think that it is also the person who set about making sure that those actions occurred.

The situation is rather like somebody who makes the paper pellets at the back of the classroom and hands them to someone else to use them, as I found out to my regret. I threw the pellets at the teacher, but the other person knew perfectly well what they were doing—there was
incitement there. I agree with Humza that there are differences and degrees.

Dr Waiton: If that is what is being argued in the bill—I think that it partly is—there is a problem. I can guarantee that, if I go to a football match, there is nothing that anybody from the opposition can shout at me that will make me be violent against them. If you want to give me an excuse and say that a shout can be an incitement to violence, that seems a problem. It undermines the idea of our being responsible not to be violent. Football fans are offensive as hell against each other, but people deal with that when they are at a football game. They just get on with it and shout back. It is part of the banter, rivalry and hatred, but people should not be violent and we should not encourage a sense that incitement is almost acceptable or understandable in that context.

The Convener: Before we move on, I want to ask Mr Spiers and Mr Nevin whether small groups of people go to matches deliberately to make things happen by the way that they sing songs and to cause things to happen to opposition supporters by incitement. Is that not some people’s purpose for being there? They are not there for the football.

Graham Spiers: Of course we cannot generalise, but you are absolutely correct that groups of football fans, of all teams, go to matches and hope that it all kicks off because that is exciting. I have real trouble accepting Stuart Waiton’s lampooning of the situation as involving luvvies, or as Guardian-reading intelligentsia basically kicking in the good old working-class football fan, which seems to be the position that Stuart takes. It is nothing like that. I share many things with Stuart. I love football. I get the distinct impression that he is proud of his working-class roots. My family had working-class roots and we were steeped in football. For me, the issue is not a class thing. It is not about sanitising the game or making it a Mary Poppins environment. The banter is critical to football. I just think that racism and religious prejudice should be erased. However, the convener is of course right that some fans go to matches hoping that it all kicks off because that will be really exciting.

The Convener: What do you mean by “it all kicks off”?

Graham Spiers: I mean verbal aggro and maybe some physical aggro.

Pat Nevin: There is a slight dichotomy. I think that we have been misrepresented. Recently, I had to cover four games in the space of a week: Barcelona v Real Madrid, Real Madrid v Barcelona, Liverpool v Manchester United and Celtic v Rangers. I enjoyed the Celtic and Rangers game the best. It was an astonishing and wonderful atmosphere, apart from a small part. To say that we are Guardian readers who want football cleaned up is a complete and total misrepresentation. I do not want that to happen. My background is exactly the opposite of that.

The Convener: We should defend Guardian readers, as they are coming in for a hard time.

Dr Waiton: I read The Guardian.

Professor Walker: I want to return to the point about what politicians can do in the debate. There has been an unfortunate tendency to push the debate into tramlines—if I can risk that metaphor here in Edinburgh. [Laughter.] As a Glaswegian, I am allowed that.

The Convener: No, you are not.

Graeme Pearson: Yes, you are.

The Convener: This is not a pantomime.

Professor Walker: My serious point is that there is an important integrated schooling lobby in Northern Ireland. It has existed now for 20 or 30 years and has been built up during the troubles in Northern Ireland. More parents than ever before from Catholic and Protestant communities are sending their children to integrated schools. Because those schools respect religious and cultural difference and make space for it, there is an ethos that appeals across the board.

It is unfortunate that people reacted in the way that they did when a committee member brought that issue into the debate some weeks ago, because it is an important subject. We are not necessarily saying that a certain group of schools are the problem; we are saying that, in Northern Ireland, there might be an alternative that can run alongside the other sectors and that it could do a bit of good by contributing to a better atmosphere in society. There is that wider problem. Politicians have a duty to explore all aspects of the debate.

The Convener: Yes, but our agenda for today is to consider a specific bill, although I appreciate that we have to look at the context and the workability.

John Finnie has the final question.

John Finnie: I will pass, convener, because my question was within the realms of Humza Yousaf’s question on incitement.

The Convener: The debate has been most intriguing, and the interaction between the witnesses has been stimulating, although I am not any clearer on what I think about the bill at the end of it. However, that is good, because you have introduced a load of subtleties and difficulties about freedom of expression and what constitutes offensive behaviour and incitement. The area is complex. I thank all the witnesses for their interesting evidence. I hope that Radio 4
broadcasts the debate, because it was extremely interesting.

I want to move on quickly, because we are running up against the buffers.

Agenda item 3 is a standard item to enable me, as convener, to authorise the payment of expenses that are incurred by witnesses who give evidence on the bill. Agreeing that now avoids individual claims having to be processed on an ad hoc basis. Do members agree to allow me to authorise expenses for witnesses?

Members indicated agreement.
Scottish Parliament
Justice Committee
Tuesday 13 September 2011

[The Convener opened the meeting at 10:01]

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

The Convener (Christine Grahame): Good morning and welcome to the sixth meeting of the Justice Committee in this session. I ask everyone to switch off mobile phones and other electronic devices—do not even have them on silent, because that still interferes with the broadcasting system. No apologies for absence have been received.

Item 1 is to continue our evidence taking on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Our overall aim is to report to Parliament next month. We will hear from three panels today. I told the committee before the meeting, in a schoolmarmly manner, that I would appreciate brief questions. I do not expect from footballing people.

I welcome our first panel of witnesses: Chief Superintendent David O’Connor, president of the Association of Scottish Police SUPERINTENDENTS; temporary Superintendent David Marshall, from protective services at British Transport Police; and Andy Niven, national teams administration, and Darryl Broadfoot, head of communications, from the Scottish Football Association. Thank you very much for coming along. I particularly thank the SFA, because you were invited at pretty short notice, just say that you agree—you do not have to develop your answer further. We have a lot to get through today.

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We will go straight to questions from members.

John Finnie (Highlands and Islands) (SNP): I have a question for Mr Broadfoot. Does the intervention of the Union of European Football Associations regarding sectarianism in Scotland not indicate a failure of Scotland’s governing football authorities to address the problem?

The Convener: Your microphone will come on automatically, Mr Broadfoot. If anyone else wants to come in, just indicate that to me and I will call you.

Darryl Broadfoot (Scottish Football Association): First, you have to bear in mind that, in order for a club to participate in European competitions, it has to agree to a set of principles outlined by UEFA, which is European football’s governing body. The current arrangement for Scottish football decrees that the SFA does not have jurisdiction over crowd misbehaviour and unacceptable conduct within football. If you are asking us whether that requires to be revisited, I would say that we are fully supportive of all that you are trying to do with the bill and that we must consider what is right for all parties. We need to work together.

The SFA has made progress in the past six months. We have adopted a new judicial panel and we have progressed from being an organisation that perhaps a year ago was not deemed to have been respected or trusted to lead. We have made huge strides in the past year and I think that the key for us to bringing back some jurisdiction is to speak to all parties and make sure that we work towards a new set of accepted and acceptable behaviours within Scottish football, notwithstanding the legislation that we are trying to push through.

John Finnie: Can I clarify that your position is that the SFA has no locus in crowd behavioural issues at Scottish football games?

Darryl Broadfoot: In our articles of association, which have been in place for 138 years, we have articles that permit a range of behaviours to be punishable. As it stands, we have reclaimed jurisdiction from the Scottish Football League and we are in open dialogue with all other partners, including the Scottish Premier League, to revisit jurisdiction, because I think that we all agree that more can be done by the Scottish football authorities, the clubs and the supporters in terms of self-policing. That debate is on-going and all parties have been receptive to it.

John Finnie: Do you have reclaimed control or jurisdiction over crowd behaviour?

Darryl Broadfoot: Yes—for Scottish Football League matters, which basically means issues from leagues 1, 2 and 3. There is an on-going debate with the Scottish Premier League with regard to reclaiming jurisdiction. As they stand, articles 28.1 to 28.11 decree a list of sanctions that can be imposed for unacceptable behaviour in football grounds, ranging from warnings, fines, annulments and replays to closures of stadia. However, there is a caveat that states that that list does not apply to games under the jurisdiction of the Scottish Premier League.

The Convener: For clarification, we invited SPL representatives, and it is not really their fault that they have not been able to attend—it was done at
short notice. Frankly, because we are running out of time to call the SPL, I think that it would be a good idea simply to send it questions and ask for a response in writing before we write a report, because what Mr Broadfoot said about the jurisdictional limits is interesting.

Darryl Broadfoot: It is important to stress that we all want to improve matters and to see a redefining of the acceptable parameters of behaviour within stadia and Scottish football, notwithstanding the bill that will be passed. Rather than going off on an independent and isolated pursuit of a new set of agreements, we must work together on that. We have managed to make a huge amount of progress as an organisation by doing that within our council and with our fans in the past six months. The next step will be to engage with the SPL and other stakeholders to find a better way of dealing with such issues in Scottish football.

John Finnie: Can I clarify, then, whether you have authority in respect of the Scottish cup and the Scottish league cup?

Darryl Broadfoot: Correct.

John Finnie: Is it your view that there have been no issues of sectarianism among crowds at any such games that you felt it would be appropriate to intervene on?

Darryl Broadfoot: Well, you have first to bear in mind the legislation. We have to admit that more can be done. We have gone through the process of a fundamental review of all that the SFA does and stands for. Until six months ago, we had never had a strategic plan nor a set of visions, values or goals. We have to discuss matters with the SPL, our stakeholders and our council and come up with a better way of dealing with misbehaviour within football stadia.

John Finnie: There are league cup matches in a couple of weeks’ time. Will the SFA take strong action if any club’s supporters display sectarian behaviour?

Darryl Broadfoot: Well, it is hypothetical at the moment. We are here to give full support to the bill and to outline the current reality, which is that we are working towards a better set of proposals to ensure that whatever happens within the confines of a football stadium can be acted on more stringently. As you may be aware, a delegate system is in operation at SPL level and, to be blunt, being an SPL delegate is tantamount to being a referee in terms of the hassle, but with a fraction of the wages. We have to put in place an infrastructure and get agreement from all parties, including the clubs and the SFA council, to ensure that we have a better system in place.

The Convener: Does anybody else want to comment? We are directing questions specifically at the SFA, so I doubt whether anyone else wants to comment. I have a list of members who want to ask questions, but I need to know whether they are along the same tack or are supplementaries. Are your questions on the SFA?

Graeme Pearson (South Scotland) (Lab): Yes.

Colin Keir (Edinburgh Western) (SNP): Yes.

Humza Yousaf (Glasgow) (SNP): My question is different.

Roderick Campbell (North East Fife) (SNP): Mine is on the same tack.

Graeme Pearson: Mr Broadfoot, you have no doubt heard earlier evidence to the committee that indicated that there was a belief that the SFA had been cowardly in the way that it dealt with these matters. I have to say that I found the SFA’s submission patronising and evasive in answering the very questions that we are dealing with today. Although you are in a difficult situation in explaining things on behalf of the SFA, I do not think that your responses to John Finnie were particularly adept in dealing with the issue.

The number of arrests at football matches across Scotland seems to have gone down over the past decade. Can you give us some indication of how the SFA should take control of these matters for the future, given that we have suffered what everybody describes as a game of shame and we are now considering legislation?

Darryl Broadfoot: As a former journalist, I spent enough time criticising authority for a perceived lack of action. In the time that I have been at the SFA I have seen a commitment to real, fundamental change. I defy anyone in the room to suggest that, under Stewart Regan as chief executive, the change has not been tangible to people on the outside. We cannot change historical decisions, nor will we apportion blame to people who are no longer part of our organisation or to other organisations. Members talk about a lack of clarity, and criticism of the bill, as it stands, concerns a lack of clarity. The police have asked the Government to help us provide a proscriptive list so that we can be empowered. We must take greater control, with the support of the Government and the police authorities, to deal with an issue that, in the past, was not addressed in the right way or as aggressively as people wished. Taking a lead from the Government and the bill when it is in force, we must come up with a set of unacceptable behaviours. We can argue about the clarity of the bill but what we must do is redefine the parameters of acceptable behaviour within football.
Currently, we have no heroes in Scotland. We have a dwindling supporter base and backpage headlines of headstones that read "Scottish football—RIP". That is the reality and, as an association, we have taken, and are prepared to take, the lead on issues that affect Scottish football in the context of football stadia. We must engage on this and bring everybody with us; otherwise, it is doomed to fail. We must agree a single code of conduct between the authorities and the clubs that makes anything, whether it is sectarian—we have touched on the issue of sectarian phrases—or otherwise unacceptable behaviour, and we have consistently referred to sectarian, offensive or other forms of unacceptable behaviour. We cannot just define such behaviour as sectarianism—we must decide what is unacceptable in the 21st century inside football stadia. We must make sure that we work together and that we take the lead to reclaim jurisdiction on this matter, if it is prudent for us to do so, and put in place a single code of conduct to which people must adhere or face sanctions. I have listed the sanctions over which we have jurisdiction in the context of the Scottish cup and the Scottish Football League. We must take the lead and must deal with the issue soon.

The Convener: Before I let Graeme Pearson back in, I want to say that I share the SFA's concerns about the generalities in the bill. We have waited for the Lord Advocate's guidelines—we have asked for them and we have been given a stalling answer. With committee members' leave, I propose writing a strongly worded letter to the Lord Advocate's office to ask for the release of the guidelines. Once we have them, they will be made public and the SFA will see what we are talking about. Do committee members agree that it is becoming imperative that we see the guidelines?

James Kelly (Rutherglen) (Lab): Absolutely, convener.

John Finnie: The guidelines presumably relate to the legislation.

The Convener: The guidelines are for the police.

John Finnie: Do you mean the existing guidelines?

The Convener: No.

Graeme Pearson: No, for the future.

The Convener: Sorry, but please go through the chair. I am talking about the guidelines that the Lord Advocate will issue to the police and everyone on the receiving end, including at the enforcement end. When we see them, we will have an idea whether the measures relate to songs with specific words. We have asked for the guidelines and they were promised over the summer. We are not being too difficult in asking for them as an imperative.

James Kelly: On a point of information, my understanding is that the Lord Advocate advised us that he was keen to get the guidelines in place for the start of the season so that the police, the fans and the administrators were clear about them. It is important that we see the guidelines.

The Convener: We share Darryl Broadfoot’s concern. The point is now on record and, although the Lord Advocate is already aware of our request, we will write a letter.

I ask Graeme Pearson to ask shorter questions.

Graeme Pearson: I just wanted to set the context. Darryl Broadfoot mentioned the match delegates who attend various events and make reports about the background and any antisocial behaviour. Does the SFA receive those reports? If so, does it do anything with them?

Darryl Broadfoot: The delegates send their reports to the SPL, which employs them, but we need to review that. As I said, there is no point in apportioning blame to people who are no longer part of the organisations concerned: we must accept the current reality.

Darryl Broadfoot: The SPL receives the reports, and it acts.

Graeme Pearson: What about the SFA?

Darryl Broadfoot: My understanding is that the SFA does not receive the SPL delegates’ reports because they fall under the SPL’s jurisdiction.

Graeme Pearson: Has the SFA written to the police recently to raise issues around the proposed national football unit and the overall strategy that is being adopted?

Andy Niven (Scottish Football Association): Not to my knowledge. We are delighted with the steps that are being taken to develop the football co-ordination unit for Scotland—in fact, our security adviser Derek Kirkwood and I will meet members of that focus group later this month to discuss its strategy. It is a development in the overall joint action group process that we very much support.

Graeme Pearson: So the SFA has not written any letter in that regard.

Andy Niven: Not to my knowledge.

Colin Keir: I will address Darryl Broadfoot’s previous answers relating to the SFA’s powers
over football supporters; he can correct me if I am wrong. A few years ago the terrible disaster at the Heysel stadium occurred, which effectively got a number of English clubs banned from European competition for several years.

The SFA registers the tartan army, which is those who travel abroad—

Darryl Broadfoot: For clarification, we do not register the tartan army: it has a separate commercial identity. We have 35,000 Scotland supporters club members.

Colin Keir: I beg your pardon; I take on board what you are saying. You register the people who travel abroad with tickets.

Darryl Broadfoot: Correct.

Colin Keir: So you are, to a certain extent, controlling who is there.

Darryl Broadfoot: Within a points system and within our membership. There are certain games for which supply cannot meet demand, so we manage the fans in those cases.

Colin Keir: What I am trying to get at is that if you are managing those who support you—and you could take that as far down as local teams such as Celtic, Rangers, Hearts and so on—you hold a degree of responsibility for them. Should you not then take into consideration your articles of association, which refer to "any recognised football body, club" or "official"?

Do you not have some degree of responsibility for those who are registered as official members of the supporters club in relation to ordinary clubs? I am trying to get at whether, as far down as local teams, you hold a degree of responsibility for them. Should you then take into consideration your articles of association, which refer to "any recognised football body, club" or "official"?

The Convener: I am trying to understand the various structures. How far down the road are the SFA and the SPL in discussing and co-operating on that matter so that the SFA will have some type of jurisdiction and responsibility? When do you expect to reach a conclusion, given that we are discussing a bill that will, if it is passed in some form or other, sit alongside whatever comes out of that process?

Darryl Broadfoot: I will pass you on to Mr Niven in a second to put some meat on the bones.

The SFA and the SPL have never been closer in terms of discussions and moving forward. However, we must provide workable legislation and ensure that there is a will to become involved in addressing unacceptable behaviour.

On timeframe, we will need to see how quickly the bill is passed and what form it takes. We will also ensure that, whatever happens, the SFA and the SPL come up with a single code of conduct. We have committed to doing that, and I believe that everybody will be satisfied with the outcome.

The Convener: When you refer to legislation, do you mean changes to your articles of association?

Darryl Broadfoot: We have changed those; the legislation to which I referred is the bill.

The Convener: Mr Niven, do you want to comment?

Andy Niven: Yes, thank you, convener.

We have found the joint action group process to be helpful in examining the governance structure of football in the context in which we are meeting. I am pleased to say that we have had positive discussions with the Scottish Premier League and the Scottish Football League on a new governance model for the future.

As my colleague Mr Broadfoot mentioned, during the summer, we instituted a new judicial panel protocol. That protocol was agreed with the unanimous support of members and it is settling in just now. However, from discussions with the Scottish Premier League’s operations director, Iain Blair, and chief executive, Neil Doncaster, I get the impression that the SPL wants to gain confidence from the new protocol before it hands back powers that are currently delegated to it.

The association is optimistic that, within 12 months, all delegated powers will be returned back to us as football’s governing body.

The Convener: So those powers will be transferred from the SPL to you.

Andy Niven: Correct.
Colin Keir: I understand the delegation process, but we still have a national association that is supposed to be in overall charge. You appear to be abdicating responsibility. That is not new: we keep referring to the game of shame, and there is a long history of such problems in Scottish football, whether in relation to sectarianism or, if we go back to the 1970s, the problems with crowd disruption.

I am a little concerned that there appears to be an idea that, although you are the SFA, it is not really your fault—it is the SPL’s fault or somebody else’s fault. What information can you give the committee to make us happy that you intend to be more robust? You obviously cannot speak for the Scottish Premier League, but what line is the discussion taking? What actions are you talking about being able to take against clubs whose supporters misbehave?

Darryl Broadfoot: You continually refer to the game of shame, which I think is a hysterical tabloid headline on to which we have all latched.

Colin Keir: I did say that, but I agree that it goes beyond that.

Darryl Broadfoot: It is hugely ironic that all of us round the table are asking and demanding that the SFA take responsibility for its affairs again. If we rewound one year, we would find an SFA that had no public trust and did not have the trust of many of its members. In a short space of time, with the right strategic plan, we have now become—I believe—respected and are trusted to lead. If you want evidence of that, I can give you an entire new article of association that was pushed through by what you guys might refer to as blazers without the need for a single vote.

The Convener: You have lost me. What is a blazer?

Darryl Broadfoot: “Blazers” is the historical term for the SFA’s council members. They were reluctant to change and were perceived to be set in their ways. However, within a year, we have managed to put through a new article of association and to push through an entirely new professional game board and a non-professional game board. I am sorry to be pedantic, but you asked what we could show the committee to convince it that we are changing. Internally, we have changed 138 years’ worth of constitution within a year.

I repeat that we are committed to doing more to address unacceptable behaviour within the confines of football stadia. We cannot do that overnight, as we have all realised with the implementation of the bill. However, we can give a pledge that we will speak to the SPL and to the fans, and that we will come up with a single code of conduct that we will all sign up to. We need to have in place a system whereby, if anyone falls foul of the code of conduct, clubs and supporters will be punished for behaviour that is not deemed to be acceptable inside a football stadium in the 21st century.

The Convener: That would be a system that you would operate rather than one under the bill—you would be able to do something independently.

Darryl Broadfoot: Yes—once we have had the necessary discussions with the SPL, which currently has jurisdiction.

The Convener: I think that we have nearly exhausted the subject, but I am sure the Roderick Campbell has a fresh line.

Roderick Campbell: I draw Mr Broadfoot’s attention to the fact that it was as long ago as 2006 when the SFA’s then chief executive suggested that UEFA sanctions should apply in Scottish domestic football as well, and that it was inappropriate to have one standard of behaviour for European games and one for domestic games.

The UEFA guidelines refer to insulting human dignity on the ground of religion, for which they propose a number of sanctions. Has the SFA been talking to UEFA over recent times about what it can do?

Darryl Broadfoot: We speak to UEFA regularly. Which chief executive were you referring to?

Roderick Campbell: I think that it was David Taylor.

Darryl Broadfoot: Okay. Around that time, we delegated power to deal with issues around football stadia to the SPL. That is an issue. We are fully aware of what needs to happen in Scottish football, but we cannot act independently without bringing people with us. You focused on the religious angle, but we need to ensure that the code of conduct deals not just with sectarianism, but with other forms of offensive, unacceptable and discriminatory behaviour.

The Convener: We will move on to the next set of questions.

Humza Yousaf: Thank you for taking the time to come along, especially at such short notice. As I have the mike, I will ask two questions.

The Convener: Just having the microphone does not give you any particular authority—in fact, your pre-emptive strike may backfire.

Humza Yousaf: I very much agree with what Mr Broadfoot said about not apportioning blame. In the past, politicians, along with the SFA and other bodies, have not taken the issue as seriously as they should have done. Unless I misheard, I notice that your list of sanctions for the SFL does not include a points deduction.
Darryl Broadfoot: It does include a points deduction.

Humza Yousaf: You therefore could envisage deducting points from clubs for misbehaviour, should the SPL give you the necessary control.

My second question is for the police officers—you guys have been given an easy ride so far. I welcome your submissions. Last week, when we heard from the supporters trusts of various football clubs, there was almost a collective denial of how bad the problem is. We kept being told that the police could do a lot more, given that they have breach of the peace powers. In your submissions, you suggest that there are gaps in the breach of the peace powers, which is why the bill is required. Will you elaborate on what gaps there are? Why is the bill needed?

Chief Superintendent David O’Connor (Association of Scottish Police Superintendents): Breach of the peace has been a catch-all common-law crime for some considerable time and has been used to cover public disorder, stalking, peeping Toms, sending offensive letters and the like but, over the last decade, in particular, there has been case law that has redefined what a breach of the peace is. It talks about public disorder and disturbance at the more serious end of the scale, and conduct and behaviour that a reasonable person would find offensive. Those terms are used in case law and come from previous decisions. The committee should be aware that we would still consider a breach of the peace is. It talks about public disorder and disturbance at the more serious end of the scale, and conduct and behaviour that a reasonable person would find offensive. Those terms are used in case law and come from previous decisions. The committee should be aware that we would still consider a breach of the peace to be a relevant and appropriate offence to use in certain circumstances. That is the common law of the land and, when appropriate, a breach of the peace charge may still be applied.

Humza Yousaf: In that respect, when an officer walks past a supporters pub and hears offensive chanting, what stops them going in there and making arrests? What will the bill provide that would allow them to do that?

10:30

Chief Superintendent O’Connor: As it stands, whether we are dealing with substantial crowd numbers in football stadiums or passing crowded pubs, we must always consider the element of risk in going in and dealing with such situations. If you are talking about a pub or club in a town or city, there would be an expectation on my members’ part that officers would intervene and deal with the situation. However, in football stadia, where we could be dealing with tens of thousands of people, the issue becomes somewhat different and evidence gathering becomes different. Gathering the evidence is a significant challenge, because if we are to gather the evidence and report to the appropriate authorities, we need to know exactly what was being said and being chanted to allow the appropriate authorities to make the decision.

Humza Yousaf: How does the bill help in that respect?

Chief Superintendent O’Connor: We hope that the bill will focus in on the particular types of religious hatred. As has been alluded to, we will also look for very clear guidance and guidelines from the Lord Advocate on how the act will be interpreted.

Our members are the match commanders across Scotland, who may well have to consider a multitude of pieces of legislation and common-law powers. Those men and women are very much in the hot seat. They have to deal with the situation dynamically and practically and they must have health and safety very much in mind. How the bill is taken forward and articulated will, hopefully, lead to it being another piece of law that we can use to tackle the problems that exist.

We have heard a lot about protocols, policies and action plans, but we are here to enforce the law. We want clear and consistent law that allows us to deal with the problem.

Humza Yousaf: The last point that I want to pick up on—

The Convener: You seem to have slipped in more than two questions. Your notion of two questions is interesting—were you no good at arithmetic at school, or are you just cunning?

Humza Yousaf: I was terrible at arithmetic, convener.

The Convener: We will add your questions up later.

Humza Yousaf: You mentioned the need for the legislation to be clear. I noticed a concept in the submission that I had not come across and on which you can perhaps elaborate: the need to distinguish between religious and political sectarianism. I was not aware of that, but it is an interesting concept. I know that the Police Service of Northern Ireland has made that distinction. Can you elaborate on what you mean by that distinction?

Chief Superintendent O’Connor: First, I must clarify that it was not the submission from the Association of Scottish Police Superintendents that included that comment. You are probably referring to the submission from the Association of Chief Police Officers in Scotland.

There needs to be clarification of what is religious and what is political. In the view of my members—the match commanders—the position is somewhat confusing. There are different ends of
the spectrum and different parts of the debate. We tend to focus on behaviour that is clearly offensive.

The Convener: I am advised that to some extent section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 has displaced breach of the peace in terms of the public element that is required and that there have been a lot of prosecutions under that act. Are we not therefore in danger, because there is already common-law breach of the peace and the Criminal Justice and Licensing (Scotland) Act 2010, of cluttering the legislative landscape? You say that you need clarity but, if there are too many bits of legislation, you will wonder what on earth to do with them. You will have to juggle the balls.

Chief Superintendent O’Connor: There is the Criminal Justice and Licensing (Scotland) Act 2010, the Public Order Act 1986, the Crime and Disorder Act 1998, common-law powers and now the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. In that regard, we will seek clarity, to allow us to have a clear understanding of the situation. We accept that there are a number of pieces of legislation and different statutes that can be used. The focus has to be on where the issue is one of religious hatred and discrimination.

The Convener: You do not think that we would be cluttering the landscape by having another piece of legislation, subject to caveats about guidelines and so on.

Chief Superintendent O’Connor: No. The legislation could be applied to football or beyond football. We have to deal with a variety of legislation—the whole legislative framework must be taken into consideration. However, we are looking for something that will help us and that will be another string to the bow in dealing with the challenges of football.

James Kelly: I would like to direct a couple of questions to Superintendent Marshall. The bill covers offences that are committed during travel to and from football matches, which come under the remit of British Transport Police. Does the bill give your officers extended powers that would be helpful in imposing public order on transport to and from football matches?

Superintendent David Marshall (British Transport Police): The policing of travelling football fans is core business for British Transport Police front-line officers—we do it week in, week out—and we do it without any additional funding from the SFA or elsewhere. Does the bill provide us with additional powers? Yes. Does it provide greater clarity around travel to and from a regulated football fixture? Yes. Does it provide us with additional legislation to which officers can refer? Absolutely. We currently work within the confines of existing legislation to deal with travelling football supporters who commit offences when travelling to and from football fixtures. Like Chief Superintendent O’Connor, we use the substantive criminal law of breach of the peace and other legislation.

We welcome the bill. Breach of the peace, for example, is and has been repeatedly open to challenge. The bill not only puts into law offences that relate specifically to religious, racial and other forms of hate crime that are associated with football; it ensures that the legislation captures with no ambiguity whatever those who are travelling to and from the event. From that point of view, we welcome the bill.

James Kelly: Thanks. That was very clear.

I have one follow-up question. In its written submission, the Law Society of Scotland said that the bill is potentially open to interpretation and that other travellers could be caught under it. I am talking about people who are not necessarily going to the football match but who are on the train and get caught up with the supporters and start to behave in a manner that brings them into disrepute under the terms of the bill. Do you have any view on that, given that, as you say, it is your core business to police football fans who are travelling on public transport?

Superintendent Marshall: I fully take on board and respect the position of the Law Society, but our front-line officers deal with this week in, week out. It is apparent to officers who police these events and the trains that carry football supporters to and from the events and it is apparent to normal members of the public where that sort of offending behaviour takes place. I do not think that there can be any ambiguity about someone conducting themselves in that way. We work within the confines of the current law and, to date, that has never been an issue for us.

The Convener: Roderick Campbell has a question.

Roderick Campbell: Mr Marshall has largely answered the questions that I was going to ask.

The Convener: You say that you do not want ambiguity, but I am concerned about section 2(4), which states:

“(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and

(b) a person’s journey includes breaks (including overnight breaks).”

If somebody is sitting with a football scarf round their neck, they might be regarded as breaching the terms of the legislation even though they are
just away to have a week’s holiday somewhere and are not even going to a match. Is that provision not too broad? Are you not concerned about it?

Superintendent Marshall: I do not have any real concerns about it. We have to concentrate on the behaviour of the individual or the group of people to whom we are referring. A decision might need to be made about that element of the bill. I would welcome further guidelines from the Lord Advocate on whether it should be left in its existing format or defined further. Like any new legislation, the bill will have to be tested through the judicial process. We would work closely with the Procurator Fiscal Service in line with the Lord Advocate’s guidelines to label the most appropriate charges. However, the bill will be an addition to and not a replacement for other substantive pieces of legislation.

Graeme Pearson: The police witnesses talk about clarity in dealing with these issues. The Law Society has indicated that it does not think that the bill will add to delivery. We also have a 14-page analysis of the current issues from Dr Kay Goodall.

On 11 May, a 35-year-old man on the platform at Coatbridge railway station talked about “200 Fenians” being alongside him when he was in conversation on his mobile phone. A report was made to British Transport Police, and the man was arrested and convicted of breach of the peace at Glasgow sheriff court. What more clarity do you need?

Superintendent Marshall: We need clarity on the sectarian or religious elements. We welcome the clarity that the bill provides in defining those who are travelling to and from an event.

The Convener: I remind you that the person does not have to be travelling to or from an event. The bill says “whether or not the person attended or intended to attend the match”.

The provision is not as narrow as you are making it out to be.

Superintendent Marshall: No, I accept that and, as my colleague has said, we would certainly welcome much clearer guidance and clarity from the Lord Advocate on the interpretation of that element of the legislation.

Graeme Pearson: Does the example that I gave you not present a fairly clear set of circumstances? Whether the man was travelling to a football match or not, he evinced views on a mobile phone and was overheard by people who were going to a football match to be using tones that the court deemed to be unacceptable, and he was convicted.

Superintendent Marshall: I accept that and I accept the use of the breach of the peace charge in those circumstances. However, to go back to the original point, the breach of the peace charge has been and will continue to be subject to challenge in court. New legislation will provide us with a greater sense of clarity, although some areas could be further clarified by the Lord Advocate’s guidelines. My nervousness about breach of the peace comes from the fact that it has been and, I am sure, will continue to be subject to challenge.

The Convener: Graeme Pearson has a comment—I mean a question; I do not want him to give evidence.

Graeme Pearson: Do you accept that the bill, if it is enacted, will still be liable to be challenged in the court? It is not beyond challenge.

Superintendent Marshall: I accept that entirely.

Graeme Pearson: You give the impression that it will not be challenged.

Superintendent Marshall: I certainly do not want to give that impression. Any legislation is subject to challenge.

Graeme Pearson: I am grateful.

Superintendent Marshall: New legislation in particular will always be subject to challenge.

10:45

Chief Superintendent O’Connor: We will always make sure that we continue to use all the powers that we have at our disposal at this time. Although the issue that we are discussing needs to be addressed, there is a huge issue with drunkenness and drunk and disorderly behaviour in football. Under the criminal law of Scotland, it is clearly an offence for people who are drunk to attempt to enter a stadium or to be travelling on public transport either two hours before or one hour after a game. With such powers at our disposal, we always try to ensure that our policing is as proactive as possible in dealing with problems as far away from the football ground as possible. After all, a stadium is a very difficult and challenging environment in which to try to deal with these matters. Although the bill’s provisions will allow us to focus on certain types of criminal behaviour, we will always look at all the other powers that we have—and will continue to have—to get this house in order.

The Convener: The committee understands that the police, the Crown Office and Procurator Fiscal Service and anyone else who has to enforce the legislation will not be, as it were,
straitjacketed into one piece of legislation and will have a whole panoply of legislation to draw on.

As usual, Alison McInnes has been terribly patient. Alison, you need to get yourself to the top of my list next time.

Alison McInnes (North East Scotland) (LD): I should have done, convener, because you have already picked up the point that I wanted to explore about the possibility of people falling foul of the law even if they were not attending the match.

It might be helpful if Superintendent Marshall could put into context the scale of the problem that he has to deal with weekly. For example, how many arrests do you make at the moment and how many more arrests might you be able to make under this new law?

Superintendent Marshall: Unfortunately, I do not have those statistics to hand. In general terms, however, football-related disorder with a sectarian or religious connotation is a problem. As I said at the very start, this is core business for British Transport Police. It certainly happens every week; indeed, it seems to happen every other day. There is no such thing as the close season. If we are not policing football fans during the season, we are indeed, it seems to happen every other day. There is no such thing as the close season. If we are not policing football fans during the season, we are having to police European fixtures and pre-season friendlies. I make it very clear, though, that this is not just a Rangers and Celtic issue; we police Scotland’s national railway network and this type of behaviour is manifested by football supporters of every single club in the country.

As for the scale of the problem, the fact that British Transport Police has the third highest record for successful applications for football banning orders might give the committee a flavour of our operational activity with regard to policing football supporters. As I have said, I do not have any hard-and-fast statistics with me, but I am happy to provide them to the committee.

Alison McInnes: That would be helpful.

Chief Superintendent O’Connor: We appreciate that this is not just a problem in the west of Scotland; it pervades communities across Scotland. In response to an earlier question, I should point out that we have experience of people who travel about the country with no intention of going to the football match. Many of these individuals who might travel to, say, Dundee, Inverness or Aberdeen do not have tickets, have no intention of going to the match and instead end up in the city centre pubs and clubs, at which point problems quickly manifest themselves. We have to deal with that kind of dynamic. In Inverness, for example, fans will sit in the pubs in the city centre rather than go down to the Caley stadium to watch the match, which means that the match commander has to deal with not only the on-going match but problems in the city centre.

Alison McInnes: Convener, can I ask one more question?

The Convener: If Humza Yousaf can develop his two questions into multiple questions, you certainly can ask another question.

Alison McInnes: There are many good examples of preventative policing in which the police have decided to tackle a problem by dealing with it and changing things from the ground up. Has either of you worked on preventative programmes in this area, or do you feel that you are merely cleaning up after the fact?

Chief Superintendent O’Connor: Our primary business is enforcing the law. However, there are many good examples of the police working with SFA clubs and young people, using the clubs to build good role models, and introducing diversionary activities such as late night and midnight football. I have been involved in those activities, and they work well. There is no doubt that they are a longer-term investment in building young people’s awareness of their responsibilities and ensuring that they are aware of their rights and, more important, the rules that society has on certain behaviour. There is an abundance of good work in communities in preventative initiatives.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): My question relates to some of the evidence that we received last week, which suggested that the problem is wider than what happens in football matches. The bill focuses on offensive behaviour and sectarianism in relation to football matches. What evidence do you have about offensive behaviour or sectarianism taking place outwith the context of football matches? Does it happen, are you aware of it, and how do you deal with it?

Chief Superintendent O’Connor: I have been both a divisional commander and a match commander. There are potential issues before the match, with fans making their way on public transport or in cars through various towns to the city where the match is hosted. As I have mentioned, issues can develop during the match in pubs and clubs and domestic properties in the city, and problems for the match commander and divisional commander can continue well after the final whistle has gone. Resources are not stood down immediately after the final whistle; a significant police resource is kept on to deal with those issues.

John Lamont: I am talking not about football matches but about behaviour that is completely unconnected with a game. Is there any evidence of offensive behaviour or sectarianism? That is what the bill is intended to tackle, albeit that it
The Convener: I have a final question that no one has asked yet. Section 2(3) says:

“The references in subsection (2)(a) to (c) to a regulated football match include a reference to any place (other than domestic premises) at which such a match is televised”.

I am thinking of supporters clubs, supporters rooms and pubs that are frequented by supporters of a particular club and that club alone. If you feel that that subsection should apply to the policing of such premises, how do you envisage it operating?

Chief Superintendent O’Connor: We already cover that in all the pre-match checks that are carried out with licensed premises. It goes back to what I said about the need to be proactive in our policing. We need to try to stop the problems getting into the football stadium. Police will carry out checks of licensed premises—

The Convener: But the point that I am making is that if it is just people supporting a particular club, including the staff serving behind the bar, who is being offended? Where is the incitement?

Chief Superintendent O’Connor: Are you talking about a specific football supporters club?

The Convener: I am just imagining a place where supporters are. It is not a domestic premises. Supporters are watching a match and shouting at staff and so on. Where is a breach of the peace taking place? Under the terms of the bill, where is the incitement or offensive behaviour when there is no one to offend?

Chief Superintendent O’Connor: A licensed public premises will always permit people in who may not necessarily be purely watching the game, and I would imagine that there will always be people within the premises who might well be offended.

The Convener: That is not my point. I am saying that the provision refers to a place where a match is televised, other than domestic premises. It could be a clubroom for example. Would the legislation apply there? If people who have the same views all get together and there is no one to offend or incite, can the bill be applied?

Chief Superintendent O’Connor: Most of that behaviour happens in and around football matches and football grounds, although, as I have said, problems will spill over into some domestic properties. A much bigger and more significant issue is the alcohol-related problem that goes with that behaviour. I understand that there has been previous evidence that alcohol is the problem and football is the excuse. On the days of football matches, the misuse of alcohol creates a whole range of challenges for police commanders across the country. On many occasions, those problems do not just occur within the town or city that is hosting the football match but go beyond them.

John Finnie: I want to build on Alison McInnes’s comments about prevention and direct a question to Chief Superintendent O’Connor. On many occasions operationally you will have groups of fans separated by officers. Section 1(5) refers to situations in which “but for the fact” that officers have done that, public disorder would be likely to occur. We have heard from the other two staff associations that the bill is a boost to the range of powers available. Is that the case?

Chief Superintendent O’Connor: It is certainly a positive development in that respect. A range of measures are already in place during football matches, such as the segregation of the different fans. That provision is another one that brings more clarity to the situation.

John Finnie: Thank you. Mr Marshall, do you want to comment on that?

Superintendent Marshall: I have made my position clear. The bill will be an additional piece of legislation that my officers who police football supporters and the consequences of football fixtures will find extremely useful. Again, I reaffirm the point that it is supplementary to other substantive pieces of legislation.

John Finnie: Chief Superintendent O’Connor, it will be your members who are the match commanders at SPL matches. In relation to the joint action group, point 15 states:

“The Match Commander protocol for briefing players, coaching staff and others be approved and implemented immediately, along with an associated warning poster.”

Will you share with the committee the nature of such a briefing and say who the “others” would be? Also, I may have missed it, but where would I find a warning poster and what would it say?

Chief Superintendent O’Connor: I understand that the warning posters would be posted in and around dressing rooms and that part of football stadiums. I understand from some of my members that such briefings have taken place. It is all about getting the message out about individual responsibilities and collective responsibility, and about the fact that behaviour breeds behaviour. Ultimately, there are certain types of behaviour by players and club officials that could be construed as criminal in certain circumstances. In terms of the fairness rule, it is important that these briefings are carried out and that, in addition to the expectations that are laid out for everyone, a clear reminder of what is expected is built in.

The Convener: I have a final question that no one has asked yet. Section 2(3) says:

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Chief Superintendent O’Connor: Yes, well, there will be an interpretation to be made there. It is back to the reasonable person test that is often applied to these types of circumstances. It may well be that someone in those premises or in that club is offended by the behaviour of an individual or a group of individuals in these circumstances.

The Convener: John Lamont is mumbling at me—I am not sure whether he wants to ask a question.

I shall stop on the mumbling. I bring the evidence session to a close. I thank you all for giving evidence. It has been very helpful. If you feel, having left the meeting, that there is anything further you wish to add, perhaps even having read what you said in the Official Report, please feel free to write to me as convener to share the information with the rest of the committee. We will put some of the issues to the SPL that the SFA has raised.

10:59
Meeting suspended.

11:06
On resuming—

The Convener: We will get back to business. I welcome our second panel of witnesses: John Deighan is parliamentary officer at the Catholic church’s parliamentary office, Chloe Clemmons is from the Scottish churches parliamentary office, representing the Church of Scotland, and Professor Tom Devine is a senior research professor in history at the University of Edinburgh. We will go straight to questions from members.

James Kelly: One of the questions that has run through the debate around the bill is this: what is offensive behaviour at a football match? Last week we heard different views, particularly about the songs that are sung at football matches. We heard some of the football representatives say that the songs are not really offensive and that they are all part of the football experience, but we heard others say specifically that it is unacceptable to sing anti-papal songs or that it is, in the context of a football match, unacceptable to sing chants or songs in support of the Irish Republican Army. How do you feel about that? Do you think that the bill is helpful in tackling some of the issues that have arisen?

The Convener: Panel members should just indicate that they want to speak and the microphone will come on.

John Deighan (Bishops Conference of Scotland): The Catholic church would not claim to be an expert in the exact songs and chants. We realise that Government or state authorities have a legitimate task to perform in ensuring that public events such as football matches are conducted in an orderly way. It is a question of balancing the different principles. We can only offer guidance on what those principles are, but we believe that wide latitude should be given in relation to freedom of expression, which must be upheld, and that any intervention should be necessary. We believe that the football clubs themselves have tried to eradicate particular chants and songs—the stuff that is likely to stir up the trouble and hatred—in order to change the culture and take the heat out of the situation.

Professor Tom Devine (University of Edinburgh): I find it difficult to respond to that question because I certainly cannot define what is offensive. Offensiveness is in the eye of the beholder. Let me give you an exemplar of what I am talking about. I may be one of the few people in this room who has actually attended a sectarianism-aggravated breach of the peace case. I did so at Perth sheriff court last March, when I was asked to give so-called expert evidence in the trial of two individuals who were accused not only of breach of the peace but of sectarianism-aggravated breach. That case was based, of course, on the existing law, which is section 74 of the Criminal Justice (Scotland) Act 2003. It was a summary proceeding, so there was no jury.

In my view, the sheriff performed sensibly and effectively. To be specific, he began by saying—unlike the procurator fiscal—that a song such as “The Fields of Athenry”, which is a well-known song at certain matches, is an Irish folk song and therefore should not be considered seriously in the trial. He then went on to consider whether references in the streets of Perth in the early morning to the Irish Republican Army, whether it be the so-called old IRA or the Provisional Irish Republican Army, amounted to a sectarianism-aggravated breach in terms of the 2003 amendment to criminal justice legislation. He decided that, since that organisation was not primarily based on religious hatred of another group, the case was unproven. He found the two individuals guilty of breach but not of sectarianism-aggravated breach. In my view, that crystallises a very important point, which is that law enforcement officers, sheriffs and juries are going to be faced by the difficulty of defining the term “offensive behaviour”.

This whole issue developed out of what is sometimes referred to as “sectarian hatred”, which I can define for you, if you wish. However, in my view, the original 2003 act is perfectly adequate in relation to some of the issues that confront the committee. The only inadequacies are in relation to the lack of enforcement by police officers at
certain football matches in the past, when people got away with brazen murder in terms of what they were allowed to sing, and there is the important new section in the bill that certainly could be rationally argued for and accepted—namely, the reference to unacceptable communications. I have not read in detail what the bill proposes in that regard, but the sense that I have of it is that its focus is very much on religious hatred and not on the blanket term “offensive behaviour”.

**James Kelly:** I will follow up on what Mr Deighan said. You spoke about your support for freedom of expression. Do you feel that there is a danger that the way the bill has been formatted could undermine freedom of expression?

**John Deighan:** We were alerted to the lack of a freedom of expression provision; concern about that is shared by many groups, but particularly Christian groups. The trouble is that free and frank discussion of certain matters that for some people could be offensive, may be caught by the bill. To tackle that would perhaps involve looking at how it has been done in England and ensuring explicitly that people are allowed to express their views freely, especially in terms of religion or belief. It is important to have that safeguard rather than to rely on what is deemed to be reasonable, which can change radically according to the different environments in which people may speak. So, our suggestion is to ensure that there is recognised human rights protection in that regard—for example, how rights are qualified by articles 9 and 10 of the European convention on human rights. Those are the sort of qualifications that we should be looking for in the bill to ensure that the rights that citizens should have are protected to the maximum and not curtailed.

11:15

**James Kelly:** How would you categorise freedom of expression in the context of a football match?

**John Deighan:** Football matches are not an area of specific expertise of the church—we would not claim that they are—but the situation is like any expression at any public event. In terms of the church’s social teaching, we would look at the principles that lie behind particular pieces of legislation rather than at the technical details. If the Government thinks that there is a problem in a particular context—at football matches, for example—it has a right to take the action that is necessary to maintain public order. That principle can be argued and, in discussing the matter with the Catholic church, the Government has made a good case that it thinks that there is a problem, and cited examples from last season when there was trouble at football matches. The Government has a duty and a right to act, but that right must be balanced with the rights of individuals in society; we say that the bill will omit to ensure that that balance can be achieved properly if there is not an explicit freedom-of-expression provision. We think that “reasonableness” is not quite sufficient, especially when that can be subjective.

**James Kelly:** What would you give as an example of somebody’s right to freedom of expression at a football match that might be compromised by the bill?

**John Deighan:** That would not just be at football matches; it would be extensive. For example, preachers standing in a street may decide that they want to go to a football match and may want to give out religious tracts. Someone at the football match may say that they find that offensive and that it is stirring up hatred. That sort of thing could be caught if there is no explicit protection for people in such situations. I do not think that people would chant doctrinal chants in a football stadium—I have certainly not come across that—but I am concerned about the wider environment. The bill is very wide in terms of whom it could encompass. I heard some of the earlier evidence, which said that the bill covers locations outside the football match and could cover people travelling on the same train as football supporters or sitting in the same pub or club as football supporters. We must ensure that their freedoms are protected, as well.

**James Kelly:** So, your freedom-of-expression concerns are more about what happens beyond the football match than they are about what happens in the football stadium itself.

**John Deighan:** Yes. The Catholic church is pleased to offer what help it can. The issue has drawn us in, to some extent, because there is recognition that an anti-Catholic element is part of sectarianism. We are happy to contribute what we can, but we are certainly not claiming to be experts on how to run orderly football matches.

**The Convener:** Can you expand on freedom of expression as it pertains to the second part of the bill, on threatening communications? Professor Devine has referred to two different kinds of offence. The first is a violent act against a person of a particular description—so it relates not just to religious matters—and the second, which is a condition B, so the two are separate, is that

“(a) the material is threatening, and

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

What about freedom of expression on the internet? That is another part of the bill, and I would like you to talk about that, as well.

**John Deighan:** Do you want me to answer that, as well?
The Convener: Yes please, if you wish. Do not feel compelled.

John Deighan: We have stated clearly that threats of violence are unacceptable. We are all in favour of stamping them out. The other condition that you mentioned could catch broader communications. An example that has been brought to our attention is religious debate that could occur and which people might see as being open criticism—the Catholic church is subject to open criticism as well—and stirring up hatred against the church.

Similarly, debates between Christians and Muslims could point to fears that Christians have about Sharia law or particular elements of the Koran. Of course people should always try to be tactful but, in certain situations where people are speaking frankly, someone might not express themselves as well as they might and could be caught by the bill. As a result, one might argue that we must ensure that that sort of frank, open and robust debate around religious debates is allowed to take place in society without people fearing being prosecuted and getting heavy penalties.

The Convener: Does anyone else wish to comment on the internet issue? I note that Colin Keir wishes to ask a supplementary. Is it about freedom of expression?

Colin Keir: Yes.

The Convener: I am sorry—Ms Clemmons was going to respond. I will take Colin Keir’s question in a moment.

Chloe Clemmons (Church of Scotland): I agree with John Deighan that the bill has two completely separate functions. Indeed, we in the Church of Scotland have had a very similar conversation. We feel that the provisions could be really useful for football matches. There is a lot of support for making it clear that, normally, people would not behave in that particular manner. Many people at football matches behave in a way that they would not behave in the rest of their professional lives, so we thought that there might be a big advantage in naming the offence, pushing it quite hard and saying, “We expect you to exercise some self-control here”. That said, we think that there are issues with the width of the drafting in the threatening communications part of the bill, but we see the two issues as being quite separate.

Colin Keir: With regard to freedom of speech, the European convention on human rights has already been mentioned. Football’s European governing body, UEFA, appears to have a problem with some of the stuff that is being chanted or sung in European stadiums; indeed, as we know, Rangers was cited the last time. That suggests that UEFA’s people have considered the European elements of the matter.

Does all this relate to a second issue—which has just been raised by Ms Clemmons—about the standards that are acceptable within and outwith football stadia? Are we in a situation in which we cannot afford to do anything with this? Where do we go with it? What would you like us to do with the bill? Surely the European governing body’s not liking what is happening puts us in a bit of an awkward place.

Professor Devine: We have to remember what the so-called European governing body, UEFA, specifically reacted to. The songs that it condemned and which it fined a football club for would have been found to have been wrong and punishable under existing Scots law. Those fines were levied because of manifestations of religious hatred and had nothing at all to do with the catch-all nature of the bill. In the light of the academic evidence that was given to UEFA—especially on the first occasion—on a song that many people around the table will know and which is crassly sectarian and anti-Catholic, the judges had no difficulty in reaching their conclusion. The case was clear cut. However, the issue of offensive behaviour is by no means clear cut. Throughout the process, members have continually asked witnesses to define such terms and, in my personal view, the answers have been intellectually unconvincing.

The Convener: I guess that we cannot ask whether the guidelines will be useful, given that we have not yet seen them, but should the guidelines that will be produced by the Lord Advocate be more than that? Guidelines, after all, are a persuasive mechanism for police and courts, but should they be put on a more statutory footing? Would that make the bill less of a broad, catch-all provision?

Professor Devine: The problem that I have is that, intellectually, and from the point of view of any empirical evidence that I have seen, I am opposed to the bill, except for the second part of it, which deals with electronic communications. That is a new development in our society, and it is an area that is certainly well worth looking at and producing robust law on.

I have a major problem with the first part of the bill because, in my view, the very tightly written act from 2003 covers most of the issues at football matches on which there is no ambiguity. I will give an illustration of the problems that we might get into. If Celtic supporters go down to watch their team play Manchester United and sing songs that they think deal with Irish freedom or oppression by the British state, is that offensive or is it a statement of political belief? That is the difficult intellectual territory that the bill has entered, and it
is in danger of bringing Scots law in that area into disrepute.

**Roderick Campbell:** You touched on an issue that I had intended to explore further. I was interested in your reference to what happened in the case at Perth sheriff court and to what we are developing. In their submissions, one or two other people have distinguished between political sectarianism and religious sectarianism. From what you are saying, although you oppose the bill generally, you would caution members against passing legislation that clearly did not allow people to make statements of political belief.

**Professor Devine:** I think that the phrase “political sectarianism” is a contradiction in terms. Sectarianism is defined as the evincing of religious hatred or hatred towards an individual or a group, either in writing or in another form of communication such as singing, because of that individual or group’s religious belief. It is a dead easy definition. That is why, in the case at Perth sheriff court, the sheriff had no difficulty in coming to a determination.

One of the police witnesses said that, in his experience, most of the offences in question took place in and around football grounds. Some members of the committee may be aware of the fact that a research project, albeit a minimalist one—I think it covered a six-month period from 2003, when existing legislation was reformed—was carried out on the cases in which people were found guilty of, or were arraigned by procurators fiscal for, sectarianism-related breaches of the peace. As you probably know, Frank Mulholland, the Lord Advocate—who was previously the Solicitor General for Scotland—has a team looking at such data for the entire period from 2003 to the present, the findings from which could be extraordinarily interesting and potentially explosive.

My point is that it was, in the research, possible to identify that the incident related specifically to football or to the support of a particular team in only 14 per cent of the cases that were examined. In other words, according to the data from that project—which is one of the few collections of hard data that we have on such offences—a very small minority of cases related to the context of the bill. That is far from consistent with the assertion that the police officer made earlier. There is a caveat: it could well be that, because of the size of the crowds that were present at those events, the police felt impotent to intervene, which is why the public sectarian breach went on.

11:30

**Chloe Clemmons:** Colin Keir asked about where to go with the bill, given the European position. A case can be made for keeping the focus slightly wider to encompass religious hatred rather than narrowing it to sectarianism. We live in a multi-religious society and some of the conversations that I have had about Church of Scotland work concerns interfaith work. The tensions people see in communities are not all between different Christian groups. We would lose a lot if we were to focus too much on that and not accept that other issues may be relevant.

**Professor Devine:** What distinguishes the Scottish experience from that in other jurisdictions is that it is well known that the problem is rooted in Irish Catholic and Irish Protestant migration in the 19th and early 20th centuries. However, of all the jurisdictions where Irish people of each faith tradition settled, Scotland is the only one with anti-sectarian legislation on its statute book. That suggests that Scotland has a distinctive and special problem regarding the original issue that caused the McConnell Government to move into this area. My fear is that if we spread and dilute, we will lose the focus on what I refer to as “the Scottish problem”, rather than as “Scotland’s shame”. The situation must be tackled not only by legislation—which can help—but by a variety of means. This bill almost moves into umbrella territory and is in danger of losing that specific focus on the particular Scottish problem.

**The Convener:** Does anyone on the panel wish to contribute before I return to committee members?

**John Deighan:** We take a similar position to Professor Devine. If the legislation is responding to a particular problem, that problem should be the focus of the legislation. We live in a time when people are very sensitive about not offending anyone and there seems to be a reluctance to focus on and to define the issue in sectarianism. It is understandable and good intentions lie behind it. However, taking a broad umbrella approach and tackling every possible prejudice in this bill moves it away from what we believe the bill was created for, which was to deal with bigotry that arises at football matches.

**Professor Devine:** From what I have heard from Frank Mulholland’s office, my sense is that we must consider the release and analysis of the data to which I referred, dealing with occupation, territory and religious affiliation of victims and offenders. Suppose the analysis of that material finds that victims overwhelmingly come from a certain religious background, and aggressors from a different religious background: that will present the Government and Parliament with a particular problem. We lack hard data on those areas.

In my definition of sectarianism, structural sectarianism and labour-market discrimination, which affected people’s life chances, have gone.
However, attitudinal sectarianism and sometimes bigotry—as defined—remain. That is unpleasant and can sometimes lead to violence—it is still with us in certain parts of Scotland, pace the truly incredible evidence of a sociologist from a university in Dundee. I was not present but I saw it on my computer. He denied that attitudinal sectarianism is an issue in this country.

The Convener: Professor Devine is referring to Dr Stuart Walton. Let us park the information technology part of the bill and focus on offensive behaviour at football matches. Before I invite Humza Yousaf to speak, do members of the panel believe that if it is enacted, the legislation will be provocative and therefore counterproductive?

Professor Devine: I will make two brief points and then let my colleagues in. One is that there is a danger—in fact, it is possibly an inevitability—that you will make criminal certain behaviour that was not criminal under the 2003 act. Certain people who do not regard themselves as behaving in a criminal way might react to that in a particular way. The second aspect, which is equally important, is that even if the legislation is not inflammatory, it will be incredibly controversial.

The Convener: We will move on, because nobody else has indicated that they want to come in on that issue. I have a queue of members who want to ask questions. I call Humza Yousaf, to be followed by John Finnie and Graeme Pearson.

Humza Yousaf: I thank the witnesses for coming along to this evidence session. My question is to do with the legislation, too. Ms Clemmons’s organisation’s submission seemed quite critical of the fact that legislation is being drawn up in the first place, which kind of reflected what we heard last week from the supporters trusts. The submission states:

“The Bill will do nothing to reduce sectarianism unless it is part of wider work.”

I agree, but I think that wider work is going on. It also states:

“conviction of a sectarian offence could be seen as a badge of honour.”

I understand that in saying that you are just reflecting the consultation that you had with others. The same point was often made about anti-racism measures in legislation, but it was thought imperative to introduce them.

The submission from Dr Kay Goodall, from whom we will hear later on, states:

“research also suggests that law can influence people to reduce overt prejudice, and can even change attitudes through changing their behaviour.”

I think that there is an understanding that there has been a collective failure among politicians, Governments, football clubs and even civic organisations in confronting this issue. Given that, is there not a need for some kind of legislation?

Chloe Clemmons: We think that there is a need for legislation and we absolutely agree that the behaviour is unacceptable and something needs to be done about it. The problem is that legislation will apply equally to everybody. Some people perceive legislation as something that is a positive part of their lives and they would seek to be law abiding and to engage with legislation, but others do not perceive legislation in that way. So, the effect that you would have on some people would be different from the effect that you would have on others.

The experience of a number of people working in communities was that the identity of people in that community was very much bound up in the relationship with another community, which could be a negative relationship, and that it was seen as a good thing to attack members of the other community because that showed greater strength of your identity. That is exactly why we think that the bill and the wider work need to be related to each other. If you want to stop the behaviour happening, you need to have something alongside the legislation on day one to address the issues of how communities relate to one another, relationship building and actively challenging barriers. We are afraid that if the legislation and wider work are not put in place simultaneously, the legislation will just move the problem. Some people will be deterred by it and they will change their behaviour but other people will not, so the problem will be of the same scale—it will just sit somewhere else. We absolutely need to take action to fix the problem. Legislation can help with that, but only if it and wider work are introduced as a package.

Humza Yousaf: Okay. Thank you.

Professor Devine said that the legislation will at least be controversial. I do not doubt that at all. Given the subject, it would always be controversial. I note that the Catholic church’s submission has a particular issue with the widening out of the scope of the bill. Under section 1(4), the bill will cover colour, race, nationality and so on. Given what your submission states, the chances are that you have an issue with only a couple of the categories that are mentioned in that section, rather than all seven. However—if I have got this right—the Church of Scotland’s submission welcomes the fact that the bill could be extended. Does that present a difficulty in drawing up the legislation? Do we not just have to accept that some people will want it drawn more narrowly and some people will want it drawn more broadly? Does there not need to be an acceptance that that is just part of the legislative process?
Chloe Clemmons: That is why we emphasised consultation the first time that we had this conversation with the committee. We should seek balance and find out who is welcoming things and why, and whether those things are a good or bad idea.

Humza Yousaf: Have I got it right? Do you think that the bill should be widened out further?

Chloe Clemmons: Yes. In our discussion we said that other things happen at football games and that if you are going to legislate, you should include those things, too.

Humza Yousaf: Mr Deighan, what do you think?

John Deighan: The legislation should be necessary—the problem that is bringing the bill into existence should be identified. Our problem is not only the widening of categories but the introduction of categories with which, to be honest, we did not understand there to be a problem.

We are accused of offending people as a result of our views on this, but one of those categories follows an understanding of human nature that we do not agree with. A belief that human nature is not defined as male and female is being brought into a bill to deal with bigotry. We thought that that was out of place, because those issues have been dealt with in the Equality Act 2010.

The Convener: The bill is not a bigotry bill; it concerns “offensive behaviour in relation to certain football matches”, so it is not a bill about sectarianism, although that has been the main focus.

John Deighan: Yes, but that is our understanding of why the bill came to be.

Humza Yousaf: I do not know whether you have had the chance to see the submission from Tim Hopkins of the Equality Network. I assume—correct me if I am wrong—that the categories with which you take issue are sexual orientation and transgender identity. At football matches, Mr Hopkins has heard expressions from the crowd—I think that the word “faggot” is used in his submission. I do not imagine that that would apply to members of the Catholic church.

In your submission, you make the point that the bill uses an “understanding of human sexuality which is rejected by the Catholic Church and which is contrary to natural law.” It could be argued that that is a tactful way of putting it, but I imagine that you would condemn the use of inflammatory language.

John Deighan: We object to mistreatment and disorder whatever the grounds for them are. The reason that we raise that concern is that, when the bill was introduced, the minister explained to us that it was intended to deal with sectarianism at football matches. I realise from the name of the bill and from what it deals with that it is much wider than that. It takes us into a much broader area.

Do we understand why we are taking it into that broader area? Do we understand why there are five different forms of transgender identity? That is all that we are saying. That needs to be explored in quite some detail. There is a philosophy behind it. Have we explored whether five forms of transgender identity need to be defined in the bill as protected characteristics? Perhaps there is evidence to show that they do, but we were not made aware of that. We were told that the bill was introduced because of sectarianism—which we understand as bigotry—at football matches, which was causing disorder.

Humza Yousaf: The point in your submission about including a provision in line with article 9 of the ECHR was well made.

John Deighan: Thank you.

John Finnie: Humza Yousaf has covered 90 per cent of the questions that I was going to direct to you, Mr Deighan. It is right to say that some people will have found the section in which you speak about the “Wide ambit of the provisions” to be deeply offensive. We must accept that that is the case.

In the second paragraph on page 2, you use an unusual phrase. You say: “We are unclear as to the source of such categories”—that is okay—“and are unaware of individuals who may define themselves under such a category having been specifically targeted for mistreatment”.

If we could give you specific examples of mistreatment of people within either of those categories—transgender identity and transsexualism—would you condemn that?

John Deighan: Yes, of course we would condemn people being mistreated for those reasons.

John Finnie: We also had a submission from the Scottish Catholic Observer. Can you speak to that?

John Deighan: I can try, if you want, but I do not speak on behalf of the Scottish Catholic Observer.

John Finnie: It is a submission from the editor, which takes the form of a brief preamble followed by an article. The article talks about a “deliberate distortion of the truth”.

The Scottish Catholic Observer: We also had a submission from the Scottish Catholic Observer. Can you speak to that?
Have you seen that submission?

John Deighan: I am sorry, but I have not.

John Finnie: It would be unfair to ask you about it, then.

The Convener: It would be. As I have said to previous witnesses, if Mr Deighan wishes to add anything later or if he wishes to comment on other evidence, whether he submitted it himself or not, he should feel free to write to the committee.

11:45

Graeme Pearson: Earlier, Professor Devine expressed his view about lack of enforcement and prosecution of the current legislation. On what evidence do you base that view?

Professor Devine: Do you listen to football matches on the television? Did you see the recent Scottish league cup final or some game involving the two opposite members of the old firm? At that match, 25,000 to 30,000 people were committing a collective and brazen act of sectarian breach of the peace because of the song that they were singing. That song was condemned by UEFA and one of those two football clubs was punished and humiliated before Europe. That is just one example, but there are many others.

Graeme Pearson: Do you identify that issue because of the sheer size of the problem that is presented by dealing with a crowd of that size? Has the problem been going on for years and been ignored?

Professor Devine: There has been a culture of toleration: that is just the way things are. We now have different expectations, partly because the attention of the world is on us. CNN was in the country two days ago, and it might well have interviewed members of this committee. Its report will go out in 200 countries during the next couple of weeks. The bill process is still going on, so the world is still very interested. The international factor has been relevant.

Modern communications systems, such as closed-circuit television and other methods, are more interesting to me. Obviously, the police cannot imprison half of the fan base at a major football match but they can at least make exemplars of some of them, which might have the desired effect. In my view, the heart of the committee’s operation should be to ensure that the forces of law and order implement the existing legislation; I know that that is almost irrelevant to the committee’s deliberations.

John Deighan is absolutely right—and it follows as night follows day—to say that this process was triggered not by concerns about sectarianism, but by concerns about racism: there is legislation to deal with that already. The process was not triggered by concerns about people insulting individuals because of their disability.

From the historian’s point of view, one of the questions that we would love to ask the former Lord Advocate and the present Lord Advocate, who was the previous Solicitor General, is why they widened the canvas in such an analytical way? If the problem has been universally specified as being rooted in the sectarian issue, why has the bill been expanded to the extent that it has been in a way that will cause enormous problems in legal enforcement?

The Convener: I am certain that the committee will ask that. We are not doing a formal stage 1 report, because that was done when the bill was going to be treated as emergency legislation, which we disapproved of collectively. However, we will be making a quasi-stage 1 report to Parliament, so those issues will be put. I assure Professor Devine that one of the questions that the committee will ask is whether the legislation is necessary. We have already examined other means of enforcement through existing legislation or protocols.

Professor Devine: I plead with the committee to take up the issue that the convener has just identified. It is tremendous that the process is ongoing, because it would have been a disaster if the legislation had been implemented immediately in the short timeframe that was originally envisaged. In my view, you must tackle the issue head on and not necessarily simply go through the sections of the bill. Is the bill really necessary? Could it be counterproductive? What is the coverage, if you like, of the existing legislation, specifically in relation to the problem that was identified in 2003?

The Convener: Those are certainly legitimate questions that the committee would ask of the minister and the Lord Advocate. Excellent as your appearance here today has been, Professor Devine—even prior to it—those questions were already in the air.

Professor Devine: I am certain that they must have been, because they are at the heart of the issue.

The Convener: We have another 11 minutes, so I am keeping to the timetable. I will take John Lamont first, because he has not been in yet. Does Alison McInnes want to come in? I am looking after her: there are only two women on the committee, so we need some positive discrimination. There are too many men on this committee.

Alison McInnes: No, I am all right.

John Lamont: My question is for Professor Devine. To rewind slightly, you referred to the fact
that only 14 per cent of offences that were committed under the 2003 act were aggravated by sectarian behaviour. Is that correct?

Professor Devine: No, I am sorry—I communicated that wrongly. I said that only 14 per cent of the cases that were assessed and evaluated related to events at or outside football matches. I was trying to refute the police officer’s assertion—so much of this process has been based on assertion rather than on argument, or on statements with evidence—that the issue is overwhelmingly a public order problem or is related to football matches. Some of the very few pieces of hard evidence from that snapshot of 2003 to early 2004 refute that analysis.

John Lamont: Do you have any information about the circumstances in the other 86 per cent of cases that were assessed?

Professor Devine: I can give you some of the major conclusions. Most of those cases—54 per cent—were in the Glasgow area; 22 per cent were in Lanarkshire; and a substantial minority were in West Lothian. I can consider the reasons why that should be the case if you are interested, because they are historical.

Alcohol featured in the majority of cases, and in 49 per cent of cases, the police report revealed that the accused was under the influence at the time of the offence. Twice as many Catholic victims as Protestant victims were examined, and 1 per cent of cases showed Muslims to be the target. Fifteen per cent of cases arose in the context of marches.

We need the big database from 2003 to 2011 in order to be confident, and it will appear in the public domain in due course. The snapshot so far tells us that such incidents do not necessarily occur where one would think that they would—for example, in the marching season or at football matches. They are part of the fabric of certain areas of Scotia, which reflects the fact that the problem is societal.

John Lamont: Can we ask for that information?

The Convener: I am coming to that. Perhaps the witnesses can provide us with the source so that the clerks—

John Deighan: The paper that I am holding up is the source.

Professor Devine: I can read it out to you.

The Convener: Sorry—I will take one at a time.

Professor Devine: It is a document called, “Investigation and Reporting of Sectarian/Religiously Aggravated Crime: An Analysis of the First 6 Months”, which was produced by the Scottish Government.

The Convener: You also referred to the Lord Advocate’s analysis, which is a separate matter.

Professor Devine: Yes. That will build on the snapshot, but importantly it will examine all the data between 2003 and the present. Academics, scholars, historians, anthropologists and sociologists have wanted to see that information for some time. It will not necessarily tell the entire truth, but it is hard, quantitative information from which we can learn a lot. It will be interesting to find out, when you next speak to Frank Mulholland, when that information will be released in the public domain.

The Convener: Again, that is a pre-emptive strike. It is going through my head that we will, when we are writing to the Lord Advocate for the guidelines, ask when that information is to be published.

Professor Devine: It is supposed to be published in the autumn.

The Convener: Is it to be published, or is it an internal matter?

Professor Devine: I think that there will be something of a controversial response if it is not published.

The Convener: We will ask if and when it will be published.

Professor Devine: It is not only to be published, but to be analysed.

The Convener: That is all on the record, so we know what to write to the Lord Advocate about before he comes to the committee in a week’s time.

Professor Devine: Good luck with that.

The Convener: This committee is fairly robust.

Professor Devine: I was simply being facetious.

The Convener: I hope so—we gave you a scone, and scones are not given away willy-nilly on this committee.

John Lamont: Professor Devine, you referred to a case in which you gave expert evidence in Perth sheriff court. Did that relate to football?

Professor Devine: No, it was an incident that took place at 2 o’clock two days after Christmas last year in small-town Scotland—or is Perth a city? I do not know. One of the defendants was an off-duty policeman, and one of the accused was also an off-duty policeman, so it was a very interesting case. It had nothing whatsoever to do with being present at a football match.

The behaviour was unambiguously a breach of the peace, but the more interesting and, if you like,
nice question was: was it sectarian aggravated? The assistant procurator fiscal argued strongly that it was—so strongly indeed that the sheriff started to lose patience with her. The case was that the Irish Republican Army is a sectarian, anti-Protestant organisation, so singing about it is sectarian aggravated under section 74 of the 2003 act. Historically, that statement cannot be proven. That is not to say that that organisation has not killed Protestants—of course it has—but it has also killed Catholics. It is a politically motivated terrorist organisation.

The Convener: I am just checking with one of the members whether Perth is a city.

Roderick Campbell: No, although there is a campaign for it to be a city.

The Convener: I have allowed you to say that—you are part of the campaign. I just wanted to clarify the point, as Perth people could be offended.

Alison McInnes: Professor Devine, do you think that it would be folly to go ahead with the legislation without seeing the evidence and analysis that you are talking about?

Professor Devine: Correct. Let us create the theoretical hypothetical. I am not saying that this will necessarily come out, but some of the analysis done by, I think, the Roman Catholic Church has suggested that the 2003 data show that Catholics are six times more likely to be targeted than non-Catholics. It may not have produced that evidence on the basis of social scientific rigorous inquiry—I do not know how it came to that figure—but let us suppose, for the sake of the hypothetical, that we find that that figure is replicated in the massive database from 2003 to the present. If that is the case, we have a huge issue to deal with in this society. We may well have to consider whether Keith O'Brien, Cardinal Archbishop of St Andrews and Edinburgh, was right when he asserted that there is not a sectarian problem but blatant anti-Catholicism. We do not have the evidence, which he may have, to support that assertion, but we will know a lot more when the entrails of the data are considered and explored.

Humza Yousaf: I want to follow on from that point. It is often said, including in the submission from the Harps community project, that anti-Catholic and anti-Irish bigotry are sometimes lost in the framework of sectarianism, and I can agree with that to an extent. Is it not therefore imperative that we avoid categorising sectarianism and important that we have the categories—of colour, race and nationality in particular—in the bill?

Professor Devine: I profoundly disagree with you.

Humza Yousaf: For what reason?

Professor Devine: The casus belli—the reason for war that produced this process—were the incidents relating to perceived sectarian behaviour during the last football season. What is the logical reason, therefore, for spreading the legislation? One of the toughest and most robust areas of offensive behaviour legislation is anti-racism legislation. We have that already. I go back to the intellectual conundrum: why do the legal officers wish to extend that into other areas? They are perhaps areas of legitimate concern, but they are particularly controversial and ambiguous and, with the legal process, could perhaps even end up looking like an ass.

Humza Yousaf: The bill deals with incitement to public disorder and behaviour that is likely to incite public disorder. When it comes to sectarianism and anti-Irish behaviour, many people believe that their Irishness is part of their race rather than their nationality.

Professor Devine: It is part of their identity.

Humza Yousaf: Yes. The police were robust in saying that they do not feel that the current measures are able to deal with behaviour in relation to that. Do you think that the police are being too lazy?

Professor Devine: What explanation did they give for that statement?

Humza Yousaf: For—

Professor Devine: For stating that the current measures are inadequate.

12:00

Humza Yousaf: They thought that the test for breach of the peace—that something has caused fear and alarm—was not addressed. If they go into a supporters club or a pub, for example, where no one has caused fear or alarm, they cannot go in on the basis of breach of the peace.

Professor Devine: That is your analysis.

Humza Yousaf: No. That was the police’s analysis.

Professor Devine: You have reported their analysis. My analysis is different. Mine is that moving the goalposts into political and ethnic provocation and so on moves us away from the case that is relatively easy to prove—because of statements made, messages sent and songs sung—which is religious hatred.

The Convener: For clarification, regarding the analysis of the statistics that we have requested concerning the 2003 act, is it the case that Celtic fans sing songs that are pro-IRA, which could be deemed political, whereas Rangers fans sing songs that could be seen as sectarian? That might
skew the statistics, in that it might make it difficult to prosecute Celtic supporters under the 2003 act because it deals with offences aggravated by religious prejudice.

Professor Devine: You are absolutely right. The act could not be used for that purpose—that is why the case was thrown out in Perth. The sheriff decided that the statements made were statements of political or racial loyalty.

The Convener: Indeed. Therefore, statistics based on that act, which you say is sufficient—and that we therefore do not need the first part of the bill—along with other existing law, whether in statute or in common law, will not prove your point about sectarianism going both ways, because the act does not tackle sectarianism in terms of what Celtic fans are doing.

Professor Devine: No. It is relevant to the issue in terms of the single criterion of religious hatred.

To return to your statement about songs being sung by Rangers supporters, although the overwhelming majority of those songs are not relevant to the 2003 act, there are some that are. If you wish to see the list, I am sure that UEFA could provide it. Only a small minority would be capable of being arraigned before the 2003 act.

My concern is to try to deal with the problem that we have in Scotland, or at least to approach dealing with the problem, through this legal process. We all agree that it will take a large number of other influences to produce a result over time. My sense is that what is being proposed moves away from the key problem. That is only a point of view.

The Convener: Yes, I know; I accept that.

Do you therefore accept my premise that prosecutions under the 2003 act will be more successful in relation to Rangers supporters singing—notwithstanding the point that the songs are not all sectarian—than Celtic supporters singing, behaving in a certain way or chanting, because that would not be deemed sectarian and would be more likely to be deemed political?

Professor Devine: I do not understand your point—

The Convener: My point is that it is not even.

Professor Devine: It might not be even in terms of the proposed legislation, but it is even in terms of the 2003 act, which deals only with religious hatred. You cannot honestly consider the statistical evidence to be dealing with anything other than the processes of law involved in the interpretation of that act.

The Convener: I am sorry—I am not explaining myself clearly. I want to forget all the other categories in the bill and go back to the 2003 act and its provisions related to offences aggravated by religious prejudice. I seek your views on the proposition that Rangers supporters might be more likely to be prosecuted because their behaviour, their singing and so on might be deemed sectarian while Celtic supporters’ singing and chanting about the IRA would be more likely to be deemed political and therefore would not fall within the ambit of section 74 of the 2003 act.

Professor Devine: Only a small minority of the cases that I cited took place in or around football matches. The rest of them took place in the street and in many instances drink had been taken. The issue with regard to the background of victims and assailants has nothing to do with the legislation or the data stemming from it or a person’s football affiliation; it is about their religion. With regard to the religious evidence, the Crown Office concluded from the cases that it examined that there were twice as many Catholic as Protestant victims. In 1 per cent of cases, Muslims were the target. For reasons that I am not absolutely certain of, the Catholic Bishop of Motherwell concluded in an article that was published six months after these data appeared that Catholics were six times as likely to be victims. I do not know what he based that on. All I am saying is that very interesting information is coming down the track and, as a committee member has already suggested, it would be quite useful if the committee could consider those results before the bill goes very much further.

The Convener: I regret to say that we are not masters of the parliamentary timetable, but we are doing our very best and might have some room for manoeuvre. I will check with the clerks.

I believe that Mr Deighan wishes to comment and then I will leave the matter there.

John Deighan: I acknowledge your point, convener, and we must recognise that in some cases you will have to show that something that might fall within a political category and which might be described as a football allegiance has been a proxy for religion. Indeed, the Scottish Trades Union Congress identified that very issue when it examined sectarianism in the workplace for a report that it published in August 2008.

We achieved the figures that Bishop Devine might have used by taking the approach that statisticians might take. They would take the number of Catholics per thousand population and look at the likelihood—

Professor Devine: They are 16 per cent of the Scottish population.

John Deighan: So Catholics were twice as likely to be victims. There were actually two reviews, the first after six months and the other after 18 months, and it was found that 15 per cent
of sectarian—or anti-Catholic or anti-Protestant—incidents were football related; the other 85 per cent were not. The issue is wider than that. It is a difficult social and religious issue but, according to the two reviews of the situation under the 2003 legislation, twice as many victims were Catholics. If you set that against the percentage of Catholics in the population, you might conclude that Catholics are six times more likely to be the victims of such behaviour.

The Convener: I should not say this—every time I do someone puts their hand up—but I do not think that we have any more questions. I am looking straight ahead—I see no one. I therefore conclude this session by thanking the witnesses for their evidence.

I suspend the meeting for five minutes. We are doing very well on time.

12:08

Meeting suspended.

12:15

On resuming—

The Convener: I welcome our third panel of witnesses. Dr Bronwen Cohen is the chief executive of Children in Scotland, Tom Halpin is the chief executive of Sacro, and Dr Kay Goodall is from the school of law at the University of Stirling. I thank you for making yourselves available this afternoon.

John Finnie: I have a question about Mr Halpin’s written submission. The second paragraph says:

“if the Bill were enacted in its current form, it could lead to individuals being brought into contact with the criminal justice system inappropriately.”

Could you expand on that please?

Tom Halpin (Sacro): We were referring to what exactly the bill intends to achieve and what is the catch-all that it sets down. We wanted to emphasise that we want clear guidance about what offences will be prosecuted under the bill.

John Finnie: With respect, I do not think that that answers my question. The statement is very clear:

“it could lead to individuals being brought into contact with the criminal justice system inappropriately.”

Do you have an example of how such inappropriate contact could take place?

Tom Halpin: Sacro works with a wide range of clients—young people and adults—who come into formal contact with the criminal justice system when it would, quite frankly, be better to deal with the root causes of their behaviours. If the definitions in the bill are enforced in their broadest sense, beyond the current good intentions of the committee, young people who are engaging in what should be a positive cultural community activity, such as going to a sporting event, could be caught up with peer group activity and end up, all of sudden, in the criminal justice system, rather than the underlying bigotry being dealt with.

John Finnie: Is that not just life? Is it not just the reality that we encourage and educate people to conduct themselves appropriately and, if they do not, there is appropriate intervention?

Tom Halpin: It would be unfortunate if that was just life.

John Finnie: I did not mean that to sound glib. I meant that intervention and education should be appropriate.

Tom Halpin: I take the point, and many people are just dealt an unlucky hand in life.

John Finnie: Yes, indeed.

Humza Yousaf: On John Finnie’s point, I still do not understand Tom Halpin’s basis for the assertion that such people would be dealt with inappropriately, especially as he has not seen the Lord Advocate’s guidelines. It would be interesting to hear about that.

My point, however, is for Dr Goodall. I appreciated your detailed submission, Dr Goodall, and I was glad to have my wife, who has a master’s degree in law, beside me while I was reading it.

The Convener: I am sure that you were glad to have your wife beside you for other reasons. I will put that on the record, I think.

Humza Yousaf: Absolutely. Thank you for doing that.

In paragraph 9 of your written submission, Dr Goodall, you say:

“research also suggests that law can influence people to reduce overt prejudice, and can even change attitudes through changing their behaviour.”

You have expressed concerns about some aspects of the legislation. Do you still think that it is important that legislation be used to tackle the problem of sectarianism? During last week’s evidence session, it was suggested that there is no need to bring in any new legislation and that it is all fine. One sociologist even suggested that if we ignored the problem, it would go away.

Dr Kay Goodall (University of Stirling): I strongly support legislating, for several reasons. Governments must be seen to respond. Lawyers may feel that there are very few gaps that need to be filled, but it is important to have named offences that the public can recognise. That shows
that Governments have responded and it enables the kind of valuable debate that we had over the summer simply because the bill was introduced, and which has helped to clarify the issues and raise public confidence.

Named offences are also easier to measure and monitor. At the moment, such offences are being lost among the huge number of events in the lower courts, which makes it difficult to know which ones might be captured under the legislation. Moreover, the public is looking for transparency on the issue and will support the bill. There are pragmatic as well as legal reasons for supporting the bill.

Humza Yousaf: I know that you go through this in your submission, but do you think that some of the bill’s definitions could be tightened up? You think that “likely to consider offensive” is too broad a term and bordering on hate-speech legislation. You broadly support something being done, but think that it perhaps has too much ambiguity in its current state. Where do you see the ambiguity?

Dr Goodall: There are several points. I support the bill, but I am particularly concerned about the fact that it has offences that are not attached to a normal, known offence in Scots law. For instance, for a racially aggravated offence someone must first commit a breach of the peace or an assault, but the bill is in effect creating new areas in that regard. Other jurisdictions have dealt with speech offences. In the debates in the United Kingdom Parliament on the English legislation on incitement to religious hatred, huge concern was expressed by people whom we might think would be most in favour of the legislation. For instance, Lord Lester, who is the great architect of race relations legislation, tabled particularly narrow amendments, which were accepted. It is generally considered that legislation that moves towards an offence that someone has not yet committed must be defined as precisely as possible. It cannot be watertight, but it should be as precise as possible.

Alison McInnes: I am very interested in Children in Scotland’s submission, which states that you regard law enforcement on this issue as necessary but not sufficient. We heard at last week’s meeting that the bill would probably disproportionately target a group of young working-class males. Can you reflect on the impact that that might have in relation to the role of fathers in tackling the problem?

Dr Bronwen Cohen (Children in Scotland): Our particular concern is the rather valuable paragraph 57 of the policy memorandum, which says explicitly that more needs to be done to address the causes.

On the point about how broadly the legislation is drawn, I listened carefully to Professor Devine’s evidence and I take the point about not losing what he described as the Scottish problem; nevertheless, from the perspective of children and young people, it is also important not to lose their sense of not having artificial distinctions between various categories of hate crime. One of the merits of the bill being broadly drawn is that it is easier for young people to understand than if you go down too much of an esoteric, narrow road.

We drew out the role of fathers in our submission, as well as the importance for prevention generally of focusing on the early years. In Scotland, we often talk about lifelong learning as being post-16, but the strongest lifelong learning comes from what children learn when they are very young, such as songs. There is interesting research that shows that older people who may not remember things can still remember the nursery rhymes that they learned. That is the clue to the fact that who children mix with in the early years and their understanding of difference at that stage is incredibly important in terms of prevention. We are concerned that the Scottish Government’s legislative programme last week postponed for two years consideration of strengthening children’s services, particularly in respect of early years. Given the committee’s task, the focus on early years is incredibly important.

The issue of fathers is not just an early years issue. There is significant research that shows the extent to which fatherhood can be a wake-up call for some hugely disadvantaged young men. In other words, becoming a father might predispose someone to reflect on what they are doing and help them to understand the world in different ways. When that happens, we are interested in the services to which those young men have access, as the services can cause them to reflect on the attitudes that they have shown.

Alison McInnes: The bill proposes a severe punishment of up to five years in prison. I am concerned about the impact of that on families. Do you think that there might be a more appropriate punishment that would perhaps help people to tackle their behaviour in a different way and thereby help to address the problem in society?

Dr Cohen: That is an area that I hope that the committee will examine long and hard. We have listened to the evidence that you have heard about whether the legislation is necessary and whether we could use existing legislation to do the job. We accept the view that there is a symbolism around legislating and focusing on a particular issue that is understood as such by children and young people, but one needs to think carefully about what happens as a result of that and whether the bill will bring in too many children and young
people, which might be the case if there is a lack of clarity on their part about what it is that they are being held responsible for.

The Convener: Would you agree that judicial discretion could play a part in that, rather than changing the penalties? The sheriff could take into account all manner of things—social inquiry reports, background reports, commitments and so on—when determining what kind of sentence to give.

Dr Cohen: I agree. I have not examined that aspect in the same detail as others on the panel have, but that would be an important point. As you know, we have a general concern about putting too many young people behind bars.

The Convener: Are there any other comments on that point?

Tom Halpin: The bench clearly has the best information to make the decision about what the sentence should look like, but Sacro would point out that the vast majority of the cases in the consultation involve direct measures—fines and other such measures—and only a small proportion of cases involve community payback orders and custodial sentences.

It is important to state that the resources that are available have to include room for diversion from prosecution, where appropriate, in order to allow the behavioural issues and the attitudinal issues to be addressed. It might be possible to use the powers that exist in relation to the community payback order to supervise people to ensure that they are excluded from football grounds or are compelled to take part in some other reparation to communities that have been harmed by sectarianism. I would emphasise that area.

The Convener: I have just discussed with the clerk the issue of diversions from prosecution and the discretion of the Crown Office and Procurator Fiscal Service. We will ask the Scottish Parliament information centre to clarify the situation. In relation to any legislation, the Procurator Fiscal Service has discretion to divert from prosecution.

Tom Halpin: It might not be appropriate to divert someone from prosecution but, within direct measures, it might well be that some other activities that deal with attitudes and behaviours might be appropriate.

The Convener: I think that those measures exist in relation to community service orders and various directions that are given by sheriffs. However, we would like to clarify that there would be that flexibility in relation to diversions from prosecution in appropriate circumstances. There probably would be, but we should make sure that that is the case.

Dr Cohen: Some research was done in Northern Ireland that looked at early years services and the extent to which children in them absorb some of the prejudices that are around. In the Northern Ireland research, that was shown to be not so significant at the early years stage but it emerged significantly when the children entered primary school. There is research that shows the power of services as they are provided in mediating between children’s entry to and understanding of the public world that they are entering, and the other communities that make up that world.

Research certainly suggests that we should start early to develop in young children the understanding of difference. As I said earlier, young children do not see things in the categories that we use, such as religion or disability; they just see difference. We had quite a powerful example of that in a programme that we run with Scottish Borders Council that was conceived of as being about physical access to services. To the children, the programme is child-led and, from their perspective, they look at all sorts of other aspects of the issue, not just the physical access. They take a truly inclusive approach to what they are doing.

I strongly believe that paragraph 57 of the policy memorandum and the preventative aspect of the bill means that one needs to take a broad view of how one works with children. It is not sufficient to say that they should understand the Scottish problem; they need to be introduced to it in a way that recognises all examples of difference, so that they can learn to value that difference and diversity.

The Convener: I am smiling slightly because two of the committee members, John Lamont and I, represent Borders constituencies and our ears pricked up when you complimented Scottish Borders Council. We will be looking for that in the Official Report because the reference went past me and I suspect that it went past John.

Graeme Pearson: My first question is for Dr Cohen, and then I have one for Dr Goodall.
Dr Cohen, your submission mentions the bill overlooking
"the opportunity to enact legislation that would increase positive attitudes".
Could you play out what you had in mind in that comment?

Dr Cohen: Again, we were thinking of paragraph 57 of the policy memorandum. We think that if we are focusing attention and resources on the whole issue of the manifestations of intolerance and bigotry of this kind, we should ensure that we should pay as much if not more attention to preventing it. That is what we had in mind when we made that comment.

Graeme Pearson: Is there any specific legislation that you would like to be introduced or is it about service support and other caring elements?

Dr Cohen: Yes, the submission is slightly loosely worded. We had more in mind the programmes that need to be put in place.

However, to add to my earlier points, in looking at prevention and what should be done, and taking paragraph 57 very seriously, as we do, we require more information to know what we are doing. We do not know enough about the extent to which young children and children of school age are mixing with others and getting opportunities to pursue activities together.

We sent the committee a copy of an article by Michael Rosie, another sociologist from the University of Edinburgh, who points to the extent to which children are in a lot of organised activities from pre-school, through school and outside school. We need to know more about the extent to which those activities facilitate cross-community activity as well as other forms of mingling. We do not know enough about that.

We have a school building programme. Canteens are shared in some schools but not in others. Do we know how many canteens are shared and what other activities take place?

Graeme Pearson: Dr Goodall, your submission was challenging and went into great detail. You mention on page 1 that the proposed use of official guidance would not only be illiberal but place a burden on enforcers and you criticise the notion of a sunset clause. Given the challenge that we face, is there a way of writing the bill with clarity that would enable fair and just enforcement?

Dr Goodall: The question is certainly difficult. I do not want to pre-empt the work of the specialist drafters, who have the most difficult task.

We can take measures without reinventing the wheel, such as taking elements from other legislation. For instance, the legislation on incitement to racial hatred, which covers us, defines the difference between public and private places. We could have such a definition to clarify the bill, without adding much work to the drafters' job. We cannot wholly define such terms as sectarianism, but we can do things such as defining behaviours that contribute to sectarianism.

Roderick Campbell: I have several questions for Dr Goodall. To kick off, will you amplify your comment “that teasing out the hatred from the banter will be a lot harder than it looks”?

Dr Goodall: As everyone is aware, sectarianism in Scotland—particularly in the context of football matches—is subtle and constantly evolving. Teams’ supporters constantly develop arcane references that they recognise but which are difficult for law to recognise.

The difficulty in comparing Scotland and Northern Ireland is that we do not have extremist organisations of any size that have explicit manifestos, whereas Northern Ireland has parties with particular loyalties. The Northern Ireland Assembly almost agreed on a definition of sectarianism that referred to religious or political affiliation, but we cannot apply that, so we must look for individual problems such as anti-Irish racism and religious antipathy.

Football rivalry seems to be innocent or just banter, but it need not be either/or—it can be fun and involve passion but also have a damaging effect on wider groups in society. We must simply capture the elements that are or should be unlawful at the same time as we recognise that people can be having fun.

Will you repeat your question? I think that I have gone slightly off the point.

Roderick Campbell: I asked you to expand on the borderline between banter and hatred, which you have touched on.

Do you agree with the Law Society of Scotland’s view that section 1 of the bill does not improve on common-law breach of the peace or section 38 of the 2010 act? Does the 2010 act provide sufficient protection?

Dr Goodall: In many ways, the comment is correct: section 1 does not necessarily change the law enormously. As I said, what helps and is important is naming the offence, not just for lawyers but for the public. My greater concern is about where section 1 goes beyond existing law. I have no problem with replicating existing law, but we must not unintentionally extend the law without good reason.
Roderick Campbell: That brings me to my next point. Intention is part of section 38 of the 2010 act, whereas you have made considerable play of the absence of intention from large chunks of section 1 of the bill. Will you expand on why that concerns you?

Dr Goodall: It concerns me because, as I mentioned, the offence has an element of incitement to hatred, but there is also the element of expressing hatred. The term “expressing hatred” is particularly wide. Earlier, the committee heard an example about a man talking on his mobile phone at Coatbridge and saying, “I’m surrounded by hundreds of Fenians.” That is clearly offensive behaviour, but it is not in itself recognised as an offence without more behaviour—perhaps some breach of the peace. If, as I fear, we are to create a law that extends to that, we will have to be careful about how we define it. That is the kind of consideration that we need to take into account.

Roderick Campbell: I have one final question. In general terms, what can we learn from the amendments on religious hatred that were inserted into the Public Order Act 1986 during the passage of the Racial and Religious Hatred Act 2006 in England?

Dr Goodall: We can learn a great deal from them, as they were helpful. The debate on them in the House of Lords was excellent, with a number of senior lawyers taking part. We can simply lift a good deal of the excellent content of that legislation and use it in the bill. In particular, there is a definition of how we protect freedom of expression, or of what is not included in an incitement offence. As I have said elsewhere, that is not strictly legally necessary, but it deals in part with the chilling effect that could arise because people are fearful of what the law says and what might be covered. We could bring elements of that legislation into the bill, such as the distinction between a public and a private place and the definition of the protection of freedom of expression. The definition of incitement to hatred in that statute is considerably longer than that in the bill, but we need all that extra content, and it would not be a great deal of work to introduce it. I recommend doing that.

The issue caused an enormous outbreak of concern in England. Groups that would not normally work together did so and were deeply worried by the proposals. We must take account of that full debate.

James Kelly: I have a question for Mr Halpin and Dr Cohen, although it relates to Dr Goodall’s submission. She points out that a positive aspect of legislation such as that proposed in the bill is that it is not just about convicting people of offences, but about the message that it sends out to society about offensive and threatening behaviour being unacceptable. Mr Halpin and Dr Cohen, you raise concerns about the bill, but do you accept that, if we get it right, it has a role in sending out a strong message about the type of behaviour that is unacceptable in Scotland?

Tom Halpin: I would like to be clear on that point. Sacro welcomes the fact that proposed legislation has been introduced; our concern is about whether the definition is so wide that it will include people who should not be included. That point has been made in other discussions. It is absolutely necessary that we have a platform for saying clearly that certain behaviour is not acceptable. However, we want to see more action. The issue is not just about sending a message or about being punitive and setting the boundary that people cannot go beyond; it is about considering the underlying issues and how we enable and facilitate people to access services that can deal with those issues. There are many good examples of cognitive behavioural programmes in which people are challenged constructively and their attitudes are changed.

Dr Cohen: I broadly agree with Tom Halpin. We believe that it is important to focus on the issue, which has struck us all as being in many ways bizarre in this century. However, it is equally important that we send out a message that we are considering the preventative aspects, the causes of the problem and some of the wider ways of approaching it. I mentioned Northern Ireland, which is important, and I know that the committee will look there.

Channel 4 and an early years organisation combined to produce an interesting programme that focused on messages that came through the media. They worked not just with children, but with their families, looking at some of those messages. It is an area in which we cannot hope to resolve the problem by just being clear about how offensive something is; we must take a preventative approach.

12:45

Humza Yousaf: My question is for Dr Goodall—the number of questions that you are getting is directly related to the detail of your written submission. Several groups—supporters trusts, in particular—say that they want clarity in the bill about which songs, chants and actions should be proscribed. In your submission, you say that that probably is not the right way to go. Where are the dangers in proscribing specific songs or actions in legislation?

Dr Goodall: That is a good question. There are several dangers. The first is that such lists go out of date and the law looks foolish because it is not...
keeping up with the latest developments, particularly in an area such as football. Could you repeat your question, please?

**Humza Yousaf:** What are the dangers of proscribing specific actions and songs in legislation? You have said that one reason is that the lists go out of date. Are there other reasons why we should avoid proscribing, which certain groups and organisations have asked for?

**Dr Goodall:** Another reason is that I am quite happy to leave it to the football clubs to define which songs are unacceptable. There is a presumption that football fans are not bright enough to work out what is and is not an acceptable song, but I do not think that that is necessarily true.

The general principle is not to create law that is too specific, which will go out of date—that has been the view of the drafters. They want to create a piece of legislation that will last and will not need to be revisited constantly. Even if you used secondary legislation, which would allow you to change a list, it would still have to go through Parliament.

I do not think that it is an area in which we need a list to provide clarity; what we need is clarity around the general behaviours that we are trying to capture. It is somewhat mischievous to suggest—I am not saying that you have said this—that we need a list, which people will know how to get around. The clubs themselves can define what is unacceptable.

**The Convener:** I have a final question for Dr Cohen on the second part of the bill, regarding the internet. Children are far better than I am at accessing the internet, Facebook, Twitter and all that stuff. I am sad—or glad—to say that it is foreign to me at the moment. My brother has forbidden me to use it, for reasons that I am not going to tell you. In any event, it seems that the bill might impact on children and young people innocently exchanging communications that fall within the ambit of the bill. Would you care to comment on the threatening communications part of the bill with regard to children and young people?

**Dr Cohen:** We looked at that area quite hard. It will be important for there to be clear definitions, and the bill’s drafting will be important in that regard. Scotland’s Commissioner for Children and Young People has been focusing on and discussing the issue as well, and it is important that that is taken account of.

I go back to the point that I made at the beginning of my evidence about needing to look at the issue through the eyes of children and young people. It is about clarity, and making slightly narrow distinctions all the time about what is offensive and what we are not going to say anything about would make it harder to ensure that the bill did not disproportionately affect young people who had not reflected on that. I would like to think that we can do this before we have to address it, but we can ensure that we are offering enough opportunities for all young people to reflect on and be clear about what is and is not offensive. To put it more positively, they must understand and value diversity and difference, which we need to make meaningful.

We have various policy frameworks in our schools. There is the curriculum for excellence, which is relevant, and I am sure that, as part of their consideration of the policy memorandum, members will look at how it can be made real. There are also the equality strategies and the duties on local authorities, which our organisation thinks need to be made more meaningful to take matters forward. There are various strands, all of which will be required if we are to ensure that the proposals do not catch young people in particular. We need to ensure that the necessary but difficult area of law on offensive communications does not disproportionately affect young people.

That was a slightly lengthy answer.

**The Convener:** The area is difficult, and there are cultural differences between young people and other generations. What might be offensive to older generations might not be offensive to younger people, and the language might mean different things to them. I wanted to put that on the record for when we come to consider implementation.

I want to conclude this evidence session. If, having reflected and read the evidence of previous witnesses, the witnesses think that they want to add something, they should feel free to do so. Next week’s evidence session will be our last. We will confront—I think that that is the appropriate word—the Lord Advocate and the minister, so we will need the material by then.

The committee is so powerful that we now have the draft guidelines, which came—I am going to be wicked—around an hour after we sat down. Obviously, elves somewhere in the deep recesses of the Lord Advocate’s office are listening to us, which is good to know. The draft guidelines will be made public this afternoon for everyone who requires to know them. That means that, with the committee’s leave, my letter to the Lord Advocate will deal simply with information about the analysis of the implementation of the 2003 act. I will also thank him for the guidelines. In addition, I need the committee’s authority for a letter to go to the SPL on its interaction with the SFA and the protocols, which it would be appropriate to copy to the SFA. Are members content with that approach?
Members indicated agreement.

John Finnie: Can we ask the SPL what happens to match delegates’ reports, who has access to them, and what action is taken as a result?

The Convener: Certainly. If members remember anything else that they want to be put in the letter, they should e-mail the clerks by close of play today, which is 5.30—I am just checking with the clerk that he does not work too much overtime. We will put anything additional in the letters and get them off as soon as possible.

Next week, we will have in front of us the Scottish Human Rights Commission, Professor Bill Buchanan, who is an IT whizz, the Lord Advocate and the minister.

I thank the committee and witnesses for their attendance.

Meeting closed at 12:53.
Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the seventh meeting of the Justice Committee in session 4. I ask everyone to switch off their mobile phones and other electronic devices, as they interfere with the broadcasting system, even when they are switched to silent. No apologies have been received.

Agenda item 1 is to decide on taking business in private. The committee is invited to agree to consider in private at future meetings the main themes arising from the evidence received on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill; our draft report on that bill; and our approach to the Scottish Government’s draft budget and the spending review. It has been the usual practice to take such an approach. Do members agree to consider those items in private?

Members indicated agreement.

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

10:04

The Convener: Item 2 is the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Before we begin our final evidence session, I want to clarify some issues that appeared in news reports at the weekend.

I received a letter from Nil by Mouth that asked why we did not require it to give oral evidence on the bill, but the letter did not come in until Friday at 6.30 pm, when, of course, no one was available to deal with it. It arrived quite late. Nil by Mouth did not indicate to the committee at any point prior to that that it wished to give oral evidence, and the rest of the committee did not hear of its disappointment until they saw press reports. I am sorry that Nil by Mouth was disappointed. That said, its written evidence was substantial, and the whole committee took the view that it was sufficient. However, I wrote to Nil by Mouth yesterday, asking it to make clear whether it wished to provide any further written evidence, which we would be pleased to consider before we report. I hope that it feels that it can do that.

On to business. We have two witnesses to hear from separately before we question the Lord Advocate and the minister, so, as usual, I would appreciate brief, focused questions from members. I will not say that again, as I know that members will provide that. Our first witness today is Shelagh McCall, one of the commissioners at the Scottish Human Rights Commission. Thank you for your written submission.

James Kelly (Rutherglen) (Lab): Good morning and thank you for attending the committee this morning. In your written submission, you express the view that the bill as drafted would be open to challenge under the European convention on human rights. Can you outline your reasons for stating that?

Shelagh McCall (Scottish Human Rights Commission): Thank you for inviting the commission to give evidence to the committee. There are five main areas in which the bill could be improved. I appreciate that, in other evidence sessions, the committee has been grappling with the question of freedom of expression, and I am happy to talk in general terms about what is required of the Parliament in that respect.

First, we recommend that the committee advise the Government to delete section 1(2)(e)—the paragraph about behaviour that a reasonable
person might find offensive. Offensive speech is protected by article 10 of the European convention on human rights. The European Court of Human Rights in Strasbourg and domestic courts have repeatedly said that not only popular speech but offensive, unpopular, shocking and disturbing speech is protected. I appreciate that the word "offensive" is intended to mean something different in the bill, but it is an immediate flag for a challenge under article 10. There are also issues with the clarity of that provision and whether an individual citizen could foresee that his action would be criminal under that section. That raises issues not only under article 10 but under articles 5 and 7. Article 5 relates to whether someone can be deprived of their liberty and article 7 is broadly described as the principle of legal certainty, meaning that the law needs to be clear in advance.

Secondly, subsections (2) to (4) of section 2 could be improved. I recognise that the committee has also been grappling with those subsections, which concern journeys to and from football matches or places where matches are being shown and conduct that occurs at a location where a match is being televised. We recommend that the committee consider clarifying those provisions to avoid unforeseen and unintended consequences. For example, if someone is in a public house or a private members club where a match is being shown and they engage in conduct that stirs up hatred against one of the groups that are protected under the bill but it has nothing to do with football nor is the person at whom that conduct is directed anything to do with the football, that would be caught under the bill. It may be that the matter could be left to the prosecutor’s discretion, but the Parliament has the opportunity to get the drafting right and avoid such potential unintended consequences. We therefore recommend greater clarity about that.

The third point that we make in our written submission, to which Mr Kelly has referred, is on section 5(5) in relation to condition B. Section 5 is the section on threatening communications. The point has been made by other witnesses that, at the moment, condition B relates only to religious hatred. In our view, it should cover all the groups that are protected under section 1(4), as there is a danger that a hierarchy of discrimination could be created, which would be inappropriate.

There are two other matters concerning section 5 that do not arise from our written submission. We question why unrecorded speech is not included. If it is intended to exclude private conversations between two individuals, it could be more narrowly drafted. At the moment, it seems also to exclude the streaming of live speech over the internet. It may also exclude a rally run by an extremist group where the speaker is speaking through the microphone but is not being recorded. It may be that the Government intends to catch those sorts of things but exclude private conversations. Further consideration could be given to that point because, in freedom of expression terms, the fact that speech is recorded or unrecorded is not a critical factor.

The other matter relating to section 5 is whether there should be a specific exemption for artistic expression, peaceful preaching and so on, as there is in the equivalent English legislation. I am sorry that my answer was rather long, but I have set out the five areas in which we think there can be improvement and explained why that is.

The Convener: It is right that it is what is in the bill that counts but, notwithstanding that, have the draft guidelines from the Lord Advocate changed your view?

Shelagh McCall: No, they have not. There are two aspects when talking about interfering with freedom of expression. The first is that the lawmakers must get it right as best they can. Secondly, those enforcing the law must get it right. One of the gaps is that the Lord Advocate does not publish his guidelines to prosecutors as a matter of course—he said here that he will not publish his guidelines to prosecutors. Although I can understand the desire of lawmakers to leave that to police and prosecutors, there is an unknown quantity there, and the Parliament should take the opportunity to get it as right as it can at the beginning.

Roderick Campbell (North East Fife) (SNP): I want to return to the first point raised, concerning section 1(2)(e). Obviously, the right to freedom of expression in article 10 is a qualified right. Although the drafting may not be terribly clear, can that provision be construed in connection with section 1(1), so that the behaviour that we are talking about is only behaviour likely to incite public disorder?

Shelagh McCall: You are right that article 10 does not provide an absolute right, but interference with it must be justified by the state. It is not for the individual to defend what he or she did as okay; it is for the state to say why it has criminalised it.

There are three tests for that. First, the law must be sufficiently clear in advance; that is one of the points on which we take issue with this section. Secondly, the measure must be directed towards one of the objectives that is allowed under article 10.2 of the ECHR. Here, the bill is directed at the prevention of disorder, but there are issues to do with whether the section would pursue that aim. Thirdly, the measure needs to be necessary in a democratic society. There must be a pressing social need for the provision and it must be the
minimum measure necessary to achieve the aim sought.

To answer your question in more depth, our concern is that, because of the way in which section 1(1)(b)(ii) is drafted, particularly relating to a situation where there are no people who could be disturbed or offended by the conduct present—not where the police outnumber everyone else but where only like-minded people are in the room—it will be hard to justify the interference with freedom of expression as a necessary measure where the conduct creates no risk to public order. I am not sure that section 1(2)(e) is saved by 1(1)(b)(ii).

Roderick Campbell: However, do you have less of a problem with it in relation to section 1(1)(b)(i)?

10:15

Shelagh McCall: There is less of a problem in respect of pursuing the aim of the prevention of disorder. There may still be issues of foreseeability that someone’s conduct will be criminal, and there may also be issues to do with whether the legislation is necessary. As I know that you have heard from other witnesses, there is a concern that much of the conduct is caught by other criminal provisions. Tim Hopkins gave evidence to suggest that the bill might create an additional stigma to the conduct. The Parliament has to be satisfied that the creation of the stigma is necessary in a democratic society and is a proportionate measure in relation to conduct that might otherwise be caught by other criminal provisions.

The Convener: We will hear from Humza Yousaf, followed by Colin Keir.

Humza Yousaf (Glasgow) (SNP): It is okay, convener. My point was precisely the same as Roderick Campbell’s.

Colin Keir (Edinburgh Western) (SNP): My question relates to part of your submission. You refer to a possible disturbance in a pub that is showing a football match, and you state that it could not be taken in the context of the bill. Many pubs, particularly on Saturdays and Sundays when the games are shown live, will advertise and get people in to watch the game. It is probably one of their most profitable parts of the week. People generally go there to see the game. What makes you think that offensive behaviour in that context is not to be taken in the same way as offensive behaviour at a match? What makes it different when people go to the pub specifically to watch the match?

Shelagh McCall: I do not think that there necessarily is a difference. We do not generally have an issue with section 2 and the definitions in it, but the point that we make in our submission is that, as drafted, it has the potential to catch people who are not in a pub to see the match but who engage in offensive behaviour entirely separate from those who are there to see the match. We are suggesting that the committee find a way to clarify the language to ensure that the people who are caught are those who are there to see the match and that the offensive behaviour is in some way connected to the football as opposed to being some other gratuitously offensive behaviour towards an individual who falls into one of the categories in section 1. Perhaps that is a question for the minister and Lord Advocate.

Colin Keir: Therefore, the principle is acceptable—the issue is just the language that is used in the bill.

Shelagh McCall: The principle is acceptable if the Parliament is satisfied that it is a necessary and proportionate measure—

Colin Keir: Okay. What is your own view?

Shelagh McCall: Unfortunately, we are not privy to all of the information that you have. From a European convention point of view, the basis for interfering with people’s freedom of expression needs to be evidence and not assertion. If the committee and Parliament are satisfied that there is sufficient evidence that there is a genuine social problem that needs to be tackled in the way outlined in the bill, there is no difficulty with it.

The Convener: I want just to clarify that everything that the committee has received is in the public domain. We have no special routes for information.

John Finnie (Highlands and Islands) (SNP): Ms McCall, thank you for coming along. I want to ask you about the phrase “pressing need”, which I think you used earlier.

Shelagh McCall: Yes.

John Finnie: You also referred to sufficient evidence. What do you think would constitute a pressing need or sufficient evidence to introduce legislation of this nature?

Shelagh McCall: The policy memorandum appears to set out a pressing social need, and I think that we are all aware of reports of events last season that came to public attention and resulted in criminal behaviour and behaviour that would be potentially criminal under this legislation. However, we need to think about the issue that needs to be dealt with that is not already dealt with by other criminal law.

The Government may have evidence that there is a pressing need to tackle bigotry and prejudice and its manifestation in violence in relation to football, and it appears from its policy
memorandum that such evidence does exist. What I am saying is that it is not enough simply for the Government to say, “We say there is a problem and therefore we will legislate.” If it was challenged, the Government would have to demonstrate why it says that there is a problem. I am not suggesting that that evidence does not exist; I am saying just that Parliament, before it passes the legislation, should be satisfied that there is such evidence.

John Finnie: That said, do you accept that there is such evidence?

Shelagh McCall: I accept, in so far as it has come to my attention, as it has come to the attention of every other member of the public, that there appears to be a problem. It appears that the continuing behaviour is not being addressed sufficiently, but it is important to narrow down precisely what it is that the bill can add to dealing with that problem. That is one reason why we have a difficulty with the offensive behaviour provision in section 1(2)(e). The other provisions in section 1(2) are much more tightly expressed and appear to be directed specifically at what the Government says is the issue.

John Finnie: We have heard from the Lord Advocate and representatives of all ranks of the police that there is a gap in the legislation. Are they incorrect?

Shelagh McCall: I have no basis for thinking that they are incorrect.

John Finnie: Okay. Thank you.

The Convener: As there do not seem to be any more questions, is there something that we have not asked you that you wish we had asked and on which you would like to comment?

Shelagh McCall: I emphasise that, in justifying the bill’s interference with freedom of expression, the Parliament has the primary role to play, so it might be interesting for the committee to press the Lord Advocate and the minister on what sort of conduct is intended to be caught by the offensive behaviour provision in section 1(2)(e) that would not otherwise be caught by other criminal provisions. It might be worth exploring that with later witnesses.

The Convener: As well as the issue of unrecorded speech.

Shelagh McCall: Yes—the issue of why that is excluded.

The Convener: Graeme Pearson wants to ask a question. Every time I say that there are no more questions, someone pops up. Roderick Campbell has popped up again, too.

Graeme Pearson (South Scotland) (Lab): It is too good an opportunity to miss.

Is the trend over the past 10 years whereby the number of arrests at games has fallen—it is certainly the case that there were very few arrests among the crowd at the game to which you referred—indicative of a “pressing social need”, which you mentioned earlier?

Shelagh McCall: You would have to work out why the number of arrests had fallen. If it has fallen because the number of incidents of potentially criminal conduct has fallen, that would suggest that such a need does not exist. If it has fallen because of an unwillingness or an inability on the part of the police to arrest or to identify people, that does not tell you one way or t’other. It is not a question of how many people are arrested and prosecuted; it is a question of whether the evidence is there on what underpins that.

Roderick Campbell: Do you think that the bill would be improved by a freedom of expression defence?

Shelagh McCall: That is why I suggested that the Government and the committee should consider recommending an exemption, which is how such a provision would normally be described. I am not an English lawyer, but I think that there is a provision in England and Wales that exempts artistic expression, peaceful preaching, peaceful proselytising and so on. Those are legitimate concerns because, on its face, the bill challenges freedom of expression.

Section 5 contains a defence of reasonableness, but that is a Scottish criminal law defence—“What I did was reasonable, so I should not be convicted”—rather than a convention rights defence, if I can put it that way. In an article 10 sense, the test is different because it is for the state to justify the interference with freedom of expression rather than for the individual to defend his speech. Some such provision might be helpful.

The Convener: Would it be of assistance if the bill linked to what the concluded guidelines—the ones that we have are just draft guidelines—said about freedom of expression?

Shelagh McCall: That would be of assistance, but it would not be the answer because the Parliament has the primary duty in justifying interference with freedom of expression.

We are suggesting that there are ways in which the bill could be improved to avoid unnecessary challenges under freedom of expression, because the last thing that the Government and the Parliament would want, if the bill is passed, is for the legislation to be bogged down in challenges in the courts that need not have taken place. We are suggesting ways in which the bill could be improved at this end to avoid subsequent challenge.
The Convener: Would the bill be improved by inserting a section on freedom of expression and importing from the Lord Advocate’s draft guidelines the list of what the offence will not criminalise, such as peaceful religious preaching? That list makes it clear that the bill will not “Criminalise jokes and satire ... depictions of threats” or “threats made in jest that no reasonable person would find alarming.”

Should we put that kind of stuff into the bill?

Shelagh McCall: Yes. I have not looked at the Lord Advocate’s list to see whether it is exhaustive or the right one, but it is the sort of list that we find in other legislation.

The Convener: Yes. The bill could exemplify but not be exhaustive. That is very helpful. Thank you very much.

That concludes questions to Shelagh McCall. I suspend the meeting but ask people to stay put. We are just changing witnesses.

10:25

Meeting suspended.

10:26

On resuming—

The Convener: I welcome William Buchanan, who is professor of computer security and digital forensics at Edinburgh Napier University. I thank him for his written submission. I will not ask any questions in this tranche as the topic is a blur to me. However, I suspect that we have some technophiles on the committee.

Humza Yousaf: Thank you for your submission, which I have found useful. It contains a useful list of difficulties that exist when prosecuting cybercrime. Do they negate the need for legislation on the matter?

Professor Bill Buchanan (Edinburgh Napier University): The proposals are a step forward, but there needs to be some in-depth consideration of what is involved. Some of what the bill says is perhaps slightly naive, in that it maps what happens on a street in the real world onto the internet. We cannot do that well without looking at the basic procedures behind the internet.

We have all posted something on the internet, perhaps as a joke, and had what we said taken wrongly. It is a different space. There is experience and knowledge in relation to cybercrime in Scotland—the Scottish Crime and Drug Enforcement Agency has such knowledge—but I wonder whether the Scottish police have enough at the moment to understand the internet and how people use it.

Humza Yousaf: Will you explain the idea of creating a group of digital experts to assist prosecutors? It is a good idea.

Professor Buchanan: We are worried that the current system of investigation, expert witnesses and prosecutors lack independence and that they are unable to consider all the risks that are associated with, for example, Facebook postings—for example, the probability that someone might maliciously post something about someone else and that that might be taken as real. Therefore, an independent body needs to be set up to assist in prosecution of internet cybercrime cases. It needs to be a wide-ranging but very focused body.

We have a lot of industry and many small and medium-sized enterprises in Scotland working on internet security and there are Dell SecureWorks, Logica and the banks, for example. Edinburgh is probably in a unique position in the world in having the expertise to properly understand the issues and become a world leader. This could be an opportunity for us to build up some excellence in prosecuting cybercrime while looking after the individual and ensuring that things are done correctly. Nothing is ever black and white on the internet and we need to understand the basic risks.

Humza Yousaf: Can I just chip in to take up that point, convener?

The Convener: I will not enforce a two-questions-only rule on you, Humza. On you go.

10:30

Humza Yousaf: I am glad to hear it.

Professor Buchanan—you make the distinction throughout your good submission, and you have reiterated it, that it is not possible to apply the same rules on the internet or in cyberworld as out in the street. Can you elaborate on that? To make a threat on the street to kill somebody is still rash and there might be other factors—the person might be inebriated or whatever. Why is there a distinction between that and a person posting the same threat on the internet?

Professor Buchanan: Things are often said on the internet without thought. People often read something and reply immediately. Once you have pressed the send button, it has gone.

Humza Yousaf: That can also happen in real life. If someone provokes you and you say something rash, you do not have the opportunity to take back whatever you said.
Professor Buchanan: If I was to write a letter, post it in the mail, and you received it, that would be something that I had thought about; it would be something that I wanted to do and everything that I said in it would be correct. The internet is a very responsive system and we cannot take things back. I might say, “I’d like to start a riot,” and add a little smiley face, which would mean that it was a joke. I might not mean it, but I might send it to you and you might say, “Bill says we should start a riot.” Things are said in jest. In the street, you would see me laughing when I said, “Let’s start a riot.” You would know that it was a joke and that I did not mean it, but if I were to make the comment in an e-mail, you might say that it is wrong and there would be evidence of what I had said. The context of the comment is removed.

The internet is a free world. Everybody can get into it and can post whatever they want. My signature does not exist on the internet, so how can you identify that it was I who sent you an e-mail? Anybody can spoof my e-mail address, can you identify that it was I who sent you an e-mail? Anybody can pretend to have my identity and anybody can take my identity.

Humza Yousaf: Currently, the police do not have the resources to detect whether something has been sent by malicious malware, spam or a bot.

Professor Buchanan: That is right. One defence that a person can use is, “The bot did it. It wasn’t me—something on my computer sent it.” I worry in this new world that is still evolving and changing, and in which social networks are becoming more and more prevalent: we send text messages and we have phones and can carry around the internet. We could quickly post something without having enough fingers free to type properly, so what we type could be incorrect or misspelt. It is very easy for a word to be taken wrong way or for the computer to change it for you.

I deal with students a lot. Some students write very nice e-mails to me, which are written carefully using grammar, punctuation and so on. Other students use almost pidgin English and I have to interpret it. We are living in a different world, but it is one that we are all part of.

The Convener: The use of pidgin English or very careful grammar is about one’s past. That is a frivolous remark, and I am not known for frivolity.

James Kelly: Good morning, Professor Buchanan. Your submission makes a number of interesting points. Central among them is a point about how we can identify someone who has made a posting that would breach the terms of the bill. When we raised the issue with the minister back in June, she was quite dismissive of it and said, “Oh well, sometimes people put their names to the posts.” That happens very rarely.

From your knowledge, if someone posted in Portugal and that post appeared on a website in Scotland, what is the technical process for trying to identify what computer and from whom it has come?

Professor Buchanan: It is very difficult, in that there are no boundaries or borders on the internet. From a technical point of view, internet service providers in the United Kingdom keep a trace for up to two years of all internet traffic coming from homes. It is therefore possible for the police to go to the ISP to determine whether someone posted something at a specific time. I worry that it is not possible to tell who posted. In my home, four people use the internet; no one could tell which person posted a specific thing because all would come from one network. Identification is possible, but legislation is not the same all around the world. I do not know whether an ISP in Portugal would log the details of communications.

There are details, though. Most servers now record the internet protocol address that posted something and at what time. That is normally done in a log. However, it would be very difficult to trace anything outside the UK. The major problem for the UK police is that it is difficult to prosecute people once borders are crossed.

James Kelly: Just to be clear, if I take my home as an example, we have one router, and three personal computers that log in through it. Is the IP address allocated to the router?

Professor Buchanan: That would be one address—it is almost impossible to find out which computer in that network had sent a particular communication. Identification is possible through profiling, however. Investigators could say that someone used a certain application, such as e-mailing their office or creating a connection to a business network, and that between this time and that time, it is likely that a specific person was present and that no one else was there. However, because it cannot be said that someone in that network definitely did something at a specific time, there is a risk.

James Kelly: If someone reports a posting from a month ago, on a Sunday afternoon, on a particular website, what resources are required to enable the police to trace that to an individual home?

Professor Buchanan: The police have mechanisms to enable them to put a case for contacting a mobile phone operator—if the posting happened through a mobile phone network—or an ISP. The police consider the crime, the risk and so on. In the case of a missing person, the police are automatically given the opportunity to view the
location of someone’s telephone or their internet record for the past day. However, if it is a trivial matter, they would not be allowed to do that. The police can ask an ISP for someone’s basic record within a certain time window, although whether it would be allowed would depend on the crime that had been committed. However, it takes ISPs some time—normally a few days—to find data on the specific posting.

The Convener: Generally, one cannot go fishing for evidence in law—you have to have a search warrant. Where does that requirement fit in with this?

Professor Buchanan: That is right. It worries me a bit that the bill gives the police an opportunity to go fishing for information when no crime has been committed. The warrant happens, then goes through some arbitrator and then to the ISP or the mobile phone operator.

James Kelly: Obviously, there are legal issues here. You are saying that the resources exist in the UK to track down an individual posting to a specific home, but that if a number of PCs go through a router it is difficult to identify which PC the posting came from.

If the police were trying to track down something that had been posted abroad, the situation is not as clear-cut—the resources do not necessarily exist to do that.

Professor Buchanan: That is especially the case as we are now more and more dependent on US-type law—I am thinking of Florida or the east coast. With Hotmail, Google and Facebook, most of our data is in the cloud. The cloud as an infrastructure does not really exist in the UK in the way that Amazon, Google and Microsoft exist in the US. To get any information from Google or Microsoft requires a warrant, which can take some time.

James Kelly: Where does that leave section 7(2), which deals with communications from persons outside Scotland? Is that an effective section? Is there any way it could be firmed up? Will it be difficult to achieve the intention of that section, given the limitations that exist?

Professor Buchanan: I think that it will be difficult. It is difficult to draw a border around Scotland as an entity, because we really exist on a world-wide basis. Although a communication might be from within Scotland, or from someone from outside Scotland to someone in Scotland, our data is often held outside Scotland. It would be very difficult to get the core data if it were held on systems outside the UK.

James Kelly: From that point of view, do you think it is realistic or practical to include section 7 in the bill?

Professor Buchanan: I think that it is. Section 7 is a good step, but it probably needs to be couched with some sort of guidelines on how to investigate such communications, so that a jury could understand the risks. All that I am identifying is that the situation is not black and white. Police have investigated crime for thousands of years—and more—but this is a new area. We need to understand some of the risks, so that the jury could be aware that something else could have happened; it is up to the jury to understand the risks. The jury could be 95 per cent certain that somebody sent an e-mail that was received by somebody in the UK, but there might be a 5 per cent chance that the e-mail could have been sent by somebody else who was maliciously using that e-mail address to send communications.

The Convener: Thank you. Forgive me, Humza—I want to call other members who have not asked questions yet. I suspect that we will cover much the same business. I call Graeme Pearson, to be followed by Alison McInnes.

Graeme Pearson: I ask this question in the context of the evidence that you have just given. The financial memorandum mentions spending of up to £1.5 million on the new demands that will be created by the bill. You talked about creating an infrastructure. Is the forecast amount sufficient to support the resources that you mentioned?

Professor Buchanan: The spending should be on creating a panel of experts. We find that many people are willing to give up their time and energy to look at such things and to really make Scotland a leader in this area. If you set up a panel with purely police members, it will be biased towards one side. We need to set up a panel that is made up of leading industry people, people from SMEs and people from our banking system, which is one of the best in the world as it has experts in e-crime and cybercrime. The banks are under threat from such crime all the time, so they understand this area. If we could look at setting up a lightweight infrastructure that includes academia—

Graeme Pearson: What kind of costs would be involved in that?

Professor Buchanan: I do not think that a lot of cost would be involved. The panel would probably need to meet twice a year to set the basic guidelines, to review what has gone on and so on. It would probably need to meet once every three or four months to look at major cases and how it can inform legislation. We probably need to set it up on a lightweight, as-per basis. You could probably set up an ad hoc committee at any time using Skype. You do not need people to travel. You say, “These are the six people in Scotland who can give a good independent assessment. They will quickly produce a report that the police can act on.” Cyber activity is a minute-by-minute
thing. It could happen on a Sunday evening at 9 o’clock, for example. Not having fixed times for this would be useful for Scotland as a country.

10:45

The Convener: That sounds like a business opportunity.

Professor Buchanan: I would say so, for Scotland. We are a small enough country that we can get people together and work together. In England it is much more difficult to do that kind of thing. In Scotland there is certainly expertise in the area from which we could benefit, and which could lead the world.

Alison McInnes (North East Scotland) (LD): Sections 5 to 7 have not yet had much scrutiny from the committee, partly because witnesses have focused on the earlier sections. Can you advise what they would add to the UK Communications Act 2003? Are there gaps in the 2003 act that would be closed by the bill?

Professor Buchanan: My response to the 2003 act, which was a difficult act, would probably have been the same as my response to the bill. The 2003 act and, certainly, the bill represent a knee-jerk reaction in that they try to scale normal behaviour in the context of the internet.

Thinking can start to crystallise about how to look at the issue in general. In relation to sectarianism and football-related matters, the bill is a good step, but we need to identify the risks and, as a country, to try to consider more generally how to create our own legislation in the area. This might be for Scotland a good starting point that enables us to define how we work in the space, because a lot of what goes on on the internet could be encompassed by the bill. Many things that happen could be prosecuted under the bill, even though they might not relate to football.

Alison McInnes: Are we starting at the right place? You seem to be saying that we have a lot to think about and to learn. However, if the bill goes through the parliamentary process, its provisions will appear on the statute book in the next month or so. Is the approach proportionate? Is there enough clarity for citizens? I sense that you are worried that the bill might create a culture of distrust. People will not be at all sure about what they are able to do and will feel that they are being watched and scrutinised all the time. Is that a danger?

Professor Buchanan: I completely agree that it is. There needs to be a trusted auditor and a trusted infrastructure—people whom we trust to look after us. That is why the committee or panel that I talked about would not necessarily be filled with the police, although it would include police representation. We need people who are trusted in the community. That is where academia can help, because we generally are trusted in the community. The bill is a step in the right direction, but there should probably be some sort of auditing system around the process.

The Convener: I take it from that that you are suggesting that somewhere in the bill there should be a provision that says, “There shall be established such-and-such” or—

Professor Buchanan: —or that there will be review and that risk assessment will be undertaken case by case. The bill could set out the rules for risk assessment and say that in cases of serious abuse an ad hoc committee will be set up to report on the evidence that is presented. There should be some sort of regular review.

John Finnie: You said that thinking about the issue can start to crystallise. Notwithstanding that there are tremendous difficulties in dealing with internet crime—which you talked about and which I think police forces the world over acknowledge—do you accept that the Scottish police service has had considerable success with its interventions on football and, in particular, on gang-related incidents?

Professor Buchanan: I completely accept that. Much of what the police do is work to disrupt and prevent such incidents. In Glasgow there are many good examples of the police working with communities to prevent escalation from low-level to high-level crime. Social workers are working closely with the police in that regard. There is much informal communication—which probably is not written down anywhere—that is good communication. For example, a social worker might say to a police officer, “Fred is at risk of doing something; maybe you should have a word with him.” That works. What will not work, however, is the police spending their time not in the community but fishing for evidence on Facebook. On the internet, a lot of what goes on is written down and can be seen—what might be called formal communications—so I am slightly worried that the police will do that. I am sure that that will not happen but the internet is, nevertheless, a source for the preventative type of evidence.

John Finnie: Dr Kay Goodall told us that the law can influence people to reduce overt prejudice and that the mere discussion of this issue, recent disturbances elsewhere on these islands and, indeed, the shocking behaviour against the Celtic manager can act as a preventative.

Professor Buchanan: I am sorry—I missed the last part of your question.

John Finnie: Along with—as you have pointed out—the bill, the mere fact that we are discussing
the issues and the knowledge that there have been successful prosecutions crystallise thinking further.

Professor Buchanan: I completely agree. The great thing about the bill is that it includes internet communications, which is definitely a step in the right direction.

Our use of the internet is changing because, I think, we can see what is and is not acceptable. At one time, everything was possible and allowed on the internet, but now we are starting to say, “This is how you should behave on the internet” or “You shouldn’t be saying things like this”. The bill is, as I have said, a step in the right direction.

Humza Yousaf: I have a supplementary to James Kelly’s question about investigating and prosecuting people outside Scotland and Mr Pearson’s point about police infrastructure. Are the police not already dealing with such matters in relation to, for example, child pornography rings? Would they not use similar infrastructure, technology and investigation techniques to tackle these crimes?

Professor Buchanan: I think that they would. We certainly have expertise in Scotland to deal with such matters. As I have said, the Scottish Crime and Drug Enforcement Agency has been at the forefront of all of this. However, it is probably vastly underresourced in this area, particularly given the risk to businesses through cybercrime and so on, and spends most of its time dealing with serious criminal activities.

The general police officer on the beat needs to begin to understand certain internet and social media issues. As we saw with the riots in London, the police do not seem in general to be prepared for the way in which social media internet postings and so on are used. There is a learning process; indeed, we found that our police need to be trained at three levels. Every police officer should indeed, we found that our police need to be trained at three levels. Every police officer should at least understand what the internet is and how it is actually used.

Humza Yousaf: In breaking up child pornography rings, for example, police forces in other countries and other continents share intelligence and engage in shared working. How compliant are internet service providers and social networking sites in that respect?

Professor Buchanan: Shared intelligence certainly works, but it could be done better, even within Scotland. We are not that great at sharing intelligence on a regional basis in the UK, and we are probably even worse internationally.

However, there are risks attached to such efforts. On one hand, under the Data Protection Act 1998 you should not share information about an individual unless you state that you are doing so; on the other, RIPA allows the state to log communications and so on. There is always a balancing act between the risk to society—

The Convener: Excuse me—what does RIPA stand for?

Professor Buchanan: It is the—ah—[Interruption.]


The Convener: There we go. I knew that there was some reason why Graeme Pearson was a member of the committee—and at last I have found it.

Professor Buchanan: The equivalent in the United States is the USA Patriot Act. There is therefore a tension involved in sharing information. For example, someone could say that their personal data should not have been shared just because it was perceived that they were at risk from low-level crime. So, there is a challenge. However, if something becomes a criminal case, the data protection legislation obviously does not apply in the same way. We need to understand how we can share information better. A lot of good research is going on in Scotland on information sharing between the police and their community partners, from which we could benefit. The bill could allow us to invest energy in looking at ways to protect society and the individual, as well as to use information to reduce risks.

The Convener: I want to bring in Colin Keir, then John Lamont.

Colin Keir: My question has been answered.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Professor Buchanan has identified a number of challenges in respect of policing the internet, particularly in relation to the bill. Are you saying that it will be almost impossible to police the internet effectively and that it is more about changing people’s behaviour regarding how they post on Facebook and such sites? Are you aware of how other countries have dealt with the issue? Do you know of Parliaments in other parts of the world that have passed more effective acts around what we are trying to achieve? Have they achieved it more effectively by other means?

Professor Buchanan: I am saying that it is not a black-and-white issue. A great deal of corroboration is required in such cases. For example, if we know that someone was at home when there was a particular posting on Facebook, and that their car was parked in their drive at that time, then there is a very good chance that they did the posting. However, if we used the internet as the sole source of evidence, the case would be knocked down. Just because there was a post on someone’s Facebook page does not mean that
they did it. We therefore need a whole infrastructure of information. I am not saying that the bill should not go ahead—I am saying that the issue that I described needs to be thought about.

On the international aspect, no country really has control of the internet. However, Scotland might have the opportunity to start to define the proper and polite way in which to use the internet. The bill does not define that and just takes a black-and-white approach to matters, to the effect that if someone does something bad, they will be prosecuted, and if they do not, then they will be okay. The bill does not go into enough detail in that regard. As a country, we probably need to say what kind of things are allowed to happen on the internet and what are definitely not. For example, we all agree that child pornography is wrong and that it is fundamentally a crime. However, for football, we do not know what kind of things we are allowed to say on the internet and what sort of things we are not allowed to say. The bill is a starting point, but we probably need an infrastructure to define what polite use of the internet is.

John Lamont: The danger of being too prescriptive is that there is an evolving process. We could start defining every single phrase or term as being allowed or not allowed, but the situation could change next week because of a new television programme or whatever. The danger in being too prescriptive is that we simply store up problems for further down the line.

Professor Buchanan: I agree. We therefore need high-level guidelines. We need people in Scotland to get together and say what kind of things should happen. It should not be the police but leading industry people who define those things at a high level. For example, whenever someone signed up to or logged into a blog site, bulletin or whatever, they would see a statement regarding what the Scottish Parliament has defined as the correct things to do. Obviously, it would be more difficult to do that for a site that existed outside Scotland and the United Kingdom. In fact, it would be almost impossible to do it, because we are typically bound by US law in many such cases.

The Convener: Thank you very much for your evidence. Is there anything that we have not asked about, or have we prodded sufficiently?

Professor Buchanan: No. Thank you very much for the opportunity.

The Convener: Thank you very much. It has been very useful. I suspend the meeting for six minutes.
I will take a few minutes to outline our initial reaction to the discussion and debate. In the spirit of the agreement that was reached in the chamber in June, I am still in listening mode and genuinely seeking to build consensus. However, we need to remind ourselves of the basic assumptions behind the bill. I will address some of the general issues that have been raised about the bill and then offer reaction to a couple of specific comments about the two separate offences.

Some have questioned whether the bill is necessary. It is true that the last football season now seems quite a long time ago. Some have commented that the crisis has maybe passed, but we have all been here before so many times that we must be wary of making that assumption. It is critical that every one of us accepts that there is a significant problem in Scottish football, which we must face up to and which existed long before last season. Some witnesses have suggested in previous committee evidence sessions that there is a collective sense of denial among many who are involved in the debate—denial that there is an issue or denial that they have a problem, although they accept that others do. I agree that that characterises a lot of the discussion around the bill. We need to get beyond that denial.

As a number of matches last season—and over many seasons before that—showed, there is a significant problem with sectarianism and other expressions of hate connected to football. Crucially, while others are unsure, there is no denial on the part of the public: 89 per cent of Scots believe that sectarianism is unacceptable in Scottish football and 91 per cent agree that further action is needed. That is a salutary lesson for everybody to remember.

I have heard many times the accusation that new laws are unnecessary because laws are already in place. We are mindful of that point, although we do not agree that it is the case. What we propose arises out of concerns that the police had earlier in the year. Furthermore, there is a danger that we miss another fundamental point: it is an entirely proper role for the Parliament to use legislation to register public outrage about a particular behaviour even when other criminal offences cover aspects of that behaviour. We have seen that in legislation to protect emergency workers, to outlaw stalking, to criminalise slavery and servitude and to express our abhorrence of genocide—all those matters were already criminal. Right-minded people are as outraged by bombs, bullets and bigotry as they are by those other crimes and will, I am sure, welcome the Parliament’s decision to bring this behaviour fully into view.

As part of our own evidence gathering, we have learned that football fans are especially worried about gaining a criminal record and being banned from watching football. That is a huge sanction from their perspective. A conviction for a general offence is, of course, a stain on someone’s character, but some offences have been devalued. I want the criminal records of the bigots to show exactly the nature of their offending—not just that they have a conviction for breach of the peace, but that they have a conviction for offensive behaviour at a football match or through threatening communications, so that employers, families and friends know the truth about the character of those individuals.

I believe that the measures in the bill are necessary and justified. I also believe that they will be effective. Since I last appeared before the committee, we have announced a £1.8 million investment, over two years, in a partnership with the Association of Police Officers in Scotland to establish a new national football policing unit. I suspect that members saw some evidence of that at the game on Sunday. The unit has already been deployed more than 30 times to matches throughout Scotland and the rest of the United Kingdom to address directly the concern that exists about a lack of consistency in the policing of football matches.

I acknowledge the extraordinary commitment of the police and stewards to ensuring that Sunday’s match passed off safely for most fans. I also acknowledge the fact that there seems to be a shift in behaviour with regard to mass offensive chanting. That is to be welcomed, but there is still a long way to go. It is worth noting that there were still 20 arrests at the match, including some for sectarian offences, and that the impact on the wider community was even greater, with the number of assaults and incidents of antisocial behaviour and domestic abuse up compared with Sundays without an old firm match. With 300 police officers deployed at the match, that wider community impact places a real strain on resources, which we must be mindful of in calling Sunday a great advert for football.

I conclude with a couple of specific comments on the two offences. The first offence concerns behaviour at and while travelling to and from a regulated football match. The critical concept in the offence is public disorder. The offence covers behaviour that does or could lead to public disorder, of which, historically, there has been too much in Scottish football.

Many have suggested that all offensive behaviour at, going to, or coming from a football match would be criminalised, and that the offence would be too wide. However, that interpretation is not strictly accurate. The first offence covers a wider class of behaviour, including threatening and hateful behaviour. Behaviour that would be
offensive to a reasonable person is covered only when it is likely, or would be likely, to incite public disorder. The bill does not make being offensive at a football match, in itself, criminal—I make the aside that, if being offensive at a football match were criminal, we would need many more jails than we have at present. The critical point is the link to public disorder.

11:15

With the second offence, we are seeking to criminalise threatening communications—and the critical concept here is that of threat. The offence does not cover any material that does not contain a threat. We acknowledge concerns about freedom of speech, including concerns that are specific to the context of religious belief. Such freedoms are absolutely protected through the European convention on human rights, to which we must adhere. However, we want to ensure that the balance is correct. I remain of the view that the defence of reasonableness.

I remain entirely open to constructive criticism and I will welcome any helpful suggestions on how we might improve the measures in the bill. I hope that today’s discussion will bring more clarity to the issue.

The Convener: Lord Advocate, do you have anything to add to those opening remarks?

The Lord Advocate (Frank Mulholland): No, I do not have an opening statement.

The Convener: I therefore invite James Kelly to start again. We will rewind.

James Kelly: Thank you.

The Lord Advocate: I remember the first part of the question.

James Kelly: Yes—I will not repeat all the remarks that I made initially, although I will make the point again that it is safe to say that the process has raised more questions than it has provided answers so far.

The bill does not use the word “sectarianism”, but the Lord Advocate’s guidelines do, in relation to public chanting and offences. If I am a police officer at a game, how do I understand whether public chanting or singing is sectarian?

The Lord Advocate: I will first make a couple of points about the guidelines. They are, of course, draft. Members will accept that it is appropriate that I should place them before the committee in draft form, and that I should take into account any comments or points made by committee members, or other parliamentarians in debate, before finalising them.

Section 12 of the Criminal Procedure (Scotland) Act 1995 allows the Lord Advocate to issue guidelines to chief constables in Scotland in relation to the reporting of offences, and chief constables are required to comply with those guidelines. The chief constables will obviously disseminate the Lord Advocate’s guidelines to the police constables of each force in Scotland.

On the implementation of the legislation, as underpinned by the Lord Advocate’s guidelines, the Minister for Community Safety and Legal Affairs has made the point about the link between threatening or offensive chants or comments and the likelihood of public disorder. Police officers in Scotland are well trained to look for that and anticipate it, and to gather evidence and apply judgment themselves in the circumstances that they face. It will be up to police constables to apply judgment as to whether a criminal offence has been committed. In all their work, police officers will apply that judgment and, if they feel that there has been a criminal offence, they will gather evidence to prove it in the report to procurators fiscal. Procurators fiscal are well able to understand evidence and whether it amounts to proof of a criminal offence. There are plenty of checks and balances along the way.

I would leave it to the judgment of police constables to decide the context in which the behaviour takes place. There is plenty of guidance in the Lord Advocate’s guidelines as to what is criminal and what is not.

James Kelly: I am not any clearer about what, for a police officer at a match, constitutes public singing or chanting that is sectarian in nature.

The Lord Advocate: On hearing a chant or singing, the police officer would first determine whether it is threatening and offensive. They must then determine whether there is a likelihood of inciting public disorder. The police officer then applies his judgment and assesses whether the chanting or singing generated or incited public disorder. On the basis of that judgment, he can decide whether to take the matter further—whether to arrest and charge the person and report the incident to the procurator fiscal.

James Kelly: All MSPs have been lobbied on whether particular songs and chants are acceptable or unacceptable. If I am a police officer who grew up in Aberdeen and moved to central Scotland at 20 years of age, I might never have been to Coatbridge or Larkhall and might not know the nature of these chants. Am I not entitled to some briefing from the match commander on the chants that are covered by the bill?
The Lord Advocate: Section 1(2) defines the behaviour as hatred against a group of persons based on membership of a religious group, a social or cultural group, or a group defined by reference to colour, race, nationality, sexual orientation, disability, etc. That gives the parameters within which a police officer will apply his judgment to the words of the songs that are being chanted or sung, whether they are threatening or offensive and whether they express hatred against a group of persons based on the criteria outlined. He will then assess whether public disorder is being incited.

James Kelly: Will the match commander simply point out the legislation and the guidelines to the officers? Will an individual officer on the ground get any briefing on the particular chants and songs that are covered by the bill?

The Lord Advocate: Match commanders are very experienced—members of the committee who attended the game on Sunday saw that. They have lengthy experience on the matters that are covered by the bill, such as threatening and offensive behaviour that is likely to incite public disorder. We have lengthy experience of seeing enforcement in action, and it seems best to leave it to the match commander to apply his judgment in the context of the behaviour.

The Convener: Does John Finnie have a supplementary question on that subject?

John Finnie: It relates to this line of questioning, I find much of the evidence to be very interesting but I see the issue as being very simple. Is it the view of the Lord Advocate that police officers, prosecutors or anyone else must exercise some new power of discretion that does not already exist in legislation?

The Lord Advocate: I do not think that that is correct. Police officers and prosecutors apply discretion across the board daily. In breach of the peace cases, they are well capable of assessing whether the conduct is such that it causes fear and alarm and threatens serious disturbance to communities, which is the current definition of a breach of the peace. That assessment of evidence requires judgment and professionalism, underpinned by specialist training on what we are dealing with. Football liaison deputes and police officers are being trained, and match commanders and the officers who are involved in policing football matches have been trained. The discretion is not new; it has always existed.

Alison McInnes: I will follow on from James Kelly’s point about subjectivity and make particular reference to section 1(2)(e), which says: “other behaviour that a reasonable person would be likely to consider offensive”,

We heard from the Scottish Human Rights Commission that the bill would quite likely be challenged under article 10 of the ECHR because there is not enough clarity to allow a citizen to know in advance what is offensive.

The Lord Advocate: In June, when I first appeared before the committee to discuss the bill, I stated that breach of the peace had been under quite significant challenge in the courts for a number of years. I can update the committee on the position. Breach of the peace is currently under a further challenge, under article 9 of the ECHR, on freedom of thought, conscience and religion, and article 10, on freedom of expression. We are waiting for a decision from the appeal court in a case that relates to protests at Aberdeen airport. We will wait and see what the appeal court says about that.

All prosecutions are subject to article 10. I cannot act in a way that is incompatible with articles 9 or 10 of the ECHR, nor can a court, which is a public authority, act in contravention of articles 9 or 10. Convention challenges are made to a breadth of criminal offences, whether common law or statutory. Those are matters for the courts, once they have heard the arguments of prosecutors and the defence.

What I would say about articles 9 and 10 is that the convention recognises that freedom of speech is not unrestricted. For example, in 2004, the Strasbourg court held that a conviction for displaying a British National Party poster that showed a photograph of the twin towers ablaze and which carried the words “Islam out of Britain” and a prohibition sign on the crescent and star was not a contravention of article 10 and was correct. There is plenty of case law at Strasbourg that recognises that freedom of speech is not unrestricted. The courts are well able to determine whether something is in breach of the convention and have lengthy experience of doing so. If a prosecution is in breach of the convention, the courts will not convict or will not uphold a conviction.

Roseanna Cunningham: It is worth restating that the concept of a reasonable person as the test that is applied when one is considering behaviour has been around for an extraordinarily long time in law and is embedded in a huge number of pieces of legislation, including a number that are highly germane to the area that we are talking about. That is not just the case north of the border—the fact that a reasonable person used to be known as the man on the Clapham omnibus indicates how old the concept is and how widespread the courts’ understanding of it is.

When I look around the committee, I see that it includes two former policemen and three former
lawyers, all of whom must be perfectly well aware that the idea of a reasonableness test is by no means unusual in the law. It is well understood by them, by the courts and by all those who work in the law.

The Lord Advocate: I add to that that the definition of breach of the peace has a reasonable person test built into it. In the leading case of Smith v Donnelly, it was held that breach of the peace may occur where the conduct complained of is “severe enough to cause alarm to ordinary people and threaten serious disturbance to the community.”

The conduct must be “genuinely alarming and disturbing, in its context, to any reasonable person.”

With knife crime, provision is made for a reasonable excuse for having a knife. Objective reasonableness is built into proof of, and is an available defence against, a raft of offences.

My other point about freedom of expression goes back to what the minister said. There must be a link to public disorder—the behaviour in question must incite public disorder. That should not be overlooked.

Roderick Campbell: Good morning, Lord Advocate. When you appeared before us on 22 June, you said that you would consider whether section 5(5) could be improved with a reference to the characteristics that are listed in section 1(4). I have a small supplementary on that. Section 1(4) does not include two of the characteristics that are protected under the Equality Act 2010—age and gender. Why is that?

11:30

Roseanna Cunningham: I am sorry—I am not clear about your question. You started by asking about the Lord Advocate’s guidelines—

Roderick Campbell: No—I was asking about the evidence that the Lord Advocate gave on 22 June about section 5(5).

The Lord Advocate: I cannot remember precisely what I said on that occasion. However, on the fact that the first offence is broader and the second offence narrower in scope with regard to the characteristics you alluded to, you must appreciate that when I gave evidence to the committee the bill was being expedited in order to become law by the start of the football season. I understand that, because it was being expedited, there was a policy decision not to include those wider characteristics in the second offence. Given that that is a policy decision, the minister might wish to comment on the matter.

Roseanna Cunningham: The Lord Advocate makes a fair point. We kept the terms of the bill relatively constrained because of what we expected at the time to be a short timescale for its consideration.

I have no huge antipathy towards expanding the second offence to cover the same categories as are covered by the first. If the committee feels that such a move would be helpful and useful, it can recommend as much. We will be open to looking at the proposal’s practicalities and whether that approach would work just as well with the second offence. We made the exclusion in the early part of the process simply to keep the bill as tightly drawn as possible in light of the short timescale that was originally mooted for its consideration.

The Lord Advocate: I endorse those comments. I am fairly relaxed about broadening the second offence but, of course, that is a matter for parliamentarians and those who deal with the policy side of things.

Roseanna Cunningham: We are open to listening to arguments or looking at evidence if the committee takes the view that categories of age and gender should be added. We are not closing our minds to those suggested changes.

Humza Yousaf: The Lord Advocate’s guidelines go into a little bit of detail about freedom of expression, but are you open minded about including in the bill an explicit freedom of expression provision? I realise, of course, that such a provision would have to comply with European standards but one or two submissions that we have received have suggested that such a move might be helpful.

Roseanna Cunningham: I do not have any problem with thinking about that. We will need to work out how it might work in the bill but if the committee is keen on the proposal we will look at how it might work, where it might go and what implications it might have. However, given that the bill does not cover unrecorded speech, it quite clearly does not catch a huge element of freedom of expression that people appear to be concerned about. Nevertheless, I know that the issue of unrecorded speech has been raised in relation to the bill.

Within the confines of the bill and given what we are trying to address, our mind is not closed on a lot of these issues, but we would need to take them away and ensure that we could make them work as law. We are certainly open to looking at the suggestion.

The Lord Advocate: It would have only a declaratory effect because, in any event, articles 9 and 10 of the European convention on human rights would apply. You might also want to look at section 29J of the Public Order Act 1986, which
covers freedom of expression. However, given that articles 9 and 10 again apply, it too is declaratory and unnecessary.

Humza Yousaf: Someone else may follow up the issue of unrecorded speech. I note that when the minister gave evidence back in June, she mentioned the possibility of looking at mechanisms for reviewing the legislation. Of course, that was because it was being expedited, but is the Government still open minded about having some review mechanism? If so, might that take the form of, say, a sunset clause?

Roseanna Cunningham: We took a view that a sunset clause was very problematic in the context of criminal legislation because it causes legislation automatically to fall, which creates all sorts of difficulties, for example if it kicks in at the point at which someone has been arrested and charged but has not gone to court.

A review clause is a slightly different animal. If it is felt that a review clause would be useful, careful thought would need to be given to how far down the line a review would take place. You would probably want to cover at least two full football seasons to give you a real sense of how things have been working. I do not have any strong antipathy towards a review clause—we are fairly relaxed about that.

The Lord Advocate: There is no tradition or history of sunset clauses in legislation on criminal offences. In fact, the only one of which I am aware is section 23 of the Terrorism Act 2006, which extends the maximum period of detention without trial for terrorist suspects.

As the minister said, sunset clauses cause problems in relation to criminal offences. A review clause is a slightly different beast. The difficulty is caused when a sunset clause kicks in after someone has been convicted and, for example, has received a sentence of imprisonment. That person would be serving a sentence of imprisonment for something that, because of the sunset clause, was no longer an offence. As a criminal lawyer, I would be against sunset clauses in relation to any criminal offence.

John Lamont: I will focus my questions on section 2(1)(b), section 7(1) and section 5 in general.

First, the provisions in section 2 concern me because they attempt to render criminal acts that are committed outside Scotland. Secondly, in relation to section 5, the provisions seem to relate to the regulation of internet services. How do those provisions stack up in relation to the Scotland Act 1998, in so far as the Parliament is prohibited from passing laws that extend outside Scotland? Also, schedule 5 to the Scotland Act 1998 prohibits the Parliament from passing laws in respect of the regulation of internet services.

Can the Government share with the committee any advice that it has received on those points to reassure us that the provisions in the bill comply with the Scotland Act 1998?

The Lord Advocate: In relation to your second point, as you rightly say, the regulation of internet services is reserved. However, the criminal law is not reserved. We are making a criminal offence, not regulating internet services. I do not think that the second offence that you mention impinges on the Scotland Act 1998.

In relation to the issue of extra-territoriality, there are already criminal offences on the statute book that have extra-territoriality; for example some sex offending taking place abroad is an offence in criminal law in relation to child pornography and so on. What we are dealing with is the type of behaviour that is covered by the bill, for persons that are resident in Scotland.

Graeme Pearson: The minister will be aware that an awful lot of evidence has been received by the committee indicating concerns about the need for new legislation. I refer to the Racial and Religious Hatred Act 2006 in England and Wales. As of last year, according to Hansard, only one person had been prosecuted in connection with that legislation and they were eventually acquitted.

You have acknowledged that there appears to have been some change in the atmosphere, particularly surrounding the old firm meeting, and there has been a review of the part that the football associations should play in looking after football. Is there time, therefore, to think a deal longer about the requirement for new legislation?

Roseanna Cunningham: We did look at the 2006 act south of the border before we introduced the bill. We also looked at the statistics, which are quite startling. As I understand it, one of the issues about the 2006 act in England and Wales is that it is very much tied to the anti-terrorism element, which has created some issues in respect of prosecution. Of course that is not what we are about here. We thought that there were particular issues with the 2006 act that do not apply in respect of our bill.

One could argue, as people have, for our taking another year, another five years or another 10 years, but, sooner or later—I believe we have to do this sooner rather than later—we have to get on and tackle this problem as explicitly as we can, which is why we have formulated the bill in the way that we have.

You will recall the remarks that I made right at the start: there is an enormous benefit in people being named exactly for doing what they have
done. That is important, because we know that there is a developing stigma around being labelled in that fashion, which, in itself, will become a deterrent. If we do not threaten that, we will remove that deterrent effect.

Sometimes what you want to do is prevent and deters, as Graeme Pearson will know from his previous profession. Ideally, we will be in a situation where the prevention and deterrence have been sufficient but, if they are not, we want to ensure that robust criminal law is available to be used in appropriate circumstances. We think that, at the moment, it is right that we proceed with the bill, the parameters of which are deliberately confined. There is a much wider debate to be had about sectarianism in general, which does not relate just to football. That will be for separate committee sessions.

We need to deal with the problem. We cannot allow the situation that we saw last season to develop.

Graeme Pearson: Is it feasible that the labelling that you mention could be done under the current legislation, with criminal records being recorded differently?

Roseanna Cunningham: I do not think that the labelling can be done in as effective a way under the current legislation. One way or another, I have been involved in these labelling arguments—not necessarily about these offences but about previous offences. I seem to recall a debate back in the 1990s about labelling breach of the peace to show evidence of stalking and harassment. At the time, we were struggling to find a way to encompass those offences in the criminal law. There is always an argument that you can somehow label existing crimes appropriately but, in the main, that does not work. We have seen that it does not work and we have resorted to a more specific labelling process. The Lord Advocate may want to come in at this point. I believe that it is important for us to name the behaviour for what it is on the face of it.

The Lord Advocate: As Graeme Pearson will know from his past life, it is very difficult to label these types of offences—breach of the peace or assault—if there is a sectarian motivational element to them. You will know the COPFS database and how it records crimes, and be well aware of how the integration of Scottish criminal justice information systems—ISCJIS—programme operates and the loop that is provided from police, to Crown, to court, to criminal records. I am not an information technology expert but, as I understand it, it is an operational database, so it is very difficult to extract raw statistical data from it. I understand that if an offence is not entered in a particular field in the operational database, it is very difficult for it to be recorded as, say, a sectarian breach of the peace or something of that nature. As Graeme Pearson will know from his experience of criminal records, you get basic information on someone’s criminal record, which refers to breach of the peace or assault—it does not tell you about the underlying nature of that particular offence. I understand that, working within the confines of the current IT system, it is extremely difficult for an additional label to be attached to the recording of crime.

11:45

On whether we may wait longer and delay or even suspend the bringing in of the bill as a result of improvements in behaviour, for example, I would look to the professionals in ACPOS. Paragraph 2 of its written submission makes it quite clear that it welcomes the bill. It says that, although “reverting to the Common Law crime of Breach of the Peace ... allows arrest, there remains uncertainty with conviction and the risk of stated cases impacting on our future reliance of Breach of the Peace. For that reason it is believed that the Common Law crime of Breach of the Peace cannot be relied upon indefinitely and additional legislation should be enacted and that the Bill’s provisions should simplify matters for operational officers.”

That is a powerful statement. I have also noted the statement from the British Transport Police in support of the bill and what the chair of the Association of Scottish Police Superintendents said. I represent the Crown prosecution in Scotland, and my judgment is that the bill will be very helpful for a number of reasons, including many that the minister has just set out.

Graeme Pearson: I do not mean to be offensive, but necessity is always the plea for any infringement of human liberty and one would always expect law enforcers to seek additional legislation and more powers. The question for us is whether the proposals are proportionate and required at this time. That accounts for our struggle with the evidence that we have received until now, which has significantly questioned whether the bill is required. In particular, the Law Society of Scotland and others have done that.

The Convener: I caution members not to speak on behalf of everybody in the committee, as I do not know whether everybody in the committee agrees with them. It would be unfair of members to say that they embrace everybody’s views. I am not sure what they are, and doing that would not be appropriate.

Graeme Pearson: Indeed.

Roseanna Cunningham: It is fair to say that a great deal of the evidence very much supports the bill. Indeed, some of the witnesses have made a call to widen the impact of the offences, which Rod
Campbell spoke about. People at one end of the spectrum would have us do nothing, as they do not think that there is a problem in the first place—I find that extraordinary—while others want us to cover the whole gamut of hate crime in both offences. There is a vast spectrum of opinion and it would be unfair to characterise the weight of it as being opposed to the bill. That is not our reading of the situation.

The Lord Advocate: I cannot really add anything to what I have said about the difficulties that surround breach of the peace and article 7 of the ECHR. My detailed comments on that are already on the record.

The new offence will make it much easier to monitor and measure the issue. I go back to the point that was made about the Scottish Criminal Record Office. Because the offence is a bespoke one that relates to offensive and threatening behaviour which is likely to incite public disorder, the nature of a conviction for it would be instantly recognisable in someone’s criminal record. That is one point.

Secondly, I think that ACPOS made the point in its written submission that the offence clarifies the law.

Thirdly, the offence would be the primary offence, as opposed to using breach of the peace, assault or any other offence, whether it be in statutory or common law, and seeking to add an aggravation to the offence.

Finally, it can be seen from reading a number of the written submissions and the transcripts of the evidence that there is symbolism surrounding such legislation. Someone referred to Dr Kay Goodall’s evidence to the committee. Legislation can be transformational. We can think back to the problems that we had with racially aggravated conduct, which was, perhaps, acceptable 15 or 20 years ago. Who can remember the social acceptability of drink-driving and the drive to make it socially unacceptable? Graeme Pearson will remember that from his experience as a police officer. There is a transformational aspect to legislation; it can change society’s behaviour and its attitude towards behaviour, and that should never be overlooked.

Given the difficulties surrounding breach of the peace and article 7 of the ECHR, the difficulties with the recording of crime, the fact that the new offence will make it easier to monitor and measure such behaviours and the fact that the public will instantly recognise what the offence means and the transformational aspect of it, in my judgment the bill is absolutely necessary and will, I hope, have a significant impact in challenging such behaviours in the future.

The Convener: James Kelly has a supplementary question on the same point, then Alison McInnes will begin questioning on a separate point.

James Kelly: My question is on the labelling of the offences. Minister, you have outlined clearly your feeling that it is important that people should be identified with the offence that they have committed. However, page 4 of the Lord Advocate’s guidelines makes it clear that, in respect of the breaches of the peace that occur at football matches, the preference would be to pursue prosecution under the existing legislation “or as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010”.

The guidelines state clearly:

“It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation”.

Is it not detrimental to the case that you are outlining that someone could be found guilty of offensive behaviour at a football match without the offence being shown to be aggravated by prejudice against, for example, a particular race or religion?

Roseanna Cunningham: As you are referring to the Lord Advocate’s guidelines, do you want the Lord Advocate to respond? He wrote the guidelines; I did not.

The Convener: I am letting you self-select whoever you feel should answer.

Roseanna Cunningham: The Lord Advocate has already stated that we want the offence in the bill to be the primary offence at a football game; however, that does not exclude the possibility of prosecution for other offences, which is what I think the question is about. If there is evidence that the offences that are taking place fall into the category that we are talking about, the primary offence will be the one in the bill. Is that what you are asking about?

The Lord Advocate: If the guidelines are unclear, we will strengthen them. However, as I read it, the statement on page 4 under “Choice of Charges” is quite clear:

“If there is sufficient evidence for the offence of offensive behaviour at a football match, such behaviour at or related to football matches should be reported as that offence”—that is, the primary offence—

“in preference to a common law breach of the peace or contravention of section 38” of the Criminal Justice and Licensing (Scotland) Act 2010. I hope that that is clear. If it is not, we can strengthen it to make it crystal clear.

James Kelly: What you have said is clear, but my issue is with the next sentence, which states:
"It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence."

Someone could sing an offensive song at a football match, for which they would rightly be brought to court under the provisions of the bill. However, if we are seeking to tackle specifically songs that create public disorder around, for example, religion, surely the bill is deficient if it is not possible to add a religious aggravation to the offence.

The Lord Advocate: If you look at the definition of the offence, you will see that it contains a religious aggravation—the nature of the offence is the religious aggravation in addition to other aspects of it. I do not think that it would be appropriate in law for a religiously aggravated offence to be religiously aggravated. That would seem slightly inconsistent. That is why that point was made in the guidelines.

Roseanna Cunningham: I am not sure that we are picking up your question clearly. Are you suggesting that the first offence that we propose in the bill should have the capacity to have a tail on it that says that, under the offence, it was the religious bit, the racial bit or the gender bit that was the issue? Is that what you are saying you would want?

James Kelly: My position, minister, is that I agree with your sentiment that people who behave in a certain manner should, in effect, be named and shamed. However, I seek further assurances, because I do not think that someone should simply be told that they have sung an offensive song at a football match. It is also important—for the courts and the public—that if the offence relates to religion, race and so on, we should be able to record that.

The Lord Advocate: That may be a valid point. Let me go away and think about it. These are only draft guidelines, so we will take on board your point and see whether what you suggest is possible within the confines of our criminal history system.

The Convener: I am glad that you have introduced the other categories, because the bill is beginning to be talked about as anti-sectarian legislation, which of course it is not: it is about offensive behaviour. I am pleased that the minister and the Lord Advocate are now speaking in broader terms about the bill. It is difficult for the public to see that other issues are involved, not just sectarianism.

Alison McInnes: Minister, the written evidence from Nil by Mouth expresses concern that the bill deals with only a particular manifestation of sectarianism. How will criminalising the behaviour of one section of society in one particular circumstance and more or less turning a blind eye to other, more insidious examples of sectarianism, whether at gala dinners, sports clubs or marches, help us to tackle what your Government calls Scotland’s shame? How can the bill help us deal with sectarianism properly, in a holistic way, if it simply singles out in the way that it does?

Roseanna Cunningham: We have said right from the start that the bill is not a magic bullet to solve the problem of sectarianism in Scotland; it is about a very specific manifestation of that sectarianism that creates a big issue of public disorder. A stream of work is going on alongside the bill so that, when the Parliament has dealt with the bill, a whole strategy will be developed that will deal with the issues that people are talking about that come from different parts of society and are not immediately and necessarily relevant to football.

The problem with the football scenario is that it creates a public disorder issue, which is what we are trying to deal with in this particular context. We all know that sectarianism goes far beyond that and can be very insidious and is often tacitly tolerated by huge numbers of people who would not necessarily consider themselves to be part of the problem. There is a bigger, wider issue for society to deal with, but we need to deal with this one right now and try to lay down a marker in respect of football. As we speak, however, a separate strand of work is going on that is directed to the much wider issues of tackling sectarianism. I expect the committee to come back to those wider issues in due course.

Alison McInnes: Can the minister give us a timetable for that?

Roseanna Cunningham: I do not want to be drawn into that just now. I will talk to the Cabinet this afternoon about the issue and, until the Cabinet makes a decision, I do not want to be drawn into a detailed discussion about what our timetable might be.

The Lord Advocate: I will add just one point to that. We are well aware of the wider aspects outwith football matches. For example, the committee has probably seen reports in the media about the increase in instances of domestic abuse that are reported to the procurator fiscal following a big match. We are well aware of that, as indeed are the police and prosecutors. I have been trying to highlight that as a particular issue, and I did so again on Friday. It is very disappointing to see that there has been another spike in the number of domestic abuse incidents in that regard. We need to be well aware of what we are dealing with and take appropriate action to deal with matters outwith the confines of the football match that are—I suppose—the secondary effects of what we are dealing with. I do not want the impression to
be given that we have a very narrow focus. The bill has a narrow focus, but we are well aware of the wider aspects.

**The Convener:** Do members have questions on other issues? Does somebody want to touch on the issue of travelling to and from private venues, for example?

12:00

**Alison McInnes:** My question follows up on the issue of stigmatisation that was talked about. The Government clearly wants to make an example through the legislation. However, a number of the submissions have regretted the lack of clarity on a rehabilitation programme or the possibility of different disposals that might be more effective than a heavy five-year sentence. What thought has the minister given to those issues? We draw attention to the comparison between the £1.8 million that was recently awarded to the national football policing unit and the very small amount of money that is available to organisations such as Nil by Mouth that work through educational means to try to change society.

**Roseanna Cunningham:** Over the piece, organisations such as Nil by Mouth have received a significant amount of money. Rehabilitation activities already take place. There are programmes in prisons that deal with the question of sectarianism, so it is not the case that such things are not happening.

We are perfectly open to other suggestions in the context of the bill about how disposals might be dealt with. Of course, the five-year sentence is at one end of the spectrum, which starts with a fine at the other end. We are not in the business of everybody automatically getting a five-year sentence, which is a rather mischievous idea. I am not suggesting that you are being mischievous, Ms McInnes, but in some cases a rather mischievous construction has been put on the proposals. That is why it is always important to make it clear what the offence is when we have the capacity to increase the disposal if people rack up a number of offences.

In respect of not just the particular criminal offence in the bill, but the issue across society as a whole, there is still a deal of work to be done in Scotland on the underlying issues that still bedevil too much of our society.

**The Lord Advocate:** I will come in on the point about the maximum sentence. It might surprise some members of the public, and indeed some members of the committee, that the maximum sentence for breach of the peace is life imprisonment. I have been involved in a case prosecuted on indictment at the sheriff court in which someone received a life sentence for breach of the peace on remit to the High Court. A court would never dream of imposing such a sentence in the majority of breach of the peace cases, but the maximum sentence for breach of the peace is life imprisonment, whereas the maximum sentence for the offence in the bill is five years in prison.

**John Lamont:** I want to pick up on a point that Professor Devine made last week in evidence to the committee. He referred to the aggravation for sectarianism that already exists under the Criminal Justice (Scotland) Act 2003 and highlighted the fact that only 14 per cent of the offences committed under that provision relate to football. Does the panel have any comments on that?

**The Lord Advocate:** That reinforces the point that Alison McInnes made about the wider aspects of sectarianism. Professor Devine referred to a study from 2003-04. There were actually two studies. One covered a six-month period—26 June to 31 December 2003—and was an internal Crown Office and Procurator Fiscal Service study following the implementation of the new legislation. The further study was an official Scottish Government study in which a researcher looked at 18 months of cases covering the period 1 January 2004 to 30 June 2005.

Some of the statistics arising from the studies are illuminating. For example, it is said that sectarianism is a west of Scotland problem. Out of 532 cases, 57 per cent of offences were committed within Glasgow and 23 per cent in Lanarkshire, but 30 per cent of the people who were accused of the offences that were committed in Glasgow lived outside Glasgow and Lanarkshire. Of the offences, 28 per cent occurred in the street, and you gave the figure for football stadia. The figures that I have show that 33 per cent of cases were related to football. In 64 per cent of cases, the religion of the person who was the subject of the religiously aggravated crime was Roman Catholic and, in 31 per cent, Protestant. Another very important statistic is that 49 per cent of those convicted were significantly under the influence of alcohol. We should never overlook the connection between alcohol and this type of behaviour.

As I understand it, the Scottish Government intends to repeat the study by looking at cases over a calendar or financial year and comparing the results with the 2003-04 statistics. It is very important to have accurate data in order to measure this type of thing.

**John Lamont:** The minister and you have referred to the need to send out the message that this behaviour is unacceptable. My concern is that, arguably, such a facility already exists under the 2003 act. I am also concerned that, given that a minority of offences under the 2003 act relate to
football, passing the bill will mean that sectarian behaviour in relation to football is seen as in some way more unacceptable than all other such behaviour. Surely we should be saying that all sectarian behaviour is unacceptable. In agreeing to these provisions, are we introducing a sliding scale of what is and is not acceptable?

Roseanna Cunningham: That is a misinterpretation of what is happening here. I might remind members that, earlier this year, very specific circumstances relating to football resulted in parcel bombs being sent in Scotland. We need to get away from the notion that this is something trivial that we do not have to take seriously.

We have responded directly to that in the bill but, as the Lord Advocate, the First Minister and I have made clear from the outset, we do not regard it as a magic bullet for solving the whole problem of sectarianism in Scotland. A great deal more work needs to—and will—be done. In fact, earlier this year I said that we have not ruled out introducing further legislation if the view is that it is needed. This is not a case of applying any kind of sliding scale; we are simply trying to deal with a very specific and dangerous scenario that was developing earlier this year and which we needed to make clear was absolutely unacceptable. It is part and parcel of a much wider focus that we want to take on the whole issue of sectarianism.

People are in danger of forgetting the vicious and—as a sheriff put it recently—“poisonous” atmosphere in football around March and April. We do not want that to continue in Scotland in any way, shape or form. Unfortunately, such behaviour is seen too often at football matches, which is why we have introduced the bill.

The Convener: I do not think that John Lamont was trivialising the matter. The committee is aware of the seriousness of the background but, nevertheless, I think that it was fair for Mr Lamont to ask his question. Things have quietened down a bit, but it is still early days.

James Kelly: The Law Society has criticised the way in which the bill deals with journeys to and from matches as a bit unspecific. To clarify matters, could you tell me whether the following practical scenarios would be covered?

Someone might leave Cambuslang, say, at 11 o'clock for a football match but go into Glasgow for lunch first. If they participated in behaviour unacceptable under the bill on the train from Cambuslang, would they be caught under the provision relating to the journey to a football match?

Roseanna Cunningham: If the person is carrying a football ticket or wearing football colours and if their intention is to get to a football match, arguably they might well be. That will be a matter of judgment at the time of decisions about arrest, charges or whatever.

The Lord Advocate might want to deal with some of the specifics. Let me make a more general point about this aspect of the bill. We have chosen to replicate exactly the wording in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which introduced football banning orders. The wording is exactly the same. To my knowledge, no enormous difficulty has arisen out of the 2006 act in relation to football banning orders. It is not clear to us why it should be assumed that the bill will suddenly create a difficulty. I do not know whether the Law Society made the same comments in relation to the Police, Public Order and Criminal Justice (Scotland) Bill.

You will forgive us for feeling that we were on strong ground in replicating the wording of the 2006 act in relation to the offence that we are considering.

The Lord Advocate: Before I talk about the specifics, let me address a point that the convener made. I would not want anyone to think that we were suggesting that John Lamont does not take sectarianism seriously, because that is not the case. I have had conversations with him about the matter and I know that he takes it very seriously.

On journeys to and from football matches, the minister made a good point. The provision replicates the wording in section 51(8) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which relates to football banning orders. The provision has been law for a number of years and I am not aware that the police, prosecutors or indeed the courts have had difficulty in applying the definition.

In evidence last week, Chief Superintendent O’Connor said:

“we have experience of people who travel about the country with no intention of going to the football match. Many of these individuals who might travel to, say, Dundee, Inverness or Aberdeen do not have tickets, have no intention of going to the match and instead end up in the city centre pubs and clubs, at which point problems quickly manifest themselves. We have to deal with that kind of dynamic.”

Another witness from the British Transport Police said:

“The bill not only puts into law offences that relate specifically to religious, racial and other forms of hate crime that are associated with football: it ensures that the legislation captures with no ambiguity whatever those who are travelling to and from the event. From that point of view, we welcome the bill.”

He went on to say of the provision that we are considering:

“I do not have any real concerns about it. We have to concentrate on the behaviour of the individual or the group...
of people to whom we are referring.”—[Official Report, Justice Committee, 13 September 2011; c 233, 230, 231.]

You will note from page 3 of the Lord Advocate’s guidelines on the bill that prosecutors and police constables are given examples of the type of evidence that should be looked for in relation to the provision. It says in the guidelines:

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

Possession of a match ticket;

Wearing teams colours in proximity of the football ground or on a route to the ground;

Person is a season ticket holder; and

Person is with a group of persons who it can clearly be evidenced are on the way to the match.”

Police officers, be they from the BTP or forces in Scotland, are well able to discern the difference between a person who is actively engaged en route to a football match, whether or not it is their intention to attend the match, and innocent bystanders or travellers who are present but are not taking part. I have no problem with the wording of the provision—it has been road tested since football banning orders were introduced in 2006.

Roseanna Cunningham: It is worth emphasising that someone who is not indulging in the kind of behaviour that we are discussing will have nothing to be concerned about.

James Kelly: It is still not clear whether the scenario that I described would be covered by the bill.

Here is another, more straightforward scenario. A person is travelling on a train to a station that is close to the stadium. They are wearing a football shirt, but they are not going to the game. They get caught up with a group of friends in behaviour that is deemed unacceptable. Will they be covered by the bill?

12:15

The Lord Advocate: You use phrases such as “caught up”, but I do not know what that really—

The Convener: “Joining in” might be more what was meant.

The Lord Advocate: We apply the law of concert, or art and part, to most crimes in Scotland. We consider the evidence of whether there has been active association and participation in the offending conduct. As I have said, the police are well able to consider what is evidence of active participation, as opposed to what is evidence of someone being an innocent bystander. I have no particular fear or concern that the police, prosecutors and, ultimately, the courts will not be able to distinguish an innocent bystander from someone who is actively involved in the types of behaviour that we are considering.

James Kelly: I would like us to be precise. Let us say that five people are singing something that we would all agree is unacceptable—and something that would be unacceptable under the bill. Those five people are going to the game, but somebody who is not going to the game joins in. Would that person be liable for prosecution?

Roseanna Cunningham: That is our intention—as long as they have joined in.

James Kelly: Yes—I am trying to be absolutely clear that the person has joined in with the unacceptable behaviour. However, if they are not going to the game, are they covered by the legislation?

The Lord Advocate: Are they actively participating?

James Kelly: Yes.

The Lord Advocate: Then yes—they would be covered.

The Convener: I wanted to ask about evidence in internet crime and about fishing expeditions. What evidence would there have to be to allow the police to access an e-mail account or to confiscate a computer?

The Lord Advocate: As to the confiscation of a computer, if someone is convicted of a criminal offence, and if they were using a computer to commit the criminal offence—

The Convener: I was thinking about what happens before and about how evidence is obtained. What evidence does there have to be for authority then to be given to someone to follow the trail back? You could be doing a lot of fishing around to find out who posted something or whether something was posted by someone other than it appeared. I am concerned about data—

Roseanna Cunningham: In police investigations, such considerations apply right now to any internet crime.

The Convener: Indeed—fishing—

Roseanna Cunningham: You call it fishing, but investigations will generally be carried out into specific allegations, and people’s computers may be taken in order to assess what is on them. That happens right now. It is not—

The Convener: Forgive me, minister. I am certainly not a technocrat, but it is quite easy to camouflage or conceal your identity on the internet, or even to point the finger at other people. The trail of inquiry to find out who is behind something may be quite long. What leave do the police have to look around and try to find
something? They may find some innocent people en route. Internet crime is different from paper crime or physical crime.

**The Lord Advocate:** In any investigation, the police will receive information and they will try to evidence that information. If they consider that there are reasonable grounds for suspecting that a crime has taken place with a conduit of, for example, a computer and the internet, it will be open to the police to apply for a warrant before a sheriff. The sheriff will then have to consider whether there are reasonable grounds for granting a warrant to enter someone’s home and seize a computer. If there is evidence to persuade a sheriff that he or she should grant a warrant, the police will receive information and they will try to evidence that information. If they consider that they have reasonable grounds to apply to a sheriff for a warrant.

**The Convener:** I am talking about the preliminaries—before one gets to a sheriff for a balancing view. The preliminaries might involve detailed investigations into quite innocent people, whose communications will be accessed even if, in the end, they are discounted from the investigations. The internet is a very different world.

**The Lord Advocate:** That question is probably better directed at a police officer, because they are conducting such investigations. As I understand it, they will have a specific piece of information about a specific possible crime committed by a specific person. As a result, they will then seek to evidence that to the point where they consider that they have reasonable grounds to apply to a sheriff for a warrant.

**Roseanna Cunningham:** The police are already quite heavily regulated. They already have to deal with this scenario in respect of other crimes. The Regulation of Investigatory Powers (Scotland) Act 2000 and the equivalent UK act already provide the regulatory framework with which the police have to conform. The bill would not introduce anything different to the way that the police operate in respect of other crimes that may or may not take place through the conduit of electronic communication.

**The Convener:** I understand. The other question on evidence relates to corroboration. I should really know this, but I do not. Is Lord Carloway looking at corroboration in relation to internet crime?

**The Lord Advocate:** I think he is looking at corroboration in general, which would apply to internet crime, too.

**Alison McInnes:** We have heard a fair bit of evidence from witnesses that the clubs, the Scottish Football Association and the Scottish Premier League could do more to put their own house in order. From my experience at the match on Sunday, the crowd dynamic is an important part of what goes on. The crowd is volatile and reacts to what is happening on the pitch, so we need the utmost professionalism from the clubs. Will the minister comment on the evidence that we have heard about the need for the clubs to do more?

**Roseanna Cunningham:** We would all want the clubs to be as fully engaged in this process as we are. There is evidence that they are trying to deal with the scenario as it develops. Although it does not relate directly to the bill—it does, however, arise out of the same set of circumstances—the joint action group, which was set up after the football summit earlier this year, has been continuing its work, which involves the clubs as well as the SFA, the SPL and so on. The group is still meeting regularly and is dealing with actions that are outside the scope of the bill. Everybody who is involved in that is taking it very seriously indeed. From the clubs’ perspective, the intervention of the Union of European Football Associations earlier this year is also very salutary—it is a concern that they have to deal with. As well as what is happening with the bill, a considerable degree of work is being done directly with the clubs and by the clubs. It would take too long to go into all the details of the commitments that have been made, but they are there.

**The Convener:** We have written to the SPL, given the evidence that the SFA gave about, as it were, retrieving some of its quasi-judicial powers back from the SPL. We have written to ask how the negotiations are going.

**Roseanna Cunningham:** Richard Foggo is directly involved in the joint action group. I do not know whether he can tell us anything.

**Richard Foggo (Scottish Government):** I am the secretary of the joint action group. I can inform the committee that the SPL and the SFA have agreed to be part of a working group this autumn precisely to look at that. That agreement was made before the appearance of Mr Broadfoot and Mr Niven at your committee. I just want to offer you some reassurance—in addition to your inquiries—that a process is in place that will look at the involvement of the football authorities.

**Graeme Pearson:** Can I ask a supplementary?

**The Convener:** I do not know whether Alison McInnes has finished.

**Alison McInnes:** I have another, separate question, but Graeme Pearson can ask a supplementary.

**The Convener:** Thank you for chairing. According to Alison, you may ask your supplementary, Graeme.

**Graeme Pearson:** Thank you. The establishment by the SFA of a judicial panel for
the beginning of this season was indicated. Was that achieved?

**Richard Foggo:** Are you asking me?

**Graeme Pearson:** Yes. You are the secretary.

**The Convener:** That sounded like something out of “The Godfather”—“Are you asking me?”

**Richard Foggo:** I wish that I had not opened my mouth.

**Graeme Pearson:** It is not “The Godfather”; it is “Taxi Driver.”

**The Convener:** It is “Taxi Driver”, not “The Godfather.” You see, Graeme is so valuable. Thank you.

**Richard Foggo:** Just to differentiate, Stewart Regan has undertaken transformational work on his core business that includes the introduction of a judicial panel, which I understand is in place, although I cannot fully confirm that. The group that I am talking about is a separate committee that will consider the role of the football authorities in tackling unacceptable supporter conduct that is not currently covered by the SFA in relation to SPL matches.

**Alison McInnes:** Due to time constraints, we have not had as much time as I would have liked to examine the second offence in the bill, which is making threatening communications. Can the Lord Advocate explain in more detail what that offence covers that is not covered by the UK Communications Act 2003 and how it helps to take things forward?

**The Lord Advocate:** First, with the common-law crime of making threats, we require evidence that someone intended to carry out the threat, whereas the offence in the bill does not require that and is therefore an improvement in that regard. Secondly, on threats that incite religious hatred, that is a crime in every other part of the United Kingdom and—I think—the Republic of Ireland, but it is not currently a crime in Scotland. That, too, is an improvement.

**The Convener:** I am not going to say that I see no other hands up. I will just mumble it so that hands do not go up. Do the minister and the Lord Advocate want to address anything that we have not addressed, or are they content?

**The Lord Advocate:** I have just one point to add to the answer that I gave to Alison McInnes, which is in relation to penalties. Currently, the Communications Act 2003 is only prosecutable summarily, so I think that the maximum sentence is six months’ imprisonment. The bill will increase the sentence for that type of offending to five years’ imprisonment. It also deals with what I consider to be a particular problem with the 2003 act by including posting on a website as opposed to sending a communication.

**Roseanna Cunningham:** It is important to say in regard to the second offence that it is not confined to the internet but is about any form of communication. In a sense, that also deals with the concern that was raised earlier about electronic communications being a reserved matter. The offence is not so much about electronic communications as it is about any delivery mechanism for the threat. Apart from that, I cannot think of anything else. No doubt something will dawn on me at 3 o’clock this afternoon when we are not here. However, I cannot think of anything else at the moment.

**The Convener:** Thank you very much. I now have some guidance for committee members. We are not particularly looking for stage 2 amendments, but if we get any and the committee decides that further evidence is required, we can take that, but only with the leave of the Parliamentary Bureau, which would have to extend the time. I am not encouraging amendments; I am just noting that information because we have heard that there might be amendments. Some but not necessarily all members will know that it would be a matter for the bureau to extend the time.

I thank the Lord Advocate and the minister and their team.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Written submissions to the Justice Committee

Submission from Action for Children Scotland

Action for Children Scotland welcomes the opportunity to submit evidence to the Justice Committee for its Stage 1 consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

We believe it is important that young people’s voices are heard in the current debate around the Scottish Government’s proposals to tackle sectarianism and attach, as part of Action for Children Scotland’s evidence, a copy of the recent survey we carried out seeking young people’s views on sectarianism.

A total of 114 young people accessing Action for Children Scotland’s services participated in the survey. Most of the young people who responded were from the West of Scotland, where the impact of sectarianism has been particularly damaging over the years. The key findings of the survey include:

- 47% of young people believe that sectarianism leads to abuse, hatred, violence and knife crime, and a further 21% said that sectarianism can lead to bullying and insecurity, and make it more difficult for people to form relationships;
- A total of 36% of the young people confirmed that they had been treated badly or unfairly because of sectarianism or some other form of hatred, while 59% said that they knew someone else who had been treated badly or unfairly because of sectarianism or some other form of hatred;
- 47% of those who participated in the survey confirmed that sectarianism was a big problem within their community;
- A total of 65% of young people said they believe that sectarianism is increasing in Scotland;
- 47% of young people believe that tougher sentences will not bring an end to sectarianism, and to other forms of hatred in Scotland; and
- A total of 52% of the young people who participated in the survey said that other actions are necessary to stop sectarianism, including education programmes in schools about sectarianism, different kinds of punishments and the greater use of football banning order

Action for Children Scotland would be happy to arrange for a group of young people from our projects to give oral evidence to the Justice Committee, or to host a visit by a Reporting Group from the Justice Committee to one of our projects, to meet a group of young people to discuss sectarianism. This would provide the committee with an opportunity to find out more about how sectarianism impacts upon the lives of young people, and upon their communities and to discuss ways in which sectarianism can be tackled effectively.

Paul Carberry
Operational Director of Children’s Services
Young people’s views on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill:  
A survey by Action for Children Scotland

Background

Action for Children Scotland works in partnership to run more than 60 services, which support almost 8000 of Scotland’s most vulnerable children and young people to fulfill their potential, and to make the most of their lives. This includes looked after and accommodated children and young people, young carers, children affected by parental drug and alcohol misuse, young people with disabilities and young people who offend or at risk of offending.

Action for Children Scotland carried out a survey seeking the views of children and young people about the Scottish Government’s proposals to tackle sectarianism through the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

We received a total of 114 responses from 18 of our projects. We received a total of 90 responses from young people accessing our services in the West of Scotland, an area where sectarianism has historically been a significant problem. All of the responses Action for Children Scotland received were anonymous. The age range of the young people who participated in the survey was 14 – 20. All of the young people who completed surveys are actively engaged with Action for Children Scotland’s services.

Many of the young people who participated in the survey have been directly affected by sectarianism either as the victim and/or perpetrator of such behaviour, or know someone who has been affected by issues around bigotry and sectarianism.

Key findings

A copy of Action for Children Scotland’s survey of young people’s views on the Scottish Government’s proposals to tackle sectarianism, and other forms of hatred can be found below. The key findings of the survey are as follows:

- A total of 44% of the young people who participated in the survey said that they believe people hold sectarian views as a direct result of how they were brought up, while 25% attributed sectarian views to religious beliefs;
- 47% of young people believe that sectarianism leads to abuse, hatred, violence and knife crime, and a further 21% said that sectarianism can lead to bullying and insecurity, and make it more difficult for people to form relationships;
- A total of 36% of the young people who participated in the survey confirmed that they had been treated badly or unfairly because of sectarianism or some other form of hatred, while 59% said that they knew someone else who had been treated badly or unfairly because of sectarianism or some other form of hatred;
- 47% of those who participated in the survey confirmed that sectarianism was a big problem within their community;
- A total of 65% of young people said they believe that sectarianism is increasing in Scotland;
- 47% of young people believe that tougher sentences will not bring an end to sectarianism, and to other forms of hatred in Scotland;
A total of 52% of the young people who participated in the survey said that other actions are also necessary to stop sectarianism, including education programmes in schools about sectarianism, different kinds of punishments and the greater use of football banning orders; 62% of young people said that primary schools and secondary schools should take a range of actions to help tackle sectarianism, including inviting experts in to promote awareness and understanding of the key issues and how sectarianism impacts on people's lives, and educating children at an earlier age about sectarianism; A total of 62% of the young people who participated in the survey confirmed that the problem of sectarianism was wider than just being a problem at football matches and on the Internet, and were aware of it on a regular basis; and The young people made a number of suggestions about how best to change the views of those convicted of sectarian offences to ensure they do not reoffend. Their suggestions included providing more education programmes focusing on the issues, introducing the offender to the victim(s) of the offence and tougher sentencing.

Range of quotes from the young people

Some of the quotes we received from the young people who participated in the survey about their experiences of sectarianism included:

Why do people hold sectarian views?

“The media have a big part to play in all of this”.

“Some people thrive on being abusive”.

How does sectarianism affect people?

“Some people are frightened to leave their home”.

"People lose confidence, and become insecure”.

Have you been affected by sectarianism?

“Why can't you just be allowed to support your team”.

"It's only friendly banter, don't take it so serious”.

Do you know other people who have been affected?

“Alcohol plays a big part in sectarianism”.

“I know someone who was killed”.

Is sectarianism a big problem in your community?

“Police have cracked down in my area”.

“Only when the Old Firm are playing”.

Is sectarianism increasing or decreasing?
“It’s terrible what’s happening with Neil Lennon”.

“I don’t really think it is bad as it used to be”.

Will tougher sentences work?

“New laws might improve things for people in the public eye, but not us”.

“Need to make a larger impact”.

“Will never be eradicated”.

“May help some people”.

“Will never end”.

“Some people enjoy fighting”.

“No mixed schools”.

“May increase when they are all put in prison”.

“How are the police going to arrest 10,000 people for singing at a game”.

“It might increase when you put them together in prison”.

Is other action necessary?

“We need to work harder to break down religious barriers”.

“Generations will grow out of it”.

What action should schools take to tackle sectarianism?

“Parents need to play a more active role”.

“Zero Tolerance is the way forward”.

How wide a problem is sectarianism?

“You can see it on Facebook and other chat sites”.

“The media have a big role to play”.

How do you change people’s sectarian views?

“It’s just a game, get on with it”.

“Introduce them to other faiths and religions”.

Any other comments

“Fine them, the way they do with litter louts, and sectarianism is much more serious”.

“You need to look at the role alcohol plays, in the build up to matches”.
# Young People's Views on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: A Survey by Action for Children Scotland

## 1. Why do you think certain people hold sectarian views?

- 44% of young people felt that people held sectarian views as a direct result of how they were brought up.
- 25% of young people believe that sectarian views are attributed to religious beliefs.
- 12% as a result of supporting a particular football team.
- 7% of young people felt that some people just cannot get on.
- 5% feel that peer pressure can force people to hold sectarian views.
- 7% answered ‘don’t know’, or did not answer this question.

## 2. How does sectarianism affect people’s lives?

- 47% of young people believe that sectarianism leads to abuse, hatred, violence and knife crime.
- 21% felt that it can lead to bullying and insecurity, resulting in difficulties in forming relationships.
- 10% of young people felt that it makes people scared.
- 5% believe that it changes people.
- 10% answered ‘don’t know’.
- 7% did not answer this question.

## 3. Have you ever been treated badly or unfairly because of sectarianism, or some other form of hatred?

- 61% of young people responded ‘No’ to this question.
- 36% answered ‘Yes’.
- 3% did not answer this question.

The majority of young people, who answered ‘yes’ to this question, cited football as the main contributing factor to being badly or unfairly treated. A
small number of young people were treated unfairly as a result of skin color, with one young person giving the reason, as a result of disability.

| 4. | **Do you know other people who have been treated badly or unfairly because of sectarianism, or some other form of hatred?** |
| 59% of young people answered ‘Yes’ to this question. |
| 35% said ‘No’. |
| 6% gave no answer. |
| Similar to the question above, the vast majority of young people who responded ‘yes’, cited football as the reason why others were treated in an unfairly or bad way. A small number of young people gave skin color as the reason, with disability and attending a catholic school, as the other reasons given. |

| 5. | **Is sectarianism a big problem within your community?** |
| 47% responded ‘Yes’. |
| 40% responded ‘No’. |
| 9% said ‘Don’t know’. |
| 4% gave no answer. |

| 6. | **Do you think that sectarianism is increasing in Scotland, or is it decreasing?** |
| 65% responded ‘Yes’. |
| 15% responded ‘No’. |
| 16% said ‘Don’t know’. |
| 4% gave no answer. |
| Young people give a number of reasons to explain why they felt sectarianism was on the increase. The recent events involving Celtic manager Neil Lennon, continued trouble in Ireland and certain marches were seen as the main causes of the increase. A number of young people commented on the role of the media, and how their portrayal of events increased tensions. |
A small number of young people who felt sectarianism was decreasing attributed this to local police being on top of things within local communities.

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<th>7.</th>
<th>Will tougher sentences help to bring an end to sectarianism, and to other forms of hatred, in Scotland?</th>
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<td></td>
<td>42% responded ‘No’.</td>
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<td>34% responded ‘Yes’.</td>
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<td>13% Said ‘Don’t know’.</td>
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<td></td>
<td>11% Said ‘Maybe’.</td>
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<td>Young people made the following comments to this question:</td>
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<td>“New laws might improve things for people in the public eye, but not us”.</td>
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<th>8.</th>
<th>Do you think that other actions are necessary to stop sectarianism? If so, what?</th>
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<td>52% of young said ‘Yes’, confirming they do think other forms of action are necessary.</td>
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<tr>
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<td>42% said ‘No’.</td>
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<td>6% gave no answer.</td>
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<td>More than half of the young people gave examples of a wide range of actions which they felt could help tackle the problem of sectarianism.</td>
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<td>15 young people indicated that school programmes would help.</td>
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10 young people felt that more punishments were necessary. 10 young people want to see bans being imposed at football grounds. 12 young people want it to stop, and feel that something serious needs to be done. 5 young people believe that Catholic schools should be abolished.

Of the remaining responses, the young people said they felt that children need to know more about the negative impact which sectarianism can have on people’s lives, and that religious barriers need to be broken down, while some said that football teams should have points deducted from them if their fans behave in a sectarian manner.

9. What action do you think primary schools and secondary schools should take to tackle sectarianism?

62% of young people provided a range of actions in response to this question.

26% gave no answer.

12% answered ‘don’t know’.

The following actions were suggested by the young people as ways in which sectarianism could be tackled within schools:

25 young people felt that schools should invite experts in, to discuss the issue and develop a better understanding of how it impacts on people’s lives.

24 young people believe that educating children at an early age would prevent them growing up with sectarian views.

12 young people feel that separate schools should be abolished.

6 young people want football banning orders.

6 young people felt that schools need to get tougher and exclude pupils who behave in a sectarian manner.

10. Is sectarianism just a problem at football matches and on the Internet, or is it much wider? Are you aware of it on a daily basis?

62% of young people believe that sectarianism is much wider and are aware of it on a regular basis as opposed to a daily basis.

18% were not aware of it on a daily basis.
| 8% of young people felt it only occurs at football matches. |
| 12% did not provide an answer. |

| 11. What action do you think would help to change the views of those convicted of sectarian offences to make sure they do not reoffend? |
| 40% of young people provided no response to this question. |
| 15% believe that educating offenders would make a difference. |
| 10% felt that tougher sentences would prevent them reoffending. |
| 13% want the offender to meet with the victim in order to understand the affects their actions has had. |
| 7% want football bans. |
| 4% believe heavy fines will stop reoffending rates. |
| Other actions which young people believe should be considered were rehabilitation, tagging, community service and having something of great value taken away. |

| 12. Do you have any other comments/suggestions about how best to tackle sectarianism? |
| 73% of young people answered ‘No’ or ‘Don’t know’ to this question. |
| 27% of young people provided a range of suggestions, which were the same to the answers given to question 11. |

*Action for Children Scotland*
*25 August 2011*
Supplementary submission from Action for Children Scotland

General
Action for Children is one of the UK’s largest children’s charities, working with over 156,000 children, young people and their families at around 420 projects across the UK. In Scotland we work in partnership with local authorities and other agencies to run more than 60 services, which help almost 8,000 of the country’s most vulnerable children and young people to fulfill their potential and to make the most of their lives. This includes looked after and accommodated children and young people, young carers, children affected by parental drug and alcohol misuse, young people with disabilities and young people who offend or at risk of offending. We welcome the opportunity to submit evidence to the Scottish Parliament’s Justice Committee for its Stage 1 consideration of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. Action for Children Scotland’s evidence draws upon our experience of working with some of the most difficult to reach young people in Scotland, many of whom have been affected by sectarianism. It also reflects the key findings from the survey Action for Children Scotland recently carried out with young people accessing our services seeking their views on the Scottish Government’s proposals to tackle sectarianism, a copy of which is attached to our original submission.

Young people’s views
Action for Children Scotland is committed to promoting equality, diversity and inclusion within our services, and throughout society as a whole. Action for Children Scotland is aware that sectarian behaviour and offending have impacted upon people’s lives, and upon communities, across Scotland. We are further aware, from our experience of delivering services across Scotland to support difficult to reach young people, that many young people in Scotland have been affected, or know other people who have been affected, by issues around sectarianism. We believe it is, therefore, important that young people’s voices are heard in the current debate around the Scottish Government’s proposals to tackle sectarianism. As part of this process, Action for Children Scotland considers it is essential that the Scottish Government and other agencies, involved in developing effective strategies and interventions to tackle sectarianism and other forms of hatred in Scotland, should draw upon young people’s experience in these areas.

The key findings of Action for Children Scotland’s young people’s survey provides further evidence of the scale of sectarianism within our society. Reflecting this, 36% of the young people who participated in the survey confirmed that they had been treated badly or unfairly because of sectarianism or some other form of hatred, while 59% said that they knew someone else who had been treated badly or unfairly because of such behaviour. Significantly, 47% of those who participated in the survey confirmed that sectarianism was a big problem within their community, and 65% said they believe that sectarianism is increasing in Scotland. Against this background, we welcome the priority being given by the Scottish Government to tackling sectarianism and other forms of hatred in our society.
Developing an effective strategy

Action for Children Scotland’s concern, however, is that the proposed Offensive Behaviour at Football and Threatening Communications (Scotland) Bill focuses on football and on the Internet, when sectarianism is actually much more widespread, and permeates many aspects of everyday life in Scotland. This was one of the key messages which emerged from Action for Children Scotland’s young people’s survey. A total of 62% of the young people who participated in the survey confirmed, for example, that the problem of sectarianism was much wider than just being a problem at football matches and on the Internet, and were aware of it on a regular basis. Action for Children Scotland believes that the starting point for the Scottish Government’s strategy for tackling sectarianism and other forms of hatred must, therefore, be recognition of the wide ranging, and deep rooted, nature of sectarianism in many parts of Scotland. We consider that the strategy, if it is to be effective, will require long-term action and initiatives in a number of areas such as, for example, cultural change, religion, education, criminal justice and in sport.

Promoting cultural change

Sectarianism has had an adverse impact upon culture and communities across Scotland. Action for Children Scotland believes that this raises significant question marks over whether or not introducing tougher sentencing for sectarian offences linked to football and the Internet will help to eradicate a problem which has historically permeated our society. Action for Children Scotland believes that securing a long term solution to sectarianism will require significant cultural change across generations. The need for such change is underlined by the young people’s survey, which confirmed that 44% of the young people said they believe people hold sectarian views as a direct result of how they were brought up. Promoting greater religious and cultural tolerance will, therefore, require actions and interventions which change people’s views about culture and religion, and help them to pass on more tolerant and inclusive messages to their families.

We believe that the process of promoting cultural change could draw upon the learning and experience from Action for Children Scotland’s youth services. Our services deliver a range of interventions which help to address vulnerable young people’s problematical behaviour, which is often long term and entrenched. Action for Children Scotland’s interventions take a people centered and holistic approach to help young people to turn their lives around. This approach is designed to raise young people’s awareness of how their own behaviour can often create obstacles and barriers, which make it difficult for them to fulfill their potential. Action for Children Scotland has a proven track record of supporting young people to make the most of their lives, and to sustain the positive changes they make in their lives. We take an outcomes focused approach, and believe that many of the interventions we use could be adapted effectively to deliver the long term cultural changes which will be necessary to tackle sectarianism in its many forms. In this respect, Action for Children Scotland would be happy to share the learning of how we help difficult to reach young people to turn their lives around.

Need for a multi-agency approach

Action for Children Scotland believes that achieving the type of effective, long term cultural change necessary to end sectarianism and other forms of hatred will require a co-ordinated, multi-agency approach. Action for Children Scotland considers that such an approach should involve the Scottish Government, local authorities, the
police, churches, schools, the SFA, football clubs, NHS Health Boards and the voluntary sector etc. Action for Children Scotland believes that this approach is vital if we are to deliver the significant cultural change necessary to develop a fairer, more inclusive Scotland, in which the diversity and achievements of all our communities and cultures are recognised and celebrated equally.

**Sentencing**
Significantly, 47% of young people believe that tougher sentences will not bring an end to sectarianism, and to other forms of hatred in Scotland. In addition, 52% of the young people said that other actions would be necessary to stop sectarianism. The alternatives to tougher jail sentences suggested by the young people included the delivery of education programmes in schools focusing on the need to raise awareness about sectarianism. Other recommendations included the greater use of different kinds of punishments such as football banning orders, and restorative justice programmes through which the perpetrators of sectarian offences are required to meet the victims of their offences. Against this background, Action for Children Scotland takes the view that the Scottish Government’s approach to tackling sectarianism should focus on community based disposals, on rehabilitation programmes and on the greater use of education and other programmes designed to promote long term cultural change, rather than on introducing tougher jail sentences. We believe that the Scottish Government should make a statement to the Justice Committee, during its Stage 1 consideration of the legislation, outlining the type of actions and interventions the government and other agencies will be taking in these areas as part of the Scottish Government’s overall strategy for tackling sectarianism and other forms of hatred.

**The need for early intervention**
Many of the young people who participated in Action for Children Scotland’s survey also highlighted the need for nurseries and schools to intervene earlier, and to work with younger children, to help raise awareness about sectarianism, and to promote the long term cultural change necessary to tackle this problem effectively. Action for Children Scotland considers that our *Roots of Empathy* pilot project, which we recently launched with North Lanarkshire Council, could make a significant contribution to progressing this cultural change.

*Roots of Empathy* is an effective and proven intervention programme for reducing bullying and aggression within schools through providing school children with opportunities to engage with mothers and their babies. We believe this programme will help to enhance protective factors and to promote greater levels of emotional and social wellbeing in children, and to reduce the risks of aggression and violence, including sectarian behaviour and offending, before it takes root in families and in communities.

*Roots of Empathy* has helped to significantly increase empathy and pro-social behaviour amongst participating children, and to decrease their social aggression.

Children who have participated in *Roots of Empathy* have consistently experienced:

- A decrease in aggression compared to an increase amongst non-participants;
• A significant and greater increase in pro-social behaviour in comparison to their peers;
• A bigger increase in social and emotional understanding in comparison to non-participants;
• Significantly more knowledge about how to help a baby and were more confident in their ability to be a parent than their peers; and
• A greater feeling of support from their classmates and teacher, and being more autonomous, than children in comparison groups.

*Roots of Empathy* has proven success in Canada, the US, New Zealand, Australia and the Isle of Man. Recent programmes in North Lanarkshire, Ireland and Northern Ireland are already showing signs of success. Action for Children Scotland believes that programmes such as *Roots of Empathy* could make an important contribution to promote the cultural change which will be necessary across generations if we are to put an end to sectarianism and to other forms of hatred.

**The importance of Education**

Action for Children Scotland believes that the education system, including primary and secondary schools and further and higher education, must play a major role in helping to raise awareness about sectarianism, and to promote the cultural change required to help develop a society which is fairer and more inclusive. The young people who responded to Action for Children Scotland’s survey recommended that special programmes should be developed for use in schools to help tackle sectarianism. Action for Children Scotland works with difficult to reach young people across Scotland, many of whom have been affected by sectarianism. We would be willing to draw upon our experience in this area to help develop suitable programme material for use in schools, and in further and higher education. Action for Children Scotland also supports the young people’s suggestion that experts should be invited into schools to promote awareness and understanding of the key issues relating to sectarianism, and how sectarianism impacts on people’s lives.

Robert McGeachy
Policy and Public Affairs Manager
Action for Children Scotland
1 September 2011
Submission from Amnesty International

1. Amnesty International welcomes efforts to tackle the existence of sectarianism and intolerance in our society.

2. However we are concerned at what seems to be the elevation of religious hatred above other forms of discrimination. LGBT groups rightly point out the extent of homophobic abuse, including in the world of football, as illustrated by the fact that not a single one of Scotland’s professional footballers is openly gay. We already have laws against stirring up racial hatred, so if we are extending this regime to include religion then this should follow the model (supported by Amnesty International) used in recent hate crime legislation and include hatred against LGBT or disabled people.

3. And like many human rights issues this is a matter of balancing competing rights. Article 18 of the Universal Declaration of Human Rights guarantees “freedom of thought, conscience or religion” and Article 19 “freedom of opinion and expression”. Crucially these freedoms cover both the right to hold religious views and to be free of religious coercion, to promote religious ideas and to criticise them. It is no simple thing to say that the proposed defence of “reasonableness” will be a sufficient safeguard of freedom of expression, and we would have more confidence in an approach that explicitly reiterated the right to freedom of expression. This right is of course set out in the European Convention of Human Rights (Article 10)\(^1\) and other organisations have already threatened legal action against the legislation on this basis.

4. However it is incredibly difficult to have a meaningful impact on this type of behaviour through legislation alone and whilst legislation can ban certain behaviours only education can change fundamental attitudes towards others. Amnesty would therefore like to emphasise that a programme of human rights education is the only comprehensive way of changing attitudes towards any and all of the groups so frequently discriminated against in our society.

5. Human Rights Education is dedicated to promoting the human rights principles and positive value system that are set forth in the Universal Declaration of Human Rights. There are a number of key features that distinguish human rights education from simple awareness raising including:

- **Timescale** – HRE is a longer term process.
- **Deeper engagement** – HRE develops knowledge, skills and attitudes (not just imparting information). Awareness raising may be one step in an HRE process which would also give the individual the opportunity to reflect on the issues, discuss them and act on them.
- **Pedagogy (learning method)** – effective HRE uses participatory learning styles and critical thinking to enable people to engage with human rights. The way in which it is taught and the learning environment follows human rights principles.

\(^1\) [http://www.hri.org/docs/ECHR50.html](http://www.hri.org/docs/ECHR50.html)
• Action-orientated – Awareness raising may be geared towards action, but equally it may not. The goal of effective HRE is to lead to some sort of action by the recipient. It doesn’t, however specify the nature of the action – for example, it could be campaigning action, behavioural change, or fund-raising.

6. Amnesty International runs an ambitious programme of human rights education resources for use with school age children across the UK and the Republic of Ireland. By helping young children to understand their own human rights we aim to foster empathy, understanding, and tolerance for the rights, similarities and differences of others. A variety of educational resources encourage young people to imagine what it might be like to be someone else or to see the world through someone else’s eyes while at the same time helping the learner to understand how their own behaviour may impact upon lives and rights of others.

7. A prime example of where human rights education has been shown to have significant impact on the behaviour and attitudes of children towards others is the cross-border Lift Off project\(^2\) in Northern Ireland and the Republic of Ireland. Lift Off resources aim to develop empathy, communication, cooperation, respect and responsibility, and conflict resolution amongst primary school children as a means of countering religious sectarianism in the two countries. External evaluation of the project, launched in June 2011, highlighted repeated feedback from teachers that, pupils experiencing the Lift Off materials show notable change in their interpersonal behaviour, with greater respect and tolerance for each other.\(^3\)

8. A similar approach has been taken to other forms of intolerance. Educational resources on LGBT rights\(^4\) explore issues relating to homophobic language, including homophobic rap lyrics, to discuss and debate the rights of sexual minorities, particularly when these rights may be perceived to come into conflict with those of others (for example, the right to free religious expression for those who fundamentally oppose homosexuality on the grounds of religious belief).

9. Traveller, Gypsy and Roma rights\(^5\) lessons explore conflicting views of land rights and aim to celebrate the different ways in which these communities have enriched UK culture to highlight and challenge the marginalisation and extreme levels of discrimination they often face.

10. And teacher-led discussions about the rights of refugees and asylum seekers\(^6\) set out to challenge prevailing myths about the conditions they are often forced to endure and the ongoing discrimination they continue to face.

11. Based on our experience, therefore, we conclude that the best means of achieving the stated aims of the Bill is to ensure that any legislative change reflects the experience of the full range of equalities groups, and is supported by a comprehensive programme of human rights education, ensuring that every child in Scotland has the opportunity to learn respect and tolerance for others.

\(^2\) [http://www.amnesty.org.uk/content.asp?CategoryID=748](http://www.amnesty.org.uk/content.asp?CategoryID=748)

\(^3\) External evaluation report available on request


Submission from Robert Anderson

I would like to submit the following with reference to the above proposed Bill.

As a committed Christian I am absolutely against sectarianism in any form, indeed if any of those who claim to be “following their religion” to justify their behaviour, were to actually stop and consider what their religion teaches, they would not do as they do.

I am concerned however about this Bill. I firmly believe that it should include some sort of “Freedom of Speech” clause. My reason for this is that, if not, this Bill will be misused against those who would preach in the open air, and indeed in churches.

I am concerned that when preaching from God’s word, there will be those that will claim that what is being said is “sectarian” and that the police will not be able to decide whether or not it is and prosecute anyway. This will happen because of the political capital associated with bring such crimes before the courts.

Their have been instances south of the border, where street preachers have been putting across Biblical views on homosexuality, only for the police to arrest them for inciting homophobia and saying things which are offensive.

The same sort of instances WILL happen if this Bill is not narrower in its definitions and if there is no “Freedom of Speech” clause included.

I am not for one moment suggesting that Christian preachers will incite, or encourage sectarianism in any way shape or form. Neither will they condone sectarianism, but, someone, somewhere will try and misrepresent, or misinterpret, for their own purposes what a preacher is saying. The new Bill must guard against that, and it must guarantee freedom of speech.

It is not only in preaching that I have concerns. If during a conversation with someone, I explain where I think that another denomination errs from what the Bible teaches, this can be misconstrued, and claims of me being an offender under sectarian laws, can and will occur.

So it is absolutely imperative that a clause is included to guard against this.

Can I suggest that contact is made with an organisation called The Christian Institute with regards to this?

Robert Anderson
24 August 2011
Submission from the Association of Chief Police Officers in Scotland Football Sub Group

Introductory comments

Offensive Behaviour at Football

1. ACPOS Football Sub Group fully support the introduction of legislation which is specifically enacted with the intention of tackling offensive behaviour at football. There is clearly a variety of statutory legislation already in existence which can be utilised, however this does not always fit with the variety of different incidents now witnessed throughout the football environment. Legislation currently available to officers:

- Section 74 of the Criminal Justice Scotland Act 2003, which creates an aggravation of prejudice relating to religion.
- Section 50A Criminal Law Consolidation Scotland Act 1995, which creates an offence to act in a manner which is racially aggravated.
- Crime and Disorder Act 1998
- The Offences (Aggravated by Prejudice) (Scotland) Act 2009
- Section 38 Criminal Justice and Licensing Scotland Act 2010.

2. While the above legislation is used by officers across Scotland both within and outwith the football environment, there are still incidents which do not fit well with this statutory legislation: Officers therefore require reverting to the Common Law crime of Breach of the Peace to tackle issues outwith the scope of the aforementioned statutory legislation. While this allows arrest, there remains uncertainty with conviction and the risk of stated cases impacting on our future reliance of Breach of the Peace. For that reason it is believed that the Common Law crime of Breach of the Peace cannot be relied upon indefinitely and additional legislation should be enacted and that the Bill’s provisions should simplify matters for operational officers.

Threatening Communications

3. Throughout the past year, the use of the internet and in particular certain social networking sites to post offensive, unacceptable and threatening comments and images has escalated. Legislation that allows criminal justice partners to keep pace with social trends and effectively target those people who publish offensive material on the internet is desirable.

4. As the internet and its misuse continues to evolve it is essential that the legislation is broad enough to ensure it is capable of addressing today’s issues and flexible enough to ensure it can tackle tomorrow’s. The relationship between the Internet, telecommunications and other media is complex and the operational difficulties in
capturing evidence of online offences must be carefully considered with the definitions contained in this section of the Bill drafted accordingly.

**Additional Comments:**

**Need for clear definition of Sectarianism**

5. The Scottish Government has yet to clearly define what it means by ‘sectarianism’. The debate on policing sectarianism will suffer from a lack of clarity unless guidance is provided.

6. Sectarianism may be seen to take various forms, including:
   - the expression of racist prejudice
   - the expression of religious prejudice
   - the expression of political opinion (unionist/nationalist, loyalist/republican).

7. In Scotland at present, there is *specific legislation* which addresses racist crime and racist/religious prejudice aggravations. The common law allows for the court to take into account motivation by prejudice for heavier sentencing. It should be noted that at present, statistical information on the use of common law aggravations are only available through Crown Office, which makes the extent of their use in practice difficult to measure or analyse.

**Need to make distinction between religious and political sectarianism**

8. Section 74 of the Criminal Justice (Scotland) Act 2003 provides a statutory definition of religious prejudice, which is ill-suited to address the political sectarianism that is such a characteristic of Old Firm animosity.

9. The relevant extract from the Lord Advocate's 2010 guidelines on Section 74 is provided below

**Lord Advocate's Guidelines: The Nature of Religious Prejudice**

*Section 74 of the Criminal Justice (Scotland) Act 2003 creates an aggravation of prejudice relating to religion and can be libelled on an indictment, or specified on a complaint, as an aggravation to any substantive offence. An offence is aggravated by religious prejudice if:*

*At the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will based on the victim's membership (or presumed membership) of a religious group, or of a social or cultural group with a perceived religious affiliation; or*

*The offence is motivated (wholly or partly) by malice and ill-will towards members of a religious group, or of a social or cultural group with a perceived religious affiliation, based on their membership of that group.*
Note that 'membership' in relation to a group includes association with members of that group; and 'religious group' means a group of persons defined by reference to:

- their religious belief or lack of religious belief;
- membership of or adherence to a church or religious organisation;
- support for the culture and traditions of a church or religious organisation; or
- participation in activities associated with such a culture or such traditions.

10. Whilst it is most likely that police officers will encounter offences aggravated by religious prejudice in a sectarian, football-oriented Roman Catholic/Protestant basis, police officers should bear in mind that this legislation will apply where the accused shows or has shown towards the victim (if any) of the offence some form of malice or ill will based on the victim’s membership (or presumed membership) of any religious group or of a social or cultural group which is perceived to have a form of religious affiliation.

11. The legislation covers offences aggravated by religious prejudice towards any of the world’s major or minor religious groups or of groups which are perceived to have some form of religious affiliation.

12. There may be instances where the same conduct may have elements of behaviour aggravated by religious prejudice as well as being racially aggravated. In such cases the Lord Advocate directs that the standard prosecution report submitted to the Procurator Fiscal should highlight both the religious and racially aggravated aspects.

13. The Lord Advocate’s guidance on ‘prejudice relating to religion’ does not address the issue of Irish Loyalist/Republican political prejudice, which is arguably the greater driver of sectarian behaviour in Scotland.

14. The Scottish Government and the Scottish Criminal Justice system may benefit from recognising - as both Northern Ireland and the Police Service of Northern Ireland does - that political sectarianism is distinct from religious sectarianism, and needs to be addressed in its own right. PSNI uses the term ‘sectarian’ to describe ‘incidents based on a person’s perceived religion or political opinion’.

Difficulties of recording politically sectarian criminal behaviour as ‘religious’

15. Difficulties can arise when dealing with politically sectarian criminal behaviour by means of Section 74’s categorisations. Treating Celtic or Rangers supporters as a "social or cultural group which is perceived to have a religious affiliation" fits poorly with sectarian incidents which involve expression of political partisanship (pro-IRA, pro-UVF etc).

16. There would not appear to be scope to capture, other than to badge it under inciting public disorder, those who sing or chant politically sectarian messages that are pro/anti IRA, UVF, UDA, Fenian, Hun etc that are intended to offend other people.
Impact of new legislation on Scottish Police

Impact

17. The Scottish Police Service already adopts a robust policing model when dealing with anti social behaviour, including all forms of hate crime, associated with football. The enactment of additional legislation will not impact greatly on this policing model which will continue to be robust, professional and proportionate. It will however allow officers to apply the most appropriate legislation to the crime they are presented with.

18. In terms of the impact on the wider community it is essential that the Bill defines offensive behaviour in a manner which permits transport networks to be included, and does not restrict police powers to within close proximity of matches.

19. In relation to internet offending there are varying degrees of offences. These range from the posting of simple, horrific examples of sectarianism on internet notice boards to clearly defined threats to kill individuals. Scottish Police will require to prioritise and target the worst offences and there will have to be an understanding from partners that the tackling of internet offending will remain a challenging and resource intensive task.

Arrests

20. It goes without saying that arrests will continue to be made where necessary, in a safe and controlled manner, although officers will not destabilise a crowd by wading into it and trying to take out large numbers of fans. The number of arrests and any year on year additionally cannot be predicted and numbers of arrests should certainly not be used to judge success. What can be predicted is the continuation of proactive match day enforcement.

21. In relation to post match investigation and internet offending both areas can be challenging, costly and resources intensive. However, the Football Coordination Unit for Scotland will bring consistency and expertise to both areas, which will see arrests being made. However the impact of the ‘Cadder’ ruling on internet investigations cannot be overlooked due to the difficulties in evidence gathering around internet investigations and reliance on suspect interviews.

Resources

22. This Bill is being introduced at a time when the Scottish Police Service has been working towards a significant reduction in the number of police resources deployed at football matches.

23. If Forces work within existing resources, then the policing response will be proportionate, as there are competing priorities throughout the community. There will not be a significant increase in the number of officers allocated to policing football, unless a specific risk is identified at a particular fixture.
24. Scottish Police will review any implication on resources as a result of this legislation very carefully as the season progresses. Should resources become an issue then this will be evidenced and presented to the Scottish Government.

25. In relation to Threatening Communications, Internet investigators are specialists within the service, however they are not always police officers and such roles are allocated to people who are gifted in the field of IT and the internet. It is therefore anticipated that investment in resources to tackle internet offences will be required in the future to allow police to deal with these present day and future challenges. The people trained will be multifaceted and will not deal solely with sectarianism due to the wider issues seen on the internet.

Deterrent of new legislation

26. There will undoubtedly be much publicity around the enactment of this proposed legislation and it is likely that supporter behaviour will be positively influenced by this publicity and media discussions which ensue.

27. Police will attempt to influence supporter behaviour by publicising the fact that these new powers exist and carry a significant sentence. Where arrests occur during or post match they will be publicised, as will the issue of football banning orders, and that offenders have been banned by their clubs.

Football Coordination Unit for Scotland

28. The Football Coordination Unit for Scotland will provide the Scottish Police Service with additional access to:
   - Specialist policing to specific games on an intelligence-led basis.
   - Additional deployments, available to match commanders based on need.
   - Access to officers available to conduct retrospective investigation into cases of disorder at or relating to football matches.

Training

29. There will be a training requirement to ensure that officers were aware of the scope and practicalities of new legislation. The impact would be no greater than any other new enactment and it is likely that training will be delivered through an intranet training package, which can reach a large number of officers within a relatively small timeframe. Work is ongoing via ACPOS Hate Crime Sub Group to produce a training package in line with timescales for likely enactment of the proposed provisions.

Legislation

30. It would be of benefit if the legislation defined that the offending behaviour can take the form of words, songs, chants, gestures and displays to remove some ambiguity and give the clubs and police more powers to deal with offensive banners, scarves and other displays.

ACPOS Football Sub Group
26 August 2011
Submission from the Association of Directors of Social Work

The Association of Directors of Social Work (ADSW) welcomes the opportunities to provide a response to the proposed legislation and offers the following comments.

The Association commends the Scottish Government for its commitment to tackle offensive behaviour and threatening communication, including use of the internet associated with Scottish Football. As an Association were are concerned by the increase in criminal and antisocial behaviour and violence, particularly against women and children that rises following certain games.

ADSW recognises that legislation alone cannot address the sectarianism, bigotry and racial hatred that exists in Scottish society and which extends beyond Scottish football. The proposed Bill aims to address specific behaviour within a context of attending and travelling to/from football matches. It will not tackle the same abhorrent behaviours when displayed at marches, parades or other demonstrations.

Several high profile incidents during the 2010 – 11 Scottish football season, attracted national and international, media coverage that brought sections of the ‘national game’ into disrepute. We support the Scottish Government’s Joint Action Group approach which involves the key players in the section jointly agreeing a set of actions intended to deliver real and sustainable change.

The reduction and elimination of sectarianism, bigotry and racial hatred is a long term commitment that will take a minimum of a generation to show results. It requires a holistic re-educative strategy that targets, individuals, families, communities, schools, Clubs, commercial sector as well as the media.

The Association suggests the strategy builds upon established initiatives dealing with sectarianism and racial hatred, which have shown positive results, ‘Beyond the Culture of Two Halves’ highlighted by Youth Link, SFA & Clubs initiatives and the work of the Violence Reduction Unit in tackling Gang Culture. We commend the use of sport as a means to challenge and change unacceptable and antisocial behaviour and attitudes. We suggest such an approach offers a unique opportunity to Scottish football clubs and players to make a strong statement that sectarianism, bigotry and racial hatred has no place and will not be tolerated in Scottish football. The influence of players can be considerable and it should be maximised in this campaign.

Many organisations and individuals have expressed concern at the speed with which the Bill is progressing through Parliament. This Association shares those views, as we consider it is critical that the Bill is understood and ‘owned’ by the football community, clubs and supporters if it is to be effective. ADSW agrees with the views of others about the need for new legislation, when the plethora of existing public order and hatred legislation is not consistently applied. Ill defined legislation and an inconsistent approach to the interpretation, enforcement and prosecution which may result in legal challenges could be counterproductive, and reinforce the attitudes and behaviour the Bill intends to eliminate.

The creation of the National Football Policing Unit and Football Liaison Prosecutors will strengthen enforcement of the Bill and increase the number of prosecutions and
individuals entering the criminal justice system. The implications of a criminal conviction are considerable and the Association suggests that prosecution should be reserved for individuals committing serious offences or who are persistent offenders.

ADSW recognise the potential implications of the Bill for the Police are considerable and not solely from a resource perspective. The logistics of enforcing the Bill within the highly volatile atmosphere of a football match without exacerbating the situation and placing staff and supporters at risk of injury will be colossal and deploy resources from other activities. We welcome proposed research to ascertain links between football and domestic abuse, exacerbated by excessive consumption of alcohol. We are keen to work with ACPOS and others to reduce the risk of domestic abuse to women and children.

ADSW has concerns that the projected increase in work and financial costs outlined are underestimated. As is appropriate there will be a range of disposals available to the police, COPF and Courts. The Community Payback Order (CPO) is one of the options available; the financial memorandum makes no reference to the potential increase in Criminal Justice Social Work Reports that will be required where the Court is considering a CPO other than a Level 1 unpaid work order of less than 100 hours. The lack of a Report will present challenges in securing ‘safe’ work places within the required timescales, particularly when individuals are appearing direct from custody with feelings still running high. Where a more intensive CPO is imposed, the aim of the order will be to challenge entrenched thoughts, beliefs and attitudes, encourage changes in behaviour in order to reduce the risk of further offending. ADSW will monitor carefully the implementation and implications for LACJSW of the Bill, to determine the relevance of existing interventions or need to develop more specific ones.

In conclusion, ADSW supports the commitment of the Scottish Government to tackle sectarianism, bigotry and racial hatred in Scotland. The proposed Bill targets such behaviour directly related to football, we hope that existing legislation will be applied to address such behaviour in other areas of Scottish life. We have some reservations about the logistics of enforcing the Bill and consider the projected increase in work across the criminal justice sector to be underestimated.

Association of Directors of Social Work
August 2011
Submission from Ballingry Celtic Supporters Club

Following the events of football season 2010/11 and the apparent increase in sectarian related behaviour at certain football stadiums around the country and, in particular, the threats made to Celtic FC Manager Neil Lennon throughout that season, Ballingry CSC welcomes the principles behind the proposed legislation in the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

However, Ballingry CSC would suggest certain aspects of the Bill require further thought and clarity and ask the Justice Committee to consider the following issues.

Within the Bill, the parameters for both offensive and threatening behaviour are wide-ranging. For example, "offensive behaviour" includes almost anything perceived as being likely to incite public disorder - regardless of whether or not that actually happens. "Regulated football matches" includes matches being screened in public places. "Threatening behaviour" includes any communication (for example t-shirts, scarves and banners) “likely to cause a reasonable person fear or alarm”.

Ballingry CSC is of the opinion that the widely framed definitions of offensive and threatening behaviour as contained in the Bill may result in a loose interpretation of such definitions by police officers, procurators fiscal and sentencers. A potential consequence of this may be the supporters of any football club finding themselves unwittingly vulnerable to prosecution. There is therefore a concern that the Scottish Government has seriously underestimated the impact of the legislation.

Examples are readily available to evidence the reasons for our concern on this issue. Criminal cases involving accused charged with singing sectarian songs relating to the IRA have been dismissed following submissions that led to the Sheriff ruling that the IRA was a "republican military organisation" that was "not sectarian in intent" and that those who showed support for the organisation were found not to be "showing 'malice or ill-will towards members of a religious group'", as defined under Section 74 of the Criminal Justice (Scotland) Act 2003. The definition of sectarianism in the new legislation appears to be virtually the same as that in the 2003 Act.

“Any communication likely to cause a reasonable person fear or alarm” could be described as a catch-all clause that threatens the liberty of some supporters who, due to the passions inspired by watching their team, could display behaviour that many people would consider unreasonable.

Strathclyde Police Assistant Chief Constable Campbell Corrigan has recently admitted that he could not publicly state which songs would get you arrested and that police would not be wading into a football crowd trying to take out large numbers of fans.

In conclusion, it is this ambiguity of the draft legislation that most concerns our membership – with the possibility of a law being introduced that you won't know you're breaking until the police arrest you for it.
Whilst Ballingry CSC welcome the underlying principles of the Bill in tackling offences aggravated by sectarianism, the Club call for much more clarity and definition on what constitutes a breach of the legislation - not only for the benefit of supporters, but for police, procurators fiscal and sentencers alike.

We trust the views of Ballingry CSC are considered by the Justice Committee during this consultation period.

Rodger Cassidy
Secretary, Ballingry Celtic Supporters Club.
24 August 2011
Submission from Martin Brennan

If media reports are accurate this Bill has its provenance in the remarks made – for the purest of reasons, no doubt - by senior police officers and the much quoted Police Federation spokesman, Les Grey, in the aftermath of a Scottish Cup replay. In terms of crowd behaviour this match was by no means exceptional but what was exceptional was the intense media searchlight trained on Neil Lennon and Alistair McCoist. In the following weeks, outrage – whether genuine or counterfeit – was the tone adopted by the civil and sporting authorities. There was general agreement that ‘Something Must Be Done’ and no shortage of candidates to do that something. This all culminated in a hastily drafted and un-workable Bill which was just as hastily ruled off-side. It is my belief that this new Bill may prove equally un-workable unless a number of questions are addressed in tandem with any legislation. I have listed a number of questions below. Each question is accompanied by an explanatory note. My questions are seriatim:

1. Does Scotland have a sectarian problem? Is there any hard evidence that Catholics suffer discrimination in modern Scotland? What are the attitudes of modern Scots to the descendants of Irish immigration? Do Scottish institutions reflect the religious diversity of the population at large?

Four questions are posed above and, superficially, not one relates to football or internet abuse. But, I would argue, these questions address the core issue at stake more properly than the putative legislation. In fact, objective evidence might reveal to what extent bigotry is a clear danger to society or whether it is largely a media construct. To the best of my knowledge Catholics now – possibly belatedly – enjoy similar job opportunities and standards of living non-Catholic citizens. However, all is not clear. Researchers acknowledge that the detailed analysis of sectarian assaults is a key indicator of contemporary attitudes. Full disclosure of these crucial statistics has not been available for some years. Official transparency in this area is essential for public debate to be informed. To sum up, serious research is required preferably ante rather than post legislation. Otherwise we will get what we got last time round – policy on the hoof based on, at best, pious aspirations or, at worst, blind prejudice. Finally, on this question, it is surprising that in a modern democracy like Scotland’s there is no credible, disinterested body of research upon which legislators may draw. To sum up – the Bill’s very narrow terms of reference may appeal to those tasked with framing legislation but that same legislation is the more likely to fail if there is no regard to a wider context.

2. What is offensive behaviour? This question may not be as crass as it appears. For example, a government Minister cited ‘aggressive signs of the cross’ as potentially offensive. Now, I think I see what she meant. But the state may be placing itself in an invidious position if it intervenes on behalf of those offended by what is, after all, a prayer. It could also be argued that some fault lies with the mind-set of those inflamed by a prayer which is offered in public and without comment across the civilised world. In addition, it will be down to the police to enforce this legislation and they will be placed in the position of having to distinguish instantly between behaviour that is ‘offensive’ as opposed to merely boisterous or indeed prayerful. If that proves to be the case then the door is open to some highly subjective judgements. What chance has the humble policeman/woman when our Justice Minister a few months ago deemed the sectarian outpourings which characterised
the mood music at the League Cup Final as representing an advert for Scottish football? Another logistical problem the police will almost certainly encounter remains, as always, the impossibility of arresting up to 30,000 malefactors. Is this where the sport’s authorities are expected to demonstrate leadership? If so, the application of sanctions must be built into the legislation.

3. **Will there be review procedures for the enacted Bill?**
Despite the reservations of its critics this Bill is the product of decent instincts. But I fear that so many anomalies and inconsistencies will arise from its application that it will require more than a few amendments to render it reasonably acceptable. The doomsday scenario would entail one section of the community perceiving themselves as victims of heavy-handed political correctness. Resentment – or worse - could be a consequence. There may also be a temptation for the police to make arrests in line with some kind of informal quota with a view to demonstrating even-handedness.

4. **Do Catholic schools cause trouble at football grounds?**
In most modern democracies this question would be seen as risible. But, time after time, the self same question is rehearsed when there is trouble at football games. World-wide evidence would suggest that there is little or no causal link between Catholic schools and sectarianism. In England, for example, 10% of school pupils attend RC schools as opposed to 12% in Scotland. The difference is that in England sectarianism has long since been consigned to a more primitive past. That said, not all opponents of faith schools in Scotland are bigots. So, the subject is up for debate. Personally, I would suggest that the proponents of faith schools will win hands down.

In very brief compass, I would suggest that the proposed legislation will be fraught with varying degrees of danger. In my opinion, there should have been some kind of educational process prior to this quite unusual Bill. The root question here is sectarianism not football and very few know the full scope and ambit of that problem – if it is indeed a problem. Quite simply we must find out more about Scotland and the Scots before passing laws which may or may not be appropriate.

Martin Brennan
26 July 2011
Submission from Professor William J Buchanan

1. I am a Professor of Computer Security and Digital Forensics, and would like to make comment on Section 5) Threatening Communications. My main points are:

2. **Credibility of any information gained from Web posts or from electronic communications.** The current Internet infrastructure, and the protocols that it uses, cannot guarantee that any posting or electronic communication can be taken on face value.

3. **Lack of a strong understanding of the Internet across Law enforcement in Scotland.** There does not seem to be an extensive understanding of the Internet and its operation within law enforcement in Scotland, and thought needs to be given to creating a more extensive understanding of operation of the Internet, and in the usage of electronic communications. This possibly requires creating an infrastructure in Scotland which includes a wide range of knowledge, in order for law enforcement to gain best advice on the strengths and weaknesses of any information gain, especially in cross-correlation of evidence trails.

4. **Lack of enforcement around Web postings and electronic communications which are hosted or sourced from outside the UK.** Many sources of Web postings, such as for Twitter and Facebook, and for electronic communications, such as for Hotmail and Google Mail, are hosted outside the UK, and they often abide by the laws for the county in which the organisation is hosted. It can thus be costly to prosecute to reveal identities those who originate suspected Web postings or electronic communications. On face value, it cannot be assumed that the source of a posting is necessarily the person who seems to be identified by the user’s online identity.

5. **Lack of credibility in the sender and source of email messages.** There is a lack of credibility in electronic mail communication, and this cannot be used as a sole source of evidence, and needs a great deal of corroboration of other sources of evidence. Some though needs to be give about the actual details of recording the details of electronic mail communication to trace the actual source of the communications, and on the risks of spoof and spam emails.

6. **The “Bot-did-it” defence.** There are many pieces of malicious programs on the Internet, and these can be used to do things on behalf of a user, without their control. Along with this a suspect could also give a defence that a malicious program infected their computer and did the actions.

7. **Lack of scientific rigour in the collection, preservation, analysis and reporting of digital information.** Digital data is fragile, and can be easily damaged and compromised, thus the Bill may give Scotland an opportunity to share information between law enforcement, academic and industry, in creating best practices for investigating crimes related to the Bill, and scale this to other cybercrime related activities.
8. **Lack of understanding of identity.** Online identities are often managed in a different way to the way they are done within the real world. At present many computer systems have low levels of identity checking, and thus even if a user has logged into a system, does not necessarily mean they actually did this.

9. **Lack of trust from the general public.** There could be a perception within the Bill that all Web postings and electronic communications could be listened-to by the Police, as many things could relate to the focus of this Bill. A strong investigation framework and auditing system is thus required so that the Bill is not abused by allowing for all Web postings and electronic communications to be investigated, even if they are intended to be private.

10. **Mistaken posting, errors, and slips-off-the-tongue.** The Internet is prone to many human weaknesses of being too fast to respond to things, or posting something which was not actually intended. Along with this human tend not to fully understand the new Internet methods, and can make mistakes, such as in forwarding postings to others by mistake, or to an incorrect email recipient.

11. **Lack of the opportunity to remove inappropriately posted/emailed messages.** With the speed of response of user posting things to forums or Web sites, or in texting/emailing, users can often react too quickly to an event, and then have very little opportunity to recall it.

12. I would strongly recommend that a cross-domain team is setup related to the Internet and electronic communications in Scotland, which provided the framework for any related investigation, which defends the rights of society as defined in the Bill, but also protected the rights of the individual to privacy. This could include law enforcement, academia and industry within Scotland, and which could inform further bills in related areas, and allow Scotland to lead the world in these areas.

**Key Points**

13. I am a Professor of Computer Security and Digital Forensics, and lead the Scottish Centre of Excellence in Computer Security and Cyber. We work extensively with a range of collaborators on the areas of computer security, digital forensics and cybercrime, including with the Scottish Police. The main comments of this document relates to Section 5) Threatening Communications, as the focus of this includes the usage of the Internet, typically with Web-based posts and electronic communications – see Paragraph 1.

14. While the Bill is a step in the right direction that integrates traditional offensive behaviour with the equivalent with electronic communications. The major problem with including Internet-based communications and postings, is that the Internet does not have a sound infrastructure for the overall creditability of the any original sources of information. For example there are many examples of spoof postings, where users can use aliases or identities that can be identified with others. This can be done for many reasons, including malicious intents or even with bribery – see Paragraph 2.

15. The current experience within the Scottish Police related to Cybercrime is strongest within small pockets of expertise, such as within the Scottish Crime and Drug Enforcement Agency (SCDEA), but there is a lack of general skills and
understanding of the Internet within Law Enforcement in Scotland, and, to a certain extent, over the UK. A key focus for this Bill is therefore to create an infrastructure within Scotland which includes a range of domains, and which is creditable in both protecting society and also preserving the rights of the individual – see Paragraph 3.

16. Many of the Web sites related to electronic posts are not actually based in Scotland or even in the UK. Thus the laws related to releasing information about the actual identity of a person posting a message might be difficult. It might also be difficult to prosecute as the methods of registration onto a Web site might be difficult to actually verify – see Paragraph 4.

17. A particularly difficult area is in tracing the source of an e-mail, as there is often no check on the original sender of an email, where any email address can be given in the sender address. Along with this, proxy email systems can often be used to hide the original sender and their location. An email is thus often difficult to trace as the protocols used are fairly archaic – see Paragraph 5.

18. There are many risks on the Internet at the present such as for “Bots” or Trojan Horse programs which can do malicious things on behalf of the user. If this is true, then there needs to be thought about how this could be proven. Along with this, the suspect could use defend themselves with a claim that they had a Trojan horse project which did the malicious behaviour – see Paragraph 6.

19. As with any form of crime related to digital communications, there is a danger that investigations might not be properly defined with a lack of strong scientific methodology, where the evidence is compromised in some way. The Bill gives us the opportunity to refresh the methodologies used for evidence gathering in Scotland, with the possibility of knowledge exchange from academia and industry, to create best practice for the collection, preservation, reporting and analysis of digital information – see Paragraph 7.

20. A major problem on the Internet at the present time is that user login names and passwords are often easily guessed, and malicious persons can often gain the details of a person, and use their account for their own purposes. As passwords become difficult to manage, many users write them down, or they can be easily guessed by people who know them, thus the credibility of users, even if they have logged in and have been authenticated, could be called into question – see Paragraph 8.

21. There is a risk in the Bill, if the investigation system is not open and well defined, that the general public will feel that the police are spying on their postings and investigating their emails, by justifying it through this Bill. A clear investigation framework and associated independent auditing is thus required in order to increase trust in the Bill – see Paragraph 9.

22. Unfortunately the Internet allows for the fast spread of communications, which could be posted or written in mistake, thus there is a risk around people reacting too quickly or incorrectly, without any real intention. Along with this, the meaning of a posting or electronic communication can often be interpreted incorrect, where a joke
can be taken seriously. Without any associated body language, it can be difficult to actually interpret the intent behind an electronic message – see Paragraph 10.

23. Related to this, is that people often post things to the Internet or send inappropriate emails, which they regret later. Unfortunately it is often extremely difficult to recall email messages (as most systems do not properly support this), and messages posted on forums, are often difficult to actually remote, as there is a lack of contact details. With the speed of postings with mobile phones and the quickness of postings, a user can often react too quickly and often regret, with little chance of recalling it – see Paragraph 11.

Author Background
Bill Buchanan is a Professor in the School of Computing at Edinburgh Napier University, and a Fellow of the BCS (British Computer Society) and the IET (Institute for Engineering and Technology). He currently leads the Centre for Distributed Computing, Networks, and Security, and works in the areas of security, next generation user interfaces, Web-based infrastructures, e-Crime, intrusion detection systems, digital forensics, e-Health, mobile computing, agent-based systems, and simulation. Bill has one of the most extensive academic sites in the World, and is involved in many areas of novel research and teaching in computing. He has published over 27 academic books, and over 130 academic research papers, along with awards for excellence in knowledge transfer, and for teaching. His publications include the Handbook of the Internet, and the Handbook of Data Communications and Networks, along with a forthcoming book on the Handbook of Computer Security.

Presently he is working with a range of industrial/domain partners, including with the Scottish Police, health care professionals and the FSA. As part of the drive to create a World-leading infrastructure for security and cybercrime, he leads the Scottish Centre of Excellence for Security and Cybercrime which bring together a wide range of collaborators, including most of the universities in Scotland, the Scottish Police, the public sector, and a range of SMEs and large organisations. At present he is a Knowledge Transfer Lead for the Investigation and Evidence Network of the Scottish Institute for Policing Research (SIPR).

He has a long track record in commercialisation activities, including being a co-founder of Inquisitive System, which has progressed from PhD work to a university spin-out. This spin-out has also involved patenting novel security software in three countries around the World. His current work includes a collaboration with Microsoft plc on a £2million project which aims to improve the care of the elderly using Trusted Cloud-based services, and with Chelsea and Westminster Hospital on a next generation Health Care platform. This also matches up with other funded projects with the FSA and the Scottish Police.

Professor William J. Buchanan
Edinburgh Napier University
3 August 2011
Submission from James Campbell

If the police have failed to act using the existing legislation on the many occasions the rangers support have belted out sectarian and racist anthems; what makes you think the new legislation will make any difference?

The police always trot out the excuse that "There's too many of them". Under new legislation this will still be the case.

Uefa have punished rangers on five or six occasions yet our authorities have failed to act, so for me there is no real will from our authorities and leaves me to wonder what our European neighbours think of our "One country, many cultures".

Indeed following Kenny MacAskill’s comments after the recent League Cup Final where we were subjected to ninety minutes of bile from the rangers support I truly despair.

James Campbell
23 June 2011
Submission from CARE for Scotland

Introduction to CARE

CARE is a Christian public affairs charity that campaigns and provides resources to Christian communities. We have 30,000 supporters throughout the UK and about 3,000 supporters drawn from all Christian denominations in Scotland. We seek to influence legislation and policy on matters which affect religious liberty. In that context, we sought to input into the UK Parliament's consideration of the Racial and Religious Hatred Bill in 2006. We are pleased to submit this paper to the Justice Committee and would welcome the opportunity to give oral evidence.

Timescale and Parliamentary Scrutiny

CARE was concerned by the initial timescale of the legislation which we viewed as being unduly rushed and providing inadequate time for proper scrutiny of the content of the Bill. We were also concern by some of the content of the Bill. For those reasons, in June CARE and the Christian Institute proposed to take a joint action against the Scottish Government and the Scottish Parliament at the Court of Session. We are pleased, therefore, that the Scottish Government and the Scottish Parliament agreed to extend the timetable for the Bill. We ask the Justice Committee to use this opportunity to give full and detailed scrutiny to the contents of the Bill. In particular, we ask the Committee to consider the potential implications of the legislation for religious liberty and freedom of speech. We are concerned that the Bill may contravene Articles 9, 10 and 11 of the European Convention on Human Rights.

Offensive Behaviour

Clause 1 would create an offence of offensive behaviour likely to incite public disorder. This includes threatening behaviour or stirring up hatred against a person or a group of persons on account of their membership of a religious group, or a group defined by reference to other factors, such as sexual orientation and/or transgender identity. This offence is, on the face of it, constrained by reference to football matches. However, there are several worrying factors:

- There is no clause protecting free speech.
  
The right of people to share the gospel or to proselytise for other religions views in the context of football matches, should be protected.

- The offence can be committed even if the hatred is also based (to any extent) on any other protected characteristic (e.g. age, race, sexual orientation etc.).
  
This raises concerns that preachers and evangelists might fall foul of the legislation if they make comments on matters relating to sexual sin.

- Although the offence purports to be one of inciting public disorder, the phrase "would be likely to incite public disorder" applies even if measures are in place to prevent public disorder or "persons likely to be incited to public disorder are not present" or no public disorder occurs.
The criteria proposed here seems to be unduly subjective and very wide in scope.

- The offence can be committed on a journey to a football match, except that “a person may be regarded as having been on a journey to or from a football match whether or not the person attended or intended to attend the match”.

The danger is that people who have no intention to attend, or even interest in football or related sectarianism, may be caught up by this provision.

- The offence can be committed outside Scotland by any British citizen.

This provision may be beyond the legislative competence of the Scottish Parliament.

CARE is concerned that the proposals in the Bill relating to public disorder may be used by over-zealous police officers to limit religious liberty. In particular, the scenario where someone at, or outside, at football match distributing religious tracts or preaching might be considered to be acting in a way likely to stir up public disorder. The intent of the individual concerned might be purely evangelistic and his motivation benign. Nevertheless the possible adverse response by recipients of the tracts or his hearers might be considered by the police as a matter which justified an arrest and charge under the provisions contained in this legislation.

We are mindful of the possibility of legislation being interpreted more broadly by the police and the courts than was originally intended by the Scottish Parliament. In 2003, the Scottish Parliament passed Section 74 of the Criminal Justice (Scotland) Act. This provision introduced an aggravating factor on grounds of religion which can be taken into consideration by the courts when someone has been charged with another offence. The aim of this provision was to help to tackle sectarianism. However, its use has been extended beyond the area of Protestant/Catholic sectarianism to include any religiously motivated criminal activity. For example, we are aware of one case when Section 74 was been used to prosecute a street preacher who had made comments about Islam. Without commenting on the justification of that prosecution, we would point out that it was not envisaged at the time Parliament debated Section 74 that this clause would be used beyond the context of Catholic/Protestant ‘sectarianism’ or to prosecute street preachers. It is important, therefore, that the Scottish Parliament is specific about the circumstances within which the legislation is intended to apply. This concern is pertinent, in particular, as the proposed legislation impinges upon freedom of speech and religious liberty.

We are conscious also of the temptation for police officers to be over-zealous in the application of the legislation even in cases where no prosecution is pursued or conviction obtained. We are aware that similar legislation relating to public order offences has been applied over-zealously by the police in England on a number of occasions. Examples of such include a street preacher who was arrested and charged with a public order offence for saying that homosexual behaviour was a sin, two evangelists who were instructed by a Police Community Support Officer to stop handing out religious tracts in a predominantly Muslim area or risk facing arrest and two hoteliers who were prosecuted after discussing religion with a Muslim guest. The
latter case was dismissed by the court after the judge ruled that the main prosecution witness was not credible.

**Threatening Communications**

The second offence of making threatening communications can take place in any context and need not be related to football. There are two conditions which have to apply before this offence would be committed. The first condition relates to incitement to carry out a seriously violent act. The second condition is that the communicated material must be ‘threatening’ and that the perpetrator intends to stir up religious hatred. There is a reasonableness defence. However, there are some real concerns. These include the fact that the scope of this provision is very wide. Any communications by any means (except unrecorded speech) are covered. This includes podcasts of sermons and written communications. It should be noted that sending ‘threatening’ material is different to making threats. For example, quoting some verses of Scripture could be considered to fall foul of this provision.

CARE is concerned that the threatening communications provision could effectively create a ‘complainant’s charter’ where people who take offence at something published will be able to involve the police to intimidate those with whom they disagree. Any diatribe or even mildly critical analysis of a religion might be argued to ‘stir up religious hatred’. For the offence to be committed, the comment would also have to be ‘threatening’. However, this term is not defined in the Bill. Similar legislation in other countries has led to unjustified prosecutions of Christians. For example, in an Australian case two Christian missionaries who spoke at a seminar on evangelism among Muslims were prosecuted under the country’s hate crimes law after a complaint was made to the police by some people present in the audience.

CARE believes that it is appropriate on those occasions when there is a genuine attempt to stir up hatred and/or to threaten people that the criminal law should be able to intervene. However, we are concerned that the proposals in this Bill may inadvertently criminalise innocuous comments and the expression of disagreements on matters of religious or ideological belief. It is possible that members of some religions would regard any criticism of their religion as threatening to them, especially if they are a minority group. Although a defence of reasonableness is allowed, it is unclear as to how this will be interpreted, who will decide what is reasonable and how the courts’ understanding of what is reasonable may alter over time. For example, if someone described another religion as being idolatrous or as posing a threat to Western culture, would these statements be deemed to be grounds for prosecution under the proposed legislation? Such comments might be viewed by some as stirring up hatred of that religion and being ‘threatening’, in the sense that they might be viewed as being likely to cause hotheads who read the criticism to attack adherents of that religion. Similarly if a politician makes a comment criticising Israel for its military actions in Gaza and in doing so refers to “the Jewish state”, would that comment fall foul of this legislation?

**Conclusion**

Our aim in this evidence is not to comment upon the rights and wrongs of any specific case, but rather to highlight the potential for legislation to be used in ways
which are not envisaged at the time it is drafted and in a heavy-handed manner. The criminal law is a blunt instrument and it should be used sparingly, particularly in relation to matters which infringe civil liberties. On issues of genuine disagreement over religious beliefs and/or sexual practice, the Justice Committee must ask whether it is appropriate for the criminal law to become involved. This should occur only on those occasions where there is a real threat of violence and objective evidence to show that this is the case. In the normal course of religious discourse, subjective interpretations of religious texts or the misrepresentation of the content of religious texts by opponents are not matters on which, in our view, it is appropriate for the criminal law to be engaged. As a minimum, the Bill should include a conscience clause to defend freedom of religion and the right to articulate and manifest belief. In addition, we suggest that a clear definition of the term ‘threatening’ would be of assistance.

Dr Gordon Macdonald
Parliamentary Officer, CARE for Scotland
26 August 2011
Submission from the Catholic Church

The Catholic Church condemns behaviour and beliefs which foster hatred of any individual or group. All persons are entitled to respect and to live without fear and intimidation.

To this end it is important to recognise the importance of maintaining public order as a central task of government. Public authorities therefore have the competence and duty in responding to particular manifestations of disorder and behaviour which threaten the wellbeing of citizens and society as a whole.

Enacting laws and designing policies aimed at resolving such problems must be pursued with prudence and wisdom to ensure that measures are suitable and proportionate for the problem they seek to address. The freedom of citizens in their movements, beliefs and expression is foundational to a decent society and these ordinary rights must be protected as far as is practicable.¹

The exercise of government powers can contribute to this work by giving leadership in fostering the values necessary for a safe and ordered society. These powers need to be used wisely and to this end democratic governance is marked by a separation of legislative, judicial and executive powers. Such a separation ensures an adequate balance within the democratic process which avoids arbitrary and poorly formulated decisions.²

Citizens carry responsibility for exercising their freedom responsibly and for contributing to harmonious relations. Church communities play a particular role in contributing to good community relationships and their efforts, along with other parts of civic society, to encourage responsible behaviour throughout our communities are vital to creating the proper environment for a genuinely tolerant society. In Scotland, the different Christian denominations and faith communities have led by example in fostering good relationships and building close and collaborative partnerships. Democracy should also encourage the participation of citizens in political choices by ensuring adequate opportunity in decision making processes.³

In light of these observations we welcome the determination of the Scottish Government to outlaw offensive behaviour and we recognise that there may very well be a case for introducing new measures to tackle the problems of threatening communication and those associated with football matches, where it can be shown that current legal provisions are inadequate. Swift action aimed at overcoming offending behaviour and preventing deterioration of the situation can be indicated, but suitable caution must be observed in order to ensure that laws are not introduced with undue haste and that they have been ascertained to be at an appropriate and necessary level.

Bishop Philip Tartaglia, President
Catholic Communications Commission, Bishops’ Conference of Scotland
21 June 2011

¹ C.f. Centesimus Annus, Pope John Paul II, Paragraph 25
² Ibid Para 44
³ Ibid Para 46
Introduction

We are grateful for the invitation to participate in the consideration of the Offensive Behaviour at Football and Threatening Communication (Scotland) Bill and are pleased to offer more detail to our original submission to the committee.

The Catholic Church condemns behaviour and beliefs which foster hatred of any individual or group. All persons are entitled to respect and to live without fear and intimidation and consequently maintaining public order is a central task of government. Public authorities therefore have the competence and duty to deal with disorder and behaviour which threaten the wellbeing of citizens and society as a whole.

Enacting laws and designing policies aimed at resolving such problems must be pursued with prudence and wisdom to ensure that measures are suitable and proportionate for the problem they seek to address. The freedom of citizens in their movements, beliefs and expression is foundational to a decent society and these ordinary rights must be protected as far as is practicable.1 The exercise of government powers can contribute to this work by giving leadership in fostering the values necessary for a safe and ordered society. These powers need to be used wisely and to this end democratic governance is marked by a separation of legislative, judicial and executive powers. Such a separation ensures an adequate balance within the democratic process which avoids arbitrary and poorly formulated decisions.2 The relationship between the Parliament and the Scottish Government in handling this, and any other, bill needs to be respectful of their respective roles and competences.

Categorising the nature and extent of the problem

Bigotry and sectarianism need to be properly understood such that views or actions which may be regarded as sectarian but which in themselves merely indicate support, belonging or empathy for particular sectional or community interests, are not proscribed.

The bill proposes very broad criteria for catching behaviour which the government wishes to eradicate. The bill in our understanding was initiated to tackle the specific problem of disorder arising from bigotry in the context of football matches. The scale of that problem itself has to be examined with a sense of proportion. For example the trouble associated with other football matches in Scotland and in other contexts where no religious sectarian element exists can provide a basis for measuring the magnitude of the problem in Scotland.

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1 C.f. Centesimus Annus, Pope John Paul II, Paragraph 25
2 Ibid Para 44
Wide ambit of the provisions

In regard to the broad ambit of sectarianism envisaged by the cumulative characteristics identified in the bill there is a need for ensuring that the impact on civil liberties. It has to be seriously considered if there is a need to include such a wide scope of categories of people given that the bill has been introduced ostensibly to deal with a much narrower issue, namely bigoted intolerance against particular perceived Christian denominations.

This widening of the ambit of what the bill can catch is exemplified by the introduction of five forms of transgender identity discriminations which may give rise to criminal offence.\(^3\) We are unclear as to the source of such categories appearing in the bill and are unaware of individuals who may define themselves under such a category having been specifically targeted for mistreatment in the context of football matches. This gives rise to concerns that a much wider agenda is being addressed by the provisions of the bill than that which is commonly perceived as being limited to football related sectarianism, which has commonly been accepted as referring to bigoted anti-social behaviour. These provisions in fact seem to deepen the embrace of an ideological understanding of human sexuality which is rejected by the Catholic Church and which is contrary to natural law.\(^4\)

There has been an extensive level of attention to the issues of equality over the last decade which indicate that wider equality issues have been addressed in that forum and that a bill dealing with football related trouble is not the proper vehicle for introducing extensions to the concepts of protected characteristics which this part of the bill seems to represent. Specifically we have fears that the extension of protected characteristics in this bill is being used to implement an ideological view of human nature to the detriment of the freedoms of other members of society who hold differing views. The significance of this is considerable given that there arises a threat of legal sanction for making sensible distinctions between individuals or for expressing views which are frowned upon by other members of society. We therefore suggest that a widening of equality categories is not undertaken in this bill.

Freedom of religion

At the heart of religious bigotry is an intolerance of religious faith. The present bill presents an important opportunity to ensure an adequate appreciation of religious freedom which will in turn help overcome intolerance. Given that this bill is concerned with intolerance directed at people of a perceived religion we particularly encourage the incorporation of a provision which re-asserts the freedoms safeguarded by articles 9 and 10 of the European Convention of Human Rights.\(^5\)

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\(^3\) Offensive Behaviour at Football and Threatening Communications (Scotland) Bill 2011, Sections 1(4)(f) and 4(3)(b)

\(^4\) For example writers who support ‘Queer Theory’ (Tatchell, Butler, Fuss et al) assert that gender is not an intrinsic characteristic of the human person and therefore gender identity as traditionally recognised is to be eradicated.

\(^5\) ARTICLE 9

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
Responsible freedom

Citizens carry responsibility for exercising their freedom responsibly and for contributing to cordial relations. Church communities play a particular role in contributing to good community relationships and their efforts, along with other parts of civic society, to encourage responsible behaviour throughout our communities are vital to creating the proper environment for a genuinely tolerant society. In Scotland, the different Christian denominations and faith communities have led by example in fostering good relationships and building close and collaborative partnerships. In particular the Catholic Church has worked to perform its task of inculcating the moral virtue of justice through its teaching role and directly through our efforts in parishes and schools in developing and sustaining an ethos of genuine respect for all persons. Our example in collaborating closely with other Christian denominations, other faiths and all people of good will, on a variety of issues is in sharp contrast to the disordered and anti-social behaviour which sometimes flares up in social settings such as at football matches. It should be noted that those responsible for such behaviour in no way represent the faiths to which they may be perceived to give adherence.

The re-assertion of respect for religious freedom will contribute to a culture of greater tolerance and we recognise the need for further work in this area across Scotland in addition to the steps which are being taken within the present legislation.

A healthy democracy should also encourage the participation of citizens in political choices by ensuring adequate opportunity to contribute meaningfully to the decision-making processes of government and parliament. In this context we are pleased that the timetable for this bill has been greatly extended to permit such participation.

Communicating threats of serious violence

Threats of violence are of course unacceptable in society. There requires however an objective standard for considering the appropriateness of state intervention in communications which may be made in jest, rashness, through lack of adequate reflection, or which are without practicable foundation for being carried out. This may

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others. (ARTICLE 10)

Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

6 It is in pursuit of Justice that the role of the State and the Church intersect; the former having a responsibility for promoting and securing justice. C.f. Pope Benedict XVI, Deus Caritas Est, paragraph 28, Libreria Editrice Vaticana 2005

7 Ibid Para 46
be achieved by giving adequate latitude to freedom of expression. Legislation, covering England and Wales\(^8\), which is similar to that proposed in this bill includes explicit protection of freedom of expression. The bill now under consideration may benefit from the inclusion of such a provision in line with articles 9 and 10 of the European Convention on Human Rights, as mentioned above.

We believe it wise to give particular emphasis to the danger of laws undermining confidence in the freedom of expression owing to the necessity of this right for a democratic polity. The introduction of legislation which criminalises particular types of expression needs to be done mindful that it can have an unintended chilling effect on society if not adequately circumscribed by provisions to protect established civil liberties.

The present bill for example could be used to challenge those who express views found to be offensive to religious believers. Whilst the Church may at times find such verbal attacks hurtful and misguided; we recognise the legitimate right of expression\(^9\) and would not wish ordinarily that such expressions would lead to prosecution and would expect that Catholics would be free to articulate their views in a forthright manner. The human person’s dignity is properly acknowledged by respecting a wide limit to this freedom and democratic society is dependent on healthy debate to permit the opportunity to reflect on competing views and arguments. European jurisprudence has consistently recognised this important right even to the point of defending the freedom to “offend, shock or disturb”\(^10\) contained within this right, albeit that we recognise that the need to protect morals as identified in article 9 of the ECHR has been somewhat neglected over recent years. Such a strong support given to freedom of expression does however serve society by preventing a narrow consensus which can grow detached from objective measures which are best identified by reasoned reflection and a willingness to engage ideas even those from which we find challenging.

John Deighan
Catholic Parliamentary Office
8 September 2011

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\(^8\) Public Order Act 1986 Section 29J as amended by the Religious Hatred Act 2006

\(^9\) Albeit that we urge this freedom to be exercised in society with due concern for the individuals who hold views which others find disagreeable.

\(^10\) Handyside v UK (1976) 1 EHRR 737
Submission from Celtic plc (Celtic Football Club)

Celtic Football Club was founded in 1888 with two main aims: the first was to raise funds to provide food for the poor of the East End of Glasgow. The second was to use football as a vehicle to improve social integration and reduce friction between the growing Irish community in the East End and the native Glaswegian population.

The Club is proud of its Irish links and heritage. Its business is run on a professional basis, with no political agenda. It recognises its wider role and responsibility as a major Scottish social institution promoting health, well-being and social integration. Its aims remain consistent with those on which it was founded and it seeks to maximise opportunities to disassociate the Club from discrimination, sectarianism and bigotry of any kind and to promote Celtic as a football club for all people regardless of gender, age, religion, race, or ability.

Recent background

The Club is committed to tackling and eradicating unacceptable behaviour at its stadium. Considerable work has been done with the police, other football clubs and the football authorities over a number of years, particularly in connection with issues involving sectarianism. Significant efforts have also been devoted to a wide range of community and social policy issues.

The Club participated fully and actively in the Joint Action Group formed in the Spring of 2011. The Joint Action Group report was published in July 2011 and includes a number of recommendations which are relevant to the comments made below.

A substantial amount of time and effort was taken during the Joint Action Group to consider and identify additional steps that could be adopted to assist in tackling extremes of behaviour and the concerns identified at the outset of the JAG process – domestic abuse, alcohol misuse, violence and sectarianism.

The JAG recognised that these problems were not ones for football alone but affected and involved Scottish society as a whole.

A number of initiatives were suggested and agreed upon. These included the formation of a new Football Policing Unit and more consistent and extensive use of Football Banning Orders. The Club supports these initiatives, particularly against the background of falling crime rates generally and the low rates of arrests at its stadium.

The prospect of legislation was raised only at the very end of the process with no real time or opportunity to assist on how it might be framed, or its scope.

The Club has consulted with several supporters’ groups and taken legal advice on the content and potential effect of the proposed legislation.
Need for and timing of legislation
Where legislation is contemplated, particularly in the context of sensitive and complex issues such as sectarianism, it must be approached very carefully, be capable of being applied in a fair and proportionate manner, and achieve the intended objective.

There is considerable debate in legal circles over whether existing laws are sufficient to deal with the behaviour contemplated by the Bill, or whether there is a gap that ought to be filled. No consensus appears to have been reached. We share these doubts and believe that they should be resolved before new legislation is introduced.

Having recognised that sectarianism is an issue that affects and involves Scottish society as a whole, if there is indeed a gap in the law relating to sectarian behaviour, it is not clear to us why that should only be closed in relation to regulated football matches, and not wider society. To address this important issue only in a football context ignores underlying causes and ultimately does not meet the wider policy objectives of the Bill.

In our view legislation should be the last step, when it can be demonstrated clearly that existing laws and the additional steps being proposed through the JAG process have not been successful in achieving an improvement.

Effect on football supporters
Active football supporters, and those who follow or have an interest in football, make up a substantial part of the Scottish population. The vast majority of supporters are law-abiding.

Although the JAG identified and agreed that the behaviour which is of concern, and the issue of sectarianism, is a wider problem for Scottish society and not simply for football or any individual football club, the legislation is clearly targeted at football supporters.

The legislation potentially discriminates against the football supporter by reason of that person being a football supporter. It criminalises him or her for being a football supporter and not only because of the nature of his or her behaviour. In other words, exactly the same behaviour could be deemed illegal if performed by a football supporter, while not constituting an offence by anyone not participating in a football environment.

This must surely be wrong in principle and runs contrary to the Joint Action Group recommendations. Those have recognised the importance of not stigmatising football or football supporters and indeed seek the participation of supporters in a variety of initiatives to bring about behavioural change.

The defining element of the offence ought to be the behaviour itself and not the fact that the person undertaking it is linked in some way to the occurrence of a football match. Individuals should not be subjected to a different standard merely by reason of being a football supporter one day, and an “ordinary “citizen the next.
The Scottish Government has made clear, correctly in our view, that the context of the behaviour will be a critical question. But that context does not need to rely on the occurrence of a football match; the legislation could have the same overall effect by removing the football-specific references from it.

**Scope and enforceability**

The legislation identifies various new offences. Several are set out clearly – for example sections 1(2) and 1(4) - and refer to sectarian or religious hatred, among others. Many of these are already reasonably well understood through other legislation or the aggravating factors to breach of the peace.

In contrast, an offence of “offensive behaviour” and the test of the reasonable person, are introduced in section 1(2) (e). This test is extremely wide and creates considerable uncertainty over what is or is not acceptable.

If this offence is to be introduced notwithstanding our comments above, clear guidelines should be published by the Lord Advocate to explain what sorts of conduct are considered as offensive or unacceptable. The potential for confusion in the absence of clear and consistent guidelines is potentially limitless and runs the risk of the law becoming unenforceable, or brought into disrepute.

Such guidance must also take account of individual rights and applicable laws including those arising under the European Convention on Human Rights. Expert legal opinion will no doubt be proffered on issues of enforceability, and the application of section 29(2)(d) of The Scotland Act in that context.

**Extraterritorial application**

The proposed legislation has wide extra-territorial reach. The Joint Action Group sought to concentrate on changing the behaviour of those whose conduct was unacceptable, with a focus on offending and issues domestically.

We suggest that the legislative efforts being made would be best concentrated in Scotland, not only in principle, but also to address potential questions over enforceability, conflict with other nations’ laws and restrictions within The Scotland Act on functions exercisable otherwise than in or as regards Scotland.

**Threatening Communications**

This section of the Act, in contrast to the rest, accepts that communications may be considered as threatening whether in a football context or not. We support that approach and believe it should be applied to the Bill as a whole. While very obvious examples have been publicised and have involved people associated with Celtic Football Club, the threatening behaviour contemplated can arise irrespective of the surrounding reasons.

Consideration could be given to a separation of the threatening communications element of the Bill from the football-related element, if this was considered by the Parliament to be capable of proceeding on a standalone basis.
Issues of extraterritoriality will undoubtedly apply due to the nature of the internet. We also note that there are questions over the existence and suitability of existing United Kingdom legislation in the Communications Act 2003 and whether internet services, telecommunications and wireless telegraphy are reserved matters for the Westminster Parliament.

**Overview**

Celtic Football Club remains supportive of the willingness of the Scottish Government to tackle difficult issues such as sectarianism and extremes of behaviour.

The outlawing of behaviour which we would all find offensive, such as the hate-based offences listed in the Bill, is welcome if these are not adequately provided for in existing law. But these offences should not be applied in a purely football context. Behaviour which is genuinely so offensive as to be considered criminal has no place anywhere in Scottish society.

The Bill has already attracted substantial comment on the perceived gap in existing law, its scope, enforceability and the potential for conflict with rights of freedom of expression. There is considerable merit in arguments that existing laws are sufficient and that in the areas mentioned above, the Bill, if made into law, may struggle to achieve its objective.

In the specific context of football we consider that the existing legal framework, with the more consistent and comprehensive approach to football banning orders and the new Football Policing Unit proposed by the Joint Action Group should first be applied and the effectiveness of those measures then reviewed before additional legislation is considered.

Robert Howat  
Company Secretary  
For and on behalf of Celtic plc  
26 August 2011
Submission from Celtic Supporters Association

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

While any action to curb offensive behaviour at football in Scotland should be applauded; I believe that the proposed Bill is far too open to interpretation; and may be impossible to implement by the Police and the Courts.

I don’t believe that football supporters in Scotland are much different to football supporters throughout Europe; generally speaking there is a healthy rivalry; particularly when it comes to local derby matches.

This initiative began after the so-called “Shame Game” at Celtic Park; it was instigated by the Police and then the Scottish Government got involved. At this particular match there were two red cards during the match; and one after the match had concluded; all three from the same team; there were also a couple of skirmishes between two of the coaches; one from each team.

I have been following Celtic Football Club since the middle fifties; and in that time have seen many similar clashes; but it has never resulted in the media frenzy that followed this match; or indeed with Government intervention.

I don’t believe that the Celtic supporters behave in an offensive manner; and while I would acknowledge that the younger element can be a bit boisterous from time to time; I believe that should be tackled by education; not criminalisation.

I would not profess to being an expert on criminal law; but I would certainly suggest that offensive behaviour at football matches could; and should be handled under the present law; for instance “Breach of the Peace” I don’t think there is any great need to implement another law.

We are in serious danger of creating a generation of criminals; their only crime would be supporting a football team; surely the limited resources available should be utilised to improve Scottish Football.

I don’t want to be cynical; but if I was; I would think this new strategy is designed by the Police and the Government to alleviate the pressure on the Police to make cuts in their budget.

Scottish Football is in a critical; if not terminal state; it needs investment and encouragement; there are many problems that need to be addressed; everyone who has an input should be consulted.

Scottish Football has evolved like any other industry; the days of terraces full of flat capped labourers has gone; we now have a generation of intelligent supporters; people who own and run their own companies; should we not be utilising them?

I believe the Government need to look at the big picture; football is a massive industry in Scotland; we need to encourage the next generation to go to football; not threaten them with imprisonment for supporting their team.
I personally have followed Celtic Football Club for over fifty years; I would appreciate being treated with some respect at times; I am sick of being criminalised in cities throughout Scotland because I wear a green and white scarf.

In my humble opinion; the Government needs to get all factions within Scottish Football together; they need to listen to the real supporters; people who go to football every week; ordinary football supporters; get their opinions and act on them.

In conclusion; I sincerely believe that First Minister Alex Salmond’s actions are for the right reasons; I believe he wants to make Scotland a better place to live in; but you don’t achieve that by criminalising the ordinary everyday people who attend football; there are far greater crimes than singing at football matches.

Joe O’Rourke
General Secretary, Celtic Supporters Association
25 August 2011
Submission from the Celtic Supporters’ Trust

In an attempt to avoid repetition of other submissions we would, at the outset state our agreement with the following elements of submissions from other bodies/individuals. In particular, though not exclusively, we wish to record our agreement with the following:

1. The Law Society of Scotland submission in its entirety which points out
   a. that the behaviours which this Bill seeks to outlaw are already covered by existing law
   b. that the Bill lacks clarity and, as a result
   c. parts of the proposed legislation may prove unenforceable

2. The submission by Dr Sarah Christie and Dr David McCardle to the effect that the Policy Memorandum contains an important error of law: it notes concern that the type of behaviour covered by the Bill may fail the strict test currently laid down for breach of the peace, of “causing fear and alarm”. The flaw in this argument is that this is not the test for breach of the peace at all. Smith v Donnelly (2002 JC 65) sets out the conjunctive test – conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community – and in the football context this test was applied by the High Court in Walls v Brown [2009] HCJAC 59. If measured against this proper test, any form of behaviour expressing or stirring up hatred against a group (as defined in s1(2)(a) and s1(4)), in such a way as to be likely to incite public disorder would also amount to behaviour that would alarm ordinary people and threaten a serious disturbance.

   This reinforces the point that existing legislation covers adequately the behaviours which this Bill intends to outlaw.

3. The submission by the Scottish Human Rights Commission which refers to:
   a. Restrictions on freedom of expression and whether or not the provisions of this Bill meets the three requirements of the ECtHR which must be met in order to legitimately interfere with freedom of expression
   b. The sections on legal certainty and the confusion which would surround this Bill if enacted in its current form. Specifically, we concur with their interpretation of Article 7 of the ECHR which in this context, and given the lack of clarity of the current draft of the Bill, might mean that someone could find themselves convicted of an offence which is not currently an offence and which they did not know to be an offence.

Furthermore we wish to make the following additional points:

- It is our view that the case has not been properly made for creating a new offence which is aimed specifically and uniquely at football fans. The statistics used by the Police in the public debate leading to this Bill being proposed have been selectively produced. There are many more types of events and times of the day and year which lead to increased incidences of violence of varying degrees of severity. FoI requests submitted by the
Celtic Trust to Strathclyde Police in April and May of 2011 revealed that the 'most prolific' dates for domestic violence are 25, 26 and 27 December and 1 and 2 January. A request for figures on other incidents/events which coincide with peaks in arrests for violent offences was denied on grounds of costs but the Justice Committee may wish to consider a fuller examination of the figures rather than relying on those selective statistics produced for public consumption so far.

- In support of this point ie that no case has been made for the creation of a new offence we would point out that figures obtained from Strathclyde Police under the FoI request referred to above, show that arrests made at Celtic Park on 2nd March in the so-called ‘Shame Game’ amounted to 34 ie approximately 0.065% of those who attended the game. Those arrests involved 8 home supporters and 28 away supporters and none of them were for violent offences. We have no knowledge of how many of those arrested were actually convicted of any offence and, again, the Committee may wish to obtain figures for convictions which correspond to the figures for arrests which the Police have repeatedly quoted.

- The whole thrust of the Bill and the accompanying debate is very anti-football and specifically anti-football supporters. As a supporters’ organisation we take very grave exception to the notion that all, or even many, football supporters are regularly engaging in criminal acts or represent a social problem. We challenge the supporters of this bill to point to any group of equivalent number to those who regularly attend football matches who are less problematic. Even in terms of football, in comparison with European and even English football supporters, there are far fewer crowd-related problems in Scotland.

- Our fear if this Bill is passed is that it will at worst criminalise supporters (most probably young, male supporters) or at best lead to those same young men being held in cells overnight and subjected to repeated court appearances on the basis of police officers and the Procurator Fiscal’s office trying to enforce an unenforceable, badly written piece of legislation.

- We object, in principle, to any act being made unlawful in the context of a game of football that is not otherwise unlawful when attending any other type of event or none.

- We object, in principle, to the notion that people should be legally entitled not to be ‘offended’.

- We have no difficulty with the enforcement of any legislation relating to hate crimes in the context of any of the categories listed in the Bill. Celtic supporters do not engage in mass singing of any songs of hate for any other group of people on grounds of religion, nationality or any of the other categories listed in the Bill.
• We wish to give qualified support to the parts of the Bill relating to Threatening Communications. The qualification being that it is on the basis that the maximum penalty will only be applied in the most serious cases.

• Notwithstanding the points made above we welcome the fact that the inclusion of ‘national origins’ in the list of categories to be protected under this Bill, will for the first time offer protection to Scotland’s largest ethnic minority group ie those of Irish descent in celebrating their history and culture without fear of being abused for so doing by racists and bigots. In terms of the current wording of the Bill one wonders how this protection on grounds of national origin might conflict in practice with any expression of Irishness being seen as ‘offensive’ by those who might otherwise consider themselves ‘reasonable’.

The Celtic Supporters Trust
25 August 2011
Submission from ChildLine in Scotland

ChildLine is the free, confidential service for any child with any problem.\(^1\) Tens of thousands of children contact ChildLine every year about a wide range of problems impacting on their lives including family relationship problems, bullying and abuse. As well as offering a service to every child who needs it, ChildLine in Scotland is committed to representing the concerns children bring, unsolicited to the service, with those who can make a difference in their lives. Our brief response to the current bill is based on what we hear from children and young people.

CHILDREN 1\(^{ST}\) supports ChildLine’s submission. For over 125 years, CHILDREN 1\(^{ST}\) has been working to build a better future for Scotland's vulnerable children and families. We listen, we support and we take action by delivering services in homes and communities across Scotland. We work to safeguard children and young people, to support them within their families and to help them recover from abuse, neglect and violence. Formerly known as the Royal Scottish Society for the Prevention of Cruelty to Children (RSSPCC), we provide 39 local services across Scotland and four national services – ParentLine Scotland which provides advice and support to anyone with a concern about a child; Safeguarding in Sport, which works with sporting bodies to keep children safe and having fun in sport; Kinship Care, the national training, outreach and helpline service for kinship care families and ChildLine in Scotland, which we manage on behalf of the NSPCC.

ChildLine hears a great deal about offensive and threatening behaviour, including at times physical and emotional violence, meted out to young people by other young people in the form of bullying behaviour. Between 1st April 2010 and 31st March 2011 there were 30,439 counselling interactions UK wide with a Primary Concern of Bullying. This represents 11% of the total counselling interactions undertaken in the UK by ChildLine during that period. Children also increasingly talk to us about cyberbullying, with 2250 last year seeking help because they were being bullied and threatened via the phone and/or the internet. The vast majority of bullying behaviour children talk to us about involves the child being singled out because of some kind of perceived ‘difference’. Children talk to us about being bullied because of their appearance, their race, their perceived ability, their choice of clothes, their gender, their family problems, their perceived sexual orientation, their religion, the football team they support . . . etc. Children tell us bullying affects every area of their lives: their self esteem, their confidence, their school life, their home. Sometimes children are driven to self harming or thinking about suicide.

ChildLine in Scotland is firmly of the view that the issues of religious intolerance and sectarianism are one reason amongst many that children in Scotland are bullied and assaulted on a regular basis. We also know from what young people tell us that whilst this sometimes happens at football matches, it far more commonly happens at school, in the community and with some young people, in the form of abuse at home – either witnessing domestic violence or being physically or emotionally abused themselves.

ChildLine in Scotland understands that sectarianism and religious intolerance needs to be taken very seriously in Scotland and addressed at a variety of levels. However we would question whether the measures in the current bill are those needed to
tackle the problem and also whether the bill is a proportionate response to the issue. More specifically, we would like to raise several key concerns in relation to children and young people.

- ChildLine in Scotland notes that the process included the bill being subjected to a business impact analysis and would ask if any analyses was undertaken to assess the potential impact on children’s rights. We note that in its concluding observations the UN Committee stated that: “Child rights impact assessment should be regularly conducted to evaluate how the allocation of budget is proportionate to the realization of policy developments and the implementation of legislation”. We also noted and enormously welcomed the Scottish Government’s stated interest in using children’s rights impact assessment in the development of Scottish Policy (Do the Right Thing). ChildLine in Scotland would strongly urge such an analyses being undertaken on the current bill, given its potential to impact on children’s rights.

- ChildLine in Scotland is concerned that the lack of any age threshold in the draft bill means there is a real danger of it ‘catching’ a wide range of behaviours that children and young people might become engaged in. The calls we receive on sectarian related bullying and violence in children’s lives means we understand the potential for children to get involved in such behaviour. Although we know all too well how traumatic and damaging this behaviour can be, we do not believe that criminalising large numbers of children is a helpful response to the problem.

- As ChildLine in Scotland understands it, the provisions in the bill at section 5 and 6 relating to threatening communications could also result in large numbers of children being criminalised for cyberbullying, if they are threatening violence or if that bullying is of a religious or sectarian nature. We do not consider this to be the best way to deal with the problem of cyberbullying and are highly concerned at the implications for an already strained Children’s Hearings System if legislation is created that catches an increasingly common form of children’s bullying behaviour. We would strongly recommend that any accompanying guidance to the Act made clear that any children under 18 would only be referred to the Hearings System or prosecuted under this legislation in the most exceptional circumstances.

This is not to say that ChildLine in Scotland does not believe measures are needed to help address the problem of cyberbullying. We are acutely aware of the issue and the impact on children’s lives, based on what they tell the ChildLine service when seeking help. Our substantial experience in working with these children convinces us that children do need to be better protected from all kinds of cyber-bullying - whether it is of a religious nature, whether it threatens ‘serious violence’ or indeed whether it represents the potential to cause serious emotional harm. ChildLine in Scotland believes that the impact on a child looking at a webpage set up to communicate the message ‘we hate you’ (with hundreds of signatures attached), is no less damaging to that child’s wellbeing than a threat of violence. However as stated above, we are not convinced that legislation that would create a ‘blanket offence’ for certain forms of cyber-bullying by children as young as twelve is the way forward.
Two decades of listening to children talk about their experiences of bullying (including cyberbullying), the sometimes devastating impact it has upon their lives and the regular failure of schools, education authorities, communities and families to deal with the problem in a helpful manner convinces us that there is insufficient protection for children against all kinds of bullying in the law. ChildLine in Scotland believes measures are required to better protect all children from all forms of bullying. We refer the Committee to previous NSPCC recommendations around tackling bullying behaviour, most specifically a duty being placed on education authorities and schools to develop and implement anti-bullying policy, where children and young people are actively consulted and involved in the development of said policy and Her Majesty’s Inspectorate of Education (now Education Scotland) required to inspect schools on the school’s consultation and the policy’s implementation, including from the child’s point of view.

ChildLine also fully endorses the recent calls to further delay the progress of the bill to allow more time for scrutiny and reasoned debate, given the far reaching implications of this draft legislation.

We hope you find these comments useful.

Alison Wales and Fiona Robertson
Policy and Information Officers, ChildLine in Scotland
29 August 2011

1 ChildLine is a service provided and funded by the National Society for the Prevention of Cruelty to Children (NSPCC). CHILDREN 1ST (RSSPCC) delivers the ChildLine service in Scotland on behalf of the NSPCC. NSPCC registered charity numbers 216401 and SC037717.


Submission from Children in Scotland

Children in Scotland is pleased to contribute to the debate, initiated by this Bill, about how to both prevent and deal effectively with offensive behaviour related to football matches. One of its strengths is that while it emphasises issues of sectarianism and religion-related hate crimes, this Bill also takes into account other forms of, and motivation for, hate crimes and threatening behaviours/communications.

We have two broad concerns about this Bill.

First, it does not adequately address the prevention side of offensive behaviour and threatening communications related to football matches – actions that are widely agreed to be unacceptable and detrimental to Scotland. The growing consensus in Scotland that governmental activity must give ever-increasing attention to keeping problems from developing in the first place (or nipping them in the bud when prevention fails) is not robustly reflected in this Bill. Its focus is on creating and enforcing new criminal offenses, which would take effect after the fact and in the aftermath of negative incidents. We regard such law enforcement as necessary, but not sufficient in the long run.

Second, it overlooks the opportunity to enact legislation that would increase positive attitudes toward ‘differences’ (including religious differences) – and thereby, reduce the negative attitudes and beliefs giving rise to unwanted and unlawful behaviours. These negative behaviours have their roots in learned prejudice and a learned belief that it is acceptable to act upon these learned prejudices in discriminatory ways at (and beyond) football matches. Whether directly through this Bill, or indirectly through the Scottish Government, the opportunity should not be missed to deal effectively with the roots, not just the branches. There are significant chances to both better educate and socialise children and young people, as well to re-educate adults away from the attitudes and beliefs causing offensive behaviour.

Our organisation’s expertise does not lie in the worlds of either football, or criminal law. We note that this Bill has sparked a variety of questions and concerns from groups having such expertise. These have been well summarized in the SPICe briefing about this Bill and subsequent news articles and commentaries. However, we have considerable knowledge in three areas that are relevant to the two concerns we have raised above about this Bill.

First, we work to promote gender equality and, in particular, to highlight the pivotal role of fathers in the lives of children and young people. We believe that, particularly in relation to football-related offensive behaviour, the lessons taught by fathers (by word and deed) to their children is both part of the current problem and could be a vital part of the future solution to this problem.

Second, we have expertise in early years research and policy at a UK and European level, as well as in Scotland. The roots of negative behaviour and learned prejudice can be found in early childhood experiences and socialisation processes. Therefore, this is also where the negative side could and should be countered with more positive, pro-social attitudes, beliefs and behaviours.
Third, we have considerable experience of working with children and young people around dealing with discrimination and promoting an appreciation of differences. There are important lessons that we learned from our work about religion and around racism – lessons that remain as relevant and useful as ever.

These topics are discussed further below. We also add links to other online information that we consider helpful and have attached a copy of an article written for the August 2011 issue of Children in Scotland magazine by Michael Rosie - ‘In a Different Division’.

The role of fathers

The majority of those committing offensive behaviour are men, and many of them will also be fathers (whether biological or de facto, resident or non-resident). Their attitudes are likely to be shared by those in their family and community. Indeed, Youth Scotland cites its own experience of working with young offenders, noting that it is difficult for these young people to challenge the cultures of their family and friends even if they recognize the need to change their views.

Children in Scotland works to increase the level of involvement of fathers, resident and non-resident, in their children’s lives. This may be through links with health care, before birth, during nursery, primary and secondary school. As well as benefiting children, the involvement of parents in children’s education brings them into environments where prejudice of all kind may be challenged.

Anti-discrimination work with children in nurseries and schools, while beneficial, can only have limited impact if children’s families and communities remain unchallenged. However, in order to be able to encourage families and communities to question their attitudes they need to be able to develop trusting long-term relationships with key professionals in health and education environments. Attitudes are not changed by professionals telling people what to think, but rather through modeled behaviour and a display of values in services that are themselves valued in communities. Trust and long-term relationships are key.

While it is understandable that the Scottish Government wishes to challenge offensive and criminal behaviour swiftly, we urge the Government to take seriously its own statement to “tackle sectarianism by all means at its disposal”. Working with men in their role as fathers offers a promising opportunity to challenge and change offensive behaviour and hate crimes at one of their key sources. We would be happy to offer further advice and evidence about how best to take forward such efforts with fathers.

The role of early childhood education and care (ECEC)

Universal early childhood education and care is particularly suited to fostering democratic, nondiscriminatory and inclusive values within staff, children, parents and communities. Such positive early childhood settings outside the home require investment and long-term commitment, but they have the potential to bring about transformational change in society.
Issue 13 (2007) of Children in Europe magazine looked at multiple belongings and the role of early childhood services and the first years of schooling in helping to combat inequality. The problems highlighted by this Bill are connected in significant ways to this evidence.

A discussion paper produced by Professor Peter Moss’ research as part of the Children in Scotland’s Working for Inclusion programme (funded by the EC) explains in more detail how early childhood education and care and promote inclusivity and non-discrimination.

A forthcoming report and series of briefings by Children in Scotland will outline how Scotland can bring about such transformational change in early childhood education and care. This has direct and powerful implications for the prevention side of the kinds of offensive behaviour and threatening communications highlighted in this Bill.

**The role of dealing directly with children and young people on alternatives to prejudice and discrimination**

The Bill considers the impact on children and young people briefly in relation to the need to communicate changes in the law. All concerned parties would find real benefit in discussing the key issues with children and young people directly. Accordingly, we are pleased that the Government is in contact with the representative organizations it lists. This must be a meaningful dialogue and two-way communication if it is to reach its potential as part of the solution to hate crimes, whether or not they are connected to football matches.

There is a danger that the new legislation – if enacted as is -- might criminalise more young people than older adults. This, in turn, may have the unintended and undesirable effect of hardening negative attitudes, reinforcing negative self-images and behaviours and blighting young lives early on. There is abundant international evidence that labeling and treating them as ‘criminals’ reinforces an anti-social self-image and often sets young people on longer-term criminal or anti-social behaviour routes. It is also doubtful whether the threat of criminalisation will change young people’s behaviour.

It is important that measures to prevent and counter offensive behaviour in young people in this context is matched by investment in programmes to encourage young football fans to reflect on this element of football culture and support for them to bring about change. The English-based website “kick it out” has little on sectarianism in football, but has strong messages about other types of discrimination, including encouragement for reporting offenses. This might be a useful model for a campaign in Scotland.

Children in Scotland’s work with children and young people -“Equal Futures”, a number of years ago addressed this issue. This Scotland-wide programme of workshops and events revealed different perspectives on discrimination among children and young people than those held by many adults. For instance, we learned that children and young people didn’t make the same kind of distinctions about discrimination, but have broader and more fluid understandings.
Local authorities’ Equality Plans need to consider inclusivity and equality in the ways that children and young people view them, not necessarily only through the labels produced by adults. Our work ‘Access All Areas’ over the past several years in partnership with the Scottish Borders has changed how adults (as well as students themselves) perceive the concept of ‘inclusion’ in schools. Changing adults’ preconceptions is the first step in understanding how to support children’s questioning and challenging of discriminatory views.

Finally, the Curriculum for Excellence’s emphasis upon working with local communities is a good opportunity to tackle these issues of prejudice and offensive behaviour beyond the school gates, but only when the levels of trust and shared values locally are in place. As experienced by Children in Scotland’s successful ‘Equal Futures’ programme of work offering young people art, music, dance, sport, and drama are all ways to bring different groups together, elicit unexpected viewpoints and encourage non-discriminatory attitudes and behaviour.

We would be happy to share more information about the background to, operations of and lessons learned from Equal Futures and associated initiatives. It has the potential to take the good intentions underlying this Bill in powerful and productive directions that reinforce prevention, early intervention and direct engagement with children and young people around offensive behaviours and threatening communications.

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4 Equal Futures: supporting a child-led approach to developing racial equality, was developed with the Commission for Racial Equality in Scotland with the support of the then Scottish Executive and ran from 2001-2004. The programme was intended to raise awareness and promote discussion of issues around ethnicity, identity, religion and culture. Largely, but not solely, based in schools in selected partner areas, it involved working with local authorities and other organisations to engage children and young people in discussion of ways of addressing inequality, racism and other forms of discrimination and supporting a better understanding – from the perspective of children and young people – on what the race relations Amendment Act 2000 and its requirements for the introduction of equality schemes might involve. It was highly successful in engaging children and young people themselves in planning and participating in the three major annual events and satellite programmes.

Key points that emerged from the programme included:

- The benefits of a child and young people-led approach in addressing all forms of discrimination and prejudice and in promoting understanding and valuing of diversity.
- Local authorities benefit from support in encouraging a more dynamic approach to implementing their duties under race relations legislation and undertaking more systematic and ongoing activities.
- Whilst schools and other formal services are important vehicles for engaging children and young people in discussion of these issues there needs to be support for extension of these activities to involve families and communities.


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Submission from The Christian Institute

SUMMARY

General points:
- We welcome the extended timescale for consideration of the Bill. In our view significant changes are needed to the legislation;
- Section 1 has an extremely low threshold and surprising omissions to the protected grounds;
- We have no problem with the offence under Condition A of section 5 covering threatening or inciting a seriously violent act;
- The most helpful change would be to delete Condition B of section 5, which as drafted will have a considerable chilling effect on free speech;
- There will be considerable resource implications for policing. We think the Police Federation is closer to the mark than the official estimates;
- We are puzzled that the Bill creates crimes outside Scotland;
- We attach great importance to the work of the Justice Committee as there has been no public consultation on the Bill whilst the proposals were at a formative stage.

Specific concerns:
- **Section 1 is too broad:**
  - Criminalising “offensive” conduct sets the threshold too low and risks damaging free speech;
  - There is no requirement for public order to be under threat, meaning the offence extends into essentially private settings;
  - The definition of journey to or from a football match includes those not intending to go to the match.

- **Condition B of section 5 is the most concerning part of the Bill and should be removed:**
  - It is unnecessary because of existing legislation such as section 38 of the Criminal Justice and Licensing (Scotland) Act 2010;
  - Any possible benefits of the offence are massively outweighed by the threat it poses to free speech both in terms of its chilling effect and the scenarios it may criminalise, as identified by Aidan O'Neill QC;
  - It extends even into private homes;
  - Such a divisive law could serve to make matters worse.

- **If Condition B is not removed:**
  - A free speech clause must be included. Alex Salmond voted for such a clause in a similar offence in England and Wales;
  - The threshold must not be lowered by including abusive/insulting conduct or removing the requirement for intention. Religion is not comparable to race. Controversy about religious belief is healthy, good and necessary;
  - The offence should not be extended to cover any other grounds:
    - The Government’s intention for the Bill is to combat sectarianism, so no other grounds are necessary;
Including further grounds will exacerbate the threat to free speech.

GENERAL POINTS:

Timetable

1. Strong concerns were expressed from many quarters, both within the Scottish Parliament and beyond, over the original timetable given to the Bill. Alex Salmond acknowledged these concerns at First Minister’s Questions on 23 June 2011 when he added several months to the timetable. Rather than completing its full parliamentary consideration in two weeks, the Bill is now to be passed by the end of the year.

2. This delay is welcome as it gives more time for scrutiny of the Bill. However, things are already at Stage 2. This legislation was not consulted on prior to being introduced. The lack of public consultation is inconsistent with the common law requirements of fairness and due and proper consultation, as per *R v Brent London Borough Council ex parte Gunning*:

   “First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third…. that adequate time must be given for consideration and response. …Fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

Much therefore depends on the Justice Committee.

Resources

3. Any new legislation of this sort is heavily dependent on enforcement if it is to have the desired impact. The Police Federation made it clear when giving evidence to the Justice Committee in June that significant resources will be required to police the Bill. Spokesman Les Gray said in his oral evidence that the Scottish Government’s estimate of the cost of implementing the legislation, given in the financial memorandum, is “way off the mark”. The point was made that the trend has been to reduce the police presence at football matches, a trend which the Police Federation believe will need to be reversed if the new Bill is to be properly applied. Similarly, Mr Gray expressed his view that online investigations are likely to “grow arms and legs”, suggesting substantial additional resources will be needed to investigate infringements of the new law via the internet. In the light of the disparity between the Scottish Government’s forecast and the Police Federation’s predictions, it must be wondered whether the legislation has been accurately budgeted for by ministers.

Territorial scope

1 *R v Brent London Borough Council ex parte Gunning* [1985] 84 LGR 168 at 189
3 *Loc cit*
4 *Ibid*, col. 49
4. There are several points at which the Bill is drafted to criminalise activity taking place outside Scotland (e.g. section 7(3)). Aidan O’Neill QC observes that such provisions “would appear to contravene Section 29(2)(a) of the Scotland Act 1998 and so fall outside the legislative competence of the Scottish Parliament to enact”.\(^5\)

**SPECIFIC COMMENTS ABOUT THE TEXT OF THE BILL**

**Section 1**

a) **The significant exclusions from the grounds in section 1(4)**

5. Age and sex are omitted from the grounds, perhaps indicating hasty drafting. Political affiliation is also not included within section 1(4). This is despite the fact that political statements are often used as a proxy for sectarianism, such as the flying of Palestinian flags by one set of fans and Israeli flags by their rivals.\(^6\)

b) **The breadth of section 1(2)(e)**

6. The wording of this particular subsection “other behaviour that a reasonable person would be likely to consider offensive” gives immediate cause for concern. ‘Offensive’ is a low and uncertain threshold, meaning very different things to different people. One person’s offensive remark is another’s joke, and this distinction may often be more a question of taste than reasonableness. The behaviour meeting this definition would of course have to be a potential threat to public disorder to fall within the offence, but that requirement is itself fraught with difficulty – a violent reaction could be said to provide prima facie evidence that the necessary threat to public order exists. Taking the two provisions together therefore, a person who takes offence at a particular remark is encouraged to over-react, perhaps in a violent fashion, in order to show that there is a threat to public disorder. Such a law could quickly become a heckler’s veto, seriously damaging free speech.

c) **The threat of public disorder can be non-existent (section 1(5))**

7. The effect of section 1(5) is to allow an offence under section 1 to be committed even when no public disorder is possible. It is an extreme sort of victimless crime, and it can be expected to apply in some surprising situations.

8. For example, a small group of fans of a particular club are assembled in the club’s supporters’ association premises to watch a televised match. There are no rival fans present. One of the members of the group, aware he is amongst like-minded individuals, tells a joke about the fans of a rival club that would be likely to offend such fans but is amusing to his companions. In doing so, he could be committing an offence under section 1, despite the fact that he has fully considered his context and been aware that there is nobody present who could be offended. This example goes to show the lack of a mental element to this offence (‘mens rea’) – it can be committed without any requirement for intention or even recklessness. It also shows the extraordinary reach of the offence,

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\(^5\) The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Advice, Aidan O’Neill QC, June 2011, para. 2.1(ii)

\(^6\) Scottish Daily Record, 9 December 2002; The Scotsman, 12 December 2002
extending as it does to what is tantamount to private activity. Furthermore, the
offence purports to apply whether the supporters’ association premises were in
Glasgow, Newcastle, Gibraltar or the Falklands.

9. The offence might apply to content of Rangers or Celtic’s online TV channels, if
something was said or done that was deemed offensive enough to be likely to
incite public disorder. Such channels are invariably highly partisan, and if in a
discussion during or after a match a presenter said something offensive this
could be taken to be within the offence.

10. In considering the application of the section 1 offence to a private venue or club,
Aidan O’Neill QC concludes that it “impacts upon the Convention rights protected
under Article 10 ECHR (on freedom of expression) and Article 11 ECHR on
freedom of assembly and association”.

\[d) \text{ Travelling to a match without intending to?}\]

11. Serious concerns have been rightly expressed about the definition of a journey to
or from a regulated football match included in section 2(4)(a). In effect, it states
that a person may be regarded as having been on a journey to a match even if
they were not. This is presumably not the legislative intention, but it is the
practical effect of such broad drafting. If the Bill is intended to catch those who
travel to matches without tickets, perhaps purely for the purpose of stirring up
trouble, it needs to be targeted far more precisely. The current drafting is
somewhat contradictory and threatens to bring the law into disrepute because, to
the ordinary person, it appears incredible.

12. We acknowledge that the wording used in 2(4)(a) is adopted from the Football
Banning Order (FBO) provision of the Police, Public Order and Criminal Justice
(Scotland) Act 2006. However, the repetition of flawed legislation does not make
it any less flawed and nonsensical. Furthermore, the FBO provisions are not part
of the constituent elements of an offence, but are providing for a specific sanction
when an offence has already been established. The sanctions involved under
section 1 are also much more serious than an FBO, including up to five years in
prison.

13. Reaction to such a definition is aptly summed up by the reaction of the convenor
to the Justice Committee when considering this matter during the evidence
sessions:

“I am sorry, but I am still struggling with section 2(4)(a) ... How can a
person be on a journey to or from somewhere if they have no intention of
going there? How can they be on a journey to or from a regulated football
match if they have no intention of going to it?”\[8\]

14. We feel sure Christine Grahame’s reaction will reflect that of the public. Given the
current definition, the following scenario may well fall within the offence:

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\[7\] The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as
2.1(v)

A Christian evangelist is on a train full of football supporters going to a match. The supporters are going to a big football match in Glasgow. The evangelist is on the way to a church convention in the same city. The evangelist gets into a conversation with a group of supporters, who clearly have had a few beers. The evangelist urges the supporters not to make football their god. In conversation, one of the football supporters says that he is gay and “what would your God say about that?” The evangelist graciously tries to deal with this objection by explaining the Bible’s position on homosexuality as a sin.

15. Although the evangelist has a completely different intended destination to the match, this might not be any defence given the current drafting. Aidan O’Neill QC concluded that “the matter is not free from doubt” given sections 2(2)(c) and 2(4).9 Surely such legislation, carrying as it does a potential five year prison sentence, needs to be far more adequately drafted.

2) Section 5

16. Condition A of section 5 does not give cause for concern, although we would question whether or not its territorial scope is within the jurisdiction of the Scottish Parliament. It is Condition B of section 5 that is at the heart of our concerns about the whole Bill.

17. A religious hatred offence could be used by traditional Christians to silence their critics, be they new atheists, liberals or members of other faiths. Condition B could easily be used in this way, but at what cost to free speech?

18. So our starting point is that there should not be any religious hatred offence such as that proposed under Condition B of section 5. Such offences are divisive and pose a great threat to free speech even when they are well drafted. Section 5 is overbroad, imprecise and is not well drafted.

19. Condition B of section 5 is unnecessary. There are very robust alternative provisions available in Scottish law. They include the brand new section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, breach of the peace and aggravated offences provisions. Section 38 only came into force last October10 and so has scarcely had time to bed-in, yet the Scottish Government is already launching into new legislation in very similar territory. We believe that section 38, properly used, will be able to tackle genuine cases of sectarianism. As the written submission of Dr Sarah Christie and Dr David McArdle said:

“If the individual were to have communicated material containing or implying a threat of serious violence, or material which is threatening and intends to stir up religious hatred, that would amount to behaving in a threatening, and no doubt in many cases abusive, manner which would be likely to cause fear or alarm to a reasonable person and so would be

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9 The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Supplementary Advice, Aidan O’Neill QC, July 2011, para. 2.2(13)
10 Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 2) Order 2010, Article 2
caught by that section. The Policy Memorandum queries whether s38 could cover all instances of behaviour intended to incite religious hatred but given the nature of material designed to inflame religious ‘hatred’, it would be hard to envisage a communication which was not sufficiently abusive to cause alarm to a reasonable person.”

20. We endorse those comments. A case in point is that of Iain Rooney, who was charged in early August under both breach of the peace and section 38 for his alleged role in sectarian hate messages being posted on the internet against Celtic Manager Neil Lennon.

21. We suspect that any situations that would be caught by the new section 5 Condition B offence but not by section 38 are simply examples of the new offence unacceptably impeding freedom of expression – reaching into areas where the criminal law should not be intruding.

22. The potential chilling effect of Condition B, to the detriment of free speech throughout Scotland, massively outweighs any possible benefits. Aidan O’Neill QC said the following about the offence:

“It should be noted even if no prosecution was proceeded with, the fact is that having such a broadly defined offence on the statute book will exert a chilling effect on freedom of speech, with individuals indulging in self-censorship and/or harbour an unwillingness to publicly express their true religious beliefs for fear of running foul of the law”.

23. Mr O’Neill believes the chilling effect is illustrated by the following scenario:

A Catholic website reproduces a lecture from Pope Benedict XVI given at the University of Regensburg in 2006 in which he repeated a quote saying: “Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached”. A Muslim activist, hearing of a new religious hatred law in Scotland, reports this website to the police, saying that he found it threatening to his faith and intended to stir up hatred of Muslims. A police investigation is commenced, which takes several weeks before reporting back to the Catholic group that they will not be

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12 The Herald, 4 August 2011

13 The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Supplementary Advice, Aidan O’Neill QC, July 2011, para. 2.2(3)

14 Pope’s speech at University of Regensburg (full text), 20 September 2006, see http://www.catholicculture.org/news/features/index.cfm?recnum=46474 as at 10 August 2011
prosecuted. In the meantime, however, the group remove the offending article from their website because they fear further complaints.\footnote{The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Supplementary Advice, Aidan O’Neill QC, July 2011, para. 2.2(9)}

24. The chilling effect of the legislation will have an impact far beyond its strict legal scope. But even that legal scope is itself problematic. Mr O’Neill considers that all the following situations may fall within the offence:

- A person stops attending his church, rejects his faith and becomes caught up in a religious cult. The elders of the church he had attended wrote to him urging him in strong terms to turn back and mention the “eternal consequences” for him if he does not do so. The letter includes references to the “dangerous and wicked cult” he has joined.
- A Church of Scotland congregation makes its Sunday sermons available on its church website. In one sermon on Christ’s teaching about himself being “the way, the truth and the life”, the preacher denounces the “false claims” of Islam in the strongest of terms and calls on the congregation to “come to Christ, our one true prophet, priest and king”. A Muslim man finds the recording after entering the words “one true prophet” into Google. On locating the sermon he listens to it, finding it hard hitting and deeply challenging (i.e. ‘threatening’) to his beliefs and worldview. He contacts the police to complain.
- A protestant activist is giving out leaflets on Princes Street in Edinburgh during a papal visit to Scotland. The leaflet is highly critical of the papal visit and “reminds” readers of the “blood of the protestant martyrs” and quotes from the 1646 Westminster Confession of Faith (the confessional standard of several Scottish denominations including, historically, the Church of Scotland) that “There is no other head of the Church but the Lord Jesus Christ. Nor can the Pope of Rome, in any sense, be head thereof; but is that Antichrist, that man of sin, and son of perdition, that exalts himself, in the Church, against Christ and all that is called God”. A loyal Roman Catholic who is in the crowd to welcome his spiritual leader to Scotland takes a tract and reads it. He reports the matter to the police.
- A Scottish human rights group publishes a speech given by Dutch politician, Geert Wilders, on its website. The speech is particularly hard-hitting in its criticism of the “growing influence of Islam in the West”, calling it a “dangerous and intolerant religion” and calling for anti-sharia law in the UK.
- A peaceful protest takes places outside the Church of Scientology in Edinburgh. Various placards are held up, including “Scientology is not a religion, it is a dangerous cult”, Scientology is “corrupt, sinister and dangerous”, the Church of Scientology is “an evil organization”, and “Scientology should be thrown out of Britain”. A member of that organisation sees the protest and contacts the police, citing the new religious hatred law.\footnote{The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Supplementary Advice, Aidan O’Neill QC, July 2011, paras 2.2(2), 2.2(3), 2.2(5), 2.2(6) and 2.2(10)}
25. The quite extraordinary scope of Condition B is also shown by the fact that it contains no exception for domestic premises. Domestic premises are quite clearly excepted from the section 1 offence, but not section 5. This creates the clear possibility that an individual may commit an offence under section 5 by communicating within his own home.

26. The proposal could also make matters worse. Celtic fan Kevin Rooney, in his submission to the Justice Committee, sees the offence being used by fans as “another stick with which to beat their rivals”, mentioning “unhealthy examples of rival fans scouring each other’s websites searching for ‘crimes’ to report to the police”. The Rangers Supporters Assembly expressed “deep concerns as to whether this Bill in its present form will address the issues that it seeks to, or whether it will have a contrary effect in creating more confusion, anger and division”. Bill McVicar of the Law Society of Scotland has predicted “ongoing confusion for some time” if the Bill is passed in its current form.

27. The multi-faceted threat to free speech posed by Condition B of section 5 can be amply seen from the above. It is unnecessary because the legal powers to deal with sectarianism are already on the statute book. It is dangerous, because of its potential chilling effect and its actual legal scope. Furthermore, it runs the risk of not only failing to tackle sectarianism but making the situation worse. Condition B should be dropped from the Bill.

**Free speech clause**

28. If the offence under Condition B of section 5 remains in the Bill, then it is imperative that at least some attempt is made to safeguard free speech. An explicit clause on the face of the Bill is absolutely essential. In England and Wales a similar offence of inciting religious hatred was introduced as Part 3A of the Public Order Act 1986. A free speech clause was included in that offence. First Minister Alex Salmond and four other SNP MPs voted for that clause at the time.

29. The policy memorandum to the Bill says that it “does not interfere with the right to preach religious beliefs nor a person’s right to be critical of religious practices or beliefs, even in harsh or strident terms.” If this reflects the policy intention of the Scottish Government, it seems most appropriate to include such wording in the text. A clause should be inserted into the text, for example:

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19 Scottish Daily Record, 22 June 2011
20 Section 29J, which reads: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”
21 House of Commons, Hansard, 31 January 2006, cols 238-243
“For the avoidance of doubt, the preaching of religious beliefs or the
criticism of religious practices or beliefs, even in harsh or strident terms,
shall not be taken of itself to be threatening or intended to stir up hatred”.

30. A free speech clause to the religious hatred offence is backed by several other
interested parties including Equality Network, YouthLink Scotland and the
National Secular Society. 22

31. The Equality and Human Rights Commission also seem to favour a free speech
clause over a reasonableness defence. 23 They are right to do so, as the problem
with a reasonableness defence is at what point it is considered operative by the
police and prosecutors. Does the defence become part of the terms of the
offence or not, and is it properly taken into account when the law is being
applied? The very nature of a defence means that it often only comes in at a late
stage, when significant damage has already been done to an individual’s freedom
of speech. The important thing is to get the threshold of an offence right in the
first place, without having to rely on a defence of reasonableness correcting
imbalanced drafting. Putting a free speech clause within the terms of the offence
helps to achieve this, and has far more practical value than a reasonableness
defence.

32. When asked about this issue during the Stage 1 debate, Roseanna Cunningham
responded by saying that the Scottish Government had sought to protect free
speech by not including unrecorded speech in the terms of the offence. But this is
an arbitrary distinction and seems to suggest a worryingly narrow understanding
of what free speech means. Free speech does not extend only to the spoken
word, but any form of expression, be it written or otherwise communicated. Why
should it be lawful to say something but criminal to write it down? The logical
inconsistencies are obvious and we doubt whether the distinction could be
maintained should it be tested in the courts. The same content could breach the
law if communicated by sign language, but not if spoken.

33. The best way to protect freedom of expression is not to have an offence such as
this at all. But if it is to be introduced, a free speech clause is the only satisfactory
way to help minimise the unforeseen infringement of civil liberties.

22 Submission by Equality Network, The Scottish Parliament Justice Committee, June 2011, para. 21,
see http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/OB2.pdf as at 5
August 2011; Submission by YouthLink Scotland, The Scottish Parliament Justice Committee, June
2011, para. 4.5, see
http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/OB25.pdf as at 5 August
2011; Submission by the National Secular Society, The Scottish Parliament Justice Committee, June
2011, para. 1, see
http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/OB17.pdf as at 5 August
2011
23 Submission by the Equality and Human Rights Commission Scotland, The Scottish Parliament
Justice Committee, June 2011, para. 4.2 see
http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/OB23.pdf as at 5 August
2011
34. In Aidan O’Neill QC’s view, the offence under Condition B “impacts upon the fundamental constitutional right of freedom of speech as well as potentially upon rights of freedom of thought, conscience and religion under Article 9 ECHR as well as freedom of expression under Article 10 ECHR”.24

Extension of section 5
35. Some of those giving evidence to the Justice Committee have suggested that the Condition B offence under section 5 should be extended. There are two main suggestions:

(1) parallel the incitement to racial hatred offence by a) including abusive and insulting words or behaviour within the offence, rather than requiring that the conduct is threatening, and b) including conduct that is likely to stir up hatred, rather than requiring intention;25

(2) expand the scope beyond purely religion by including various other grounds, such as sexual orientation, disability and transgender identity.26

It is important that both these proposals are resisted.

36. Taking (1) above first, race is very different to religion, and it will be very much easier to invoke the law in the field of religion than in race. Religion is all about ideas, beliefs and philosophies. Religion (and irreligion) governs the choices people make between doctrinal, philosophical or moral alternatives. Race, on the other hand, is an immutable characteristic.

37. Arguments take place between people of different beliefs where people try to convince one another of their point of view. Attempts are routinely made to convince people to change or abandon their religion. Such arguments are obviously not possible over race. Any redrafting of section 5 to make it more like the racial hatred offence would be to fundamentally misunderstand the difference between the two.

38. Religious debate is widespread and, for the most part, entirely peaceful. But criminalising abusive or insulting conduct under section 5 would raise the prospect of what currently passes for argument being regarded as inciting religious hatred. Even ordinary preaching may fall foul of the law, particularly if the requirement for intention to stir up hatred is watered down so that the conduct merely has to be likely to do so. Somebody may take the view that a sermon on the uniqueness of Christ as the way of salvation incites religious hatred in a

24 The Offensive Behaviour in Football and Threatening Communications (Scotland) Bill (SP Bill 1) as introduced in the Scottish Parliament on 16 June 2011 – Advice, Aidan O’Neill QC, June 2011, para. 2.1(v)
member of the congregation against people of a particular religion. This might seem unlikely now, but what will happen in five, ten or twenty years’ time?

39. Our society believes that controversy about whether racism is right or wrong is unacceptable. We have collectively decided it is wrong and legislated against it. But at the same time controversy about religious belief is healthy, good and necessary. This means there are bound to be far more opportunities for invoking a law on religious hatred. Therefore, if a law is to be introduced in this area, it must have a higher threshold than the law on racial hatred.

40. Turning to (2), any new offence should not extend any further than religion. If sectarianism is the target of this legislation, as it is claimed to be, then the religious ground will suffice.

41. There are three reasons why a religious hatred offence along the lines of Condition B should not be introduced at all:

   (i) it is unnecessary in view of existing laws;
   (ii) it is dangerous for free speech;
   (iii) it could make matters worse by being inherently divisive.

All of these points are often just as true of incitement offences on other grounds, and indeed the potential for damaging free speech is multiplied several times over if other grounds are included.

42. The Vogelenzang case illustrates the absurd waste of police time that can result from a false allegation being made about religious hatred. In that case, a complaint was made following a religious discussion over breakfast. It was treated as a religiously aggravated crime and prosecuted in the magistrates’ court. It involved at least six police officers, including a detective chief inspector, for a period of several months. The case was thrown out by the district judge after a two-day hearing.

43. Having an incitement offence on multiple grounds will significantly escalate the problems for free speech and waste police time. If one group is given a ‘nuclear weapon’ of an incitement offence, then all the other groups will want their own ‘nuclear weapon’ too. Going down this route will result in a proliferation of such laws, which dangerously imperils free speech.

44. The way an incitement offence on the grounds of sexual orientation might impact free speech can be illustrated by the disturbing 2006 case of Mario Conti, Archbishop of Glasgow, who was reported to the police for saying in a sermon that civil partnerships undermine marriage. Green MSP and gay rights activist Patrick Harvie called on the police to intervene despite no sexual orientation incitement offence being on the statute book. Patrick Harvie said: “What he [Conti] said was clearly homophobic. This is a matter for the police.” Had a sexual orientation incitement offence been in place, the police might have had a

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27 Davies, J G, A New Inquisition: Religious Persecution in Britain Today, Civitas, 2010, pages 1-2; Daily Mail, 10 December 2009
28 Sunday Herald, 15 January 2006
much more difficult job dismissing the accusation, and similar frivolous claims by those who want to silence dissenting voices would be encouraged.

The Christian Institute
August 2011
Submission from Dr Sarah Christie and Dr David McArdle

Overview
The Bill was introduced on June 16th and, notwithstanding its many flaws, will be passed within the course of the next two weeks. Its timeframe thus departs radically from the normal Parliamentary process which involves considered progression through debate stages and sufficient time in committee for the issues and complexities within the proposed legislation to be fully discussed. To date, there has been little justification for the approach which has been taken on this occasion. The Committee might like to consider why the timetable for the Bill’s implementation is more akin to that which was utilised in the wake of the Cadder ruling - particularly when the new legislation adds little to the existing criminal legal remedies or the penalties currently available in respect of those.

Offensive Behaviour
The Policy Memorandum (http://www.scottish.parliament.uk/s4/bills/01-offbehfoot/index.htm) reflects widely-held beliefs about the seriousness and complexity of the problems facing Scottish football and Scottish society more generally. The insidious nature of Sectarianism is not in doubt and the Policy Memorandum rightly states that such behaviour is unacceptable; it also states that this Bill clearly emphasises that Sectarianism constitutes serious criminal conduct. However, it is not clear how the provisions in this Bill will represent a stronger response than what is available in the existing criminal law. The sole objective behind the Bill is to tackle Sectarian behaviour (the other ‘hate’ categories contained in s1(4) are tagged on for the sake of completeness) and much has been made of the need to ensure that the measures contained in this Bill are in force before the beginning of the domestic football season in mid-July. If there was nothing already in place to tackle Sectarian offences through the prosecution and judicial processes, then that case might be well made (although it would still require justification for the proposed speed of it passage through Parliament); but there is already a range of provisions under statute and common law which can, and are, used to tackle Sectarianism in football. Accordingly, it is not the case that delaying this Bill to allow for full debate of the issues would have meant that individuals would face no sanction in the interim. A more appropriate response would have been to consider how the existing laws can be enforced more effectively, rather than rushing through legislation which adds very little to what is already available.

Whether this Bill is necessary at all depends on whether it adds anything qualitatively different to the armoury currently at Crown Office’s disposal, whether in terms of offences or sentencing powers. The sentencing provisions in the Bill allow for sentencing up to the maximum allowed in the Sheriff Court. At 12 months (summary) or 5 years (indictment), the imprisonment available under the Bill is thus no different from that available under the Criminal Justice and Licensing (Scotland) Act 2010 s38, which deals with threatening or abusive behaviour and is eminently well-suited to most of the offences committed at or in connection with football matches. The provisions under s38 cover behaving (intentionally or recklessly) in a threatening or abusive manner which would be likely to cause fear or alarm to a reasonable person. The conduct envisaged in the Bill – expressing or stirring up hatred against a defined group so as to be likely to incite public disorder, particularly in the context of crowd behaviour at football matches – thus already falls within the
ambit of s38. If sufficient to be likely to incite public disorder, particularly when done *en masse*, it would amount to threatening behaviour likely to alarm a reasonable person. The expression of hatred is also behaviour which would be, particularly in the context of football chants, abusive in manner and likely to alarm the reasonable person.

At common law, the Sheriff has the power to pass sentence in a breach of the peace case up to the maximum allowed in that court, which is again at the same level. Whether or not previous racially/religiously aggravated breaches of the peace have been punished at this level is immaterial – the point is that the Sheriff’s sentencing powers extend to the 5 year maximum on indictment, if (s)he chooses to use them given the severity of the conduct in that case (and in any case, it is always possible to remit to the High Court for a higher sentence).

It should also be noted that the Policy Memorandum contains an important error of law: it notes concern that the type of behaviour covered by the Bill may fail the strict test currently laid down for breach of the peace, of “causing fear and alarm”. The flaw in this argument is that this is not the test for breach of the peace at all. *Smith v Donnelly* (2002 JC 65) sets out the conjunctive test – conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community – and in the football context this test was applied by the High Court in *Walls v Brown* [2009] HCJAC 59. If measured against this proper test, any form of behaviour expressing or stirring up hatred against a group (as defined in s1(2)(a) and s1(4)), in such a way as to be likely to incite public disorder would also amount to behaviour that would alarm ordinary people and threaten a serious disturbance.

Beyond breach of the peace and s38, there are a variety of statutory aggravations that can be used to inform sentencing decisions. The Crime and Disorder Act 1998 s96 (racial), and the Criminal Justice (Scotland) Act 2003 s74 (religious) are the most obvious, but the recent Offences (Aggravation by Prejudice) (Scotland) Act 2009 also allows for increased sentencing where the aggravation is found in prejudice relating to disability, sexual orientation and transgender identity, thereby covering some of the ‘things’ listed in s1(4). The others – colour, race, nationality and ethnic or national origin – are covered under the definition of racial group in s96(6) of the CDA 1998. There is also the possibility of using s50A of the Criminal Law (Consolidation) (Scotland) Act 1995 if there is evidence of a racially aggravated course of conduct amounting to harassment, and the common law of threats where what is involved is oral or written threats to kill or seriously injure.

The Policy Memorandum also vaunts the provisions of the Bill as providing a means for recording in the conviction that the offensive behaviour was football related. With respect, Sheriffs already have this power and it is used on those occasions where they have declined to impose a Football Banning Order in respect of a relevant offence. Recording a conviction as football-related is a useful way of drawing a future court’s attention to a previous instance where the Sheriff was aware that s/he was dealing with football-related criminality but did not regard the conduct as meriting an FBO. Facilitating the more widespread use of ‘recording’ is best achieved through judicial training - and a greater willingness on the part of the Crown to ask for it – rather than it being, at best, an indirect consequence of new legislation which does not add to the wider panoply of judicial sentencing powers.
Threatening communications

The s38 provisions on threatening or abusive behaviour can also be read to encompass the offence proposed in s5 of the Bill. Section 38 is made out where the accused has behaved in a threatening or abusive manner which is likely to, intentionally or recklessly, cause fear or alarm to a reasonable person. ‘Behaviour’ in this context covers behaviour of any kind including, either as a single incident or a course of conduct, spoken threats, or threats communicated in other ways, and threats evinced through physical acts. If the individual were to have communicated material containing or implying a threat of serious violence, or material which is threatening and intends to stir up religious hatred, that would amount to behaving in a threatening, and no doubt in many cases abusive, manner which would be likely to cause fear or alarm to a reasonable person and so would be caught by that section. The Policy Memorandum queries whether s38 could cover all instances of behaviour intended to incite religious hatred but given the nature of material designed to inflame religious ‘hatred’, it would be hard to envisage a communication which was not sufficiently abusive to cause alarm to a reasonable person. In relation to material threatening serious violence, the common law of threats could also be used, as could the common law crime of incitement, including inciting serious, possibly aggravated assault or incitement to murder, and indeed in relation to the latter, would be treated as a crime of particular gravity.

Conclusion

It is disappointing that a Bill which has such a limited timeframe for discussion contains no sunset clause to allow for its efficacy to be reviewed after a set period. Over the course of the 2011/2012 season it may well become apparent that the existing law is neither unclear nor lacking in strength, and given that criminal sanctions already exist to cover these issues, the better question would have been how to facilitate their enforcement in appropriate instances, rather than layering empty legislative provisions on top of the existing ones. A commitment to addressing Sectarian behaviour is commendable, but hastily racing to pass legislation which does not go beyond what is already in existence is not. The only feasible justification for this measure is that it draws the attention of the media, the public and football’s international authorities to the fact that something is being done to address ‘Scotland’s Shame’. While this is understandable in an era of 24-hour rolling news where every Old Firm match is televised live, every Sectarian incident is gleefully dissected by the media at home and abroad - and Rangers and Celtic suffer disproportionately at the hands of UEFA’s over-zealous disciplinary authorities ([http://news.bbc.co.uk/sport1/hi/football/13218273.stm](http://news.bbc.co.uk/sport1/hi/football/13218273.stm)) - it is the a wrong approach. Very short Acts which complete truncated Parliamentary processes in a matter of days rarely have much to commend them, and in a mature democracy law-making at the speed of light is not ever an appropriate response to adverse media coverage. Clearly, this legislation will be in force by the end of June because that is what the Government wishes; but providing the resources to secure the effective application of the existing criminal legal framework would have had far more to commend it.

Dr Sarah Christie, Reader in Law, Aberdeen Business School
Dr David McArdle, Senior Lecturer, Stirling Law School
20 June 2011
Submission from Church and Society Council of the Church of Scotland and Faith in Community Scotland

1. The Church of Scotland and Faith in Community Scotland recognise the seriousness of the problem of sectarianism in our communities today and are absolutely committed to challenging it locally and nationally. Since 2002\(^1\) the Kirk has focussed on the effectiveness, and therefore the importance, of work undertaken at local level. This evidence is presented from the perspective of our local experience.

2. The Church and Society Council of the Church of Scotland and Faith in Community Scotland welcome the introduction of specific offences relating to religious hatred and sectarianism at football. However, we urge caution about proceeding with legislation ahead of designing and consulting on a wider programme of work to tackle sectarianism of which this legislation can only be one part.

3. The consultation meeting focused on issues relating to religious hatred. The Church and Society Council of the Church of Scotland and Faith in Community Scotland would also like to take this opportunity to welcome the fact that the offence of offensive behaviour at football includes hatred based on colour, race, nationality (including citizenship), ethnic or national origins, sexual orientation, transgender identity and disability.

4. The submission covers 3 areas:
   - Work done by churches to tackle religious hatred and sectarianism at local level;
   - potential consequences of the proposals in the Bill; and
   - other factors which should be considered when addressing sectarianism.

Work done by churches to tackle religious hatred and sectarianism at local level

5. The Church and Society Council gave oral evidence to the Justice Committee on 22 June 2011. The evidence emphasised the importance of allowing time and using transparent processes to enable communities to be an active part of discussions on how to tackle sectarianism. The Council is pleased that the First Minister listened to public opinion and extended the consultation period on the Bill. This extra time has been used to provide information on the Bill and Parliamentary process to churches and faith communities who are working to tackle religious hatred and sectarianism at a local level. We regret that the extended consultation period was still only 2 months in length rather than the usual 3 months and took place across the summer holiday period; this meant that individuals and organisations who may have wished to participate were unable to do so. Nevertheless, on 11 August the Church and Society Council and Faith and Community Scotland held a joint consultation meeting with 6 churches and community projects, and an additional written contribution was also received.

6. The consultation meeting explored the impact of participants’ work on sectarianism and religious hatred and the implications of these experiences for the

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\(^1\) Report of the Church and Nation Committee to the General Assembly of the Church of Scotland, 2002. Available on request from churchandsociety@cofscotland.org.uk
new offences in the Bill. In the course of the meeting participants identified a number of themes which ran through successful community projects. All of the projects are based on building personal relationships and breaking down barriers. Many projects focus on young people, including working in non-denominational and Roman Catholic Schools and arranging joint activities for the young people. One of the reported outcomes of this is the creation of a sense of identity which was about a shared place of residence and a sense of inclusion in the community. This was perceived by the group as an important contrast to formation of identity through association with some of the more negative aspects of behaviour relating to football. It is felt that there is a clear role for churches of different denominations to be seen working together in their communities and there is a strong commitment to partnership work in order to achieve this unity. Some participants are also working with other faiths to address tensions between different communities.

7. Participants discussed some of the barriers to tackling sectarianism. Many said that there are barriers within their own communities and congregations; there can often be a difference between peoples’ lived experience and their wider opinions. For example a person may like their son’s girlfriend who is Catholic but may still make offensive comments about Catholics in general. There may also be an unwillingness to work with certain groups, which the people involved do not perceive as a sectarian attitude – this can lead to the perception that sectarianism has decreased although relationships between communities and behaviours have not necessarily improved. One participant spoke of the fact that although relationships were regarded as positive, joint working was nonetheless viewed suspiciously. There was some concern that as “sectarianism” becomes the subject of more public debate and censure the tensions between communities and within communities would be expressed in different ways rather than be reduced. This emphasises that the long term solution requires a change of heart and a change of deep rooted belief that legislation itself cannot bring about. Building and maintaining good relationships in order to break down barriers is likely to be far more effective than legislation tackling certain aspects of public behaviour.

What are the potential consequences of the Bill as proposed?

8. The intentions of the two offences in the Bill are different. The discussion at our consultation meeting focussed on the first offence of offensive behaviour at football and explored firstly whether the possibility of being convicted for an offence which included incitement to religious hatred would be a deterrent, and secondly whether conviction for such an offence would create stigma. Participants’ views were mixed. Some shared stories about individuals who behave offensively at football matches when those same individuals would never behave in that manner in their professional lives. In this scenario there was a lot of support for making a clear statement that such language and behaviour was unacceptable, and illegal, wherever it took place, and that football matches were no exception. It was suggested that most people choose to exercise self control in public and it would be beneficial to formalise the position that society expects people to exercise self control when at football matches.

9. However, for others in the group these provisions were concerning. It was suggested that in some communities where identity was related to hatred of those who were seen as different then conviction of a sectarian offence could be seen as a
badge of honour. There was serious concern that labelling a person in this way would have the negative effect of pushing them further into a culture of hatred or violence rather than deter them from unacceptable behaviour. If this were to happen then incidents that are seen as unusual and shocking today could become the normal behaviour of tomorrow.

10. The experiences of people working to address issues of religious hatred and sectarian behaviour suggest that these provisions could have drastically different outcomes when applied to different social groups. It is possible that using this legislation to tackle a specific aspect of sectarian behaviour will simply displace the problem. If this happens then it is crucial that the Government puts in place other mechanisms to tackle sectarianism and religious hatred alongside this legislation. However, there was consensus that it is important to name the problem as sectarianism so that individuals are challenged to think about their own behaviour.

11. In view these different experiences we would encourage the Justice Committee to consider hate crime legislation in the UK and around the world and assess the consequences of the introduction of such legislation.

12. In her evidence to the Justice Committee the Minister for Community Safety and Legal Affairs acknowledged that sectarianism is not confined to football and that the Bill would be part of a wider programme of work to root out the problem. However, she reiterated that the Bill is a vital first step. We disagree. If legislative change is part of the solution then it must be seen in the context of this wider programme of work. We must understand how the Government proposes to support communities in the work they are already doing and what leadership the Government is offering; only then should decisions be taken as to what legislative support is required. This Bill goes far beyond tackling sectarian behaviour at football without addressing the real experiences of sectarianism in other parts of society. The Bill will do nothing to reduce sectarianism unless it is part of wider work.

13. **What other factors should the Government address in relation to sectarianism?**

   a. The most important mechanism for reducing sectarianism is to resource work at local level and we call on the Government to make funding available for projects of the kind outlined in this response. The Church of Scotland and Faith in Community Scotland would be happy to work with the Government and with other partners in the development, delivery and evaluation of such funding.

   b. The Church of Scotland and Faith in Community Scotland acknowledge and have campaigned about the negative impact which excessive alcohol consumption has on Scottish society and would like to see links between anti-sectarian policy and alcohol policy strengthened.

   c. It is noted that reported incidences of domestic abuse increase on Old Firm match days and therefore would welcome the recommendation of the Joint Action Group that the Scottish Government commissions academic research into the relationship between football and domestic abuse in Scotland.

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2 The Church of Scotland the Poverty Truth Commission (supported by Faith in Community Scotland) submitted evidence to the Health and Sport Committee on the Alcohol etc. (Scotland) Bill (SP Bill 34)
Implications for freedom of speech

14. During the initial considerations of this Bill concerns were raised about whether the threatening communications offences in the Bill would have the unintended consequence of limiting freedom of speech and religious expression. The Church and Society Council of the Church of Scotland will discuss this issue at the full meeting of the Council on 8 September 2011. A further statement may be made after that meeting.

Church and Society Council of the Church of Scotland and Faith in Community Scotland

25 August 2011
Submission from the Coalition for Racial Equality and Rights

Introduction

The Coalition for Racial Equality and Rights (CRER) (formerly known as the Glasgow Anti Racist Alliance) is Scotland’s leading think-tank on race and equality issues. Taking a rights-based approach, we are especially interested in promoting all the relevant international, regional and national human rights and equality conventions and pieces of legislation.

We welcome the opportunity to comment on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. CRER fully welcomes and supports any initiative or intervention that prevents hatred or discrimination against any peoples of a particular culture, ethnicity or race. So while in principle we support the proposed Bill and its objective ‘to help make Scotland safer and stronger, and contribute to tackling inequalities in Scottish society’ (as stated in the Bill’s Equality Impact Assessment), we would like to express serious concerns at the potential duplication of legislation this bill may create, and it’s limited impact outwith the footballing arena.

Duplication

The test of any legislation is whether it will achieve better overall outcomes than the current legislative framework already in place. Although it is commendable that Ministers are sending out a categorical message that sectarian behaviour will not be tolerated, we would like to highlight that the majority of the Bill’s provisions are potentially already covered by existing legislation such as Section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, Section 18, 19, 23 (1)a of the Public Disorder Act 1980, the Public Order Act 1986, Section 96 of the Crime and Disorder Act 1998 and Section 74 of the Criminal Justice (Scotland) Act 2003 (all as detailed in the ACPOS Hate Crime Guidance Manual 2010). It is of great concern to us that the current Bill may cause further confusion rather than adding clarity.

What is paramount and worthy of discussion is to what extent the above legislation is understood and applied by law enforcers and other relevant agencies. It would be useful if detailed scrutiny of this could be carried out before any new legislation was enacted.

According to the equality impact assessment ‘the primary but not sole motivation for the measures in this Bill, both in terms of the nature of the measures themselves and the urgency with which the Scottish Government is seeking to introduce them concerns football’. It is therefore worrying that because football enjoys a high profile, new laws are being ushered in as a damage limitations exercise to stop any further erosion of Scotland’s global image. In this respect the proposed Bill’s objectives to challenge and tackle sectarian and racist behaviour becomes disingenuous.

Monitoring

According to the Crown Office and Procurator Fiscal Service (COPFS) figures 4,165 charges of race crime were reported in 2010/11 - 3.6% fewer than in 2009/10. Sixty
two per cent of the charges related to racially aggravated harassment and behaviour, and 38% related to another offence with racial aggravation (COPFS: Hate Crime in Scotland 2010/11). These figures at first glance seem low, but a freedom of information request to Scotland’s eight police forces carried out by Scottish Television news in February 2011 reveals a far greater problem. Statistics show that in 2009/10, 6,171 incidents of racism were recorded compared to COPFS figure of race crimes reported in the same year as only 4,322. From such a simple comparison the discrepancies between recorded incidents and reporting must be rectified. Given the scale of racial (and other hate crime) incidents in Scotland, and our assumption that only a small proportion of these took place in football-related environments, we again question why the emphasis on any new legislation is confined to football.

Recommendations

Apart from legislation, CRER believes the effectiveness of any Bill needs to be supported by vociferous educational and training campaigns. In order to promote race and rights education in the wider community it would be beneficial to hold activities like anti-racist workshops throughout Scotland’s schools, along with producing educational packs for teachers assisting them to recognise racial abuse and be confident enough to take appropriate action. However, the impacts of such interventions need to be vigorously monitored – research has shown that well-meaning anti-racism campaigns can sometimes have unintended but negative effects (e.g. see Sutton et al, ‘Getting the Message Across – using media to reduce racial prejudice and discrimination’ DCLG, 2007).

In order to provide a robust response to the victims of hate crime we recommend the police service be brought up to speed with the existing laws and be able to execute them with complete clarity. This can only be achieved by investing in training and support (thus avoiding any further disconcerting scenes like that recorded by the BBC Scotland programme ‘Bombs, Bigotry and Football’ (May 2011) where officers policing the terraces at a football match stood by whilst sectarian and racist chants took place).

Legislation does have its place, but it is only when anti-discrimination legislation is assisted through sustained enforcement measures and successful campaigning on the same level as that of (for example) the anti-drink driving campaign, will we be able to rid ourselves of parochial sectarian and racist attitudes and render them completely unacceptable in modern Scotland.

Coalition for Racial Equality and Rights
(formerly known as the Glasgow Anti Racist Alliance)
26 August 2011
Submission from Paul Cochrane

SUMMARY

- Reject this bill as it stands.
- Consult more extensively on this matter before drafting a more precise set of conditions within the bill.
- Draft a bill that defines sectarianism in society.
- Draft a bill that specifically tackles racism at football games.
- Explore the issue of offensive behaviour and how it overlaps with the principle of free speech

1. It is a widely held view, that this legislation has been introduced due to the recent reignition of extreme sectarian behaviour in Scotland. Some of this behaviour exists at football games, but much of it was conducted within the context of anti-Catholic threats towards Neil Lennon and other high profile persons with an affinity for Celtic Football Club.

2. It is also apparent that the famous summit after the infamous Scottish Cup tie, has led to political activity that has created that much quoted phrase of ‘lots of heat but little light.’

3. I cannot see any definition or focus on sectarianism within the bill as drafted and I therefore conclude that this bill is a smokescreen for maintaining the current inactivity towards the one of the main sources of sectarianism and anti-Irish racism.

4. No sane person could argue against the intention to remove offensive, inciteful or sectarian behaviour in Scottish society. However, one is perfectly at liberty to argue against the poor drafting and potential for injustice that will be dependent upon individual police officers who may have to apply this law.

5. Much (all?) of section 1 of the bill seems to attempt to customize currently existing criminal behaviour and wrap it in a football scarf. Breach of the Peace, Aggravated Breach of the Peace and other legislative measures already allow for the arrest and trial of people exhibiting the behaviour described within the bill. To delineate criminal behaviour because it takes place at a football match seems to be bizarre, populist and short term when the police have singularly failed to apply current law to mass singing because of the maxim ‘there’s too many doing it.’

6. How often are we subjected to racist and sectarian chants during football games? How often are the offenders arrested? How do we view this legislation if the ‘mass offenders defence’ is used by the police again to explain their inaction? Unfortunately, my interpretation of this bill is that the politicians must be seen to be reacting to a media frenzy, the police see an opportunity for more funding and small pressure groups may be able to raise their profile and survive during the current financial crisis. There are better things to spend time, energy and money on unless the bill becomes focused on specific behaviours instead of the generalities.
7. Legislation that tries to garner the motivation for a particular behaviour is bound to fail. Section 1 (b and c) is a perfect example of this. Many Scots will offend me by expressing their view of the Catholic Church. I do not know if their intentions are ‘motivated by hatred’, a set of genuine beliefs that the reformation was a positive liberation or based on personal experience of how they were treated by the Catholic Church. I will argue with them. The debate can be tasty, but that, I would contend, is free speech in our society. If I lose the debate, do I phone the police if the venue was Hampden Park but only contact the Samaritans if it was in the pub?

8. Why, if the problem is so serious, is the legislation only to be applied to football games? I find it far more offensive to have to hear and (if I do not have my wits about me) see, parades and marches celebrating battles fought long ago with the accompanying wake of snarling detritus using their environment as one long continuous public toilet. It would be my personal choice that many of these parades be restricted but I would never want them banned because, in a free society, it is essential that people should be allowed to express their views and, within reason, stand by them in positive terms. If their expressions become singularly aimed at the denigration of others, then that may be offensive, sectarian or racist and lead to prosecution. 47 years of experience though, would indicate otherwise.

9. The Threatening Communications Section is also somewhat bizarre as much of what I see in the media falls within the remit of this section. This area should be tackled under existing regulations or revisited after extensive consultation.

I leave you with some thoughts. How would an individual police officer, reporter or member of the public react to any of the following?

- The jeering of the national anthem of any country at George Square.
- Anti-China/Free Tibet protestors whistling, jeering and displaying placards when Chinese officials visit Holyrood.
- A protestor shouting, ‘You stupid Yank’ at Donald Trump at his development.
- Flower of Scotland sung in a pub with a few English people present.
- The Fields of Athenry or the Irish National anthem sung by Irish supporters on the Stranraer ferry.
- God Save the Queen or Rule Britannia sung by Rangers supporters on the Stranraer ferry.

Each of the above could become criminal offences under the proposed legislation but this interpretation would be entirely contextual and open to too wide an interpretation. This legislation should be revisited and focused forensically on the main engine of what drove the formulation of the bill. This bill should be using a scalpel, not a machete.

Please start again.

Paul Cochrane
22 June 2011
Submission from John Connelly

I wish you luck in your endeavours to rid Scotland of bigotry, discrimination and sectarianism.

It’s not a vote winner and I hope you have the courage to put the right legislation in place to make a difference for our children. Here are some points I think you should look at:

1. Education at a young age against any form of religious bigotry;
2. Integrated Catholic and none denominational schools;
3. The banning of all bigot related marches Catholic or protestant;
4. Legislation to ensure any clubs or organisations do not discriminate against any person who wishes to join a club or organisation.

I know this is a wish list but I think Scotland would be a better place with these simple changes

John Connelly
25 August 2011
Submission from James P. Connolly

The following submission is in response to the call by the Scottish Parliament’s Justice Committee for views on The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, introduced by Kenny MacAskill MSP on 16 June 2011.

1. In line with the guidelines, I will make this submission brief as there appears to me to have been much criticism of this Bill already, from others who have submitted and, implicitly, in the Justice Committee’s scrutiny so far.

2. What this Bill tries to do is in two parts. Firstly, it seeks to create an offence which can be charged summarily or on indictment, which deals specifically with behaviour of football fans connected to a match, whether going to or from a match or to a public place where a match is shown. There would be an offence if such persons are likely to cause disorder by expressing hatred or stirring up hatred towards a presumed member of another group which (somehow) can be defined by religion, race ethnicity or colour. Secondly, and separately, the Bill seeks to make it an offence to communicate threats of serious violence so as to cause fear and alarm, or if the communication is intended to stir up religious hatred.

3. In effect the first proposed offence would be a new thing that might be called a ‘football match hate breach’. It would hinge upon the same likelihood of public disorder that the common law offence of breach of the peace currently does. However, it ventures into the highly problematic area of ‘hate speech’, despite there being an extensive literature around the world on the difficulties with this concept. The malignity of hate crimes is generally argued to be that they target communities within communities and as such are more destructive than ‘regular’ crime. Hate crimes are discriminatory and especially pernicious. Difficulties are especially numerous for hate crimes related to expression, but I will confine my self to a few observations. Firstly, there is the human right to freedom of speech, which others have discussed in submissions. Secondly there is the incohere problem - hatred is an emotional state and not a completed action. Thirdly, hatred is not an objective moral wrong, as there may be perfectly justifiable grounds for hatred, such as by a concentration camp survivor for a guard. Fourthly, hate crimes have a way of creating a ‘victimization veto’ that may be itself unfair and can lead to escalation of the type of hate it seeks to deter. Leaving aside the significant difficulties with hate speech and legal interpretation, and the classification of a crime for football supporters as a subset of society, there is the obvious difficulty that even singing or chanting of the vilest nature by thousands upon thousands of fans can not be effectively policed in a democracy. What some see as vile, others may see as legitimate expression, and even the Soviet Union had eventually to bow to the Estonians who were said to have sung their way to freedom. A law which is flouted and treated with impunity because it can not be applied fairly is enough reason to reject it, as it undermines the rule of law itself. This problem is compounded in the Bill, as the Bill does not simply confine itself to expressions of hatred that would be likely to incite public disorder, but in its paragraph 1(2)(e) would criminalize behaviour likely to cause public disorder where “a reasonable person would be likely to consider the behaviour offensive.” This test of offensiveness is a test of manners not law. Offensiveness in my view would become in reality a subjective test for an
arresting officer to interpret as he wills, masquerading as an objective one. This sort of thing was not unknown in the law relating to breach of the peace at common law, but this common law vagueness and uncertainty has been ruled unacceptable under human rights law. There are also the same fundamental issues of free speech at stake as in other difficult cases – persons do not have a right not to be offended. Free speech is not determined by whether someone might punch you in the face for it.

4. There is a further difficulty in the context of Scottish football which is the issue of religion and perceived ethno-religious allegiances owed to certain teams, notably Celtic and Rangers. Again, these allegiances are well documented and essentially have their roots in British and Irish history going back generations. These differences sit layer upon layer through history, but within the context of modern football, where such teams are as likely to have more foreign players as British or Irish ones, it seems outdated to focus on ethnic or religious hatreds. That is to misread the real subtlety and multi-faceted cultures and sub-cultures that attach to football in modern Scotland. The entire political landscape has also changed in just over a decade, with the Scottish Parliament, the ‘Good Friday’ agreement, decommissioning of weapons by paramilitaries in Northern Ireland, and now power sharing in the Northern Ireland Assembly as examples. The major clubs themselves can not simply be said to be Catholic/Irish or Protestant/Scottish, even if a substantial number of their fans might think that. It seems strange for a legal response to tensions surrounding football rivalries to focus on speech related to religion or ethnicity in 2011, which the clubs themselves do not accept as exclusive identifiers. Certainly where bigotry is an exacerbation of a crime, we do currently have s.74 of the Criminal Justice (Scotland) Act 2003, which makes ‘religious prejudice’ an aggravation. There have been challenges for the courts in determining whether football chants fall into this category, but regrettably the Bill does not help at all in saying anything new on that matter.

5. However well intentioned the Bill might be on such points, the issues of ugly and widespread divisions in Scottish society, which are in essence bigotry, and that find concentrated expression in the spectacle surrounding Scottish football are too difficult in a democracy to legislate away in the manner proposed. The most effective way of dealing with these problems is by the regulation of football associations themselves, as we have already seen in the case of UEFA, who have imposed sanctions specifically on Rangers three times since 2006 for the behaviour of their supporters. UEFA however do not have the same constraints as a democratic government observing the rule of law. Beyond this, the matter is one of education. As Thomas Jefferson said: “Bigotry is the disease of ignorance, of morbid minds; enthusiasm of the free and buoyant, education and free discussion are the antidotes of both”.

6. The most serious matters that arose last season were undoubtedly the well documented sending of bullets and viable explosive devices to persons associated with Celtic - to the manager, to players, to an MSP, and a QC. These are all matters that existing criminal law can deal with. However, if there was a gap in the law on these matters it strikes me that the Terrorism Act 2000 is where the gap is. In that Act "terrorism" means a threat which is designed to “… intimidate the public or a section of the public” (which might have been Celtic supporters), but the Act continues “… and the use or threat is made for the purpose of advancing a political,
religious, racial or ideological cause.” There is nothing about terror in intimidating a sporting institution’s participation in sporting competition.

7. When discussing the second proposed offence of threatening communications before the Justice Committee, the Lord Advocate indicated that there might be a problem with what communication means under the Communications Act 2003. The issue is in the context modern social media, such as blogging, or of Facebook pages, such as we saw last season with the page called “I Hope Neil Lennon Gets Shot”. It is not at all clear to me that the Bill would fix that problem, if it exists. “Communication” is still required by the Bill, with no better definition to solve the problem of whether a Facebook site is “communicated”. In recent weeks, however, there have been prosecutions using the offence of “threatening and abusive behaviour” under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 for messages put on social networks. This offence seems as wide as any we had seen before under the common law of breach of the peace, and we must await the views of the higher courts on its applicability. If it is generally applicable to the sort of postings on social networks that we saw last football season, then there would be no need for a new law doing the same.

8. The Bill seems to me to be deeply flawed on the question of legal clarity, freedoms of speech, and necessity. It would be marvelous to outlaw bigoted attitudes and they then vanished. I made my own private attempts recently to attempt to devise an alternative Bill, which would have criminalized bigoted attitudes addressed to others by producing multiple and instructive definitions of bigoted expression, but concluded we might all have been criminalized sooner or later, despite the safeguards I attempted to build in.. The point is made in one submission of whether it would be offensive to call Donald Trump a stupid American (leaving aside the ‘causing disorder’ matter for a second). That could arguably be a bigoted remark based on an unfair generalization about Americans. Yet no legal system that values freedom of speech could criminalize that, even if Donald Trump’s supporters might create havoc because of such a slight. The statement might even be a fair opinion and of fact, and we have the law of defamation for that. I suggest seeking amendments to the Terrorism Act, focusing on education about attitudes, and allowing the football authorities to sanction clubs. I do not think that it would be good for Scots Law if this bill were to become law.

Senior Lecturer in Law, Glasgow Caledonian University
25 August 2011.
Submission from the Council of Ethnic Minority Voluntary Sector Organisations (CEMVO) Scotland

1. Background
1.1 The Council of Ethnic Minority Voluntary Sector Organisations (CEMVO) Scotland is a national intermediary organisation and strategic partner of the Scottish Government working to provide support to the Scottish Ethnic Minority (EM) voluntary sector. CEMVO established its operations in Scotland in March 2003, with the aim of building the capacity and sustainability of the country's EM voluntary and community sector. We currently have a network of over 600 EM voluntary sector organisations and community groups throughout Scotland to which we provide a range of programmes to help build its capacity. The wide-ranging work of CEMVO Scotland reflects the diverse needs of the groups it serves, varying from socio-economic regeneration such as social enterprise, life-long learning, civic and democratic participation and representation to organisational development, mainstreaming, policy and research.

1.2 CEMVO Scotland welcomes the opportunity to contribute to the Bill although given the current timeframe which falls over the summer holiday period and Ramadan, we are not able to consult with our network as widely as we would have wished. We have instead based our comments on our extensive experience working with EM voluntary organisations, community groups and public bodies through our role as the national intermediary organisation of the EM voluntary sector.

1.3 CEMVO also welcomes the strong messages this Bill gives in relation to the insidious nature of sectarianism and that such behaviour is not to be tolerated. We retain a particular interest in the issue given the centrality of religious identity within notions of 'race' and 'ethnicity'.

2. EQIA
2.1 We note the fact that an EQIA has been carried out on the Bill, including a consultation exercise on 17 June and that a further EQIA is to be prepared in relation to media campaigns/awareness raising. Importantly, we recognise that the EQIA attempts to clarify the purpose of the Bill, stating that the principal objective is 'to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of material including where it incites racial hatred', as well as what the Bill will and will not do.

2.2 The EQIA further indicates that as part of the post implementation work on the Bill, the Scottish Government will look at ‘further building a strong evidence base in relation to tackling the issue of sectarianism as well as other forms of bigoted and discriminatory behaviour’ in order to enable understanding of the impact the legislation and related policy is having on people of different ethnicities.

2.3 We welcome the assurance that while the nature of the public debate has been and will continue to focus on 'sectarianism' or religious hatred expressed in the context of football matches there is a clear recognition that the nature of the offensive behaviour the Bill seeks to cover is in fact wider.
That said, we have a number of further concerns and comments to record:

3. **Timetable**
3.1 Whilst recognising that the Scottish government believed the measures in the Bill need to be in place before the start of the 2011/12 football season we, like others working in the equalities field, had concerns about the limited consultation period offered prior to the Bill being introduced into the Scottish Parliament. This meant the Bill was departing from normal Parliamentary process and the consultation carried out as a result was neither fully inclusive nor democratic. We wish it noted that with regard to the event held on 17 June, neither of the key national EM led organisations – BEMIS or CEMVO - were present.

3.2 However whilst we have decided to submit our response by the original deadline, we were pleased to read that a decision to extend the timetable for the Bill until later in the year has now been made. Given this extension, CEMVO considers that a more appropriate response might be to first consider what gaps if any exist in current legislation, what is not working well at present and how it might be enforced more effectively.

3.3 Should the Bill still go through, we would also strongly encourage a clause to be built in which would allow for evaluation of its effectiveness and consideration of further review and amendments.

4. **Content of the Bill**
4.1 Section 1 – offensive behaviour at regulated football matches: we are aware that colleagues from the legal profession have made a number of expert responses and would only wish to add that from our point of view as one of a number of EM organisations working to inform disadvantaged and excluded communities about new forms of legal protection and rights, there appears to be room for considerable confusion arising out of the apparent duplication at times between the new Bill and common law breach of the peace.

4.2 We believe that this section would be helped by providing clarification of how the new provisions will be stronger than existing criminal law provisions for example Part 3 of the Public Order Act 1986 (incitement of racial hatred) and Section 96 of the Crime and Disorder Act 1986 which provide for statutory aggravations on grounds of religious or racial hatred. If indeed they are stronger (although on the contrary the proposed new offence appears to be more restrictive than the offence in Scotland of stirring up racial hatred) we would firmly support comments made by other organisations in relation to missed opportunities to extend the Bill beyond football related incidents.

4.3 Section 5 - threatening communication: with regard to this section CEMVO supports the views expressed by the Equality Network that section 5(5) on threatening communication would be more consistent and less confusing if it were to be amended to cover all the categories in section 1(4) on offensive behaviour. Given the positive work that is being done in Scotland to build alliances and develop partnership across strands and communities we are extremely concerned that no unintentional hierarchies or divisions are fostered between people of protected characteristics.
5. General comments

5.1 Lessons to be learnt: given the wealth of research completed and knowledge gained in regions such as the North of Ireland (and where numbers of EM people are similar to Scotland), CEMVO would welcome opportunities to hear from individuals there in respect of sectarianism and hate crime so that Scotland can build on such experiences. Two examples we are aware of are sectarianism and racism, and their parallels and differences: Brewer, JD (Ethnic and Racial Studies Volume 15 Issue 3, 1992) an attempt to define the concept of sectarianism, under-theorized compared to that of racism, and identifying the points of continuity and difference between the two terms and b) numerous articles on the implications of sectarian division for multi-ethnicity in Ireland by Dr Robbie McVeigh.

5.2 Sharing good practice: as we have already stated CEMVO welcomes the inclusive definition used in (2) (a). We are in general supportive of a number of comments made by the Scottish Council of Jewish bodies and strongly condemn any form of anti-Semitic or Islamophobic attacks or any attempt to incite hatred and violence about either community in Scotland. We would draw your attention to a recent educational pack produced by Show Racism the Red Card, the aim of which is to help young people challenge stereotypes and prejudice towards Muslims, and to gain a greater historical and political awareness of the climate which has enabled Islamophobia to flourish in recent times.

5.3 Additional guidance required

5.3.1 Legislation can only play a small part in tackling sectarianism and other forms of hatred. The problem is also clearly much wider than football – as many other respondents have indicated. CEMVO’s role to help mainstream racial equality across public bodies has enabled us to paint a picture of what is happening in health, criminal justice and education in terms of raising awareness and building greater understanding. We believe that in order to prevent cluttering the landscape further with additional pieces of legislation and policy, the issue of sectarianism need to be mainstreamed across the public sector in line with current equality legislation. The general duty requires public bodies to ‘foster good relations between people who share a protected characteristic’ and whilst there is a current debate taking place about the extension of publication of employment information across all protected strands including religion, we believe that it is crucial to have robust data which will evidence the level of sectarianism across all sectors and enable more robust action plans to be set in place.

5.3.2 CEMVO is also keen to see the results of the first ever international study into the rehabilitation of hate crime offenders (EHRC) as we would also welcome greater attention being paid to what motivates people to commit these crimes and what can be done to stop them.

5.3.3 We believe that the points we raise in section 5 above offer a more holistic approach to tackling sectarianism across Scotland.

6. Summary

In summary, our main concerns are the risk of further confusion rather than clarity in relation to other related pieces of legislation along with the lack of a joined up
approach to support wider understanding of sectarianism and possible solutions to it. We do however strongly support the clear political will and leadership to challenge bigotry, prejudice and discrimination in Scottish society today.

CEMVO Scotland
25 June 2011
Submission from John Easdale

I am writing to you regarding the new Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, I find this Bill to be against my human right to express my freedom of speech under article 10 of the Human Rights Act, as penned below.

Article 10 protects your right to freedom of expression. This includes the right to hold and express opinions yourself as well as to receive and impart information and ideas to others.

Before the Human Rights Act came into force, the right to freedom of expression was a negative one: you were free to express yourself, unless the law otherwise prevented you from doing so. With the incorporation of the European Convention on Human Rights into English and Welsh domestic law, the right to freedom of expression is now expressly guaranteed.

In Handyside v UK (1976) the ECHR stated that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and development of every person. It also made clear that Article 10 applied not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb the State or a sector of the population.

John A Easdale
22 June 2011
Submission from the Equality and Human Rights Commission Scotland

1 Introduction
The Equality and Human Rights Commission (the Commission) was established in statute in the Equality Act 2006 and came into being on 1st October 2007. The Commission champions equality and human rights for all, working to eliminate discrimination, reduce inequality, protect human rights and build good relations, ensuring that everyone has a fair chance to participate in society.

We welcome the Scottish Government’s commitment to challenging sectarianism in Scotland. The Commission shares the Government’s concern about the detrimental impact that football related sectarianism is causing to Scottish citizens and to Scotland’s international reputation.

However, the Commission is concerned that this Bill is being dealt with as an ‘emergency’ procedure unnecessarily. The Commission feels that the standard parliamentary procedures have served Scotland well and have resulted in the introduction of well drafted and effective legislation. The Commission also believes that this Bill would benefit significantly from having wide ranging consultation, scrutiny and debate.

Without due regard for the normal parliamentary procedures, there is a risk that the final Act will not be fit for purpose and will not provide the powers required to address the concerns of the public and police. There is also a risk that the Act would be open to challenge in the future.

This submission also reminds Scottish Ministers of the statutory obligation on the Scottish Ministers set out in the public sector equality duty, and considers the benefits of compliance with that duty and whether the emergency procedure being used jeopardises compliance with the general duty.

The Commission believes that addressing sectarianism requires a broad response from across civic society. We acknowledge the good work that the voluntary sector, Church groups, Police and Councils (amongst others) have undertaken to build good relations in Scottish communities. The Commission recognise that there is a particular problem with sectarian related violence and aggression at football games. We agree with the Government that this is unacceptable and requires urgent attention.

The Commission would like to see greater reflection on current criminal law that deals with sectarian behaviour. A thorough analysis of the legislation available should be dealt with in a Regulatory Impact Assessment which has not been undertaken in relation to this Bill. The Commission is also disappointed that an Equality Impact Assessment of the Bill is suggested in the policy memorandum but has not been made available.
Given the extremely short period for consultation, the Commission has not had adequate time to fully examine the Bill in detail or had an opportunity to discuss this with our own stakeholders.

2 Public Sector Equality Duty

The public sector equality duty (the general duty) set out in s149 Equality Act 2010 requires Scottish Ministers to pay due regard to the need to:

- Eliminate discrimination, victimisation and harassment or other unlawful conduct that is prohibited under the Equality Act 2010
- Advance equality of opportunity between people who share a characteristic and those who do not
- Foster good relations between people who share a relevant protected characteristic and those who do not.

These three requirements apply across the ‘protected characteristics’ of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

In order to demonstrate that the general duty has been met, the Scottish Ministers must be able to demonstrate that impact on the protected characteristics were considered with rigour and an open mind, and should be able to demonstrate how this consideration influenced the final product.

‘Due regard’ requires a proportionate and relevant response which allows that the weight given to equality should be proportionate to how relevant equality is to the particular function being carried out. Given the nature of the legislation introduced, it is clear that there is a need to demonstrate compliance with the general duty, most particularly the need to foster good relations.

Demonstrating due regard for the duty can be achieved by either assessing impact\(^1\) by systematically considering relevant evidence in order to determine whether particular groups may be disproportionately affected by decisions, or whether more could be done to advance equality and good relations. This systematic approach enables policymakers to consider the impact of the policy on a strand-by-strand basis: look at relevant evidence, ensure actions are appropriate for each strand and, where necessary, identify steps that will be taken to mitigate negative impacts. This evidence-based approach ensures that the impact on various groups are thought through and result in proposals that will make a real difference and help to get things right the first time.

The Commission also recommends\(^2\) that consultation and involvement of key stakeholders, particularly those from groups affected by the policy, will enable


\(^2\) Equality and Human Rights Commission Meeting the public sector equality duty in Scotland – Interim guidance for Scottish public authorities on meeting the general duty, April 2011: 10
Ministers to demonstrate that they have met the general duty with regard to proposed legislation.

We note that the policy memorandum for the bill states that an Equality Impact Assessment (EIA) will accompany the Bill. This is to be welcomed as an EIA would have provided the Commission and the broader stakeholder community with an overview of the consideration that the Minister has given to equality issues in the development of this legislation. However, we also note that as of the 23rd June 2011 an EIA has not yet been published. Given the fast-track process being used, we find this disappointing as it fails to provide stakeholders with the opportunity to comment on the EIA.

Whilst we would welcome an EIA as evidence that the duty has been met, we have broader concerns that the haste of the emergency legislative procedure seriously limits the ability of the Minister to demonstrate due regard in this instance. Both offences created by the Bill cover the protected characteristic of religion, but the section 1 offence extends beyond religion and includes colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. All are protected characteristics within the Equality Act 2010 and all are therefore covered by the general duty. We share the concerns of many other stakeholders that the one week consultation window has serious ramifications on the ability of Ministers to adequately consult with groups affected by the legislation.

The Commission also has concerns about the good relations element of this Bill. In terms of the Equality Act 2010, good relations is understood to mean tackling prejudice and promoting understanding between people from different groups. We understand that this piece of legislation is just the first step in a number of measures that will be taken to tackle sectarianism in football. We also understand the intention of the Bill is to tackle the manifestations of sectarianism, rather than deal with the deeply embedded causes of sectarianism in Scotland. Whilst we agree that this Bill will only tackle obvious manifestations of sectarianism, there is a danger that adopting this legislation without appropriate scrutiny and without a broader strategy in place could worsen rather than improve relations between groups. Eliminating sectarianism in Scotland requires a robust evidence base that identifies the underlying causes of the violent behaviour (including issues outwith sectarianism such as alcohol misuse) and responds with a strategy that takes a multilateral approach, and engages all of civic society to address these causes. The blunt legislative response currently being proposed removes responsibility from society (in particular the football clubs and the SFA) and places it solely within the criminal justice sphere. This purely criminal justice response risks increasing division and hatred between groups rather than tackle prejudice and promote understanding. It does not appear that the Scottish Government have considered this possibility and we would urge the Committee to question the Government on what thought they have given to their good relations duty, and whether they have considered the negative consequences that such proposals could have on relations between groups.

As the regulator responsible for the enforcement of the Equality Act, we must advise the Committee that the use of emergency procedure powers in this instance may put
the Scottish Ministers in breach of the general duty, making the legislation vulnerable to legal challenge on these grounds. Any person, including the Commission, can apply to the Court of Session for judicial review of a public body that they felt was failing to comply with the general duty.

3 Existing Legislation
As mentioned in the policy memorandum and the SPICe briefing that accompany the Bill, there are a number of relevant pieces of legislation passed in Scotland in recent years which are directly relevant to the policy aims of the Bill:

- Section 74 of the Criminal Justice (Scotland) Act 2003 introduced statutory aggravations for offences motivated by religious prejudice and requires courts to take any aggravating factors into account when passing sentence.
- Part 2, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 allows for football banning orders of varying lengths to be applied to offences of violence, disorder and stirring up hatred towards a range of protected characteristics.
- Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 introduces a new offence of threatening or abusive behaviour, punishable on conviction on indictment to up to five years in prison, or on summary conviction to up to 12 months and/or a fine. The offence has been in force since October 2010.

Therefore, given that there is currently a range of responses available in Scots criminal law, and that previous changes in the law in this area have come at the end of extensive consultation and scrutiny, it is important that the Scottish Parliament is satisfied that the further provisions proposed in the Bill are necessary – as well as lawful and proportionate – means of achieving a legitimate end.

4 The Substance of the Bill
The truncated consultation period for this legislation has meant that we have not had the time to undertake proper scrutiny of the proposed legislation. As such, we are only able to make a few brief points in relation to the two offences, but stress we have been unable to fully examine the offences and consider the consequences.

4.1 Section 1 Offence: Offensive behaviour at regulated football matches
The intention of the offence is to be welcomed, particularly the recognition that sectarianism is not the only source of threats or offensive behaviour that occurs at football matches. As such, we welcome that the offence covers not just religion but also colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability.

We note that gender or ‘sex’ is not included in the list at s1(4). The exclusion of sex seems at odds with how broadly the provision has been drawn. The Commission would like to understand why the decision was taken to exclude gender from this offence.

Whilst we recognise that the Government wishes to tackle a specific concern, we feel that a debate on the widest application of the principles would consider the need to address sectarian behaviour in non-football related environments. This would
make the legislation more rounded. To achieve this, a larger and more inclusive public consultation will be necessary.

4.2 Section 5 offence: Threatening communications
Section 5 is a much broader offence that goes beyond the scope of a football match. This makes it hard to justify why the offence needs to be in place for the beginning of the football season.

Condition B of section 5 introduces into Scotland the crime of inciting religious hatred. We note the inconsistency in sentencing between the incitement to racial hatred, which is subject to a maximum sentence of seven years, and this new offence of incitement to religious hatred which is subject to a maximum sentence of five years. The consequence is that the choice of one word could result in a two year sentencing difference. We would question whether this is the Government’s intention, and if so, what the rationale for such a difference would be.

The Racial and Religious Hatred Act 2006 in England, which was subjected to the usual scrutiny processes by Westminster, chose to list the different circumstances in which a communication would not be considered incitement in order to protect freedom of expression (Schedule 3, paragraph 29J). The Commission would like the Government to explain why it has instead elected to use a reasonable person test for this Bill, and whether this is the right choice given the concerns about freedom of expression that this Bill raises.

We note that Condition B relates only to material that is threatening and intended to ‘stir up religious hatred’. We find this at odds with existing Scottish legislation on statutory aggravations which covers not just religious but also racial, homophobic, transphobic or disability-related prejudice. It is also in contrast to Offence 1 of the act which is broadly drawn to cover these aspects of prejudice and harassment. We would expect further explanation of why this has been confined to religious only hatred. Again an EIA would assist consultees to understand the government’s intention with regard to this issue.

The Commission would also like clarification on whether s74 of the Criminal Justice (Scotland) Act 2003 (offences aggravated by religious prejudice) would be applied where an individual is found guilty of inciting religious hatred set out in Condition B of this legislation.

5 Conclusion
In summary, we emphasise our concern at the use of emergency legislation procedures with regard to this piece of legislation. The time frame has meant that the issue of sectarianism, violence and football has not been subjected to a broader consultation process. A more inclusive process would have resulted in a better evidence base and suggested a wider range of options with better defined parameters for this piece of legislation, as well as more options for solving the problems such as considering the role of those within the Scottish Football sector and the responsibility that Football Clubs have for the behaviour of fans.
The Commission regrets that it has not had more time to prepare the response that this issue deserves, and remains concerned that the proposed legislation may not achieve the desired objectives of Scottish Ministers nor secure the best outcome for Scotland.

Sally MacKenzie and Helen Miller
Policy and Parliamentary Team
Equality and Human Rights Commission Scotland
23 June 2011
Supplementary submission from the Equality and Human Rights Commission Scotland

1. Introduction
The Equality and Human Rights Commission (the Commission) was established in statute in the Equality Act 2006 and came into being on 1st October 2007. The Commission champions equality and human rights for all, working to eliminate discrimination, reduce inequality, protect human rights and build good relations, ensuring that everyone has a fair chance to participate in society.

The Commission believes that addressing sectarianism requires a broad response from across civic society. We acknowledge the good work that the voluntary sector, Church groups, Police and Councils (amongst others) have undertaken to build good relations in Scottish communities.

The Commission recognises that there is a particular problem with sectarianism-related violence and aggression at football games. We agree with the Government that this is unacceptable and requires urgent attention.

We welcome the decision to extend the Bill's timetable to allow for further consultation and scrutiny by the Justice Committee. This paper builds on our earlier submission to the Committee. In this next stage we would ask the Committee to consider:

- Given the range of law already available is the Bill proposed a proportionate means of achieving a legitimate aim?
- What action needs to be taken to address the lack of robust research and data relating to sectarianism?

2. Public Sector Equality Duty and Equality Impact Assessment (EQIA)
The Commission is the regulator responsible for the enforcement of the Equality Act. It is important to highlight the role that Scottish Ministers have in meeting the requirements of the public sector equality duty (the general duty) set out in s149 Equality Act 2010. Scottish Ministers are required to pay due regard to the need to:

- Eliminate discrimination, victimisation and harassment or other unlawful conduct that is prohibited under the Equality Act 2010
- Advance equality of opportunity between people who share a characteristic and those who do not
- Foster good relations between people who share a relevant protected characteristic and those who do not.

The Commission welcomes the publication of the equality impact assessment for this Bill although we are concerned that more robust evidence about sectarianism was not available to the Government.

3. Evidence and Data
The Commission believes that access to robust evidence regarding sectarianism (including issues such as alcohol misuse and poverty) is crucial to underpin an effective strategy for tackling the issue. The Commission would encourage the Committee and Scottish Government to ensure that the development of a strategy to address sectarianism involves taking steps to increase the availability of a range of data related to sectarianism.
reliable and systematic evidence on the incident of, as well as the causes and outcomes from, sectarianism.

In addition we would question if there is evidence that the football clubs, the SPL and SFA have explored all avenues of sanction available to them to address football related sectarianism amongst their fans, for example points fines and playing games behind closed doors.

4. Existing Legislation
As mentioned in the policy memorandum and the SPICe briefing that accompany the Bill, there are a number of relevant pieces of legislation passed in Scotland in recent years which are directly relevant to the policy aims of the Bill:

- Section 74 of the Criminal Justice (Scotland) Act 2003 introduced statutory aggravations for offences motivated by religious prejudice and requires courts to take any aggravating factors into account when passing sentence.
- Part 2, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 allows for football banning orders of varying lengths to be applied to offences of violence, disorder and stirring up hatred towards a range of protected characteristics.
- Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 introduces a new offence of threatening or abusive behaviour, punishable on conviction on indictment to up to five years in prison, or on summary conviction to up to 12 months and/or a fine. The offence has been in force since October 2010.

Therefore, given that there is currently a range of responses available in Scots criminal law, and that previous changes in the law in this area have come at the end of extensive consultation and scrutiny, it is important that the Justice Committee is satisfied that the further provisions proposed in the Bill are a necessary – as well as a lawful and proportionate – means of achieving a legitimate end.

5. Substantive Provisions of the Bill

5.1 Section 1 Offensive behaviour at regulated football matches
The commission agrees with the Government that sectarianism is not the only type of prejudice expressed at football matches. We welcome the proposal that if a new offence is introduced, it should cover not just religion but also colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability.

We also welcome the definition of ‘transgender identity’ provided in section 4(3) of the Bill that is consistent with the wording in section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

In our submission to the Committee on the 23 June we highlighted that the absence of ‘sex’ in the list at s1(4) seems at odds with how broadly this provision has been drawn and we would ask that the Committee considers this point again or justify its exclusion in the policy memorandum.
Section 1 introduces into Scotland the crime of inciting religious hatred. We note the inconsistency in sentencing between the incitement to racial hatred, which is subject to a maximum sentence of seven years, and this new offence of incitement to religious hatred which is subject to a maximum sentence of five years. The consequence is that the choice of one word could result in a two year sentencing difference. We would question whether this is the Government’s intention, and if so, what the rationale for such a difference would be.

5.2 Section 5 Offence: Threatening Communications
Section 5 is a much broader offence that goes beyond the scope of a football match.

The Racial and Religious Hatred Act 2006 in England, which was subjected to the usual scrutiny processes by Westminster, chose to list the different circumstances in which a communication would not be considered incitement in order to protect freedom of expression (Schedule 3, paragraph 29J). The Commission would like the Government to explain why it has instead elected to use a ‘reasonable person’ test for this Bill, and we question whether this is the right choice given the concerns about freedom of expression that this Bill raises.

We note that Condition B relates only to material that is threatening and intended to ‘stir up religious hatred’. We find this at odds with existing Scottish legislation on statutory aggravations which covers not just religious but also racial, homophobic, transphobic or disability-related prejudice. It is also in contrast to Offence 1 of the Bill which is broadly drawn to cover these aspects of prejudice and harassment. We would expect further explanation of why this has been confined to religious hatred only.

The Commission would also like clarification on whether s74 of the Criminal Justice (Scotland) Act 2003 (Offences Aggravated by Religious Prejudice) would be applied where an individual is found guilty of stirring up religious hatred set out in Condition B of this legislation.

6. Conclusion
We welcome the Scottish Government’s commitment to challenging sectarianism in Scotland. The Commission shares the Government’s concern about the detrimental impact that football related sectarianism is causing to Scottish citizens and to Scotland’s international reputation.

In addition to the specific points we raise about the Bill’s provisions in section 5 of our submission, we believe that the Government should urgently seek to improve its evidence base on the causes and impact of sectarianism, and on the extent to which existing powers are being used effectively to tackle it; that robust evidence should inform the Government’s strategy and the next legislative steps taken.

The Equality and Human Rights Commission
25 August 2011
Submission from the Equality Network

1. The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network’s policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us. We welcome the opportunity to submit evidence on this bill.

2. We welcome the policy intention of the Scottish Government to address the problem of the expression and stirring up of sectarian and other hatred, in relation to football, and to address incitement to violence and hatred through online and other communication.

3. However, we are very concerned that the speed at which this legislation is being dealt with is preventing proper consultation and consideration and will result in less effective law. We have particularly strong concerns about this in relation to the ‘Condition B’ version of the section 5 offence, on stirring up religious hatred, and, given the very short time available, this is where we have focussed our main attention.

Legislative timetable

4. The Equality Network believes that the standard process for Scottish Parliament legislation is effective because it includes at least one phase of public pre-legislative consultation on detailed proposals, followed by Parliamentary scrutiny at stage 1 that is open, detailed and consultative, and then by a stage 2 procedure that allows MSPs to consider amendments carefully in consultation with interested parties.

5. There has been no pre-legislative consultation on this bill. The bill covers issues explicitly related to sexual orientation and transgender identity, but the first opportunity that Scotland’s national LGBT organisations had to see the proposals was on June 17th, only 9 working days before the date on which we understand the Scottish Government wishes the bill to be finally passed by the Parliament.

6. We note that in the cases of the two previous substantial changes to hate crime law – section 74 of the Criminal Justice (Scotland) Act 2003, and the Offences (Aggravation by Prejudice) (Scotland) Act 2009 – there was lengthy public pre-legislative consultation, involving the Scottish Executive’s Cross-Party Working Group on Religious Hatred (2002-3) and Working Group on Hate Crime (2003-4), respectively.

7. We appreciate the efforts of the Justice Committee to allow the maximum possible time, given the circumstances, of one week for evidence to be submitted. This is of course much shorter than would usually be allowed at stage 1, and far shorter than the standard three months for Government pre-legislative consultation. We also note that two of the three Justice Committee meetings considering the bill take place well before that week is up, in fact within 3 and 4 working days of the first publication of the proposals in the bill. We have therefore prepared this evidence as a matter of urgency, so that the Committee has it available at those meetings, but in doing so we...
have of course been unable to consult with LGBT people and groups, or to gather evidence, in the way that we would usually do.

8. In short, the process proposed for the bill does not allow proper public scrutiny or consultation, and, in our view, also provides insufficient time for a fully effective Parliamentary scrutiny. Such a process can only be justified for an emergency bill, and we are not convinced that the current circumstances constitute a true emergency.

Content of the bill

9. The Equality Network agrees with the overall policy aim of dealing more effectively with sectarian and other hatred and other behaviour likely to incite public disorder, at football matches, and with threatening communications. The issue is whether the detailed solutions proposed are the right ones.

10. We note that both the Scottish Executive’s Working Group on Hate Crime (2003-4), and the Scottish Parliament’s Justice Committee and Equal Opportunities Committee, at stage 1 consideration of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, consulted publicly with a wide range of organisations. A consensus was reached that hate crime legislation in Scotland should cover crime motivated by prejudice on grounds of race, religion, disability, sexual orientation and transgender identity. All of these kinds of hate crime are a problem in Scotland, and all of these kinds of prejudice are expressed at football matches.

Section 1 offence

11. Sectarian behaviour at football matches is unacceptable and all too common. As paragraph 12 of the Policy Memorandum for the bill recognises, so is homophobic / transphobic behaviour. We therefore welcome the fact that the proposed offence of behaviour at football matches that is likely to incite public disorder, by expressing hatred, stirring up hatred, or which is motivated by hatred, covers hatred on the same grounds as the existing hate crime legislation, namely religion, race, disability, sexual orientation and transgender identity.

12. The definition of “transgender identity” provided in section 4(3) of the bill is identical to that in the existing legislation (section 2(8) of the Offences (Aggravation by Prejudice) (Scotland) Act 2009), and we welcome this.

Section 5 offence

13. The ‘Condition A’ version of the section 5 offence covers the communication of a threat or incitement to carry out a seriously violent act, against a person, or against persons of a particular description. We welcome the breadth of the phrase “persons of a particular description”, which would cover the threat or incitement of serious violence against LGBT people, and against other groups.

14. We note that where the offence was motivated by hatred, that like any other offence it could be charged together with a statutory aggravation of racial, religious,
homophobic, transphobic or disability-related prejudice. We welcome the availability of these aggravations in relation to this offence.

15. The ‘Condition B’ version of the section 5 offence covers communication of any threats intended to stir up religious hatred. We have a number of specific concerns about this proposal.

16. Paragraph 40 of the Policy Memorandum states that this new offence would bring Scotland into line with England and Wales, and with Northern Ireland and the Republic of Ireland. This is not the case. In all of those jurisdictions, and for good reason, the stirring up hatred offence covers hatred on grounds of sexual orientation, as well as on grounds of religion (in England and Wales this is in Part 3A of the Public Order Act 1986).

17. The stirring up of homophobic and transphobic hatred through threats does happen, and takes a similar form to the stirring up of religious hatred. For example, earlier this month, an openly gay actor in a well-known British soap opera, was told publicly on Twitter “I hope you get AIDS and die you freak” (we have not been able to check whether in this example the tweet originated in Scotland or was retweeted by anyone in Scotland).

18. We are very concerned that the proposed new offence departs from the scope of Scotland’s existing hate crime legislation, decided previously after lengthy consultation and debate, by dealing only with religious hatred and not hatred on grounds of sexual orientation, transgender identity or disability.

19. Our other concerns about the proposed new offence apply to the offence as proposed, and would also apply to a broader version of the offence, covering the stirring up of hatred on other grounds.

20. There is already an offence in Scotland of stirring up racial hatred, in Part 3 of the Public Order Act 1986. That offence is significantly different from the proposed new offence. It is wider, including not just threatening communication, but also abusive and insulting communication, and not just communication that is intended to stir up racial hatred, but also communication that is likely to do so. There may well be good reasons for comparatively restricting the scope of the new offence, but the appropriate scope should be subject to proper consultation and debate.

21. The Scottish Executive’s Cross-Party Working Group on Religious Hatred (2002) considered the introduction of an offence of incitement to religious hatred, and rejected it, on grounds of free speech (http://www.scotland.gov.uk/Publications/2002/12/15892/14536 paragraphs 5.06 and 5.07). Section 5(6) of the bill provides a “reasonableness” defence, but this is very different in form from the free speech defence in the corresponding English legislation, in section 29J of the Public Order Act 1986. That defence specifically protects a number of forms of criticism of religions and their practices, as well as proselytising, in a way which the reasonableness defence in section 5(6) does not. We think that the issue of freedom of speech needs further consideration.
22. Finally, we note that the corresponding English legislation covers threatening communication intended to stir up hatred which is made in the form of unrecorded speech (outwith domestic premises). The offence proposed in the bill does not cover unrecorded speech. We understand that the English offence could catch a speech made to an audience that intentionally stirred up, for example, anti-Semitic, anti-Islamic or homophobic hatred using threats. If the members of the audience were of like mind with the speaker, such a speech might not currently be an offence in Scotland, as it might not be considered a breach of the peace. Should the proposed new offence therefore cover unrecorded speech?

23. In our view therefore, there are several important unresolved issues about the proposed offence of stirring up religious hatred, and we think that these should be considered through full public consultation and the normal legislative procedure. In England and Wales, the stirring up religious hatred offence was the subject of a full bill (which became the Racial and Religious Hatred Act 2006). That bill underwent several months of Parliamentary scrutiny and debate, resulting in amendments such as the free speech defence referred to above. While there is perhaps an argument for sections 1 to 4 of the current bill to be in place for the start of the football season, since they relate directly to football matches, that does not apply in the same way to the rest of the bill.

Summary

24. In summary, although we welcome the general aims of the policy behind this bill, we are very concerned that:

- The legislative process for an emergency bill is being used for something that is not a true emergency. As a result there is insufficient time for consultation on and consideration of the legislation.

- This is particularly the case with the ‘Condition B’ offence in section 5, of stirring up religious hatred. There are several important open questions in regard to this proposed offence, including:
  - most importantly, why it only covers only religious hatred and not other forms of hatred such as sexual orientation hatred. A broader offence would be more in line with section 1 of the bill, with existing Scottish hate crime legislation, and with the corresponding stirring up hatred legislation in England & Wales, Northern Ireland and the Republic of Ireland.
  - whether the scope of the offence, covering threatening behaviour intended to stir up hatred, is right, given that it is narrower than the existing Scottish offence of stirring up racial hatred.
  - whether the reasonableness defence will properly guarantee free speech, especially in the light of the much more explicit free speech defence in the corresponding English legislation.
  - whether the offence should cover the stirring up of hatred by threats made in unrecorded speech (outwith domestic premises).

25. If the bill is to be rushed through the Parliament in the next two weeks, we therefore strongly believe that the stirring up religious hatred offence (Section 5,
Condition B) should be removed from the bill, and considered and consulted on fully, with a view to legislating over the following months.
Submission from the Evangelical Alliance Scotland

1. Introduction

1.1 The Evangelical Alliance Scotland is the largest body serving evangelical Christians in Scotland and has a membership including denominations, churches, organisations and individuals. Across the UK, Evangelical Alliance memberships includes over 700 organisations, 3500 churches and thousands of individuals. In Scotland many church and individual members of the Evangelical Alliance are Church of Scotland. The mission of the Evangelical Alliance Scotland is to unite evangelicals to present Christ credibly as good news for spiritual and social transformation. We firmly believe in a pro-community agenda with tolerance and respect at the forefront of a transforming culture.

1.2 The Evangelical Alliance Scotland welcomes the opportunity to respond to this consultation document and was encouraged that the Scottish Government decided to abandon their plans to push the legislation through before the summer recess and instead allow for greater consultation and scrutiny through a lengthened legislative process. As a membership organisation we would seek to draw attention to responses from member organisations such as CARE for Scotland.

1.3 Our response looks at two specific areas of concern within the Bill; firstly it’s overall remit and aims and secondly its implications for the infringement on freedom of speech and expression.

2. Intended Remit of the Bill

2.1 The Evangelical Alliance applauds and welcomes the aims of this Bill as set out in the Scottish Government Policy Memorandum which states:

“2. The objective of the Bill is to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material”

2.2 But we are concerned that the Bill goes far beyond its intended remit and objectives to tackle sectarianism, widely understood to mean tensions between Protestant and Catholic Christians, within football. While we understand a need to strengthen the law to criminalise “threatening” and/or offensive behaviour at football matches, the Government should be asked to clarify that the stated aims of the Bill are proportional to its actual content and probable future use in law. This is particularly important as the Bill’s broad remit might have future unintended consequences which have no relation to sectarianism and/or football.

2.3 Firstly, Section 1 (2) widens to cover expressing hatred or stirring up hated, not just in terms of a religious group or affiliation, but also includes other groups such as colour, ethnic origin, race and sexual orientation.

2.4 Secondly, the two conditions for a person to commit an offence in Section 5 require no connection with Scottish football at all and therefore could be used in
numerous scenarios and situations which have no relationship or connection to Scottish football.

2.5 Thirdly Condition A in Section 5 is satisfied without any connection to religious or other hatred.

2.6 We would encourage the Committee to thoroughly investigate whether the Government and the Police envisage the laws within this Bill to be used in circumstances with no connection to football and/or religious hatred. If this is likely the Government need to communicate that the Bill will do much more than simply tackling sectarianism.

3. Implications for freedom of speech and expression.

3.1 We do not believe that appropriate safe guards are in place to protect freedoms of religion, expression and assembly (within Articles 9, 10 and 11 of the European Convention on Human Rights) which could be infringed by the offences under Section 2(3) and Section 5.

3.2 The objectivity and proportionality required to decide whether Conditions A + B of Section 5 have been filled could have unintended consequences through misinterpretation and misunderstanding of a particular piece of material which some might deem as offensive or threatening, while others might deem reasonable (Section 5(6)).

3.3 It will also be very difficult to understand and interpret the intention of any material communicated or whether it was communicated with recklessness and therefore judge accordingly.

3.4 The Evangelical Alliance recommends that a clause be included within the bill that will sufficiently protect and safeguard the freedoms of religion, expression and assembly included in Articles 9, 10 and 11 of the European Convention on Human Rights. This clause should provide protection for firstly, the right to proselytise or urge those of a different religion or belief to change their religion or beliefs and secondly the right to express disagreement or dislike of a particular religion or belief and its practice. We are very concerned that the Bill, as it currently stands, in its use could easily infringe upon these rights.

4. A sunset clause

4.1 We would highly recommend that the Parliament include a sunset clause within the Bill so that the Parliament has a chance at a future date to decide upon the merits and effectiveness of the Bill and whether it is fulfilled it stated aims.

5. We would be happy to give oral evidence to provide clarity on any of these issues raised.

Alistair Stevenson
Public Policy Officer, Evangelical Alliance Scotland
26 August 2011
Submission from Daniel and Elizabeth Furey

Although we agree that offensive and threatening behaviour at football matches or anywhere else is unacceptable we would want to ensure that religious liberty and freedom of speech are protected.

Mr Daniel and Mrs Elizabeth Furey
23 August 2011
1. What particularly concerns me about this proposed bill is the very broad interpretation of religious hatred, particularly in section 5 ‘Threatening communications.

It goes considerably beyond prescribing violence or threats of violence as shown by section 2b ‘the material or communication of it would be likely to cause a reasonable person to suffer fear or alarm’.

Also section 5b ‘the person communicating it[the material] intends by doing so to stir up religious hatred’.

As worded, these provisions to me (a lifelong Roman Catholic) pose a threat to religious liberties and individual freedoms that only with difficulty were conceded by state authority over a long historical period.

2. The legislation appears to give law-enforcers the power to criminalise criticisms, insults, ridicule, satire, because of religion, and even proselytism (that involves robust rejection of other faiths).

It appears to place in the hands of ‘a reasonable person’ who is the adherent of a faith, the power to request the arrest of someone who is commits a non-violent act of aggression directed at their faith.

Nowhere is it explained why it is religious hatred that should be sanctioned in such a manner.

There are numerous other examples of prejudice some of which are expressed just as vociferously as this one:

Antagonism towards an economic system capitalism, and its chief upholders which in Scotland has been the cause (whether rightly or wrongly) of much verbal aggression and will likely continue to be so.

Antagonism towards a particular age-group (often but not exclusively the elderly).

Antagonism towards people who adhere to a particular national identity or who are linked with a particular region.

Even antagonism towards people who are avowedly opposed to al kinds of religions. If such legislation becomes law, it cannot be ruled out that a time will come when it is deemed necessary to be used towards people who are hostile to those who are ostentatiously secularist or atheistic in the expression of their beliefs to the extent that ‘a reasonable person suffers fear or alarm’.

3. I am not content with the legal status quo concerning sectarianism. I believe there is a case for amending the existing law so as to deter aggressive behaviour with strong religious or ethnic overtones that can destroy individual lives and devastate the community to which the victim belonged. I don't believe enough
has been done by the authorities to deter serious violence springing from the violent expression of group identities nor do I think that this legislation responds to what has been a terrible scourge in parts of Scotland.

Given the entrenched and complex nature of social violence in Scotland which receives most attention when expressed at football matches, but which is not confined to that milieu, I am surprised that a bill with such far-seeing implications (one that potentially could criminalise large numbers of people) has not been the result of a much wider period of consultation, involving at the very least, soccer clubs, supporters associations, groups trying to monitor and contain group hatreds, academics and community groups with knowledge of the phenomenon.

I think a longer preparatory period is necessary to ensure that religious texts themselves do not fall foul of the provisions of this bill.

A more extended consultation process might have enabled the danger that sectarian violence will only simply be displaced by the operation of the proposed law to be included in the preparatory discussion. What is to stop it being played out in residential areas or in particular downtown locations where the police might not have the operational resources to deal with it as effectively as at soccer matches.

My chief fear is that the bill, as worded, is far too indiscriminate and open to interpretations that could harm community relations and produce friction between sections of society and the state (particularly the police (whose legitimacy, arguably, has been eroded over the years). If the law drags into its net large numbers of people whom much of local society does not judge to be guilty at least of a serious crime, it raises the possibility of a damaging breach between sections of society and those who maintain the law.

If a sense of grievance is heightened and certain sections of the population become more intransigent and reckless in their behaviour, due to a sense of victimisation, then the risk of increased friction and also more serious violence, cannot be ruled out.

In conclusion, my chief concerns about this bill are therefore twofold:

a) The risks to hardworn individual freedoms concerning expressions of belief that are contained in it.

b) The far from negligible possibility that a bill with such broad provisions could exacerbate an existing problem, spread it to social spheres where it has lain dormant, and increase the amount of violence associated with it.

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22 June 2011
Submission from Dr Kay Goodall

Summary

I will try here to add to what others have said, rather than to duplicate their comments.

The decision to create new legislation, even where it overlaps with existing law, can be justified. Creating specific named offences can aid public discussion and encourage public support. Doing this also makes it easier in practice to monitor reporting, recording, prosecution and conviction of the offences.

It is also justifiable for the Scottish Government to decide not to include the term “sectarianism” nor to define it. The Northern Ireland Assembly recently wrestled with this, but even after much debate came up with a definition that would not be suited to Scots law. Sectarian in Scotland is not a unitary phenomenon. As an alternative, it has been argued that the Bill should include a list of what amounts to sectarian behaviour. Again, it was a good decision to leave this out. Creating such a list is not practicable and the Government is entitled to refuse to include it.

However, there are many elements of the Bill that it seems to me need to be changed.

The structure of the Bill: this is difficult to follow and it would be helpful if it was split into several offences rather than just two. This anyway would better reflect the range of offences that the Bill in fact creates.

Limits on the scope of the statute: The Scottish Government has stated that it does not aim to criminalise behaviour which was not criminal before. It expects however that the scope of the offences in the Bill will be limited, not by clear statutory language, but by official guidance (not yet in existence) for police, prosecutors and courts.

The decision to limit the legislation in this way is illiberal, and it surely places an unwarranted burden on police officers, defence and fiscals, not to say the courts of first instance. The suggestion that a sunset clause be included is not a suitable way to overcome this.

In addition, Parliament may not be aware that when a statute is clear, it is to be interpreted to achieve its purpose. This is true of criminal statutes, not just civil ones. This can tie the hands of judges. The common belief that criminal statutes are necessarily to be construed strictly is misleading.

Section 1: The section 1 offence I believe creates (in certain circumstances) a very broad offence of incitement to hatred, in all but name. One element of the section appears as an incitement to disorder offence, but in practice it criminalises inciting hatred, with the proviso only that the effect of the hatred is likely to incite public disorder, whether or not the offender intended disorder to result. It seems to me that this can fall within the species of incitement to hatred offences. If so, it needs
anxious consideration, particularly given that it can apply to incitement to religious hatred.

The section 1 offence also includes expressing hatred, which is wider than stirring up hatred.

**Section 5:** this section does expressly include an offence of incitement to religious hatred. That offence could do with more definition, perhaps of the kind provided in the sister English provisions. Although this assistance in the legislation itself is not necessary in law, without it the public and criminal justice officials will find it difficult to see what the limits of the offence are.

Another problem is that this offence applies only to recorded communications, based on the hope that it will only catch more serious acts. Merely excluding live speech, though, seems arbitrary and it is not clear why this alone will achieve the aim of limiting the scope of the offence.

“Persons of a particular description” is not defined. This is presumably an omission (understandable given the rush to write the Bill) that will be corrected. Likewise, the territorial breadth of section 7 seems to be intended for section 1 and so linked to Scottish football. Section 5 goes beyond Scottish football. Section 7 should not apply to section 5.

**Observations on the broad thrust of the policy proposals**

1. Creating more legislation can be justified, even though much of what these problems involve is already covered by Scots law. Research suggests that the public may be more likely to hold favourable views of the criminal justice system when they are more informed about offences and patterns of sentencing. Even just a public discussion which provides more information about sentencing may prove useful. It matters that the public feel positive toward the criminal justice system; not least because it is they who report crimes and support the prosecution process throughout.

2. As regards the policy objective of the Bill, few would object to it, particularly in the light of the admirable plan to embed it in a much wider engagement with civil society. I also think that it is understandable that the legislation is not designed to capture every form of criminal behaviour that has been displayed in recent months. As long as it is clear to the public and to criminal justice professionals what the Bill does cover, and as long as there is some basic logic to this selection of offences, this decision to legislate seems reasonable.

**The structure of the offences**

3. The Bill is divided into two umbrella offences. I did find this hard to follow and (assuming that there are no policy reasons to restrict it to two) I wonder if it might be easier for the lay reader, the legal professional and the drafter for these to be split into several offences. I realise a revision of this extent might require that the Bill be withdrawn and presented anew. Nonetheless, it seems likely that the body of critics’ comments on the totality of the legislation may necessitate that anyway.
A definition of sectarianism

4. Although the Bill encompasses much more than problems of sectarianism, sectarianism is nevertheless a major target. The Policy Memorandum and other documents make it clear that there is no intention to define Scottish sectarianism. I think this is appropriate. There is little agreement about what it appears to be and what it is a proxy for (religious conflict; racism; tribalism; the hidden injuries of class) and how deep it runs (history; life chances; demography). Perhaps, some say, it might be deemed ethno-religious. But, however plausible that might be as regards some “Protestant” offenders, should we assume an ethno-religious motivation for “Catholic” offenders? It is not clear that the nature of the problem is the same on both sides.

5. An underlying problem for Scots law is that Scottish sectarianism is not a unitary phenomenon. Unlike Northern Ireland, Scotland has pockets of football rivalry where supporters sing and yell sectarian insults, knowing that these are damaging and are banned, but barely grasping the cultural differences from which these originate.

6. Perhaps the best example of the difference between the two nations is the recent attempt at a legislative definition of sectarian in Northern Ireland. The definition of sectarian chanting proposed by the NI Human Rights Commission, and accepted by the NI Executive, was that “it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person’s religious belief or political opinion or against an individual as a member of such a group”. The definition had cross-party support and failed to become law only because it was opposed by the Ulster Unionist Party.

7. In Scotland, sectarian loyalties are not typically demarcated by political loyalty. Religious prejudice, it seems, was not read across to include political taunts in one case where football supporters sang songs about the IRA - even though a religious aggravation in Scots law can extend even to an offence motivated by malice and ill-will “against a social or cultural group with a perceived religious affiliation, based on their membership of that group”. Reference to a political organisation, whatever its meaning in the Northern Irish context, could not by itself be seen in Scotland to amount to religious prejudice. I therefore support the decision not to provide (at the moment) a statutory definition of sectarianism.

The aim of clarifying the law

8. There are some arguments in favour of creating new legislation even where it mostly duplicates existing law. At present it is easier for police and prosecutors to monitor complaints and convictions as regards a named offence: it is difficult to try to keep to track of a wide body of general offences in the hope of recording those where a specific finding has simply been made by the sheriff. It is easily forgotten that before the introduction of police monitoring of racist incidents in Scotland, commentators were fond of announcing that Scots were too busy being sectarian to engage in something as un-Scottish as racism.
9. Although more new legislation can be an expensive and bureaucratic way to prove there is a problem, research also suggests that law can influence people to reduce overt prejudice, and can even change attitudes through changing their behaviour. As regards incitement to hatred in particular, there is evidence that the incitement to racial provisions in Part 3 of the Public Order Act 1986 have been more successful than many assume in limiting the impact of extremist activities in the UK. It is also worth noting that when a “hate” crime is carried out in search of a thrill, some previous experiments have concluded that a policy of tackling bigotry in society may not be all that productive. These educational approaches sometimes need the support of the criminal law.

**Fair labelling**

10. Relating to this is the question of fair labelling, both for the offender and the victim. It can for instance feel like an insult to victims to treat acts of religious hatred as “mere” religiously aggravated breach of the peace. It may also be unhelpful to classify such acts as simply the offence of “threatening and abusive behaviour” in section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 – a concern which the Policy Memorandum recognises. A clear descriptive name can be more fair.

**The specific offences**

11. Comments by others discuss human rights issues and whether some of the offences should be created at all. Rather than repeat the content of some very good arguments elsewhere, I will assume that the Scottish Government will want to enact some version of the Bill.

12. I have particular concern about the wording of the offences relating to incitement to hatred. There appear to be two distinct offences relating to this topic in the Bill:
   - An offence with an element of incitement to hatred related to a regulated football match (section 1(2)(a) and (b))
   - A general offence of incitement to religious hatred by most forms of expression, with the express exclusion of unrecorded speech (section 5(5))

13. The paramount question is whether these provisions are worded appropriately so as to achieve the policy objective without unduly exceeding it.

**Section 1: offensive behaviour with a hatred element**

14. This goes far further than bringing the law into line with England and Wales.

15. For instance, we could consider how this applies to religious hatred. As I read this, section 1 extends to:
   - engaging in behaviour during travel to, or in the public vicinity of, a football match, or a place where the football match is on television (see section 2)
   - that would be seen by a reasonable person as behaviour that expresses or stirs up religious hatred, or is offensive even if the offender did not intend to be offensive
• or that the reasonable person would see as likely to express or stir up religious hatred, or be offensive even if the offender did not intend to be offensive
• and be behaviour that the reasonable person would see as likely to incite public disorder
• or that the reasonable person would see as behaviour that would have been likely to incite public disorder, but for the fact that the police were there
• or that the reasonable person would see as behaviour that would have been likely to incite public disorder, but for the fact that not enough people who were likely to be incited were there
• even if the offender did not intend to incite public disorder anyway
• allowing (I assume) that the offence will under general principles of criminal law exclude certain circumstances such as reasonable excuse or the more general lack of basic mens rea.

16. I must confess to getting quite lost at this point. To make myself clearer (I hope) I will continue to use the example of inciting religious hatred, because this is an offence that caused so much controversy during bill debates in the UK Parliament.

A wholly new offence of “expressing hatred”?

17. To begin with, it is important to break apart subsection 1(2) so that it separates “expressing” hatred from “stirring up” hatred: they are two different beasts. Expressing hatred covers much more than inciting others and it should not be part of subsection (2). “Expressing” is even wider than the concepts of “glorifying” or “encouraging” used in the terrorism offences in section 1 of the Terrorism Act 2006 - two terms which were also the subject of much criticism in the UK Parliament.

Specific intention to commit a crime

18. For several reasons, I feel that section 1 is not merely an incitement to disorder offence: it is effectively an incitement to hatred offence (at the very least).

19. First, in Scots law, inciting others to commit a crime usually requires that the person doing the inciting intended that that crime would result. The section 1 provision does not require this. In practice, this can mean that a person who expresses hatred commits an offence, not because he intends to incite others to disorder, but merely because this is likely to happen – or even that this would have been likely to happen, had circumstances had been different.

20. This not only broadens Scots law; it goes beyond new English statute on incitement to a crime, for instance in the Serious Crime Act 2007 ss.44-46, which requires intention. It is little comfort that section 1 refers only to football-related behaviour, or that we are to assume that keeping control of prosecutions can be safely left to the procurator fiscal (see below).
Specific intention as regards inciting hatred

21. If it is accepted that this can in certain circumstances be an incitement to hatred offence, the provision is broader than the much-maligned English provisions on incitement to religious hatred in Part 3A of the Public Order Act 1986.

22. If so, Parliament must be made aware of this. The definition of this section 1 offence (albeit that it is restricted to football-related acts) is different from the definition of incitement to hatred on religious or sexual orientation grounds in Part 3A of the Public Order Act 1986 (which is not part of Scots law, although it is capable of affecting acts done in Scotland). The English offence can only be committed intentionally.

23. Proving intention is of course particularly difficult in sectarian hatred incidents, which are the problems that sparked this Bill. Sectarianism in Scotland is distinctive because there are no powerful extremist organisations who engage in politics with an explicit manifesto. Hence, the evidence that might prove someone has expressed or incited sectarian hatred is usually going to be ambiguous. Nonetheless, we must not try to overcome this problem by wording the statute so that it sweeps up dolphins in a tuna net.

“Any other factor”

24. Furthermore, subsection 1(3) allows the hatred to be based not solely on hatred related to a protected group. The offence may also be based to any extent on any other factor. This formulation is a familiar one, found as standard in Scots and English statutory aggravation provisions. They serve a useful purpose there. However, the “any other factor” formulation should not be exported to incitement provisions without full discussion.

25. The words “to any other extent” can mean that hatred could be a minor part of the offence. Thus, given subsection (2)(e) in particular, it does not even require that the offender’s main intention was to express religious hatred (to take my example): it would be enough if his main concern was something else.

The “but for” provision

26. In addition, the offence is not greatly narrowed simply by the requirement that it is or would be likely to incite public disorder (and this need not be violent disorder; merely disorder).

27. Section 1(5) makes clear that the offence covers behaviour even when public disorder is unlikely because measures are in place to prevent that, or because there are too few people present who might be incited. The aim, the Policy Memorandum says, is to capture circumstances such as where football supporters are among like-minded persons, or where the police and stewards have the situation under control.

28. So:

- the offender need not mainly intend to express religious hatred
- he need not intend what he says to incite others to commit disorder
- indeed, the people who would be likely to be incited need not even be there.
29. This seems to me to fall within the species of incitement to hatred offences, regardless of what it is called in this Bill. All that is added is a prescription as regards the outcome. The test as regards that outcome is objective: the offender need not necessarily have desired nor foreseen it.

30. Offences which have the effect of criminalising hate speech by itself are an attack on freedom of expression. There are circumstances in which (I believe) they are needed, but they require to be drafted with particular care, having regard to (among other things) the stipulation in Article 10(2) of the ECHR that the law go no further than what is necessary in a democratic society.

31. It may be worth noting that even the much-criticised offence of encouragement or glorification of terrorism (in section 1 of the 2006 Act) specifically states that it applies only where “members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.” In other words, the persons who might be influenced actually have to be influenced to emulate the conduct, and there are constraints too on when and where they might do it.

32. Furthermore, as regards both intention and result, section 1 is also wider than section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which deals only with threatening or abusive behaviour, and expressly requires that the offender intends to cause fear and alarm, or is reckless as to whether he does. It also applies only where his behaviour would be likely to cause a reasonable person fear or alarm. No such limitations are provided for expressly in section 1 of this Bill - and nor does it seem to me that rules of statutory construction require that in every circumstance a judge be compelled to read them in.

33. If my understanding is correct, this element of the section 1 offence is not just a new way of describing incitement to public disorder. It is much wider than that.

In particular, it is not acceptable to include “expressing” hatred in this offence.

Ways of committing the offence: divining objective and subjective tests

34. This section appears to specify three modes of committing the offence as related to hatred:

- Expressing hatred of a person or a group on the ground of their presumed membership of a protected group (subsections 1(2)(a) and (b))
- Stirring up hatred toward such a person or group (subsections 1(2)(a) and (b))
- Engaging in behaviour motivated wholly or partly by hatred of that group (subsection 1(2)(c))

35. The third mode (engaging in behaviour motivated by the hatred) is presumably to be governed by a subjective test of the offender’s motivation. This seems clear from the wording of the provision.

As noted above, there is no guidance stipulating that the first two are to be assessed by this subjective test, rather than by an objective test.
36. Section 1 also appears to specify two modes of committing the offence when it is related to threatening or offensive behaviour, i.e.:
   - Behaviour that is threatening (subsection 1(2)(d))
   - Other behaviour that is likely to be regarded by the reasonable person as offensive (subsection 1(2)(e))

37. Although the test of the offensive behaviour is an expressly objective one of reasonableness and the other makes no such provision, both are probably to be assessed by an objective test.

38. Indeed, apart from the behaviour motivated by hatred (subsection 1(2)(c)), one interpretation of subsection (2)(e) would sweep all these other modes into the objective test.

To avoid this, it seems to me that the subsection would need to separate “other behaviour”, which would usually be interpreted within the context of the whole subsection, from the stipulation “that a reasonable person would...”. Then, the latter would need to be treated as referring to a test only of what constitutes the behaviour in subsection 1(2)(e)). I presume that that is what is intended. But given that the hatred may also be based on “any other factor”, “to any other extent”, I feel this should be made more clear.

39. Behaviour that is likely to be regarded offensive is the broadest of the five modes. Although one might argue that its limits are to be understood by reference to the other offences in this section, because the section heading refers to “offensive behaviour”, it may be that this will be interpreted in the ordinary language sense. That range of meaning tends of course to the expansive.

**Whether “protected group” applies to the offence in all its manifestations**

40. Not all of the offence appears to apply only to a protected group as listed in subsections 1(2)(a)-(c). Subsections (2)(d) and (e) appear to extend beyond these groups. This is reinforced by subsection 1(3), which applies only to subsections 2(a) and (b). If so, this offence is a very general provision and the Bill should be debated in Parliament in that light.

41. Also as regards a protected group: section 1(4) lists the groups defined by reference to a protected set of things and the contents of the list are not new to Scots law, but it should be emphasised that religious affiliation has a cultural content which is not an essence of the others. For that reason (again returning to the example I chose) the UK Parliament scrutinised the offence of incitement to religious hatred particularly anxiously. If the section 1 offence does in fact encroach on the territory of incitement to religious hatred, then we should be equally cautious in our scrutiny.

**Contemporaneity**

42. If the legislation is going to be so broad, this section would benefit from (among other things) at least some sort of contemporaneity clause. The Scots statutory
aggravation provisions for instance require that the aggravation of an offence be shown to have taken place “at the time of committing the offence, or immediately before or after”.

43. It should be remembered that the purpose of provisions of this kind is not to sweep up all outpourings of hostility and hatred, however egregious. The Crown must prove that the hatred etc. of the protected group was connected to that particular offence. A requirement of contemporaneity is only one example: the general principle should be that the limits of these offences are made as explicit as is reasonably possible, and there are terms which could be used for this purpose in other statute.

**How the scope of these very broad offences is to be limited**

44. The Explanatory Notes make the extraordinary statement that the new offences would have “very wide potential scope ... [t]he potential costs of enforcing all such instances of the offences would be unsustainable.” These two surely very serious problems are, the Notes say, to be addressed not by more narrowly drafting the provisions, but by the expectation that with official extra-legislative guidance, the police will select the suitable cases and prosecutors and courts will prefer to use existing offences. This, it is said, will ensure that only a handful more cases will be prosecuted than before.

45. However, the references to providing a “strengthened response” do not sufficiently consider (albeit that this is mentioned briefly towards the end of the Policy Memorandum) the need to balance controlling such behaviour with the need to design offences which make it clear what is not criminal, and which do not interfere with liberty more than is necessary to achieve the policy objective. I am concerned that the balance is not where it should be.

46. Quite apart from the illiberal nature of such proposals - a problem which will be raised repeatedly by critics – the “wide potential scope” surely places an unwarranted burden on police officers, defence and fiscals, not to say the courts of first instance.

47. This also seems at odds with the later statement, regarding the offensive behaviour offences, that the Government “anticipates that the new measures set out in the Bill will in large part be used in place of existing offences including breach of the peace. It may be that what is intended is again that the new offences will be used to tackle much the same behaviour as the existing law does. The Notes also state that “the primary intent of the measures is to bring clarity and strengthen the law, and not criminalise behaviour that is not already likely to be prosecuted”. The wording of the Bill however does little to ensure this.

**Sections 2 and 3**

48. I have no comments to make on these that would not be better made by others with more knowledge.
Section 4: interpretation of terms in sections 1 and 2

Should there be a list of banned behaviours, e.g. providing examples of sectarian songs?

49. There has been dispute over how to specify examples of behaviour that would fall within these provisions. However, it is not reasonable to expect this of the Bill. There is no realistic substitute for prosecutorial discretion and judicial judgment.

50. Examples of how this works can be found in English precedent regarding racially aggravated offences. In practice, down South, the racial element is usually proved by the offender’s speech together with behaviour. It is not necessary for the racial words to be themselves offensive: even an (apparently) neutral descriptive term such as “African” or a mildly alienating word such as “foreigner” may be enough. This “broad non-technical” interpretation attracts flak, but it is important to remember that the purpose of such a provision is to focus on the offender’s impressions and prejudices about what a protected racial group is, not on some artificial entity of a “race” that he must identify in the real world.

51. What is crucial is that such words do not of course amount to racial aggravation by themselves. More must be shown: it must be proved that in the circumstances of the case, there is evidence beyond reasonable doubt that there is an offence which has been committed, and that it has been racially aggravated. This is hard for people not versed in the law to grasp, and it will be mischievously misinterpreted, but the Government is right to refuse to provide a list. This however makes it all the more important that the legislation is drafted with all due precision.

Course of conduct

52. Section 4(1)(b) states that “behaviour” can be a single act or a course of conduct. This formulation is familiar from provisions such as racially aggravated harassment in section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. I am not familiar with how these provisions are applied in practice. Can behaviours which are sub-criminal in themselves together amount to a criminal course of conduct? If so, what effect would this have when applied to the over-broad section 1?

Section 5 offences: Threatening communications

53. This appears to comprise two offences:
   - Intentionally or recklessly communicating material which threatens (in several possible ways), or incites, a seriously violent act which would be likely to cause fear or alarm to the person or group targeted
   - Communicating to another person threatening material which is intended to stir up religious hatred

54. This offence goes beyond behaviour related to a regulated football match, or indeed anything to do with football. It should also be noted that the incitement to hatred offence in the Condition B option (communicating material intended to stir up religious hatred) is not restricted to sectarianism: religious hatred can cover such things as Islamophobia or anti-semitism.
55. It is particularly important therefore to consider carefully what other circumstances it may cover.

As before, it is clear from the Policy Memorandum and other statements what the government would like the provisions to refer to. But the question for the principle of liberty from unnecessary criminal sanction is what other actions the legislation might also be applied to.

**Condition A: Persons “of a particular description”**

56. It is not clear what the phrase “persons of a particular description” is to mean. Where in the statute is this defined? Section 5(2)(a) does not refer expressly back to the lists in section 1(2) and (4), nor is the term included in the relevant interpretation section 6.

57. The phrase itself can be a good choice of words. Legislation in Victoria, Australia has used the phrase “a group of people with common characteristics” (subsection 5(2)(daaa) of the Sentencing Act 1991). There has been a proposal there to make it clear that a victim has an “identified” characteristic. This emphasises that what counts as the “group” is in the mind of the offender.

There has also been a proposal there to create a new offence of new offence of “promoting community animosity”. No term would be perfect. Persons “of a particular description” is fine if it is defined.

**Condition B: Communications intended to stir up religious hatred**

I commented above in general on offences of incitement to religious hatred. I have a few more observations about the offence in section 5.

58. This is a general offence which covers a wide arena, not only the football-related behaviour of the section 1 offence. It is also wider than the threat to violence provision, because (being an incitement offence) it covers a gamut of threats, not only those which threaten serious violence.

59. It is in another respect narrower, though, because it requires specific intention, not mere recklessness. And of course it refers only to religious hatred (as defined in the very comprehensive formulation contained in section 6(4).

60. Nonetheless, a speech offence must be scrutinised carefully. Like the section 1 offence, there is no requirement that it in fact incites hatred or is likely to. Also, although its general scope seems similar to that of its sister English offence, it is much less detailed: several important specifications and qualifications are missed out.

**Banter and stirring up hatred**

61. Considering the topic of football behaviour, I note the Policy Memorandum at paragraph 41 states that the legislation is worded in such a way that it would not
capture comedians and satirists. Elsewhere at paragraph 12, it distinguishes passion and banter from behaviour which is provoking, antagonising, threatening or offending. One problem in football, though, surely is ill-thought out and spontaneous banter, which is rather more difficult to assess in the context of a sporting culture where banter is welcomed. Most banter will be provocative.

62. Scots precedent regarding breach of the peace provides that the context of a football match is not in itself a reason to conclude that worse behaviour is acceptable than it would be elsewhere. My point is not that football supporters should be given more lenient treatment, but rather that teasing out the hatred from the banter will be a lot harder than it looks, given the subtle layers of symbolism which can be (and are) developed by these groups of football supporters who encounter each other regularly, for significant periods of time, and who can therefore move far beyond crude communications which would be easily deciphered by outsiders.

**Protecting freedom of expression**

63. The protection of freedom of expression is not made manifest. Section 5(6) provides the defence that the communication of the material was, in the particular circumstances, reasonable. This is far from the explicit saving introduced for the benefit of clarity in the English offence of incitement to hatred on religious grounds. Section 29J of the Public Order Act 1986, “Protection of freedom of expression”, states:

> “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

64. As long as the section 5 offence in this Bill is interpreted as it is required to be (in the light of human rights such as freedom of expression), such a clause may not be necessary for interpretative purposes. Given Scottish football supporter traditions, though, if the Government intends that the law be clarified for the public, it needs to insert a clause such as this.

65. It is not made sufficiently clear to the non-specialist where the line is to be drawn. Assistant Chief Constable Campbell Corrigan in his evidence to the Justice Committee said that if a case of mere joking was referred for prosecution inappropriately, “[i]t might be recommended that disciplinary proceedings be initiated against the officers.” Is this really what we want?

**Unrecorded speech**

66. “Communicates” has a special meaning which excludes unrecorded speech (section 6(2)). This distinguishes it from the section 1 offence. The Policy Memorandum states at paragraph 55 that “verbal threats relating to sectarian hatred were not a central part of the recent upsurge of unacceptable behaviour” which gave rise to the need for the Bill. So, it argues, these should be treated separately and
given deeper consideration. Hence, the reason to exclude “live” speech is, it says, that other forms may indicate a stronger expression of such views or a more serious intention to carry out such threats.

67. This division surely needs to be justified. I do not find the distinction between “live” speech and other forms of expression compelling: it is not clear that this alone makes them qualitatively different. The Government’s aim may well be to introduce an offence of incitement to religious hatred to combat only one particularly serious problem – for instance messages of sectarian hate posted on a Facebook page. However, in drafting it must consider all the unanticipated cases to which the provision may in the future apply. Simply excluding unrecorded speech is not enough to ensure that the provision is applied only to the unacceptable behaviour the Government has in mind.

Penal drafting and the proposal to insert a sunset clause

68. Nor do I feel that some critics’ suggestion of a sunset clause is a suitable way to address this. Bad legislation later revised to be better legislation is not a fair way to treat those captured under the bad legislation merely because their actions happened to fall within that unfortunate period of time.

69. The Policy Memorandum states at paragraph 63 that the Government is engaging in dialogue with human rights specialists to ensure that the new offences do not restrict legitimate freedom of expression. This should be completed before the legislation is redrafted, not afterwards. After enactment, the only advice that would be used to limit the Bill’s application would be government guidance which has not been through the parliamentary process (and which would only very indirectly be enforceable in a court).

70. Furthermore, it is often supposed that criminal statutes are to be construed strictly. In fact it is not the job of the court to approach a clear statute with the presumption that the defendant is to be set free if at all possible. Parliament needs to be made aware that where a statute is clear, it is to be interpreted to achieve its purpose, and this is as true of criminal statutes as it is of civil ones. A statutory provision with penal effect is to be interpreted narrowly only if there is real doubt over what it means.

So, if a penal bill is to be construed by judges strictly, the drafters need to word that bill so that it directs the judges to do so.

Section 6: Interpretation of terms in section 5

71. I have no other comments to make about this.

Section 7: Territorial extent

72. Section 7 purports to cover territorial extent outwith Scotland. As this applies to the section 5 offence, it seems to cover more than is intended. Section 1 ties back to Scottish events through its being restricted to behaviour in connection with a regulated football match. Section 5 does not however expressly tie into events within
Scotland, or aimed at persons connected to Scotland. Might it be that the section was drafted with only section 1 in mind? Regardless of whether a judge should construct this as implicitly restricted in this way, I think it might be helpful to separate the two offences here.

73. Also, note could be taken of the English decision regarding incitement to racial hatred in \textit{R v Sheppard}. The appellants had published racially inflammatory material online. They argued that a publication on the internet is only cognisable in the jurisdiction where the web server on which it is hosted is located. The Court of Appeal held that jurisdiction is governed by a “substantial measure” principle: the court had jurisdiction to try offenders for conduct amounting to incitement to racial hatred where a substantial measure of the activities constituting the crime had taken place in England.

This is a very ambitious Bill which the drafters undertook to write under enormous pressure of time. I hope, now that there is a chance to revise it, that some of these comments here may be found helpful.

Dr Kay Goodall
School of Law, University of Stirling
26 August 2011
Submission from the Grand Orange Lodge Scotland

Introduction

1. This submission is made by the Grand Orange Lodge of Scotland. Whilst the Orange Order has rightly refrained from making public comments relating to general or specific football related matters, we feel it is important to comment on this Bill and its wider implications for society. This submission is offered in response to the Call for written evidence by the Justice Committee.

2. The Orange Order wishes to make it clear that it deplores acts of bigotry perpetrated against any groups or individuals in Scotland. Whilst it is an established right to be free of thought, belief and opinion, it is also important that those with different views are allowed to freely celebrate and hold those views. Scotland is a land of many faiths and cultures that for the better part are able to live together harmoniously. However, there is a small minority within our society that refuses to tolerate others. The Orange Order supports valid and appropriate initiatives and legislation that targets those individuals both through education and the law if necessary.

3. It is important in the context of this submission to make clear that the Orange Order does not hold any affiliation to any Scottish football club. Nor does the Lodge support any formal or informal links with any club or clubs.

The Bill – objectives, thrust and implications

4. It is our understanding that the Bill before Parliament seeks to introduce two new offences into the legal system. The first is to criminalise offensive behaviour connected to football matches and the second, to criminalise communications of a threatening manner.

5. In order for any ‘law’ to be effective, it must meet two objectives, namely it must:
   - be clear in detailing what constitutes an offence
   - be easily understood by the public what action might break that law

6. We do not believe that the Bill in its current form meets either of these objectives. Taking the first of these, the current Bill fails to set out clearly what action is sufficient enough to cause an offence. By failing to set this out clearly, it leaves the definition open to interpretation firstly by a police officer, then by a procurator fiscal and lastly by a court. Whilst the court system is designed to interpret the law, this is supposed to be within a clearly defined framework. The definition of an offence in the proposed Bill fails to set out any framework.

7. As regards the second objective, that of being clearly understood by the public what action might break the law, this is a fundamental requirement for a number of important reasons. We assume that Parliament shares our belief that prevention is better than prosecution. If the objective is to stop perpetrators of certain crimes from carrying out those crimes, we need to ensure that they know which forms of behaviour are no longer acceptable. In its current form the Bill takes
a reactionary position, only ruling that an offence has been committed after the event.

8. Another serious flaw in a lack of understanding of the law would be the possibility that members of the public with no interest in showing ill will towards anyone may find themselves on the wrong side of the law. We do not think that it is morally correct to allow members of the public to be used as test subjects to define a law that Parliament has failed to determine.

9. We note that the events from the 2010/11 football season have been identified as key drivers in influencing this Bill. It was said that the “The Bill is a specific response to a particular problem that was brought into sharp focus at football matches and on our televisions earlier this year” [The Minister for Community Safety and Legal Affairs – 23 June 2011], and that reports of the trouble in the media was an embarrassment to Scotland. We agree on both counts. However it should be noted that the events being referenced either took place or were as a result of incidents that happened either on the pitch or on the touchline of football matches. This then begs the question of how this legislation will deal with that issue. Indeed, had this legislation been in place during the events that took place, perhaps the Minister or Justice Committee Members could reflect on how the terms of the legislation would have been applied to prevent that happening or to deal with the aftermath?

10. We believe that, however reprehensible the behaviour of the players and managers involved in the incidents in question, it would have been difficult in itself to have brought any prosecutions under the current Bill. Therefore the main stated influence in bringing about this legislation would not have been prevented or punished.

11. As a direct result of the vacuum of information within the Bill of what action will cause an offence, the door is left open to speculation. We note that the Bill seeks to tie together the action of ‘acting in an offensive way’ with that of ‘likely to cause public order offences’. Whilst we can see the need to do so, once again the lack of any specific detail leaves the law completely ambiguous and open to random determination.

12. The singing of national anthems or songs has been raised as examples that might or might not be criminalised under this new Bill. Satisfactory answers could not be provided as to whether or not singing your own national anthem may be an offence. Instead we were told that it depends on the circumstances. The Orange Order would strongly argue that it should never be an offence to sing your own national anthem.

13. Under the terms of the Bill, if a person sang their national anthem on the way home from a football game, and one person found this offensive and reacted in a way that was a public order offence, then the person singing the song would be deemed to have satisfied the loose terms of the Bill and committed a crime. We find this difficult to accept morally and legally.
14. The same argument may be applied for ‘Flower of Scotland’. This song could be interpreted as anti-English and as inciting followers to ‘rise now’. Whilst we do not accept this interpretation, in what circumstances would this song be deemed illegal under the terms of the Bill? Again, we find the very fact there could be any instance where this song is illegal to be wrong both morally and legally.

15. This point leads on to general perceived anti-English sentiment. Whilst direct discrimination or hostile acts towards citizens of another country is to be condemned, this issue has already been caught up in ambiguity. In football terms, there is a long-established but generally good natured rivalry between Scotland and England. However, recently there have been cases where Police have entered shop premises to warn shopkeepers about stocking T-shirts with the slogan ‘Anyone but England’.

16. Whilst a prosecution was not sought, this slogan was deemed to warrant a Police visit. The law was not sufficiently clear to enforce an action, and again it seems that we are poised to introduce new legislation that offers no definitions or parameters to ensure that people are informed regarding what is or isn’t an offence.

Sectarianism

17. We note that the Bill seeks to tackle wide issues surrounding offensive behaviour but concedes that sectarianism will always be seen as the main focus [Policy Memorandum, Para 27].

18. The Orange Order is concerned that the Bill serves as a legal call to action against sectarianism without actually defining the word ‘sectarian’ or what actions are deemed to be sectarian in nature. A dictionary definition of sectarian is:

sectarian [sɛkˈtɛərɪən]
1. of, belonging or relating to, or characteristic of sects or sectaries
2. adhering to a particular sect, faction, or doctrine
3. narrow-minded, esp as a result of rigid adherence to a particular sect

Sect is defined as
sect [sɛkt]
1. A group of people forming a distinct unit within a larger group by virtue of certain refinements or distinctions of belief or practice.
2. A religious body, especially one that has separated from a larger denomination.
3. A faction united by common interests or beliefs.

19. By these definitions, many legitimate groups could be defined as sects and sectarian in nature. Whilst the Orange Order is supportive of the role of the Church and believes that religion should remain a strong part of our society, we must concede that most religions could be deemed to be sectarian if tested against the above definitions.

20. Many other groups could also be deemed to be sectarian in nature. There is an argument that political parties are themselves sectarian as they are united by common interests, follow a doctrine or manifesto, and occasionally may be narrow-
minded in rigid support of their own beliefs, whilst strictly refusing to accept the views of opposing parties.

21. We give these examples to demonstrate that there perhaps should be further detail provided in the Bill to define what sectarianism will mean in terms of the law.

Understanding our culture and heritage

22. It could be argued that Scotland has evolved quicker than the attitudes of some its citizens. That is probably to be expected. It comes as no surprise that the attitudes of one generation may be very different to attitudes of another. In particular, younger people maybe more accustomed to change than their older counterparts.

23. Whilst the Bill aims to tackle disorder and offensive behaviour, we would advocate that in its current form its reactionary approach will do nothing to tackle the root causes of bigotry in our society. If the Bill succeeds in tackling the issue at football grounds, it will only move the problem on to other locations within our communities.

24. So whilst the football PR may be better, the core issue continues unchecked. We would advocate tackling the issue through education and better integration and inclusion within our communities and schools.

25. We teach children how to segregate on purely religious grounds at an early age when we divide communities into separate schools. We have heard the counter-arguments on this issue many times. However, in the context of this Bill which relates to football, we need to ask the question - why do so many Roman Catholic children support Celtic FC, and so many Protestant children support Rangers FC? General evidence on the formation of attitudes and opinions seems to suggest that the greatest influences come from our peers and are formed at a young age.

26. When we give our children a reason to divide, should we be surprised that some take these divisions to a deeper level than others?

27. We need to better understand what factors fuel the divisions and act proactively, rather than developing reactionary legislation that criminalises sectors of society.

28. We need to understand why some of those who may be singing bigoted songs at a club football match can then be seen arm in arm singing together at an international match.

29. The Orange Order has been part of the culture of Scotland for over 200 years. There are lodges throughout Scotland and a membership base of around 50,000 people from all walks of life. However, the Orange Order is often defined by its parades and the negative actions of a small band of non-members who sometimes attach themselves to parades. These people are not wanted; and our efforts over the past few years have gone into working with the Police and Local Authorities to tackle this issue.
30. At the same time, the Orange Order has made efforts to be more open and to educate others on the beliefs and ideals of our organisation. Whilst there is a long way to go, we can clearly see that education is the way forward. As we tell people why we exist and what we believe in, we see a greater understanding and tolerance of our principles and ideals. Whilst many do not share our views and opinions, they respect our right to hold those beliefs and to celebrate our traditions.

31. We believe that a better understanding of each others faiths and points of view as part of a less divided society will tackle bigotry both at football matches and deeper in communities.

Conclusion

32. The Orange Order believes that the current Bill asks more questions than it answers. Due to the vague wording, lack of detail, and failure to define what might cause an offence, the public will struggle to understand the law.

33. The current terms of the Bill, together with recent verbal responses from the Minister responsible, have made it clear that there may be circumstances when British citizens are prosecuted for singing their own national anthem. This cannot be accepted under any circumstances.

34. The people of Scotland, with its many faiths and cultures, get along pretty well. There is only a small minority who continue to act on religious divides that they probably know little about; other than the fact that ‘he went to a different school’.

35. We should be wary of elevating the status of these bigots and creating a new ‘ASBO badge of honour’ culture where their fellow bigots see a sectarian crime as something of which to be proud.

36. Legislation should be written to offer the courts a clear set of guidelines upon which to operate. The ambiguity of this Bill creates a three tier level of personal judgement on whether or not a crime has been committed – the Police, the Procurator Fiscal and the Courts.

37. The Bill fails to define what an offence may be – it is unworkable to ask the public to abide by a law but fails to say what that law is.

Grand Orange Lodge Scotland
22 August 2011
Submission from M. Hadfield

While supporting the general intention of the Bill, I am concerned that, as with much legislation, there will be unintended consequences, namely restriction of free speech and freedom of religion.

I am generally supportive of the comments by CARE for Scotland.


The offence (of Threatening Communications) will **NOT**:

- Stop peaceful preaching or proselytising.
- Restrict freedom of speech including the right to criticise or comment on religion or non-religious beliefs, even in harsh terms.
- Criminalise jokes and satire about religion or non-religious belief.

However I think that the Bill will in fact have these effects.

The Bill could usefully be amended to include such activities as defences both for the offence of Threatening Communication and the offence of Offensive Behaviour.

Finally it seems to me that anyone that gave a Koran or communicated certain sections from it could be guilty of an offence under 5(1), by Condition A, because in places it calls for violence against non Muslims. I presume that would be an unintended consequence of the Bill.

M. Hadfield
25 August 2011
Submission from Margaret Halliday

I refer to the proposed changes to the above Bill. Whilst applauding the Parliament in its attempt to curb sectarian acts and violence I am concerned that the Bill goes too far and in effect curbs freedom of speech especially religious speech. I am a Christian and having lived in a number of countries greatly appreciate the freedom of speech we have in this country. In particular in these days of creeping or rather rampant secularisation of our values, etc., I value the opportunity to express my Christian views without fear of being branded a criminal.

Please consider very carefully the wording of what could be a significantly important Bill.

Margaret Halliday
23 August 2011
Submission from Dr John M. Hannah

I am writing to respond to the consultation on the above proposed Bill.

I welcome the intention behind this proposed legislation and strongly agree that sectarian and offensive chanting and threatening behaviour have long been a blight on Scottish football and wider aspects of our society.

In relation to the specific proposals in the Bill, I feel that the proposed offence of Offensive Behaviour related to football which is likely to cause public disorder, appears to be fairly well defined. Importantly, it also seems likely to be capable of being implemented in a manner which will not affect freedom of speech. However, it will be important that the actual enforcement by the police and the courts is such that personal and religious freedom are not further eroded.

While, I support the intentions of the Scottish Government in relation to the proposed offence of Threatening Communications, I do not feel that the implementation of this section of the Bill is likely to be quite so satisfactory. In the attempt to address what is a very complex and difficult problem, in view of the wide forms of communication available today, the wording of the Bill appears to be worrying vague.

I warmly welcome the published assurances that the Bill is not intended to, "Stop peaceful preaching or proselytising. Restrict freedom of speech including the right to criticise or comment on religion or non-religious beliefs, even in harsh terms.". However, the currently proposed wording, for example, in relation to the term, "reasonable person" (Section 5, 3b) is dangerously imprecise and obviously subject to widely varying interpretation.

In conclusion, I am seriously concerned that the "Threatening Communication" section of this very well intentioned legislation, if implemented in its present form, will do little to solve the deep seated problem of football tribalism but may lead to heavy handed policing or litigation by individuals who will wish to use it against legitimate expression of religious or moral views.

Dr John M Hannah
25 August 2011
Submission from the Harps Community Project

The Harps Community Project is core funded through the Irish Government’s Emigrant Support Programme (IGESP). The Project has a remit to engage with Scotland’s multi-generational Irish community and those beyond our community with a view to providing support for Irish cultural activities in Scotland and fostering and celebrating cultural diversity and promoting active citizenship in a multi-cultural and plural Scotland. In this sense, the Project looks to engage with relevant cultural organisations, service providers, local and national authorities to promote and celebrate Irish heritage and cultural activities in Scotland within the ‘One Scotland Many Cultures’ framework while recognising and promoting our civic responsibility and active citizenship.

This Submission seeks to highlight and clarify the implications for expression of cultural identity and the different facets of identity this incorporates in the context of the legislation ‘Offensive Behaviour at Football and Threatening Communications (Scotland) Bill’

This Bill has implications not only within the context of football matches but also in relation to the context of civic society and the development of the ‘One Scotland Many Cultures’ strategy especially with regards to Scotland’s largest immigrant community, the Irish Diaspora. To date, this submission is the first engagement between the Scottish Executive and the broader Irish community with regards the outcomes, nature, community perception and possible impact of the legislation.

We welcome the opportunity to make a submission to the Justice Committee via this mechanism and would welcome any further opportunity to engage with relevant stakeholders including verbal representation at any stage in the development of this legislation. We hope to be kept informed at all stages in the future development of the legislation and are pleased to recognise our responsibility and citizenship in these settings. The Project recognises the need for positive, progressive dialogue surrounding the myriad of social issues which pertain to the circumstances in which the legislation has been formulated. We commend the Scottish Executive for instigating a national conversation surrounding the ‘sectarian’ concept, however there should be serious clarification regarding the implication and impact which can be stipulated through its implementation.

Contents

- Sectarian narrative
- Bill’s implication
- Current legislation
- Considerations
- Reflection

Sectarian narrative

The connotations of Sectarianism in Scotland are of an inter-Christian, Catholic versus Protestant religious divide. The narrative of the sectarian framework in which this bill and its previous counterparts have been produced is rooted in this
assumption and symbolised through focus on Scotland’s two major football clubs Celtic and Rangers, each menacingly represented as representing two ‘separate’ (as opposed to distinctive but similar) religious communities, Catholic Celtic and Protestant Rangers.

Although current media, Police and political narratives support this general Catholic versus Protestant assumption, the ambiguity involved in universally labelling identity in religious terms only leaves a vacuum in which the concept of ‘sectarianism’ is consistently mis-interpreted. Identity derived from an intolerance or hatred of an individual or community is the antipathy of the ‘One Scotland Many Cultures’ concept; however expressions of identity which ignite this intolerance must not be incorporated into the solution to alienate the racist, bigoted or prejudiced view.

Bill’s implications

The Bill in its current format is open to interpretation and this ambiguity is further clouded if the traditional ‘sectarian’ Catholic vs. Protestant narrative is implemented in execution of the legislation.

Article 1 (a) The person engages in behaviour of a kind described in subsection (2)
   (i) is likely to incite public disorder, or
   (ii) would be likely to incite public disorder

Article 2(e) The behaviour is- other behaviour that a reasonable person would be likely to consider offensive

- This could effectively criminalise expressions of national, ethnic or religious identity due to the fact that their understanding is supported by a ‘sectarian’ framework which simplistically equates religious faith as an all encompassing indicator of cultural identity.

- Catholic and Irish, Protestant and British become interchangeable terms. To express an Irish, British, Catholic or Protestant identity should not be the focus of legislation.

Current legislation

- The Equality Act 2010, an integral derivative of Scottish integration policy and a cornerstone of the ‘One Scotland Many Cultures’ concept.

- Human Rights Act 1998 / Scotland Act 1998 / protects the right of any ethno cultural religious (of current Irish/Scottish-Catholic / Irish/Scottish-Protestant or neither) community to express its non-Scottish and non-British identities with adherence to the Equality Act 2010 where the protected characteristics are not transgressed.

   (I) Schedule 19/ Part 3. Section 2 of Police (Scotland) ACT 1967
   (II) Members of Scottish Executive
Relevant stakeholder’s duty bound through existing legislation to consult with impact communities on implementation of legislation and policy in terms of protected characteristics outlined in Equality Act 2010 with specific reference in the context of the Bill being deliberated to protection of characteristics Race and Religion.

- The Harps Community Project would be happy to engage with both the Scottish Executive, Scottish Football Association, The Police and all relevant stakeholders within the directed mechanisms outlined in the Equality Act 2010/Section 149 – The Public Sector Equality Duty, which stipulates the recommendation that ‘Equality Impact Assessments’ are in-acted in terms of progressing the dialogue away from the sectarian framework and towards a greater understanding and tolerance of Irish identity within applicable settings relevant to the Bill and its wider implications and to ensure that the protected characteristics of both Race and Religion are being supplemented in relevant settings. The current Sectarian framework does not have the ability to fulfil a true narrative for these obligations.

Considerations

- This sectarian framework and the ignorance surrounding what constitutes a sectarian offence leaves this bill open to mis-interpretation by all stakeholders, The Crown Prosecution Service, Police and general public. If the Bill is being derived from a point of ignorance how can we seriously expect the relevant departments of the judiciary to uphold its credibility not to mention the perception of the general public? The nature of the dialogue surrounding the Bill constructed within these ‘sectarian’ settings and the failure of the Police and judiciary to utilise aforementioned legislation which have the mechanisms to deal with religious and racial hatred highlights the need for further dialogue surrounding the nature and expected outcomes of this bill.

- Expressions of cultural identity which manifest through language, song, dance, music or faith should not be perceived through an ignorant sectarian prism. Preconceptions surrounding cultural expression and identity with reference to the Scotland’s Irish community must be discussed out with this enforced sectarian narrative of Catholic versus Protestant.

- Expressions of Irish identity surrounding the formation of the modern Irish Republic and the history of the struggle to achieve Irish independence from Britain have and will continue to be an intrinsic and distinctive cultural indicator for the Irish Diaspora in Britain and are crucially not sectarian within the traditional perceptions of this concept, with Irish Nationalist Politics encompassing people of all Christian denominations and none.
Reflection

The Harps Community Project welcomes the opportunity to engage with the Scottish Executive and relevant stakeholders in the continuing dialogue surrounding the progression of the ‘Offensive Behaviour at Football and Threatening Communications (Scotland) Bill’

The Project fully submits to the ‘One Scotland Many Cultures’ initiative and supports a positive and progressive dialogue to initiate meaningful outcomes which reflect the issues we are presented with.

Harps Community Project
23 August 2011
Submission from the Human Rights Consortium Scotland

The Human Rights Consortium Scotland (HRCS) is pleased that the Justice Committee now has the opportunity to carefully consider the Bill and its implications. Sectarianism is one example of intolerance in our society which breaches human rights. Intolerance is manifest in many ways and is evidenced by State statistics as well as the work of NGOs in addressing e.g. violence against women, discrimination against migrants and refugees, attacks on disabled people and the demonisation of young people. The HRCS firmly believes that by explicitly adopting and proactively delivering a human rights culture, a range of problems would be addressed in Scotland. A human rights culture provides the framework for policy, practice and services and is rooted in the principles of fairness, respect, equality, dignity and autonomy.

The HRCS believes that the Bill, as currently drafted, requires to be rigorously assessed and we believe that will result in substantial amendments. It is important that the Bill has all party support and commands the respect of those who share the Scottish Government’s objective of tackling intolerance and violence in our society.

About the HRCS
The HRCS is a network of 36 civil society organisations working to address the gap in knowledge of human rights within our sector and to build capacity on applying human rights principles and standards to the delivery of publicly funded services. This submission has been approved by the Steering Group.

General Issues
1. The HRCS is pleased to have the opportunity to take part in the consultation process. We welcome the announcement of the First Minister in June 2011 to slow the pace and change the timetable of the Bill which we expect will lead to a thorough analysis of the Bill and better understanding of its implications for people’s human rights across Scotland. In particular, we look forward to understanding the Scottish Government’s evidence on the impact of this Bill on human rights and whether the Bill meets the criteria:
   - That the interference is legal
   - That it will achieve a legitimate aim
   - That the interference is proportionate i.e. the minimum necessary interference to achieve the legitimate aim

2. We note the legal opinion on the Bill commissioned by and posted on the Christian Institute website, along with a subsequent legal opinion1. We welcome this initiative to make such information available to everyone and believe it has served an educational role as well as providing a detailed analysis of the issues particularly relating to the competence of the Bill, the problems that arise by the failure to define ‘sectarianism’ and the criteria for balancing Articles 9, 10, 11 and 17 of the ECHR. Importantly, the opinion compensates for the lack of a detailed human rights analysis of the Bill either from the Scottish Government or from the lawyers of the Scottish Parliament who have judged the Bill to be competent under Section 29 of the

1 Legal Opinion by Aidan O’Neill QC of 21 June 2011 and Supplementary Advice by Aidan O’Neill QC of 21st July 2011
Scotland Act. It is a matter of regret that the Scottish Parliament has, as yet, failed to develop a transparent system for the consideration of the human rights implications of its business e.g. there is standard phraseology in Policy Memorandums and Explanatory Notes about human rights which are quite insufficient to enable informed debate on individual issues.

In May and June 2011, the HRCS called for the establishment of a dedicated human rights committee at the Scottish Parliament and when that failed to happen called for the appointment of a human rights rapporteur on each Committee. We hope this call will be heeded by each Committee so that the impact of human rights on law, policy, practice and funding will be correctly understood.

3. The HRCS agrees that the Scottish Government does have a legal duty to positively comply with the ECHR as well as ratified human rights treaties (e.g. in S57 of the Scotland Act 1998). International human rights law obliges States to ensure that everyone understands human rights standards, understands their obligations and there is a duty on the State to ensure equal enjoyment of those human rights. Undoubtedly the drive by the Scottish Government to address sectarianism is one of the State’s human rights obligations. The HRCS accepts that the Scottish Government’s actions are in pursuit of a legitimate aim. What we may disagree about is tactics on how that can best be achieved.

4. The HRCS urges the Justice Committee to undertake a proactive inquiry into sectarianism and identify the best way to tackle sectarianism using law, policy and services. We are pleased to note that the Scottish Government has a twin tracked approach of working on this Bill at the same time as developing a long term strategy on sectarianism.

5. The HRCS notes that the Scottish Government has “... sought to ensure that the Bill is tightly drawn to tackle specific issues rather than ranging more widely to cover other issues relating to sectarianism or other forms of hatred which may be equally offensive and equally deserving of a firm legislative response but which were not part of the specific impetus for this Bill. The Government is clear that Bill covering a much wider range of attitudes and behaviours and introducing a wider range of measures would not have been justified without fuller consultation and engagement.”

Given that we now have a longer period for consultation and engagement, we urge the Justice Committee to consider how to deal with the acknowledged problems with attitudes and behaviours in Scotland.

6. The Scottish Government states that there is no need for a ‘Business and Regulatory Impact Assessment’. The HRCS disagrees as we believe that ICT companies, pubs, clubs, restaurants, public transport e.g. ticket collectors on ScotRail will all be impacted by this Bill. In addition football clubs generally will be affected as sectarianism may afflict matches beyond those known as ‘old firm’. ALOs, established by local authorities, may also be affected if, for example, supporters congregate in the premises or in the car parks of Leisure Trusts.

7. The HRCS is perplexed that there has been no children’s rights impact assessment undertaken on this Bill as the proposed offences relate to people rather
than to adults – which are defined by the UN Convention on the Rights of the Child as those aged 18 years and over. The model prepared by SCCYP is ideal for this process. [http://www.sccyp.org.uk/publications/adults/cria](http://www.sccyp.org.uk/publications/adults/cria)

### Specific Issues

8. The HRCS believes the Justice Committee needs to address each of the concerns articulated in the legal opinion on the Bill. The HRCS cannot add to this robust legal opinion and so we have focused on other matters.

9. Although the timetable for the Bill has changed, a problem remains that the Bill is not the product of consultation and engagement rather we are being consulted and engaged after the text is published.

This is not the process envisaged when the Scottish Parliament was set up. It is useful to reflect on the work of the ‘Scottish Consultative Steering Group’ on the policy development process of the Scottish Parliament:

“Consultation, in the form of inviting comments on specific legislative proposals for example, would not meet our aspirations for a participative policy development process. We have noted elsewhere that there is a perception among those we consulted (and within our own group) that once detailed legislative proposals have been published, in whatever form, it is extremely difficult for outside organisations to influence changes to those proposals to any great extent. What is desired is an earlier involvement of relevant bodies from the outset - identifying issues which need to be addressed, contributing to the policy-making process and the preparation of legislation.”

[2](#)

The role of the voluntary sector in developing policy is acknowledged and longstanding. According to SCVO “The Scottish Compact is an agreement between the Voluntary Sector and the Scottish Government, its Agencies and Non-Departmental Public Bodies (NDPBs) that sets out clear principles for working in partnership. Its aim is to develop robust relationships for the wider public good.” The Scottish Compact of 1998/99 and of 2003 formalises existing practice including:

- ‘The Executive acknowledges its obligation to facilitate access for the voluntary sector to its processes. The Executive will … provide access and support, including the provision of information, to enable voluntary organisations to contribute to the policy development process…’ (pg 5)
- ‘In encouraging good practice and co-operative methods of decision-making, the Scottish Executive undertakes to ... work collaboratively with the sector to develop policy and practice ...;’ (pg 6)

10. The HRCS believes the purpose clause should ensure clarity. The HRCS understands the legitimate aim of tackling sectarianism and intolerant behaviour. Despite what the Scottish Government has said, the Policy

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4. Launched 23rd February 2004
Memorandum makes clear that the purpose of the Bill goes beyond sectarianism and therefore changes the focus of the consultation and analysis of this Bill.

“We intend that these measures will cover all offensive or threatening behaviour at football matches, regardless of whether it is “sectarian”. This means offensive or threatening behaviour likely to incite public disorder, whether that is through songs and chants, displaying banners or otherwise. In terms of threatening communications, the focus is on threatening or inciting serious harm intended to cause fear and alarm or threats that incite religious hatred, regardless of whether such communications are of a “sectarian” character or not.”

11. **The HRCS wishes to see more detailed evidence that the current law on threatening communications is inadequate.** We need to understand if the problem is with the law or its application in Scotland.

The HRCS shares the Scottish Government’s concern about the “less positive aspects of our society, expressed in violent and bigoted attitudes and behaviours which are incompatible with those values and which have no place in the Scotland we aspire to be. This Bill seeks to strengthen our established laws to ensure that we can root out these violent and bigoted attitudes and behaviours from Scottish society and make our communities safer.”

So far, there is insufficient evidence to demonstrate that the law is inadequate. For example Section 127 of the Communications Act 2003 provides that it would be an offence if a person sends "a message or other matter" which is "grossly offensive or of an indecent, obscene or menacing character" by means of a "public electronic communications network". Commentators have argued that this law is being interpreted in such a way as "means that the offence has a worryingly low and fluid threshold."

12. **The HRCS believes the Justice Committee needs to understand this Bill in light of human rights developments that impact on the Scottish Government’s obligations.** We draw the Committee’s attention to three developments.

- On 28th July, the UN Human Rights Committee issued its General Comment 34 on the interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR) which guarantees "freedoms of opinion and expression" but does permit the right to be restricted if “provided by law and are necessary”. General comment 34 asserts that “prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the covenant." According to the Open Society Justice Initiative: ‘The standards are in many areas stronger than protections offered by the European Convention on Human Rights – particularly on blasphemy. General Comment 34 has authoritative legal credibility that will carry strong weight before courts and tribunals, and will substantially influence the development of legal norms globally.‘

Importantly Scottish Government

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5 Policy Memorandum para 4

6 Para 5. Policy Memorandum on the Bill

7 New Statesman Article by David Allen Green is legal correspondent of the New Statesman pub 17th Nov 2010. He is also lead of media law at Preiskel & Co LLP.

8 http://www2.ohchr.org/english/law/ccpr.htm

9 http://www.soros.org/initiatives/justice/articles_publications/publications/unhrd-gc14-20110725
Ministers must positively comply with international ratified Treaties such as the ICCPR e.g. under S57 of the Scotland Act 1998. Restrictions on speech may be justified in specific circumstances under article 20(2) of the ICCPR, which states “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

- UK Bill of Rights Consultation “Do we need a UK Bill of Rights?” seeks to gather the views of the public in the UK and of organisations. What are the implications of this Scottish specific Bill? The deadline for responding to this initial phase is 11th November 2011
- UN agreed to operationalise the ‘Respect, Protect and Remedy Framework’, which sets out the human rights responsibilities of business, in June 2011. Developments in technology potentially impact on human rights: ICT is the vehicle for ‘threatening communications’ and so we need to understand better what the industry thinks and is doing to uphold human rights. See for example “Applying the UN Guiding Principles on Business and Human Rights to the ICT Industry” A Briefing Paper From BSR

13. The Bill should contain a ‘free speech clause’ to ensure compliance with international and domestic human rights law.

14. The Bill should be confined to adult behaviour which is consistent with our obligations under the UN Convention on the Rights of the Child (UNCRC) which also extend to the responsibilities of children to each other.

The HRCS does not wish to see children and young people, who have learned language and behaviour from adults, to be covered by the legislation. However sectarianism or intolerant behaviour may be grounds for referral to a children’s hearing. The HRCS recognises that the Scottish Government has a specific strategy on bullying and we believe detailed consideration is needed about the impact of this Bill on that strategy e.g. cyber bullying.

15. If the Bill proceeds in its current format, we believe the Bill must uphold the existing equality duties and extend the list of groups defined by S1(4) to include “age” and extend that broader definition to the offence of ‘threatening communications’ S5(2).

Equality law treats the six prohibited grounds of discrimination – age, disability, race, religion, sex (including transgender status) and sexual orientation – as being of equal weight. As there is no hierarchy among these grounds, all should be included. Furthermore, to maintain the current logic of the Bill, the groups protected should be consistently defined.

16. The UN’s Human Rights Treaty review process has flagged up a number of problems about how our State protects minorities and vulnerable groups and it is disappointing that so little attention has been given to the solutions proposed. We urge the Committee to take evidence from the Scottish Government on how it plans to give effect to the UN’s recommendations which fall within its competence.

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Recent examples demonstrate the role and influence of the press and media:

**UN Committee on Elimination of Racial Discrimination 2003** “The Committee is concerned about the increasing racial prejudice against ethnic minorities, asylum-seekers and immigrants reflected in the media and the reported lack of effectiveness of the Press Complaints Commission in dealing with this issue. The Committee recommends that the State party consider further how the Press Complaints Commission can be made more effective and can be further empowered to consider complaints received from the Commission for Racial Equality as well as other groups or organizations working in the field of race relations”. (Para 13)

**UN Committee on the Rights of the Child 2008** “The Committee is also concerned at the general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media, and may be often the underlying cause of further infringements of their rights.” (Para 24) “The Committee recommends that the State party ensure full protection against discrimination on any grounds, including by: a) taking urgent measures to address the intolerance and inappropriate characterization of children, especially adolescents, within the society, including the media..." (Para 25)

**UN Committee on the Elimination of Discrimination against Women 2008** "The Committee notes with concern the stereotyped media portrayals of women and of women’s roles in the family and in society, which contribute to women’s disadvantaged position in a number of areas, including in the labour market and in access to decision-making positions, and affect women’s choices in their studies and professions. The Committee also notes the lack of positive media portrayals of ethnic and minority women, elderly women and women with disabilities.” (Para 274)

"The Committee recommends that policies be strengthened and programmes implemented, including awareness-raising and educational campaigns directed at women and men, and specifically at media and advertising agencies, to help ensure the elimination of stereotypes regarding the roles of women and men in society and in the family, in accordance with articles 2 (f) and 5 (a) of the Convention. It also recommends that the media be encouraged to project a positive image of women, including ethnic and minority women, elderly women and women with disabilities, and to promote the value of gender equality for society as a whole. It calls upon the State party to review periodically the measures taken in order to assess their impact, to take appropriate action and to report thereon to the Committee in its next periodic report.” (Para 275)

**Conclusion**

The Scottish Government’s wider work to tackle sectarianism will require sustained and strategic action to acknowledge and eradicate intolerant attitudes and behaviour. We commend the Scottish Government for exercising leadership and look forward to the deliberations of the Justice Committee which we expect will lead to better legislation.

Carole Ewart  
Convener, Human Rights Consortium Scotland  
30 August 2011.
Submission from Inclusion Scotland

Background

Inclusion Scotland are a network of disabled people’s organisations and individual disabled people. We are funded by Scottish Government to carry out engagement work with disabled people and ensure that they and their views are represented in the policy process.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill makes mention of disabled people in Section 1 and seeks to protect them at football matches. We therefore believe that the views of disabled people are relevant and should inform the work of the Committee and the wider Parliament.

General Comments

Inclusion Scotland wishes to place on record that we agree with Government that there is a very serious issue with sectarian violence within football which needs to be addressed. We are therefore in broad agreement with the general intent of the proposed Bill. However we have very serious concerns with the Bill’s proposed timetable and the extent of its coverage.

The timetable of the Bill is perhaps the cause of greatest concern. The Bill is to be considered in Committee and voted on within the next fortnight. The Justice Committee’s own call for evidence sets a deadline of Friday (24th June) – just one week from our first sight of the Bill.

These timescales are wholly inadequate for Inclusion Scotland’s membership, or indeed anyone else, to give proper consideration of the Bill’s potential consequences – both positive and negative. It also does not allow us sufficient time to consult with our membership and gather detailed evidence from them (e.g. on incitement to hatred against disabled people perpetrated through social media and/or the internet) which could then be considered by the Committee.

Given that the Justice Committee will only be able to consider evidence on over a very short period there is little chance of the Committee hearing detailed oral evidence from either ourselves or wider civic society.

Inclusion Scotland believes that it is more important to take action and pass legislation which will successfully address the problem of sectarianism rather than to act in haste and perhaps adopt legislation which has serious flaws and thus unforeseen consequences and outcomes. Therefore Inclusion Scotland believes that this bill needs proper consultation, scrutiny and debate within the Scottish Parliament and should not be fast-tracked.

Extent of Protection from Hatred offered by Bill

Inclusion Scotland wishes to welcome the Government’s proposal (in Section 1 of the Bill) to extend protection from hatred at football matches beyond religious sectarianism and to include incitement on the grounds of race, disability, sexual
orientation and transgender identity. We are therefore at a loss to understand why similar protection from incitement to hatred for these groups is not mirrored in Section 2 of the Bill

Section 2 of the Bill introduces a new offence of stirring up religious hatred, but there is no corresponding offence for other kinds of hatred such as disablist or sexual orientation hatred.

Yet Section 2 is being introduced specifically because existing laws are thought to be insufficient to deal with incitement to hatred carried out through social media. If this is the case then surely protection from hatred should be extended to all those groups who are currently covered by Offences Aggravated by prejudice legislation?

Not to extend protection to such groups seems illogical and moreover creates a hierarchy of Hate Crimes where religious sectarianism is dealt with more seriously and comprehensively than hate crimes directed against LGBT or disabled people.

When this issue was raised by ourselves and others at a Scottish Government involvement event for stakeholders we were told that the Government did not wish to proceed too quickly with extending coverage because this Bill was already a substantial extension of existing protection and ‘there might be unforeseen consequences’! We were then told that if a case could be made then such protection might be extended at an unspecified later date. That is not really acceptable to the disabled people and their organisations which Inclusion Scotland represents.

Either the law needs to be updated because it has failed to keep pace with the use of social media or it does not. If it does need to be updated then we should take sufficient time to discuss who should receive protection and how this is to be achieved rather than prioritising one section of society (those with religious beliefs) over everyone else.

Research by the UK disability charity Scope showed that disabled people throughout the UK face widespread casual and institutional disablism creating the conditions where disability hate crime can flourish without being recognised or challenged.

Despite a complete lack of official government data on the prevalence of hate crime against disabled people, research by a number of disability charities and disabled people’s organisations shows that incidents of hate crime are widespread - disabled people are four times more likely to be violently assaulted than non-disabled people and almost twice as likely to be burgled.

According to the report Hate crimes against disabled people are driven by the belief that disabled people are inferior; in some cases less than human and of no value to society. The research also showed that hate crimes against disabled people are rarely recognised by the police and criminal justice system, a fact which allows some perpetrators to “get away with murder”.
The situation has however deteriorated seriously since 2008. Disabled people believe that public attitudes towards them have worsened in the past year. According to research by Scope published in the last month –

- More than half (56%) of disabled people say they have experienced hostility, aggression or violence from a stranger because of their condition or impairment.
- Half of disabled people say they experience discrimination on either a daily or weekly basis.
- More than a third (37%) said people’s attitudes towards them have got worse over the past year.
- 58% of people thought others did not believe that they were disabled and 50% of people said they felt others presumed they did not work.

Inclusion Scotland would agree with Richard Hawkes, chief executive of Scope, in believing that much of the increased hostility that disabled people face is due to the tenor of the Welfare Reform debate as conducted by politicians and its coverage in the tabloid press. As Richard Hawkes pointed out - “…much of the welfare reform debate has focused on disabled people as benefit scroungers, and many disabled people feel this has led to the public being more sceptical about disability issues and more hostile to those who receive welfare support.”

Therefore we believe that the need to tackle disablist hate and incitement to hate on social media is a given and would ask that the Justice Committee, the Scottish Government and Parliament as a whole, should consider extending the incitement to hatred provisions in Section 2 (5) Condition B to provide for outlawing incitement to hatred against disabled people.

**Conclusion**

Inclusion Scotland would strongly urge the Justice Committee and Parliament to give proper time and consideration to the issues addressed in this Bill. It is vital that the legislation passed is fit for purpose and deals effectively with the important and long-standing problem that has until now festered at the heart of Scottish society. However it is also vital that the proper balance is struck between societal condemnation of offensive behavior and individual liberties and free speech otherwise the legislation will quickly fall into disrepute as injustices occur.


Bill Scott
Manager, Inclusion Scotland
23 June 2011
Submission from the Internet Services Providers’ Association

About ISPA
The Internet Services Providers’ Association (ISPA) UK is the trade association for companies involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

ISPA’s membership includes small, medium and large Internet Service Providers (ISPs), cable companies, content providers, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA, the European Internet Service Providers Association based in Brussels, which is the largest umbrella organisation of ISPs globally.

About ISPs
ISPs perform a number of services each of which may have varying degrees of liability. Traditional ISPs or access providers provide Internet connectivity to their customers and are generally regarded as mere conduits that cannot be held liable for the information they transmit on behalf of their customers. Hosting provider ISPs store others’ content online – from the website of large corporations to an individual’s personal website or user generated content posted on a website. Under the e-Commerce Regulation 19 hosting providers are not liable for the content they host as long as the service provider does not have actual knowledge of unlawful activity or information. However, upon obtaining such knowledge, hosting providers become liable if they do not act expeditiously to remove or to disable access to the information.2

Introduction
ISPA welcomes the opportunity to submit written evidence and hope that its response will be useful in helping the Justice Committee to formulate a bill that is effective in addressing the problems that have been identified by the Scottish Government and the Football Summit held on 8 March 2011. However, as the body representing ISPs in the UK, ISPA wants to ensure that the Bill fully takes into account potential implications for Internet Services Providers and Internet users. Our response will focus exclusively on Sections 5 to 7 of the proposed Bill, which are most relevant to ISPA’s members, and we hope our views are of value to the Committee.

Summary
- ISPA understands the reasoning for creating a new provision on religious hate crime but argues that the new provision should resemble as closely as possible the legislative framework that already exists in the rest of the UK.

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1 As mere conduits access providers “shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as result of that transmission.” (e-Commerce Regulation 17).
2 It is important to note that under the e-Commerce Directive, ISPs are not obliged to monitor the information which they transmit or store and that member states are indeed barred from imposing general monitoring obligations on ISPs.
• While not fundamentally opposed to Section 5 (2) Condition A, ISPA would welcome further evidence as to why already existing offences are deemed to be inadequate in relation to addressing threatening communications.
• ISPA would welcome clarification on how the new rules are to be enforced outside of Scotland and calls for the provision of guidance for ISPs and law enforcement authorities.
• ISPA would welcome a commitment that the final Bill does not negatively affect the limited liability provisions for ISPs under the e-Commerce Regulations.
• Any new provisions must be carefully drafted and fully justified to ensure that it strikes the right balance between freedom of speech and the protection of users.

Response
Scotland faces a unique set of problems related to offensive and threatening behaviour in the context of football matches that are often sectarian in nature and we believe that the Bill was primarily introduced to prevent these kinds of incidents from happening again in the future. Scotland, unlike as the rest of the UK, has so far not introduced any specific offences relating to inciting religious hatred, and given the aforementioned incidents, we can understand and support the Scottish Parliament in seeking to introduce these specific offences.

When considering this new offence, the Scottish Parliament should try to replicate already existing provisions in other parts of the UK as much as possible, especially as the new offence of religious hatred is intended to apply to anything done outside Scotland. Doing so would provide clarity to the average citizen in the UK but also to hosting providers who, under e-Commerce Regulation 19, need to expeditiously remove or to disable access to illegal content as soon as they are made aware of it in order to be not held liable for that content. This legal certainty, based on practical, well-established definitions, would enable sectarian content to be tackled online and give our members the confidence they need in this fast-moving sector. Online providers have developed and grown their businesses (and continue to do so) on the assumption that the liability regime will apply across the board and to all types of content.

While ISPA understands the introduction of a religious hatred offence, we are less certain about introduction of Section 5 (2) Condition A, i.e. the new offence of generally threatening communication. This offence is neither related to football nor religion and we feel that it was added to the bill as an afterthought and has not been given the same amount of consideration as the other aspects of the bill. While not fundamentally opposed to the new offence, we would welcome further evidence as to why the Scottish Government believe that already existing offences (see p.7f of the policy memorandum that accompanies the bill) that deal with threatening communications (such as the Communications Act) are inadequate. Therefore the new offence needs to be fully justified to ensure that the balance between freedom of expression and protection of users is found.

ISPA would welcome clarification from the Scottish Parliament on how it intends to enforce the new provisions outside of Scotland, e.g. if somebody from inside Scotland or indeed outside Scotland uses an ISP that is not based in Scotland.
There is also the additional difficulty of removing content hosted outside of the UK. However, ISPs are generally cooperative when they are approached by law enforcement about the removal of clearly illegal content hosted in the UK, particularly as their terms and conditions often allow them to remove offensive material. However, this process would be facilitated by the provision of clear guidance for both ISPs and law enforcement on how the new rules are to be enforced and the types of cases the new rules are supposed to cover. As with the religious hatred offence, a legal framework that is as uniform as possible within the UK would facilitate better implementation of the new rules.

In this context, we would also urge to Scottish Government to confirm that the final Bill will fully respect the limited liability provisions that are provided to ISPs under the e-Commerce Directive. The Directive is implemented in the UK through the e-Commerce Regulations but the UK Government failed to give prospective effect to the Regulations (i.e. they are not automatically applied to new relevant legislation). While the Bill, in its present state, does not directly confer any new responsibilities on ISPs, we would welcome that any further development of the Bill or implementation guidelines do not reduce the limited liability provisions under the e-Commerce Directive.

Internet Services Providers’ Association
31 August 2011
Submission from Gordon Jackson

I have many concerns over what I have read so far about this proposed legislation.

Firstly, I do not accept there are as many sectarian issues here in Scotland which warrant this type of "law" and it's "Victorian" style consequences, especially when comparing the "crime" with many others ie. sticks and stones vs actual bodily crime. It's complete nonsense that carrying a knife with intent is considered less harmful than namecalling.

Secondly, when did the Democratic Right to free speech and freedom of choice end.

However, I am a regular internet user and like to keep up to speed with the latest football news, and take part in the banter amongst the different supporters. Last season was particularly bad with vile abuse and threats being more commonplace than ever before. Each website is overseen by at least administrator and all those wish to post messages need to go through them before they are displayed (forgive me if you already know this). Personal details are held of everyone who wishes to make contributions to each site, and therefore such abusive and threatening posts should be able to be traced to its' origin. If someone is considered to have overstepped their right to free speech etc. then surely the authorities are able to act in that kind of situation.

I believe this is where the policing should be concentrated. A straightforward set of rules should be established and site administrators should be licensed before they can sit in any judgement concerning the comments made on their website. Anyone flouting this set of rules should have their license withdrawn and the actual perpetrator of the abuse should be relieved of their ability to post any messages ie. equipment confiscated.

On a related matter, I have reported the website of a supposed journalist to my local MP, Brian Donohoe, and many other leading members of our Parliament. This person regularly produces exaggerated lies regarding "Anti Irish Catholic" hatred in Scotland and I believe this kind of thing incites much of the hatred which has infiltrated many footballing websites. I urge you to look up his site and see for yourself. If you read most of the subjects, ask yourself why this person would do what he does and to what end.

There may well be anti Catholic, anti Irish Catholic, anti Muslim, anti Christian, anti Protestant, anti English, anti Welsh bigotry here on an individual basis, but not on the National scale which has been alluded to by some individuals. Individuals which have some kind of an agenda.

Anyway, I hate the fact that my Country is being portrayed as a "biggotted wee place" by those people, and I think by producing this sectarian legislation is playing into their hands as well as making us a laughing stock around the World.

Please consider tighter legislation within the internet as I think this is at the root of the matter.

Gordon Jackson
20 June 2011
Submission from Dr Graham Keith

I can well understand that after the last season in Scottish football the Scottish Parliament should be proposing legislation to directly tackle sectarian behaviour in and around football matches. I doubt, however, the wisdom of this two-headed legislation where the issue of offensive behaviour at football matches is being combined with threatening communications in any context whatsoever. I would much prefer that these two areas were dealt with separately.

Let me deal with them in turn –

(i) Offensive behaviour – Though this aspect of the proposed legislation is restricted to football matches, in practice the context is broadened by the reference to travel to and from football matches. Since football supporters often travel by the same trains, buses or ferries used by other members of the general public, there is a real possibility that ordinary people could be caught up in this legislation if they became involved in a discussion about religion or sexual orientation with football supporters who are sharing the same public transport. This would mean a loss of rights of free speech for ordinary members of the public. I note that there are no safeguards about this in the legislation.

I believe that an opportunity is being lost here by not giving police greater powers with regard to the timing and context of Premier League matches, including travel to and from the games. Moreover, wherever circumstances require exceptional levels of policing, the cost should be borne not by the police (or the council tax payer) but by the clubs or their supporters or both.

It should not be left largely with TV companies to say when matches are to take place, irrespective of disruption and disturbance caused to particular neighbourhoods and to public transport. It may take some time to devise suitable legislation here, but this would be worth the effort, as the legislators are right to recognize the problems extend beyond football stadiums. We have also to acknowledge that the recent troubles of Scottish football go wider than Old Firm clashes, however much the Old Firm may be the primary forum of disturbances.

(ii) Threatening Communications: Here the provisions are very wide-ranging – too wide-ranging in my view. According to the proposals a prosecution may take place if any ‘communicated material’ is deemed to be ‘threatening’. But who is to define ‘threatening’? If some written or verbal statement challenges someone’s cherished religious views, they could be described as ‘threatening’ by that person. There seems to be little in the legislation to guard against a subjective interpretation of ‘threatening’ and so the Scottish Parliament would be opening the door to a sort of complainants’ charter. There are, for example, some passages in the Bible that are threatening – not in the sense of inciting to violence, but in terms of condemning aspects of human behaviour and thought, including what it sees as false religion. Are these parts of the Bible to be proscribed?

This may seem a ridiculous outcome for the proposed legislation but experience from elsewhere has shown that religious ‘hatred’ can be interpreted very widely. Eg. In Australia two Christian missionaries speaking as a seminar on evangelism among
Muslims found themselves in court as a result of complaints made by some of those in the audience, under the state’s hate crimes law.

In short, much more thought needs to be given to the concept of ‘threatening’ if the legislation is to achieve any worthwhile end. An acceptable objective definition must be found if it is not to cause more problems than it solves.

Summary: the legislation tries to do too much and for that reason may fail on both counts. The two distinct aspects should be disentangled and dealt with separately. More thought should be given regarding powers which would enable the police to exercise greater control than at present over the whole context of SPL football.

Dr Graham Keith
23 August 2011
Submission from Dr John Kelly

As someone engaged in research in this field, I wanted to express my support for the government's determination to tackle ethno-religious bigotry in Scotland and for its action in drafting legislation to tackle this problem. In doing so, may I also make a few points regarding the proposed new Bill? I hope these will be received in the helpful spirit in which they are proposed.

It is extremely helpful that the Bill explicitly acknowledges the rights of people to have a 'sectarian' identity without fear of hatred. So, for example, it is a major leap forward to specify that ethnic and national origins are to be protected from the all too common assaults from those who seek to demonise and ridicule the felt national/ethnic identity of others (and often of minority Others). This should help all groups in Scotland realise that just because they do not feel Ulster-Scottish or Irish-Scottish or indeed Polish/Italian/Asian-Scottish that others may, and that others are legally and morally entitled to feel this way. Unfortunately, we still have many people in positions of authority who appear unaware or insensitive to this reality. Hopefully the lawful implementation will help educate them. It is also excellent that the proposed Bill protects the additional identities such as disability, transgender, sexual orientation, 'race' and colour. For too long, football has been an environment that has accepted intolerance and hatred of these minority groups, helping to create and nurture a culture of prejudice.

I fully applaud the wise decision not to include the polysemous term 'sectarian/ism' on the proposed Bill and I am confident that this will enable every stakeholder to begin discussing these issues in the correct context and to reduce misinformation and confusion, thus facilitating equality. As noted above, the proposed Bill correctly protects 'sectarian' identities, which are often completely legitimate. In watching media coverage and commentary of this proposed Bill, however, I am struck by some important points that continue being missed. Commentators and politicians insist on using the word 'sectarian/ism' and this contributes to the continued inability of police, media, politicians and the public to actually know what it is exactly that is being outlawed. Carelessly allowing this vague term to muddy the waters adds to the problem. For example, on the Politics Scotland show (BBC1, 19/6/11) Roseanna Cunningham, and the police spokesman, were unable to explicitly specify what the police would arrest someone for in relation to the Bill. They and others keep repeating the useless and confusing soundbite that we will stop 'sectarianism', thus giving the false impression that having a 'sectarian' identity itself is to be made illegal. This is simply not true and not expressed in the Bill. The Bill writers appear to be aware of this distinction and I suspect this is why the word 'sectarian' does not appear on the proposed Bill once. Rather, it explicitly states "expressing hatred" (in relation to the identities of Others).

I have two further points of clarity that I wish to call for. First, by including "offensive behaviour" in the title, the proposed Bill is misleading the public and making it difficult for everyone to actually differentiate what is going to be allowed and prohibited. Causing offence per se is not and cannot be made illegal and therefore I cannot understand why this phrase appears in the title. It is likely to cause confusion and reduce the proposed Bill's effectiveness in the long run. As we are all aware, the necessary condition to make 'causing offence' illegal lies in the nature of the offence.
The Bill is explicit about this in sections 1(2) and 1(4). It clearly states that it is illegal if the cause of the offence is the *expressing of hatred* towards the identities already noted. It is not illegal to celebrate one's own identity. Only if one's identity is based on hatred of the Other should one worry. By including "offensive behaviour" in the title, there is an inescapable inevitability that confusion and disagreement will flourish. The legislation is in fact tackling hatred, so why doesn't the proposed Bill simply state this? It could be called the Hate Crime at Football and Threatening Communications Bill. I do realise that there are other offensive behaviours that the government would like to see disappear and that it may be impractical and unrealistic to legally prohibit these. But a confusing and ultimately unworkable Bill is unlikely to do this better than grown up debate and dialogue with the offenders.

The biggest problem with the proposed Bill is the equivocal Section 1(2)(e) ("behaviour that a reasonable person would be likely to consider offensive"). Whilst the proposed Bill is explicit in this same section, noting the necessity of "expressing hatred" to be present 1(2)(a)(i)(ii)(iii) as a necessary condition for it to be deemed illegal, clause 1(2)(e) is surely too broad and conceptually inaccurate. For example, as I've noted above, causing offence cannot and should not be outlawed in a democratic and free society. Expressing hatred towards someone else due to her/his identity is actually what is being targeted and therefore this should be explicitly stated. The type of offence that *is* outlined elsewhere on the Bill requires hatred towards the Other based on religion, 'race', nationality, ethnicity, gender, sexuality, disability. If clause 1(2)(e) is left as this ambiguous phrase, I fear that we will have numerous accusations of 'reasonable' people being 'offended' and calling for 5-year jail sentences for what cannot actually be classified as illegal in any court worth its title. Additionally, we have seen time and again - from media, politicians and police commentators - that 'reasonable' people are not always aware of the subtleties of prejudice, racism and bigotry, and are sometimes unable to differentiate legitimate identities from bigoted behaviour. Kenny MacAskill's League Cup comments about it being a "wonderful advert" and Les Gray's unfortunate comments about pictures of the Pope in people's homes reveal these inadvertent realities all too well. Indeed, these are unremarkable outcomes from within a society that experiences ethnic and religious relations, and this type of misunderstanding is well recognised in studies on racism and bigotry. Reasonable people are not always aware of the subtleties of bigotry, particularly (though not exclusively) when they are not part of the target group. Therefore, arbiters deemed by some to be 'reasonable' cannot be charged with upholding laws that are governed by such subjective and contested terms, symbols and interpretations. The law must be explicit and unequivocal here!

I believe that those who will undoubtedly try to take advantage of this broad and ill-defined term ("reasonable person likely to be offended") in 1(2)(e) by claiming offence at anything Irish-Catholic or Ulster-Protestant are likely to have to prove that the offence involved the offender expressing hatred towards his/her identity. This whole issue is characterized by groups 'being offended' by the Other. However, any good student of race/ethnic/religious relations knows that offence itself is often inflamed by prejudiced belief structures rather than genuine inequality. Therefore, rather than waste tax revenue and valuable police/court time on misguided, mischievous and potentially bigoted accusers, why can't the proposed Bill be unequivocal in its entirety?
In summary, may I suggest?

1. In accordance with the proposed Bill, all official discussion avoids using the confusing term 'sectarian'. The true demon to be slain is hatred of the Other based on the Other's identity (not least because a. sectarian identities per se are often legitimate; b. there are numerous non-sectarian identities included in the Bill).

2. Change the Bill's title from "offensive behaviour" to "hatred". We all know you cannot criminalise causing offence per se, so say what you really mean. These are hate crimes.

3. Omit 1(2)(e) ("behaviour that a reasonable person would be likely to consider offensive") or re-word to be universally understood, conceptually accurate/specific and legally workable! I would suggest if it is re-worded, it becomes "behaviour that can be considered offensive hatred".

Dr John Kelly
Lecturer in Sociology of Sport
University of Edinburgh

21 June 2011
Submission from the Law Society of Scotland

INTRODUCTION

The Criminal Law Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to comment upon the general principles of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill introduced into the Scottish Parliament on 17 June 2011 and should like to respond as follows.

GENERAL COMMENTS

The Committee believes that the policy objective of the Bill to tackle sectarianism by preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred is entirely laudable. The Committee is deeply concerned, however that there was no proper consultation prior to the Bill being introduced into the Scottish Parliament on 16 June 2011 nor is the Parliamentary process which is to be applied to this Bill sufficient. The Committee believes that this process sets a bad precedent.

SPECIFIC COMMENTS

The Committee has the following comments:-

Section 1 – Offensive behaviour at regulated football matches

The Committee notes that this section creates a statutory offence of engaging in offensive behaviour which is either likely to incite public disorder or would be likely to incite public disorder and Section 1 (2) lists the five kinds of behaviour which trigger the offence at subsection 1.

The policy memorandum states that objective of this section is “to provide the police with powers to deal with offensive or threatening behaviour which is liable to incite public disorder at football matches”.

With particular reference to paragraph 21 of the policy memorandum, the Committee does not share the concerns that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law:-

1. Mark Harris v HMA [2009] HCJAC 80, the Appeal Court held that breach of the peace simply requires some serious disturbance to the community.

2. Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 covers a situation where a person behaves in a threatening or abusive manner and such behaviour would be likely to cause a reasonable person to suffer fear or alarm where it is the intention so to cause fear or alarm or one is reckless as to whether the behaviour would cause fear or alarm.
The Committee is of the view that the offence, under Section 1 does not improve in common law breach of the peace or section 38 of the 2010. Rather than result in clarity, the new offences may cause confusion with particular reference to what type of behaviour is to be considered unacceptable at regulated football matches.

The Committee is also concerned by section 1(5)(b) of the Bill in that there does not require to be anyone present to be incited to public disorder.

Section 2: Regulated football match: definition and meaning of behaviour” in relation to match

The Committee questions whether section 2 can be legitimately enforced extra territorially, in that, for the purposes of section 1, offensive behaviour at regulated football matches extends to football matches played outside Scotland involving either 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.

Section 2(1)(b)(ii) apparently widens the definition of “regulated football match” by extending it to all Scottish football teams playing outside Scotland whereas only Scottish Premier League or Scottish Football League teams play in “regulated football matches” for the purposes of section 55 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. Clarification of the Government’s intention in this respect would be welcome.

Section 2(2)(c) of the Bill applies the offence as outlined at section 1 to a person’s behaviour which occurs on a journey to or from a regulated football match and appears to cover travellers who are not actually going to the match in terms of section 2(4)(e) of the Bill. The terms of section 2(4) are inspecific. By way of practical example, is it intended to cover a situation where a journey has to include either to or from the ground where the match is being held for the offence to be committed regardless of whether or not the person attends the match or intended to attend the match?

The Committee expresses serious concern about section 2(3) of the Bill in that it appears to apply to any match which is televised at any place (other than domestic premises). This would appear to cover pubs, outdoor arenas, hospital day rooms and TV sales outlets and also mobile TV receivers and computers – such a variety of broadcast possibilities underlines how difficult this provision will be to enforce.

Section 2(3) appears to cover any place anywhere including a situation where matches are being screened worldwide.

In all the circumstances, the Committee is concerned with regard to the definition and meaning of behaviour in relation to a regulated football match for the purposes of section 1 can be proved, particularly with reference to matches either being played or watched on television abroad and, moreover, how the provisions at section 1 are to be enforced.
Section 3 – Fixed Penalties

The Committee is concerned that the police are to be given powers to deal with complex offences carrying potential penalties on summary conviction of twelve months’ imprisonment by way of a fixed penalty.

Section 4 - Sections 1 and 2: Interpretation

With particular reference to section 4(4) of the Bill at which “televised” is defined, the Committee questions whether this is to be restricted to live broadcasts or extended to include recorded broadcasts such as edited highlights of regulated football matches and recorded coverage of regulated football matches on news programmes, etc shown at any time after the match has been played.

Section 5 – Threatening Communications

The Committee notes (policy memorandum paragraph 33) that there are a number of offence provisions which may currently apply in respect of making threatening communications notably breach of the peace and uttering threats, the new offence at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 as referred to above of threatening and abusive behaviour, the offences at part 3 of the Public Order Act 1986 (Incitement of Racial Hatred), Section 74 of the Criminal Justice (Scotland) Act 2003 and Section 96 of the Crime and Disorder Act 1986 which provide for statutory aggravations on grounds of religious or racial hatred.

The Committee also notes section 127 of the Communications Act 2003 which criminalises “improper use of a public and electronic communications network.”

The Committee questions the interpretation that can be placed on either condition A or condition B in section 5(1)(b) of the Bill. In particular, the offence seems to cover a situation where the threat is simply to intend fear as opposed to threaten to carry out the act. The Committee would welcome clarification as to how this provision extends the terms of breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (Threatening or Abusive Behaviour) in that to threaten with the intent of stirring up religious hatred, as referred to in section 5(5) of the Bill, could be adequately covered in terms of section 38.

The Committee also questions the circumstances in which the defence, as outlined at section 5(6) of the Bill, could be applied.

With regard to condition A as outlined at section 5(2) of the Bill, the committee questions why the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act. What is the distinction between a seriously violent act and a violent act and why is that distinction applied in the Bill?
Section 6 – Section 5: interpretation

The Committee notes the definition of “communicates” at section 6(2) of the Bill as being very broad but an offence is created only after the communication is recorded. Why are oral threats excluded?

Section 7 – Sections 1(1) and 5(1): offences outside Scotland

The Committee reiterates its concerns as outlined above with regard to legislative competence in that these new offences are also to apply to anything done outside Scotland by inter alia British citizens and also section 5(1) is to apply to anyone anywhere in the world on the basis that the person intends the material communicated to be read, looked at, watched or listened to primarily in Scotland. This provision, at section 7(2) is unprovable and is unlikely ever to result in a successful prosecution.

Financial memorandum

The Committee refers to paragraph 45 of the financial memorandum where it states that “it is crucial to the estimates that follow that much of the behaviour that the provisions cover is already criminal and therefore liable to prosecution”. The Committee questions whether these proposed measures do in fact bring clarity and strengthen the law.

With particular reference to paragraphs 65 to 67 of the financial memorandum, the Committee is concerned that “these new measures will lead to relatively small additional numbers of the most serious cases being prosecuted in the sheriff courts under solemn procedure” at paragraph 65 where it is estimated that between 5 and 10 additional cases would be tried each year in the sheriff solemn court.

With regard to summary cases at paragraph 66 of the financial memorandum, the Committee is concerned that the Scottish Government considers a realistic estimate of new prosecutions would lie between 50 and 100 additional cases per annum and at paragraph 67 (Direct Measures) it is anticipated that between 200 and 500 fixed penalty notices might be issued directly by the police each year. Against this background, the Committee remains concerned that this proposed legislation is being considered without adequate consultation.

Sunset clause

The Committee note that there have been a number of concerns raised by both Parliamentarians and various stakeholders including the Law Society with regard to the length of consultation and would welcome an appropriate sunset clause and review mechanism on the face of the Bill.
Supplementary submission from the Law Society of Scotland

[Note: This information was requested by the Committee at its meeting on 21 June 2011.]

Threatening Communications

Section 5 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (the OBFTC Bill) purports to create a new offence of making threatening communications.

Subsection (1) provides that a person who communicates material to another person where either of “Conditions A or B” (as they are set out in the Bill) is satisfied commits an offence.

There are a number of offence provisions which may currently apply in respect of making threatening communications notably breach of the peace and uttering threats, the offence at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (the CJL(S) Act 2010) of threatening and abusive behaviour, the offences at part 3 of the Public Order Act 1986 (Incitement of Racial Hatred), Section 74 of the Criminal Justice (Scotland) Act 2003 and Section 96 of the Crime and Disorder Act 1986 which provide for statutory aggravations on grounds of religious or racial hatred.

It is also worth noting that Section 127 of the Communications Act 2003 criminalises “improper use of a public and electronic communications network.”

It is not clear that Section 5 of the OBFTC Bill extends the terms of breach of the peace or section 38 of the CJL(S) Act 2010 (Threatening or Abusive Behaviour).

Postings on Websites

Existing Legislation - Section 38 of the CJL(S) Act 2010

Section 38 of the CJL(S) Act 2010, subsection 1, provides that it is an offence to engage in “threatening or abusive behaviour”.

Subsection 3 states that the section applies to behaviour of any kind including “things said or otherwise communicated as well as things done”. The explanatory notes to the legislation give examples of texting and emailing and it is clear that the behaviour referred to in the section is not intended to be restricted to a particular form of communication. Subsection 3(b) states that the provision applies both in respect of behaviour consisting of a single act and behaviour consisting of a course of conduct. On the basis the offence is not restricted to a particular form or type of communication, it is submitted that threatening communications posted on internet websites would be caught by the provision.
Section 5 of the OBFTC Bill

Section 5 of the OBFTC Bill provides that a person who communicates material to another person where either of “Conditions A or B” (as set out in the Bill) is satisfied commits an offence.

Conclusions

Section 5 of the Bill has the wording “communicates material to another person”. This does not seem to go further than the wording of Section 38 of the CJL(S) Act 2010 which states that “threatening or abusive behaviour” can be “things said or otherwise communicated as well as things done”.

In other words, there does not appear to be a legislative need to criminalise individuals posting threatening communications on websites. These situations are already covered by the existing legislation.

However, even if there were a legislative need, it is not met by section 5 of the Bill. The Bill does not create a new offence of making threatening communications which are in front of a wider audience (such as posts on the internet). It terms of defining “communication” it seems to go no further than the existing legislation.

A prosecution has already been brought under existing legislation for alleged abusive behaviour posted on websites:  
http://www.bbc.co.uk/news/uk-scotland-tayside-central-14392082

Alan McCreadie
Deputy Director of Law Reform, Law Society of Scotland
15 August 2011
Submission from Alan Leonard

How will the proposed law sit with reference to Article 10 and Handyside v UK (1976)?
I would imagine the courts are going to be full to the rafters with people using both as a 'defence'.

Article 10 protects your right to freedom of expression. This includes the right to hold and express opinions yourself as well as to receive and impart information and ideas to others.

Before the Human Rights Act came into force, the right to freedom of expression was a negative one: you were free to express yourself, unless the law otherwise prevented you from doing so. With the incorporation of the European Convention on Human Rights into English and Welsh domestic law, the right to freedom of expression is now expressly guaranteed.

In Handyside v UK (1976) paragraph 49 of the judgement, the ECHR stated that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and development of every person. It also made clear that Article 10 applied not only to information or ideas that are favourable and inoffensive but also to those that offend, shock or disturb the State or a sector of the population.

Alan Leonard
22 June 2011
Submission from John McAree

With regards the above Bill and the Justice Secretary’s comments today I would like to raise the following points:

Making the sign of the cross is not an act of aggression- it is actually a prayer- and for an individual to be liable to prosecution because another individual feels that its was done "aggressively" is an outright attack on Catholicism. As a 37 year old regular church go-er, I’ve yet to see anyone bless themselves aggressively. I will keep an eye out on Sunday, though, and will be sure to report any offenders.

Secondly, there should be no difference between outlawing Irish Republican songs which some people find offensive and other, political songs such as Flower of Scotland. Flower of Scotland isn't the Scottish national anthem. As part of the UK, God Save The Queen is the Scottish national anthem. Flower of Scotland celebrates the actions of an insurgent and terrorist, and those of a usurper king, which is equally as, if not more, political than most Irish Republican songs I can think of.

Thirdly, moving onto the Act itself. The Act gives too much power to individual interpretation. What one police officer finds offensive may not be what others do. For example, officers on duty at Celtic Park often find songs offensive, and act accordingly under existing legislation. Other officers, for example, on duty at Ibrox have much more tolerance. Unless, of course, there are other reasons?

Fourthly, the Act enshrines the right of the Orange Order and other groups to march with impunity, while raising the threat of arrest for anyone protesting against them.

I shudder at the authoritarian powers which this Bill will bestow on the police. I also shudder at the implications of this Bill on Roman Catholics and Scots of Irish origin. I believe that this Bill is the most blatantly anti- Catholic piece of legislation since the Act of Settlement.

John McAree
22 June 2011
Submission from Mark McCabe

Further to the Parliament’s call for evidence on the Parliament’s website, I am submitting my views in relation to the above Bill.

I am alarmed at the very wide and vague definitions in this Bill.

Dicey (Alder 2007: 158) stated that one of the features of the rule of law is that,

No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts.


This has been brought into British law (in England) by R v. Goldstein (2006) at 32,33 and by section 1 of the Constitutional Reform Act 2005. Clause 1(2) of this Bill does not seem to accord to the rule of law in this respect.

In terms of sectarian behaviour, given that it is motivated by religion, clause 1(2)(a), (b) and (c) seems to amply cover the ambit of sectarianism. Clause 1(2)(d) and (e) are so vague as to be ill-defined and could lead to people being prosecuted for anything that another person is likely to find offensive; the implication here being that no-one need actually be offended. Under the rule of law, it could not be said – it seems fair to say – that a person prosecuted under clause 1(2)(e) has committed a “distinct breach of the law”, precisely because the offence itself is not clear and distinct.

What one person finds offensive, another does not. This is entirely subjective because each person has different sensibilities to the next person; it seems fair to say that clause 1(2)(e) will probably lead to prosecutions of people who did not intend to be offensive in any way, but which someone else finds offensive. This is not even to mention the unjustifiable infringement of the right to freedom of expression – unjustifiable because the only behaviour that is criminalised is that which another finds offensive. I find it offensive that the Scottish Executive should think it perfectly alright to try to infringe my freedom of expression with vague laws, but I would merely dismiss it as a typical government activity to ban what it doesn’t like or agree with – and I certainly wouldn’t go to the trouble of prosecuting them for having the brass neck to do so. For these reasons and considerations, I think clause 1(2)(e) should be deleted.

Behaviour under clause 1(2)(d) is already covered by numerous other crimes, including breach of the peace, and the recently-created threatening and abusive behaviour.

I hope the Committee considers these views.

Mark McCabe
21 June 2011
Submission from Bob McKay

http://www.glasgow.gov.uk/NR/rdonlyres/DA614F81-4F1B-4452-8847-F3FDE920D550/0/sectarianism03.pdf

You will all be aware of the highlights. This comprehensive report with incredibly real qualitative evidence and expertly researched quantitative evidence cost Glasgow City Council over £1m.

The report was the subject of a fantastic Gallery of Modern Art season by Roderick Buchanan on sectarianism in Glasgow.

The conclusions included

"The majority of respondents did not support a special law against sectarian motivated violence as proposed initially by Donald Gorrie MP. While there were few concrete suggestions of action the Police might take to combat sectarianism, there was a general feeling that the Police should take a 'zero tolerance' approach to sectarian crime and that lesser crimes associated with sectarianism should not go unpunished."

"The results challenge the common belief that serious sectarian actions are prevalent in Glasgow. Neither different forms of crime, nor different forms of discrimination experienced by respondents themselves were commonly believed to be caused by religion. Less than one percent of all respondents said that, in the last five years, their religion had been the motivation of a physical attack against them (0.7%), a threat of physical violence (0.8%), vandalism (0.6%) or another form of harassment against them (0.4%). Similarly, only a small proportion of all respondents believed that, because of their religion, they had been turned down for a job (1.1%), unfairly treated at work (1.1%) unfairly treated by the Council (0.5%), unfairly treated by the "Police (0.3%), or unfairly treated by another public service (0.2%) in the last five years."

You the justice committee of my parliament have seen fit to prioritise this tiny problem which has disproportionate media scrutiny (why?) over and above the other ills of our society, (50,000 scots children living with addicts, not a concern? Not a priority?)

You the justice committee feel "something has to be done" unquestioning of the campaign to raise the profile of this issue at every turn.

You the justice committee are responsible for this shameful bill and its hamfisted, one sided amateur attempt to address deeps seated cultural issues. Poverty is Scotland shame. Addiction to booze and drugs are Scotland's shame, not nutters and ned's using offensive language at football.

You fundamentally misunderstand the psyche of west of Scotland men if you believe there is a true dispute about religion; perhaps you imagine gers and tic fans debating transubstantiation in a horrible way?? No you know as well as everyone else its simple tribalism over an incredibly strong football rivalry.
You must stop, think, look and listen.....don’t go down this road.

Funnily enough the police seem delighted by orwellian thought police laws and are talking of needing more resources.....are you all mad?

Bob McKay
22 June 2011
I write as the Scottish Parliament’s Justice Committee is convened by you today to consider the Offensive Behaviour at Football and Threatening Communications Bill. On reading the Bill, Section 5 introduces measures to address the increasing use of the internet to disseminate offensive or threatening material. Given the ubiquity of the internet, there does appear to be justification in the introduction of measures designed to discourage its use as a medium for behaviour that would be unacceptable in hard copy or other format.

Section 1 on the other hand, appears largely to extend sentencing for offences already well provided for, with much of the emphasis in the text reflecting Section 74 of the Criminal Justice Act 2003 and other relevant legislation. If it is the Government’s policy to provide the courts with sentencing options that may deter others from carrying out discriminatory offences, few of the law abiding majority will complain.

However Section 1, subsection 2e provides an ill defined catch all that raises a profound concern: A person will be considered to have committed an offence under the terms of this section if they participate in “other behaviour that a reasonable person would be likely to consider offensive”.

Explanatory Note 7 states “this would include, but is not limited to, sectarian songs or chants.”

I note in paragraph 63 of the Explanatory Notes accompanying the Bill that, with reference to Offensive Behaviour at Football “The Scottish Government does not rule out that individuals who are not currently considered to be acting criminally will be arrested on the basis of these new offences”.

In its judgement in Kokkinakis v. Greece 1993, the European Court of Human Rights held that under Article 7 of the European Convention on Human Rights: “an offence must be clearly defined in the law. ... this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable.”

The profound issue with the wording of Section 1 Subsection 2e is that it does not clearly define from the wording what acts will make a person criminally liable. Indeed, it does not define it at all, other than presumably, by reference to behaviour that the courts have already held to be in Breach of the Peace. This contradicts the Explanatory Note 63 above.

I ask you, as Convener of the Justice Committee, to direct the Committee to examine the intent of the Government behind this specific provision, and to seek confirmation and clarity as to what might constitute an offence under this provision. Practically and usefully, some examples of behaviour from the past season that would be considered indictable under the provisions of Section 1 (2) (e) would be wholly welcome.

Indeed, such clarity is simply essential.
Supplementary submission from Tony McKelvie

Following my email to you of yesterday, and in light of the comments of Roseanna Cunningham MSP to the Justice Committee referring to ‘Aggressive making of the Sign of the Cross’ amongst other matters, I am drawn to the following paragraphs in the Memorandum attached to the Bill:

“20. At present, disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of “threatening and abusive behaviour” at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, might also be relevant.

“21. However, there is concern that a substantial proportion of offensive behaviour related to football which leads to public disorder is not explicitly caught by current law. Such offensive behaviour might not satisfy the strict criteria for causing ‘fear and alarm’ required to prove Breach of the Peace, or section 38 of the 2010 Act. The Bill, therefore, seeks to put beyond doubt that behaviour related to football matches which is likely to incite public disorder and which would be offensive to any reasonable person is a criminal offence.”

Essentially, these paragraphs state that there are periodically behaviours witnessed at football grounds which are not breaching the peace, nor are they threatening or abusive, nor indeed are they racist in nature, inciting of religious hatred, discriminatory or otherwise unlawful. The example provided by Ms Cunningham is ‘Aggressive making of the Sign of the Cross’. For this we are to be convinced of the need for new legislation.

Were one to apply the Pareto Rule to the behaviour of football supporters in Scotland, it is unlikely that Aggressive making of the Sign of the Cross would figure amongst the 20% of behaviours causing 80% of the trouble. Indeed, being a frequent attender at football matches throughout Scotland for over 30 years, attending 30 senior games per season, I have yet to witness such behaviour.

Moreover, one needs to question who precisely ought be offended by such profanity such that they would be incited to public disorder? One suspects those who practice the Sign of the Cross as a pious act will be offended at its inappropriate and profane use. No doubt the Leaders of the Roman Catholic, Anglican, Lutheran and Eastern Orthodox churches would be dismayed. None of these practicing Christian groups are likely to retaliate causing public disorder though.

As an aside: One wonders if Scotland at large needs the accolade of being the first country in the World to draft legislation, the intention of which is to make the Sign of the Cross an indictable offence.
On considering the text of the Bill, its Explanatory Notes and Memorandum, its context, and public comments made to date, one is led along a different thought path, to an altogether different conclusion.

Since 2003 and the introduction of Section 74 of the CJS Act 2003, the overwhelming number of manifestations of sectarianism in Scotland, as defined by law and confirmed by the courts, have been anti-Catholic in nature. Similarly, in the football domain, while Rangers have been brought to book for 5 successive years by UEFA for discriminatory behaviour of their supporters, no other UK team has been reprimanded in this way.

Since 2003, whenever a charge has been brought under S74 for singing/chanting Irish Republican songs, even material referring to the actions and atrocities of the Provisional IRA, the courts have rejected the charge of Religious Aggravation, leading to a reaction amongst many that the law is simply not fair.

Some, for example David McLetchie MSP, have demanded that the law is changed to allow for S74 type prosecutions for Irish Republican expressions.

Because actions against sectarianism have overwhelmingly been see to be applied to offenders on one side, a political problem has arisen.

The political problem is seen in the response of the Scottish electorate to the measures and effects of Jack McConnell's extensive anti-sectarianism programme 2003-2007. As you will recall Mr McConnell was defeated heavily in the polls.

Accordingly, any new measures addressing sectarian behaviour will, pragmatically, require to be dressed such as to avoid a repeat of Mr McConnell's electoral fate.

In considering this context therefore, it seems reasonable to conclude that S1(2)(e) is in fact designed to address the substantial imbalance in sectarian convictions, but this singularly fails to recognise that the imbalance in conviction rates exists because there is a fundamental imbalance in the nature and direction of sectarian behaviour at large. Widening the scope of the law will not address the core problem.

It is clear that this issue is a complex one and attempting to draft legislation which addresses such a difficult topic while maintaining the principles of good jurisprudence is fraught. It is therefore surprising that this Bill is being managed through the legislative process quite so quickly.

There is of course an alternative to legislation, one that will have an immediate and long lasting impact on behaviour at football grounds. It is to encourage, through appropriate actions, the SFA and its affiliates to adopt and apply the UEFA standard of accountability for behaviour inside stadiums. I provide below a quote from then SFA Chief Executive David Taylor, speaking at the launch of the SFA’s strand of the Scottish Executive’s Action Plan on Sectarianism in 2006:

"Everyone saw what happened to Rangers last season[UEfa sanction] and such sanctions should apply in Scottish domestic football as well. We couldn't have a
situation where there was one standard of behaviour for European games and another for domestic matches because that would leave us open to ridicule."

Since then, the SFA and the SPL have adopted an entirely contrary view to UEFA, with the result that while UEFA continues to sanction Rangers for the behaviour of their fans, the SFA and SPL do not. Today Scottish Football is not, in David Taylor’s words, open to ridicule, its status is somewhat less reputable than that.

The Scottish Government has the means to encourage Scottish Football to adopt the UEFA code on behaviour inside the stadium. In my view, the first time a club is docked points for the behaviour of their support will be the last time the behaviour will be seen or heard.

We do not need difficult legislation. We do not need to skirt the principles laid out in Article 7 of the ECHR. We simply need to follow through on the available sanction of docking points and disqualifying teams in Scottish competitions, in the very same manner as is done in Europe.

All that is required is a little Leadership.

I am content for this submission to be included in the Justice Committee’s call for evidence on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

Tony McKelvie
22 June 2011
Submission from John McKnight

The main elements that concern me in relation to the proposed Act are (A) Singing at football matches, (B) The responsibility for monitoring behaviour at football matches by the voluntary sector. (C) The fomenting of offensive behaviour by the media and other organisations.

(A) Singing at football matches

1.0 Introduction

1.1 Religious division in Scotland existed before organized football. There were sectarian differences within and outwith Christianity. The history of the churches although based on love, has paradoxically, a history of violence and hatred. Songs or hymns have words such “Soldiers”, “marching as to war”, “put your armour on”, “must not suffer loss” etc. The violence and hatred of Church history is not, however, in the public consciousness. No one would deem that these songs are intended to be offensive.

1.2 A Roman Catholic priest founded Celtic, and Celtic were further established by Irishmen, Scotsmen of Irish descent, and Scotsmen. Celtic attracted a Roman Catholic following.

1.3 Rangers and Heart of Midlothian were founded by Scotsmen and eventually attracted a Protestant following. This was probably as a counter balance to the Catholic supported Celtic and Hibernian.

1.4 At the time of Celtic's foundation, all of Ireland was part of the United Kingdom. There was no campaign of terror that involved the civilian population at that time.

2.0 The First World War

2.1 At the height of the First World War the IRA rebelled against the British at the Easter Rising. This was months before the atrocious casualties of the Somme. The British and many of the Irish people saw this as a stab in the back.

2.2 The First World War touched every household in Scotland and Britain. The stab in the back by the IRA was seen as a heinous crime of hatred. It was not viewed as an act of self-determination. A minority perpetrated it.

3.0 Songs of the IRA

3.1 I cannot trace the beginning of the Celtic supporters adherence to, at least in song, for the IRA, but it certainly was offensive to the rest of the Scottish population. It has been going on for years, almost without comment. It has become a kind of institutionalised anti-Scottish, anti-British hatred. It has passed without comment in the media for years.
3.2 This stab in the back, at the Easter rising is still in the public consciousness. Paradoxically it lives there partly because of the offensive singing of Celtic supporters.

3.3 More recently we had the Troubles in mainly Northern Ireland, although this extended to other parts of the British Isles. The atrocities during these Troubles are clearly in the consciousness of people in Scotland. The Celtic supporter singing, in support of the IRA, was still going on during these Troubles. This was at a time when the IRA was killing Scottish soldiers. The singing was hate filled and provocative and resulted in violence.

3.4 It is particularly offensive to those of a patriotic nature and is mainly directed against Protestants who are seen to be pro-Scottish and pro-British. Falling into this category are the supporters of Rangers and Heart of Midlothian.

4.0 “Loyalist” songs

4.1 During the Troubles Loyalist organisations were formed – UDA, UVF, LVF, and Red Hand Commando. A series of songs were introduced at football matches that sung the praises of these groups. These groups committed atrocities on innocent people just as the IRA. Ranger’s supporters directed songs, which supported these groups at Celtic supporters. These groups are not patriotic in the normal definition of the word.

4.2 Songs in support of these “loyalist” groups are in the public consciousness, offensive.

5.0 Traditional songs

5.1 There are other songs that are sung at football matches that contain terms of violence. These songs are usually long standing and the battles they “celebrate” were long ago. They are not in the public consciousness seen as violent, provocative or crude. Into this category are Rule Britannia, The Flower of Scotland, The Soldiers Song, the Sash, The Fields of Athenry, and others. Just like the religious songs outlined in section 1.2 they are not generally regarded as provocative or an incitation to violence.

6.0 Summary

6.1 There is, therefore, a difference between songs and their intention. Hymns, religious songs, patriotic, nationalistic, or cultural songs can be benign when the battles to which they refer, are not in the public consciousness, provocative, aggressive, or intentionally offensive.

6.2 Songs, which celebrate terrorism, acts of violence, that were carried out in the recent past, are generally regarded as abhorrent by the general public. Songs that celebrate older acts of terrorism are not acceptable either. The Scottish people cannot have a minute’s silence to respect the dead of the First World War, and then be subjected to songs, which celebrate their deaths in Ireland. These songs praise
acts of terror against the civil power and innocent civilians. They are used by one set of supporters to taunt, humiliate, and offend the other set of supporters.

6.3 Songs, which celebrate the myriad of so-called loyalist groups in Northern Ireland, are not patriotic songs. They celebrate groups who terrorised the civilian population and conspired, when it suited their purpose, to undermine civil power. These songs are used by one set of supporters to taunt, humiliate, and offend another set of supporters.

6.4 Songs in section 5.1 should not be seen as offensive, and are songs that celebrate a patriotic, nationalistic, or cultural event. Songs described in sections 5.2 and 5.3 should be regarded offensive, because that's what they are in the public consciousness.

(B) The responsibility for monitoring behaviour at football matches by the voluntary sector

1.0 The voluntary sector has much admirable strength. Local knowledge of a subject and closeness to a subject can bring benefits. However the voluntary sector has a major weakness in that factions can overtake it, and it is subject to factionalism.

1.1 When one of the main problems at football matches is factionalism or sectarianism there is a need for complete and utter impartiality in the monitoring of sectarian and offensive behaviour. There is also a need for complete transparency. I feel that this is not the case at present.

1.2 I believe that the current groups receiving funding in relation to the monitoring of sectarian behaviour are not best equipped to deal with this issue. In addition there are allegations that one group is lacking in transparency, and has failed to satisfy a major football club, its supporters, and the media in relation to allegations of sectarian singing. The allegations and modus operandi of this organisation are unclear.

1.3 Responsibility for monitoring offensive behaviour should be carried out by the Police. The Police have professionalism and transparency and are accountable to elected representatives. They are best placed to undertake the role currently carried out by the voluntary sector.

1.4 There is a danger that by using the voluntary sector the government is creating an anti-sectarian industry. Rather than seek to resolve the problem the voluntary sector will seek further funding to expand their operations and in fact create an industry. The Police, under existing financial control, will keep the problem in both financial and policy perspective.

1.5 The Police, working with football clubs, would offer better training in techniques to deter offensive behaviour and sectarianism.

1.6 There is no need to extend the remit of groups like Nil by Mouth who appear to want enter the workplace to educate workers on sectarianism. If this purposed act is successful there will be no need for groups like Nil by Mouth.
2.0 Summary

2.1 The voluntary sector is open to factionalism and in the instance of sectarianism-motivated individuals who may potentially instil their views through coercion, and bullying.

2.2 The Police should carry out the entire operation, in relation to offensive behaviour and potential offensive behaviour. The Police should carry out all education, prevention, identification, policy development, implementation and others. The football clubs should where appropriate, augment this.

(C) The fomenting of offensive behaviour by the media and other organisations

1.1 The Media and their spokespersons and “experts” who have attached themselves to anti-sectarian programmes and articles are often less than helpful. In fact, some of their ill found comments exacerbate the problem of sectarianism, extreme nationalism, and racism.

1.2 Comments are made in relation to a variety of problems especially Scottish racism against the Irish, and anti-Catholic behaviour. Allegations in relation to anti-Irish racism and anti-Catholic behaviour should be substantiated. Failure to substantiate allegations should be examined by the Police. The days of fomenting sectarianism and racism by unsubstantiated comment must end. This should be the case no matter the source of ill-founded allegation, whether it is media spokespersons, professors, religious media officers, and newspaper “sources”.

2.0 Summary

2.1 The Police should take responsibility in monitoring, not only Threatening Communications on social media and sports sites, but also in the wider media. No one should be absolved of responsibility in relation to offensive behaviour, or fomenting offensive behaviour.

John McKnight
22 August 2011
Submission from Tom Minogue

Having scanned the draft Bill and based on my experiences in these matters I would comment as follows:

A I cannot understand why a new offence of “Offensive behaviour at regulated football matches” will help stamp out sectarianism. The police already have powers to arrest troublemakers at football matches if they engage in expressions of hatred against religious or ethnic groups.

The sad fact is that by and large the police have failed to use these powers to enforce the law when tens, hundreds and even thousands flaunt them. If the police cannot find fault in those fans singing of their desire to see their fellow Irish-descended Scots go back to Ireland and cannot find offence in the same fans singing of their desire to be up to their knees in Fenian (Irish RC) blood then God help us.

When the police find such clearly defined and proscribed racist and religious sectarian songs/chants are deemed to be too difficult to enforce how on earth will these same police officers have the wit to define the rather vague offence of (2) (e) “other behaviour that a reasonable person would be likely to consider offensive”? I think I am a reasonable person and find most of what Rangers fans sing to be offensive as they seem to have no songs about football. Derry’s Walls, The Sash, A Soldier of the UDA, and some of the other chants about RC’s and the Pope are generally offensive to me but I do not dispute the fact that they are typical of the Scottish/Ulster Orange tradition and Rangers draw much of their support from that group. And I do not doubt that in the confines of a football stadium their singing could not be described as a criminal offence.

I would not want these songs to be outlawed, offensive as they are, but I certainly would want the police to act when these fans sing of their wish to involve me and my kind in their bigotry.

To sing a request for me to return to my ancestral home because the famine is over dances on the graves of the dead of An Gorta Mor, and to sing of a desire to be knee deep in my blood is an incitement to violence against me and mine. The singers of offensive and racist songs directed at others and the singers of proscribed songs that incited violence towards religious or ethnic groups should be prosecuted.

But that which is not proscribed and causes offence to me may not cause offence to others. These things are entirely subjective and it was noticeable on Newsnight that Kenny MacAskill was unable to give examples of same. If our Justice Secretary can’t define or draw up a list of what is not proscribed but is offensive then how will the ordinary Bobby-on-the-beat make this distinction?

Another criticism I would make of this proposed new offense is that it appears to relate only to behaviour in connection with soccer matches, i.e. in relation to a regulated football match. This cannot be right and it seems to me that a major cause of sectarianism is the abuse that goes with Orange Order events when those that
accompany the parade seem able to racially and religiously abuse the general public with impunity.

I don’t think this legislation is needed, but if it is why not widen it to include parades and marches where the most virulent offensive behaviour takes place in events that are of themselves offensive to many?

B I would agree that there needs to be a new offence created in relation to “Threatening Communications” and my own experience of being threatened online did have my lawyers and the police at a loss to define what offence had been committed under the existing law.

I would make it clear that I passionately believe in free speech and especially when this involves those taking part in private internet forums.

In my own case I took the view that the Hearts internet site were entitled to say what they liked be it offensive to others or not. If I didn’t like their views then I did not have to join the forum. However I was alerted by a decent anonymous forum member who warned me that threats of violence against me had been made on the site. Furthermore my religion was given as RC and my address was also given out.

It cost me the best part of £1,000.00 in legal fees to have the offending posters banned for breaking the rules of their website, as opposed to the law. The Moderator also resigned and all posts were removed. My lawyers advised me to stay away from my home when Hearts visited Dunfermline—advice I did not take—and the police monitored my home on the day of the game.

I was threatened, not in relation to anything I had posted on their site, but because of a letter of mine that was published in another forum, the letters section of The Herald. It cannot be right that this can be allowed in law, and your proposed new legislation should deal with such threats and incitement.

Thanking you in anticipation of your consideration of my submission which is made based on personal experience.

Tom Minogue
21 June 2011
Submission from the Muslim Council of Scotland

The Muslim Council of Scotland (MCS) is grateful for having the opportunity to respond to the Justice Committee call for evidence on the Offensive Behaviour at Football and Threatening Communication (Scotland) Bill.

MCS is a membership-based umbrella organisation, which accommodate and reflect the variety of social and cultural backgrounds and outlook of the Muslim community. It is an independent body working to promote consultation, cooperation and coordination on Muslim affairs in Scotland. It is a non-sectarian and non-partisan body working for the common good.

We welcome the opportunity to contribute to the Bill and appreciate the government’s decision to extend the consultation period from June original deadline.

We keep our response very brief and focus on the general points especially relating to Communication.

General Points:

We welcome the strong messages this Bill gives in relation to the insidious nature of sectarianism and that such behaviour is not to be tolerated. However we believe that the Bill should not be confined only to football related incidents and that the Bill should cover all offensive behaviour/communication which would be creating community divisions. Examples of offensive incidents and communications driven by islamophobia and anti-semetic ideas are too many to mention.

We condemn any behaviour and beliefs which foster hatred of any individual or group. All persons are entitled to respect and to live without fear and harassment intimidation. Citizens carry responsibility for exercising their freedom responsibly and for contributing to harmonious relations.

We would firmly support comments made by other organisations in relation to missed opportunities to extend the Bill beyond football related incidents.

We believe that the best means of achieving the stated aims of the Bill is to ensure that any legislative change reflects the experience of the full range of equalities groups, and is supported by a comprehensive programme of human rights education, ensuring that every child in Scotland has the opportunity to learn respect and tolerance for others.

We also believe that the government and civic bodies should give leadership in this area through education and support of the collective work by many voluntary organisations.

Socially responsible media whether large organisations or individuals on electronic social media are also very much an effective part of the society which can help stamp out offensive behaviour and reduce offences.
As recent events have shown proper media regulation is urgently needed, it is not part of this Bill but should be promptly considered.

On the balance between freedom of expression and community harmony, we welcome the policy intention that underlines the Bill. However, we would like the provisions of this Bill to be in conformity with the Convention of Human Rights, and especially are clear, precise and foreseeable in its application. It is important that the Bill strikes the right balance between the protection of public order and human rights such as the ‘responsible’ freedom of expression.

The Bill and government activities should aim to act in a preventive way beyond the protection of public order in order to maintain and support the community cohesion and harmony.

The right to freedom of expression is not absolute, it is a qualified right. As Article 10(2) of the EHRC provides: “the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of … public safety, for the prevention of public disorder or crime…”

The intention of the offence is to be welcomed, particularly the recognition that sectarianism is not the only source of threats or offensive behaviour that occurs at football matches or other gatherings. The offence should cover all equality characteristics.

A major example of this is our own experiences with the Far Right organisations and individuals, such as English Defence League etc. There is a good link established link between these groups and football hooligans.

While there is some difficulty in listing the different circumstances in which a communication would not be considered incitement in order to protect freedom of expression, the present Bill provision of the use of a reasonable person test is so difficult to apply and will potentially lead to many inconsistencies. It is not clear who is the person to apply the test and at what stage of the proceedings, is it the police, the prosecutor or the court.

Muslim Council of Scotland
25 August 2011
Submission from the National Secular Society

The National Secular Society challenges religious privilege and campaigns for the separation of Church and State.

The NSS wishes to make the following points on the proposed legislation:

1. The impairment of Freedom of Expression – one of our most fundamental rights - is a potential consequence of the current wording of the Bill. Parliamentarians need to ensure that disagreements and robust debate are not unwittingly proscribed. It is essential that the prosecution threshold always includes intention, not just likelihood. We do not think that material on its own should be deemed threatening; in order to secure a conviction, persons should need to have been threatened. Similar concerns were recognised by late freedom of expression amendments to the Racial and Religious Hatred Act in England\(^1\). Alex Salmond voted for these in England; but so far there is no equivalent in the Scottish Bill.

2. Offensive religious sectarianism has disappeared from many areas of Scottish life. In the 1950s many Scottish Roman Catholics feared Home Rule because they thought that it might result in discriminatory behaviour towards them\(^2\). Collaboration between the major churches in Scotland was, however, a feature of the movement that resulted in the establishment of a Scottish Parliament in 1999. There is also evidence that the descendants of the Roman Catholic Irish immigrants of the late 19\(^{th}\) and early 20\(^{th}\) century have integrated on equal terms into Scottish society\(^3\).

3. The proposed legislation is only tackling the tip of an iceberg in attempting to deal with specified types of purported disorder related to certain football matches.

4. The NSS agrees with the Moderator of the Church of Scotland that religious sectarianism in Scotland is a ‘deeply cultural matter’\(^4\).

5. While the proposed legislation may diminish unacceptable targeted behaviour it will not totally eradicate its causes and other manifestations of violent and offensive religious sectarianism in Scotland.

6. The causes of unacceptable religious sectarian behaviour at football matches and elsewhere lie deeply rooted in Scottish and UK society. Religious identities are continually expressed and reinforced in a number of ways by institutions central to Scottish society.

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\(^1\) Para J29 Protection of freedom of expression. Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practicing their religion or belief system. (Racial and Religious Hatred Act 2006) [http://www.legislation.gov.uk/ukpga/2006/1/schedule](http://www.legislation.gov.uk/ukpga/2006/1/schedule)


\(^4\) Scotsman 17 June 2011
7. State funded schools are divided between Roman Catholic and ‘non-denominational’ (Protestant) schools – many of the latter with Church of Scotland chaplains. Whatever the efforts of teachers, ministers and priests to promote inter-faith understanding, the overall effect of schooling in such a system is to emphasise the significance of faith and faith distinctions in society.

8. Scotland’s publicly funded further education colleges and universities provide a model of how state funded education can be delivered without a religious ethos, religious indoctrination or religious observance to students from various ethnic and national origins and a great diversity of religious and non-religious beliefs.

9. Sectarian divisions have even been embedded in the Scottish Parliament in the weekly ‘Time for Reflection’ where, because of the attempt to incorporate and reflect the religious diversity of the nation, the most numerous appearances are by Protestant and Roman Catholic representatives – reinforcing, in the Parliament, the idea that these religious differences are of great importance.

10. Successive Scottish governments have given privileged consultative status to the two biggest churches in Scotland – most recently evident in the consultation held by the Minister for Justice with representatives of the Church of Scotland and the Roman Catholic Church prior to the release of the proposed legislation on offensive and violent behaviour at football matches.

11. Politicians often appeal for support on the basis of religious distinctions and thus contribute to the maintenance of vigorous attachment to religious identities amongst some Scots.

12. Perhaps the most important symbolic representation of the continuing divisions between Roman Catholics and Protestants in Scottish society is the oath required of a new monarch (under the Acts of Union of 1706/7) to swear to maintain, in Scotland, Protestantism and the Presbyterian form of church government and the exclusion of Roman Catholics from succession to the throne.

13. The Scottish Parliament expressed opposition to discrimination against Roman Catholics in the succession to the throne in 1999. It is time that it considered making representations to remove a new monarch’s oath to maintain Protestantism in Scotland.

14. The Scottish Parliament’s consideration of the UK Parliament’s Scotland Bill over the next six months provides an opportunity to initiate action to end the additionally Protestant character of the monarchy in Scotland by proposing amendments to the relevant UK legislation.

15. Unless these issues are attended to, the fundamental factors that shape sectarian religious attitudes and behaviour in Scotland will continue to result in unacceptable and offensive behaviour at football matches and in other locations.

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5 Scotsman 17 June 2011
16. Increasing numbers of Scots reject, or are indifferent to religion and the differences among Christians that are the sources of violence and disorder at football matches. There is thus a need for the Parliament and commentators to avoid attempting to depict the Scottish population as divided between Protestants and Roman Catholics. There is a large and growing sector of the population to whom these distinctions are irrelevant.

17. There is thus a considerable agenda for the Scottish Parliament in several areas of its responsibilities, not just in the Justice Committee, if it wishes fundamentally to challenge the undesirable manifestations of religious differences in various aspects of Scottish life. For this reason this paper is being circulated to all members of the Scottish Parliament, the Education and Culture Committee and the Scotland Bill Committee.

Norman Bonney
National Secular Society Council Member for Scotland
22 June 2011
Submission from Nil by Mouth

Who we are

Nil By Mouth (NbM) is Scotland’s leading sectarianism awareness charity and was founded by Glasgow teenager Cara Henderson in response to the brutal sectarian murder of her friend Mark Scott in 1995.

NbM successfully campaigned for the introduction of a new law to make religious hatred an aggravated offence and has campaigned against sectarian attitudes throughout Scottish society.

Since 2000 we have delivered, free of charge, hundreds of sectarianism awareness workshops in schools, youth groups, colleges, universities and workplaces. The charity regularly contributes to academic work on the issue and provides informed comment in the media on the subject.

Background

Recent and reprehensible threats and offences against several high profile figures have refocused minds on this problem, but we must remember that sectarianism has plagued Scotland for generations.

Since the introduction of section 74 of the Criminal Justice (Scotland) Act 2003 there have been over 2,200 convictions for religiously aggravated offences across Scotland. Recent statistics reveal that between 2006 and 2010 2,605 charges were brought under section 74 with 1,062 people being convicted.

These statistics, coupled with recent high profile incidents, illustrate that sectarianism is alive and well in Scotland in the 21st century. Sadly, these figures may only be the tip of the iceberg. We must ensure that the ongoing problem of sectarianism receives not just public attention but that further action is taken through both the Government and Judiciary to restrain and prevent sectarian behaviour.

While NbM wishes to contribute to the debate surrounding this bill we would state at the outset that the proposals contained within the bill only deal with certain manifestations of sectarian behaviour. The final paragraphs of this submission will deal with the charity’s view as to how we can best challenge sectarianism in wider society.

The Proposed Legislation

NbM has long recognised the links between sectarianism, football, the internet and threatening behaviour and have assisted with various pieces of research on these issues down the years.
We have previously campaigned for the introduction of new laws and controls to effectively tackle sectarian behaviour, many of which are directly relevant to the stated policy objectives of the bill. These include:

Section 74 of the Criminal Justice (Scotland) Act 2003 which introduced statutory aggravations for offences motivated by religious prejudice and requires courts to take any aggravating factors into account when passing sentence.

Part 2, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 allows for football banning orders of varying lengths to be applied to offences of violence, disorder and stirring up hatred towards a range of protected characteristics.

Discussions regarding this bill also provide an opportunity to examine the use of existing legislation, particularly with regard to the use of Football Banning Orders.

Nil By Mouth notes with concern the recent evaluation of the use of FBO’s in Scotland by the SCCJR (1) regarding the use of FBOs across Scotland and would ask the Committee to reflect on how this sanction can be better utilised.

Given that these laws are currently in place, any new legislation must be as robust as possible and add something to the existing package of sanctions to maximise its effectiveness, both as punishment and deterrent. They must also be closely monitored by relevant authorities – including Parliament.

We would ask the committee to reflect upon the challenges encountered by agencies enforcing existing legislation, and the manner in which football clubs and governing bodies assist these agencies, in order to ensure that any new legislation is as practically enforceable as possible.

To facilitate this we would like to see the insertion of a ‘sunset clause’ which would allow an opportunity for all agencies to monitor the effectiveness of any new laws over an initial 12-24 month period.

**Definition of Sectarianism**

Perhaps the biggest issue surrounding this bill in both public and political discourse is that of definition.

NbM is well acquainted with the difficulties in providing a hard and fast definition of what constitutes sectarian language or act. The charity frequently receives e-mails from individuals and groups seeking clarification on our viewpoint, or challenging our assertions that a particular word or act is sectarian.

We must accept that the word ‘sectarianism’ transcends its dictionary meaning when applied to Scotland.

NbM understands that sectarianism in Scotland is a **fusion of religion, politics, identity and ignorance**. The context in which a particular act is performed, or certain word is spoken, is also highly significant.
While many football clubs have adopted their own codes of conduct for supporters it is also clear that there has been a marked reluctance on the part of government, police, sporting authorities and civic Scotland to providing a clear definition of words, acts or gestures which may, or may not, be viewed as sectarian.

NbM would be willing to work with the committee to explore ways in which a greater understanding of the complexities surrounding definition can be reached.

**Operational Issues**

We would request that detailed annual statistics relating to charges brought and the outcome of legal proceedings are compiled and made publicly available.

We would suggest that both breach of the peace and section 74 conviction rates provide the best form of comparison for measuring the success of any new legislation.

NbM is keen to establish what type of training the government will provide to enforcement agencies, such as the police and crown office, in order to ensure that they are equipped to deal with the various manifestations of sectarianism, and able to distinguish what is, or is not, sectarian behaviour.

NbM would like to know if the government plans to introduce a rehabilitation programme for those convicted under this legislation. Schemes are currently in operation for those convicted under section 74 and similar provision should be in place for new offenders.

If enacted, there should be a nationwide publicity campaign to promote awareness of any new laws.

**Sectarianism in Wider Society**

While the proposed legislation seeks to challenge football and internet based sectarianism, we need to understand that the key battlegrounds are the hearts and minds of our people – particularly the young.

The long term and lasting solution lies in education and awareness. Legislation must be backed up with grassroots educational and intervention programmes. Government must ensure that anti-sectarianism measures are firmly embedded in the curriculum.

Given the Christie Commission’s call for renewed emphasis on ‘preventive spend’ we would ask the committee, and government, to reflect, upon the disparity of central funding between the £1.8 million provided to the National Football Policing Unit (2) and the £527,250 awarded for anti-sectarian educational and prevention projects. (3)

We ask the committee to urge the Government to support these projects and ensure that tackling sectarianism, in all its forms, remains firmly on its agenda during this session of Parliament.
Finally, consideration should be given to creating a nationwide fund to allow communities, voluntary organisations, supporters groups and faith communities to create and develop their own grassroots anti-sectarianism projects.

Reference Notes:


Nil by Mouth
25 August 2011
Submission from Deirdre O’Reilly

My concerns are generally that the Bill, as it stands, may restrict freedom of speech and religious freedom, including the distribution of Christian literature or street preaching.

[1] A section 1 offence of offensive behaviour at or relating to football matches

[i] There appears to be no protection clause included in the Bill which would ensure freedom of speech for people. My concern as a Christian is that other Christians or myself would be allowed to promote the Christian message in the context of football matches. There seems to be the possibility that police may object to those sharing the Christian message, limiting religious freedom.

[ii] There is concern regarding the differing views on the acceptability of various sexual orientations and actions. As a Christian, I hold a particular viewpoint regarding what is sexually sinful and what is sexually good. Other members of the public may have a differing viewpoint. If my viewpoint is expressed, the Bill seems to leave open the possibility that police may consider that I am committing an offence.

[iii] The Bill is intended to make an offence of actions which incite public disorder. However, it would include the situation where a person's actions or comments are LIKELY to incite public disorder. However, the Bill leaves the judgement open to the subjective decision of the police. It is possible that, if I were distributing Christian literature near a football match, a member of the police may consider that this behaviour is likely to incite public disorder.

[iv] Moreover, according to the Bill, the situation can be deemed an offence even when the persons likely to be incited to public disorder are not present or when no public disorder actually happens. Again the judgement depends very much on the subjective view of the police. It is possible that, if I were distributing Christian literature near a football match, a member of the police may consider that this behaviour is likely to incite public disorder, even when no person present seems to be offended.

[v] The vagueness of the legislation is such that the offence may be committed on a journey to a football match. However, it includes people who may neither have attended nor have the intention of attending the match. Such people may be classed as on a journey to a football match. This could include almost anyone travelling on public transport in the neighbourhood of a scheduled football match.

[vi] The offence includes actions/comments by any British citizen who is outside Scotland. Such a situation seems to involve Scotland legislating for others not residing in or visiting Scotland. This seems to be questionable as a legal possibility.

[II] A section 5 offence involving threatening behaviour

Again the vagueness of the provisions of the Bill raise concerns, particularly as to the stirring up of religious hatred.
1] Any communication by any means except unrecorded speech is included. This would appear to include the possibility of recorded sermons or podcasts, again raising concerns as to the freedom of Christians to express our views on sexuality.

2] The communication seems to include almost anything capable of being read or listened to, again raising concerns as to the freedom of Christians to express our views on sexuality.

3] It is possible that the quotation of some verses of Scripture might be regarded as threatening, even while it is not making threats.

4] The offence includes those outside of Scotland which raises the question of legal possibility.

[III] General summary

My concern regards the lack of clarity of the Bill, which could lead to prosecutions of Christians who are sharing the Christian message.

The terms 'THREATENING' and 'STIRRING UP HATRED' are not clearly defined. Their interpretation is very subjective. There is the possibility that criticism of another's religion may be regarded by some as 'threatening' and 'stirring up hatred'.

The protection of the matter of 'reasonableness' is also subjective. Who decides what is reasonable and on what criteria?

A person who takes offence at what another publishes may possible use the legislation to intimidate the person publishing.

The Scottish Government believes that the Bill will NOT

- Stop peaceful preaching or proselytising.
- Restrict freedom of speech including the right to criticise or comment on religion or non-religious beliefs, even in harsh terms.
- Criminalise jokes and satire about religion or non-religious belief.

However, the very vagueness and the subjectivity involved in the suggested Bill may result in such situations arising. I understand that, in Australia, two Christian missionaries, who spoke at a seminar on evangelism among Muslims, were prosecuted under a hate crimes law, after someone in the audience at the seminar complained to the police.

Deirdre O'Reilly
25 August 2011
Submission from Playbusters

Playbusters is pleased to submit evidence to the Justice Committee on the Bill and to set out what positive, non legislative work can be undertaken in local communities to promote tolerance, fairness and respect. We believe that by delivering projects and services, we can break down barriers between people and between communities which make a long term impact and avoid the need for legal intervention and makes communities safer and more vibrant.

Playbusters shares the Scottish Government’s objective of tackling intolerance and violence in our society and we urge the Justice Committee to consider what non-legislative measures need to be in place to make a cultural and attitudinal difference in our society.

About Playbusters

Playbusters is a grassroots voluntary organisation based in Parkhead and working across 11 areas within the East End. We deliver a number of high quality services, interventions and educational projects to break down barriers across areas, age groups and backgrounds. The ethos of our organisation is to use the skills and experiences of the community (all ages) to bring about positive change and build more cohesive communities. At the core of our values is tolerance and respect for others.

Our activities include a highly successful intergenerational programme that allows for sharing of skills and positive dialogue between the generations. Our environmental workshops, outdoor play opportunities and youth activities provide positive benefits for young people.

We have developed a successful language programme and have developed our ‘Easy Spanish Football programme’ which promotes health and wellbeing and incorporates a cultural element.

We have strong progression routes for young people through volunteering, Dynamic Youth, Youth Achievements and Ambassador schemes. We connect with family units and see this as a means to address some issues that are carried down through generations.

We have developed a partnership with Glasgow University through a community development programme with over 300 participating. As a result many have undertaken further education with John Wheatley College and 9 have graduated at Glasgow University with a BA Community Development. We are now progressing an ‘Activate’ exchange programme in conjunction with partners in Belfast.

We have over 90 active volunteers (aged 11 to 90) - details on http://www.youtube.com/watch?v=ZZMg_ZMBUTU
The success of our programmes has been positively reported on throughout disciplines, from education services, Police, public organisations, housing organisations, young people themselves and the wider community. Many of our projects have been reported in local and national newspapers. Some of these comments are as follows:

**Head Teacher of a local primary school**

“We feel this is a very worthwhile project which promotes positive community relationships – fostering greater understanding and respect, in particular between our young people and more senior citizens. Playbusters clearly have some interesting and innovative activities and we are keen to continue to be involved”.

**A Communities Inspector at a local police station**

“Playbusters have been instrumental in helping us tackle antisocial behaviour in the Parkhead area and our community based officers work closely with you on a daily basis. This has had a dramatic impact in reducing levels of violence and disorder in the area and I would add my full support to Connecting Generations as another key measure to help improve the quality of life for residents in Parkhead”.

**The Principal of a local college**

“The college can contribute to your proposal “seeking to assist in the development of Youth work skills for Young Community Volunteers (aged 18 – 24) who might be acting as leaders of your local projects and, in part, be capable of certification”.

**Community Hall Management Committee**

“We have been keen supporters of Playbusters in our community, particularly the Connecting Generations initiative. This is a very worthwhile project greatly enjoyed by our hall users, old and young alike”.

**Comments from young people**

“I really enjoy getting to play games outside” (young female aged 10).

“I enjoyed making tents and playing outside” (young female).

“Playbusters are really fun…The people that work there are kind fair and they make our day better. So if I did not come there I would have had a dull day”.

**Comments from the Activate course (Glasgow University). Course content includes anti-discriminatory practice, community values, social justice and equalities.**

Some comments are as follows:

- A greater understanding of the importance of a community, the security it offers to individuals. The significance and strength of interaction between individuals and community.
I have gained a different approach to the way I tackle situations, also and insight into the way other people think and to perhaps think out of the box.

It made me self-reflect on every aspect of my life from an educational point of view to a strictly personal point of view. It was a journey of self discovery.

I have gained an insight into things that I never knew about. The subjects discussed I found very interesting.

I gained Knowledge and awareness. Knowledge of other people’s views from their background and area.

Participation in this course has allowed people to progress as follows:

- 9 people graduated with BA Community Development at Glasgow University.
- 16 people have undertaking voluntary work leading on to sessional employment.
- 8 people have undertaken HNC Working with Communities and other courses at John Wheatley College.
- 2 people currently undertaking BA Community Development at Glasgow University –(2nd Year)
- 4 people currently undertaking HNC Working with Communities at John Wheatley College
- 1 person currently undertaking HNC Housing and Community work at John Wheatley College
- 5 people currently undertaking PDA Youth work at John Wheatley College
- 2 People currently undertaking NC Working with Communities at John Wheatley College

**Difference Playbusters makes**

Playbusters is making a lasting difference to people of all ages within the communities where they operate. This is shown in the levels of participation at youth clubs and community activities. It is demonstrated by the amount of people volunteering with us, including entire families who volunteer. The difference is seen in the development of people including the progression for young people. Over the past year progression for young people are as follows:

- 17 young people registered as volunteers
- 22 young people participated in Dynamic youth awards
- 25 Millennium development volunteers – completing either 50 hours, 100 hours or 200 hours of volunteering
- 2 young people have become young ambassadors for Save the Children
- Young Volunteers won the East centre/ Calton Community Champions Awards and where Finalists for Glasgow wide
- Voscar award winner
- Young Green List Winner
- Youth Board – 10 members aged 11/18
- 2 Young people undertaken Sports Leadership courses.

We work across schools, community centres, sheltered housing, parks and streets and connect with over 600 people on a weekly basis.
Funders

We have a mixture of funding including: Scottish Government, Big Lottery Fund, Children in Need, Keep Scotland Beautiful, Inspiring Scotland, Glasgow Housing Association, Glasgow City Council and a number of Trusts. (full details on our website: http://www.playbusters.org.uk

We have also received many awards for our programmes (details in footnote)¹. Most recently we received the Queens Award for Voluntary Service (equivalent of an MBE to voluntary organisations) and this was presented at a Civic Reception at the City Chambers.

Margaret Layden
Project Manager, Playbusters
1 September 2011

¹ European Language Award, Spanish Embassy Award, Mary Glasgow Award, National Charities Award, SURF Award, Community Champions Award, Volunteer Friendly Award and Queens Award for Voluntary Service.
Submission from William Queen

I write to you with regard to the proposed legislation Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

I can understand the need to introduce some legislation with regard to the online abuse of certain individuals during the last football season, there is a need to prevent people hiding behind a computer and spilling out there vile all across the world.

But I see no need for the rest of the bill as it seems that existing laws are enough to deal with the behaviour of those who use football as a way of expressing their hatred. It has become clear over the last few days that this part of the bill is clearly unworkable. Neither the police nor the minister could be clear on what would constitute committing an offence under this part of the act. A senior police officer said he could not define which songs would constitute committing an offence under the act. The minister said at committee that making the sign of the cross could constitute an offence if Celtic and Rangers supporters met in the street.

If a senior policeman and the minister cannot say how people would be deemed to have committed an offence, how will the police on the ground decide who is committing such an offence.

This bill is being rushed through parliament at breakneck speed for no good reason and needs to be slowed down and thought through properly. As a Rangers supporter I want to see sectarianism banished from our nation but this is not the answer, a well thought out law may help eradicate some online abuse but this law will do nothing to prevent it.

William Queen
21 June 2011
Submission from Margaret Ramsay

While I agree that something should be done about the continuing football hooliganism of a small minority which is a stain on our society, as a Christian I am very concerned with the wider scope of this bill which could affect my freedom of religion and freedom of speech. Having been a Christian for 45 years I’ve had many conversations with people where I’ve had the opportunity at some point in the conversation to share my faith and sometimes offer them a little leaflet with more information if they’re interested in what I’ve said or want to know more.

As the basis of what I want to share with people is that God loves them and sent His Son to die for them, I share it in a way which is in line with what I’m saying ie. politely and in a non threatening manner. But if, because of the faith or viewpoint they hold, what I say threatens them, does that mean I could now be arrested if this bill passes? The term "and threatening communications" needs to be dropped altogether or included after "offensive behaviour".

Margaret Ramsay
19 August 2011
Submission from Rangers Football Club

I write on behalf of Rangers Football Club in response to the call from the Justice Committee of the Scottish Parliament for written evidence in respect of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

This submission follows oral evidence I gave on behalf of Rangers Football Club at the Justice Committee on Wednesday 22 June.

1. General Principles
As stated in oral evidence given to the Justice Committee previously, as well as in public statements, Rangers Football Club supports efforts to tackle offensive behaviour, both at football matches and on the internet.

The Club understands its responsibilities in this regard and has been an active participant in the Joint Action Group which was set up following the initial summit in March.

As a Club, we acknowledge the issues we have within a small element of our support and are continually working with supporters groups and others to address these areas and will continue to do so.

We will also continue to support the Scottish Government campaigns to tackle issues such as the increase in domestic violence following Old Firm matches, which was the catalyst for the original summit in March.

It is important, however, to reiterate that football clubs are not the cause, nor are they the sole solution, to addressing offensive and threatening behaviour of individuals. Nor can they be responsible for curing the ills of society.

It should be acknowledged that the general behaviour of football supporters across Scotland is extremely good, including at Old Firm matches.

Football matches in Scotland are played in a safe and generally comfortable environment. The management and policing of matches has advanced immeasurably over the years. There is virtually no violence at or around football stadiums when matches take place, unlike many European countries. The incidence of racism has diminished to a very low level whereas this continues to be a significant issue in leading footballing countries in continental Europe.

In this context, Rangers Football Club believes the challenges facing football should be kept in perspective. Football makes an overwhelmingly positive contribution to society.

There is a danger of demonising football at a time when there are a number of challenges facing the future of the game in Scotland as a whole.

Problems on the day of football matches primarily take place well away from stadia where they are played. They often arise in communities many hours after the end of the match and alcohol is the single biggest factor in the behaviour of the individuals
involved. For this reason, Rangers Football Club fully supports the introduction of minimum pricing for alcohol as we believe this will have a positive effect within Scottish society as a whole.

It is also important to reiterate that this proposed legislation comes against the backdrop of an agreed plan between the police and clubs to reduce the number of police officers at football matches across the country and I will address this issue in the next section.

2. Offensive Behaviour at Regulated Football Matches
Rangers Football Club welcomes the focus to address offensive behaviour at football matches throughout Scotland and, along with Celtic FC, called for the establishment of a national Football Policing Unit at the original football summit in March.

We are pleased that this unit is now up and running as we are acutely aware of inconsistencies in policing such behaviour across the country.

The inconsistencies in the enforcement of existing legislation has a major effect on the behaviour of fans. Greater and more consistent enforcement of existing legislation, we believe, will have as much if not more impact than the introduction of new legislation in this area, though we fully understand and support the Scottish Government’s desire to eradicate offensive behaviour.

We would also encourage greater use of football banning orders.

Neither the police, nor the courts have a consistent approach.

This lack of clarity regarding arrestable offences still exists under the proposed legislation and this needs to be addressed sooner rather than later in order for police across the country to have a clear understanding of what constitutes an offence and to stop the police, the procurator fiscal and the court system being overwhelmed.

For Rangers, and I believe other clubs, there are more problems with fans who attend ‘away’ games. Fans who attend away games often sense the police priority is to ensure visiting fans are dealt with on a ‘get them in, get them out’ basis and the chances of being arrested are less than at a home match. If fans believe they can ‘get away with’ certain behaviour at certain stadiums, they will engage in that behaviour.

The agreed plan to reduce police numbers at football matches will inevitably exacerbate this situation and will certainly distort any evaluation of the impact of the legislation, as practically, there can only be arrests when police officers are present. This will lead to distorted figures given that many matches will have no police officers present yet Old Firm matches, for instance, will have significant numbers (although it should be noted that police numbers are also being reduced at Old Firm matches).

For the avoidance of doubt, low attendances (and therefore no police presence) does not mean, no offensive behaviour. There have been countless examples of offensive behaviour at matches in the lower leagues for example, yet this is unlikely to be addressed going forward.
It is important to state that the perception that there are only problems at Old Firm matches, or that it is only Rangers fans who sing offensive songs, is simply untrue and it is crucial that the new Football Policing Unit applies a fair and even-handed approach when it comes to addressing offensive behaviour.

We are concerned that the new Football Policing Unit has, so far, had a disproportionate focus on Rangers supporters and indeed, the unit has attended 100% of our matches this season, often filming fans, including children, who are not engaging in any offensive behaviours. We are unaware of any other club that the unit has so far attended 100% of their matches.

This is extremely troubling for Rangers Football Club and its supporters as it appears the Football Policing Unit is manifesting as an ‘anti-sectarian unit’, not an ‘offensive behaviour’ unit and there is a disproportionate focus on Rangers supporters.

Whilst the Bill does not focus on sectarianism specifically, the policy memorandum contains numerous references to “sectarianism” and as such, there needs to be further clarification on two things before the Bill goes before the Scottish Parliament:

a) how does the Parliament define sectarianism; and
b) that the legislation will tackle ALL forms of offensive behaviour, not just sectarianism.

With songs glorifying the death of Rangers fans in the Ibrox disaster and pro-IRA songs among those being regularly sung by other clubs, we would ask for assurance that any new legislation was enforced consistently and even-handedly to tackle ALL offensive behaviour and that the legislation makes clear whether or not songs or chants in support of terrorist organisations will be an offense under the new legislation.

The list in subsection (4) makes no mention of proscribed organisations and we would ask that this be included.

For the avoidance of doubt, Rangers Football Club acknowledges the problems that exist with elements of our own support and we are continuously working with supporters groups and others to address this. We have been very clear that any songs or chants that include references to ‘fenian bastards’ or ‘F*** the Pope’ are unacceptable. The Rangers supporters’ working group has also recently reiterated this stance. Supporters also recognise that the song the Billy Boys is prohibited by UEFA, although we now face the bizarre situation where the supporters of other clubs sing various versions of the same song without sanction.

We firmly believe we have the most robust system in Scottish football for tackling offensive behaviour by supporters and within the last 10 years have taken action against more than 3,000 supporters for a wide range of issues, including more than 550 banned for sectarianism. No Club does more to identify and deal with rogue supporters and we would be more than happy to work with the SPL and SFA to share our best practice.
3. Threatening Communications

Rangers Football Club fully supports this section of the Bill and will be happy to work with the police and authorities in this area.

It is not clear, however, that this proposed legislation would cover websites/blogs/posts/uploads etc that are clearly ‘offensive’, such as the recent website set up glorifying the death of Rangers fans in the Ibrox Disaster. We would ask that provisions were made within the Bill to include such examples.

Conclusion

Rangers Football Club thanks the Justice Committee for the opportunity to present both written and oral evidence and we reiterate our commitment to the Joint Action Group and tackling offensive behaviour at football matches.

We are more than willing to play our part, as are our supporters, and we look forward to an amended Bill that addresses the points within our submission.

David Martin
Head of Safety and Security, Rangers Football Club
25 August 2011
Submission from the Rangers Supporters Assembly

I write in response to your call for evidence with regards to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. In particular I would like to address your interest in hearing views from organisations and bodies on the Bill’s proposals and their likely impact, and also about any issues that respondents consider may have been omitted from the Bill.

The Rangers Supporters Assembly find favour in the overarching intentions of the Bill which, according to the policy memorandum, are to prevent “offensive and threatening behaviour related to football matches” and to prevent “the communication of threatening material.” However, we have grave concerns as to the intentions of the Bill in its present form and equally deep concerns as to whether this Bill in its present form will address the issues that it seeks to, or whether it will have a contrary effect in creating more confusion, anger and division.

1) General Comments

We find the haste of this Bill to be ill-advised. We consider that there has been a grave lack of appropriate Parliamentary consideration and consultation on this Bill, and that due time should be allowed in order for Parliament to bring forward a fully considered and effective piece of legislation.

At what would appear to have been a panicked and last minute effort of stakeholder engagement, similar concerns were raised by many of the attendees at the “Engagement Event” on the 17th June 2011 in the George Hotel, Edinburgh. To our mind, many key stakeholders were not in attendance, and invitations were received as late as 16th June. At the event, Aiden O’Neill Q.C., who we believe to be a leading Human Rights lawyer, put forward the opinion that “it is the worst drafted Bill I’ve ever seen.” Furthermore, he remarked that there were at least half a dozen fundamental rights of the citizen which were being breached by the terms of the Bill.

Aiden O’Neill Q.C. further put forward the opinion that most of the behaviour which the Bill seeks to address could quite easily be dealt with by the application of existing legislation. This point was also substantiated by Dr. David McArdle, a Senior Lecturer in Law at Stirling University, who has researched substantially in the areas of football legislation, such as Football Banning Orders. His opinion was that every offence which the Bill seeks to create is already an offence under existing legislation, and furthermore that the five year and unlimited fine penalties were already available to the courts. The Law Society has issued a statement stating that the Bill is being pushed through too quickly and that the lack of scrutiny could result in legislation that may be open to successful challenge in the courts.

Recommendation:

We therefore ask that the haste of this Bill be addressed, and that due time should be allowed in order for Parliament to bring forward a fully considered and effective piece of legislation, as in normal with Criminal Law legislation.
2) General Comments - Sectarianism

We have deep reservations about the intention of the Bill, and note that, while the Bill does not feature references to “sectarianism” there are numerous references to “sectarianism” within the policy memorandum. As such, further transparent clarification on what the Scottish Parliament’s understanding of the term “sectarianism” should be stated. Furthermore, the Bill is being generally referred to throughout the media and by the general public as the “Anti-Sectarian Bill.”

Recommendation:

A policy memorandum should not have repeated references to a subject matter that is not a subject referred to in the Bill. Should the Bill therefore be addressing sectarianism by stealth, we would ask that a transparent definition of the term “sectarian” be included within the Bill, for example in section 4.

3) General Comments – Specific Definitions such as Religious Hatred

There are many actions at football matches, and indeed outwith football matches yet still within a footballing context that may be deemed to constitute “offensive behaviour. There are regular chants and songs sung at football matches which glorify Irish Republican terrorist organisations. The effect on fans that have lost loved ones due to the actions of these groups can easily be understood. There are songs and chants at football matches mocking the deaths of opposing fans, such as Aberdeen fans mocking those who died in the last Ibex Disaster. There are songs and chants mocking our Armed Forces, and banners such as “No Blood Stained Poppies on Our Hoops.” For fans who have lost family members serving in the Armed Forces, or whose loved ones are presently on active service, such actions are deeply offensive, and are certainly every bit as offensive as many of the other specific categories which feature within the Bill.

In a Bill which seeks to address such a contentious issue, it is appropriate and necessary that this subject matter is approached in an even-handed and transparent way. We are concerned that, while the Bill makes particular references to “religious hatred”, as it should, no reference is made to, for example, singing or chanting which glorifies the IRA and Provisional IRA, or deeply offensive singing or chanting which mocks those who have died in the service of our country.

Recommendation:

We ask that, in seeking to address specific behaviours, the Bill adopts an even-handed approach. We ask that glorification of, and open support for, terrorism, terrorist groups or terrorist actions be defined in Section 1 (2) of the Bill. We ask that unpatriotic singing chanting and banners, mocking the Armed Forces be equally addressed in Section 1 (2) of the Bill.

4) Transparency and Guidance

In a Bill which seeks to address issues of such a divisive nature, we see it as vital that transparent guidance is produced by the Scottish Government, and that the Scottish Parliament should have an advisory role in ensuring that such guidance is fit for purpose.
On matters of such significance, it should not be for the courts to make judgement on what is deemed to be offensive, nor should it be for concerted campaigns by fan groups to raise awareness of particular events. It should be the role of the Government and Parliament to set out guidance that is easily understood by fans, the Crown Office, the Courts and the Police.

Recommendation:

We ask that accompanying guidance for the Bill be developed in constructive consultation with all stakeholders and that the Scottish Parliament oversee such guidance ensuring that it is fit for purpose, balanced and fair to all parties.

5) The Media

In addressing communications, we are of the opinion that the Bill fails to address the pivotal role that the media – such as chat shows and populist newspapers – plays in perpetuating division between opposing fan groups.

This season, despite general opinion, has not led to any increase in criminality or indeed any increase in arrests made within the footballing environment. In actual fact, in comparison to previous seasons, this past one has been fairly quiet. There were, however, three key incidents. One was the sending of threatening packages to Neil Lennon, Paul McBride Q.C., Donald Findlay Q.C. and former MSP Trish Godman. The individuals responsible for some of these offences have been apprehended and they will be dealt with under existing legislation as they quite rightly should. Another incident involved the attack on Neil Lennon by a Hearts fan, who is equally being dealt with under existing legislation. The third event was a more or less harmless spat between Neil Lennon and Ally McCoist at the end of a Rangers v Celtic game. In all instances, the media coverage was nothing short of moral panic. It was not intended to address any particular issue, to raise public awareness nor to provoke Government action. In our opinion, the excessive media coverage was designed solely to sell newspapers.

We believe that part of the job of this Bill should be addressing such matters, ensuring a less divisive footballing environment within Scotland.

Recommendation:

We believe that the Scottish Parliament should urge the Scottish Government to investigate the nature of media coverage of football, and of footballing events as reported by the media, thereafter seeking a Memorandum of Understanding to be agreed with the Scottish media in order to foster a less divisive and fraught environment for our National game.

6) Economic Impact

We note from the Financial Memorandum that “the Scottish Government does not envisage additional costs associated with the introduction of these measures.” We are not convinced that this has been adequately scoped out. We certainly have
reservations concerning a document presented to the Strathclyde Police Authority by Strathclyde Police.


From previous press releases by Strathclyde Police, we do not see this as purely coincidental with the timing of the Bill. Strathclyde Police have previously blamed “Old Firm” matches for numerous problems including spikes in domestic abuse incidents and serious assaults.

It is our opinion that to solely blame Old Firm matches for the social problems on given match days in general is grossly misleading. Equally, to impose severe financial burdens upon football clubs is grossly unfair. There is no doubt that more profit is made from the sale of alcohol on match days than that which football clubs make. Why is Strathclyde Police instead not actively seeking to penalise purveyors of alcohol?

**Recommendation:**

We believe that the Scottish Parliament should urge the Scottish Government to investigate the causes of crime on football match days and publish its findings. We would also urge that appropriate measures be put in place to reduce that crime including apportioning appropriate financial levies or restrictions on the source of such causes, thus ensuring that football clubs do not wholly bear a disproportionate cost for policing of matches.

7) **Summary**

In summary, we would like to thank the Justice Committee of the Scottish Parliament for considering our thoughts and we would urge the Committee that it fully considers the implications and effects of the legislation in its present form. We would also hope that the Scottish Parliament will be able to bring forward an amended form of the current Bill which will fulfil the overarching objectives which it sets out to achieve. As a final note, we wish that the Committee would note our sincere willingness to work together with either the Scottish Government or the Scottish Parliament in creating a less divisive environment within Scottish football and in doing so create a fair and even-handed footballing culture for Scotland.

Andy Kerr
President
Rangers Supporters Assembly
21 June 2011
Submission from Kevin Rooney

I write in response to your call for evidence with regards to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I write in an individual capacity – I am Head of Politics and Sociology at a large comprehensive school outside London, I have been writing and commentating on issues related to sectarianism in Scottish football for many years, and I am a season ticket holder at Celtic Football Club.

Introduction

I welcome the Scottish Parliament's decision to slow down the implementation of this Bill and consult widely before moving to legislation. The people who will be most affected by these new laws are Celtic and Rangers fans. As such I hope the well informed and considered views of football fans will be taken especially seriously by law makers. As one such fan I am extremely concerned about the Bill. I believe that it is disproportionate, a dangerous attack on freedom of speech and will actually increase tensions amongst football fans. My reasons are laid out below:-

1. **Existing criminal laws cover key offenses.** While these new laws have been presented as a response to the violent events of last season, including death threats and attacks on the Celtic manager Neil Lennon, all these offenses are already covered by existing criminal law. Governments should not rush to create new laws without a compelling reason – that case has not yet been made.

2. **The legislation makes a dangerous leap between words and actions.** Societies have long made the distinction between thoughts and words on the one hand and actions and deeds on the other. This law assumes that offensive words inevitably lead to sectarian or violent deeds without any evidence whatsoever to prove that. Linking the sending of letter bombs to the singing of traditional rebel songs or shouting of loyalist chants is misleading and dangerous.

3. **All laws should be measured and proportionate.** This law could result in football fans serving jail terms greater than those for rape or violent crime for an offensive chant at a football game. This is clearly disproportionate.

4. **The laws are a ‘victims charter’.** By allowing the ‘victim’ to define what passes as ‘offensive’ the Scottish parliament is creating a victims charter which will encourage football fans to accuse rival fans of causing offence. Just one small example of this tension appears in one submission to the Consultation which refers to a protest at a game one year ago when a group of anti war Celtic fans unfurled a banner in saying “No Blood Stained Poppies on Our Hoops.” According to the submission “For fans who have lost family members serving in the Armed Forces, or whose loved ones are presently on active service, such actions are deeply offensive, and are certainly every bit as offensive as many of the other specific categories which feature within the Bill.” Yet exactly the same could be said by fans who have lost loved ones at the hands of the Armed Forces in conflicts in Ireland and elsewhere who could claim equal right to be ‘offended’ by open displays of support for the armed forces.
5. **Conflicts have been sorted out between the clubs without the need for outside intervention.** Both the media and the authorities have exaggerated and sensationalized many of the disputes at Celtic/Rangers games. A closer look demonstrates clearly that the clubs are good at sorting out differences easily and quickly. Within a couple of hours of the televised ill-tempered spat between Neil Lennon and Ally McCoist at an old Firm game the two managers had issued a statement saying that they had resolved their differences and made up. It was deeply ironic that when the two clubs were summoned to Holyrood for talks about on pitch tensions, they had a pre-meeting with each other first to agree key messages, proving that the clubs do not need outside intervention from politicians or legislation to resolve problems.

6. **These laws will increase rather than decrease tensions amongst fans.** You do not need to go to Celtic/Rangers games to see football rivalry in action. Yet now Celtic and Rangers fans will be able to seize on these new laws as another stick with which to beat their rivals. Even before the laws have come into place there are unhealthy examples of rival fans scouring each other’s websites searching for ‘crimes’ to report to the police. One case we are likely to see more of under the new laws was the reporting of Celtic manager Neil Lennon to police for allegedly making racist remarks to a black Rangers player. Hundreds of fans reported the incident forcing the police to interview Lennon. When Lennon robustly denied the accusation lip readers were even brought in by the police to examine video footage. The investigation was only dropped when the Rangers player himself rejected the accusations. Fans may not be so quick to absolve their rivals and the spectacle of fans spying on each other’s websites and lip reading insults at games is likely to increase tensions rather than reduce them.

7. **These laws are anti-working class.** There is a strong whiff of anti-working class prejudice in the language and tone used by MSPs and commentators supporting these laws. Such has been the demonization of fans over the past few years that it’s now acceptable to talk about Celtic and Rangers fans en masse as potential bigots, wife beaters and parcel bombers. One national newspaper columnist welcomed the news that police will walk thought the stadiums filming fans in the following way “they will film the morons as they spout their sectarian filth and beat the bigots who stain the game”. In the name of reducing offensive behavior political leaders have given carte blanche to insult football fans.

8. **Sectarian chanting is more than ever restricted to games.** Part of the problem with the disproportionate nature of these laws is the notion that sectarianism is a bigger problem than ever in Scottish society. This is simply not true and many objective commentators and historians have made the point that sectarianism in Scottish society is at an all time low. While many football fans might indulge in some traditional sectarian chants from the terraces in the course of a 90 minute game, most now go back home or into work the next day with partners and workmates of a different religious persuasion.

9. **Football terraces are not for the faint hearted.** Despite the many attempts to gentrify football in recent years it remains the case for many clubs in Scotland and throughout the UK that football stadiums are a place of high passions and uncouth shouting. Apart from the problem of excluding sections of society whose idea of fun would be to listen to the game on the radio.
is not standing for 90 minutes surrounded by people shouting, noisy football fans do not harm anyone and bringing heavy handed policing and draconian criminal laws onto these terraces will not protect anyone in wider society.

10. **Draconian rules already dominate old firm games.** It’s important to note that the proposed Bill comes in the wake of a bewildering array of restrictive rules already imposed on Celtic and Rangers fans over recent years. Don’t drink inside the ground; don’t drink outside the ground; don’t swear; don’t sing this list of songs; don’t wear that T.Shirt; don’t unfurl that banner, and so on. Fans are already faced with life time bans by their clubs if they transgress and the police are on hand everywhere to enforce these rules – even stationed in the toilets of the pubs used by fans before and after games. For anyone to conclude that what Old Firm games need is more laws and policing beggars belief for the fans who are already at the sharp end of draconian laws and policing at every game.

11. **These laws are an attack on the fundamental right of all citizens to free speech.** Anyone who knows or cares about protecting the right to free speech will know that the test of support for this principle always lies in whether you are prepared to extend it to those whose speech you do not like or agree with. As Voltaire once said, “I detest what you have to say, but I will defend to the death your right to say it”. Of course there is nothing noble about much that is shouted at football games but free speech means just that – the freedom to say what you want to say without fear of censorship or repression.

Kevin Rooney
18 July 2011
Submission from Sacro

1. In light of the serious events of the football season past and the apparent increase in sectarian related behaviour at certain grounds around the country, Sacro welcomes the principles behind the new legislation. However, Sacro believes that certain aspects of the Bill require further consideration by the Justice Committee.

2. The definitions for "offensive behaviour", "regulated football matches" and "threatening behaviour" appear very wide ranging. Sacro accepts that there is a need to ensure that the legislation is framed in such a way as to cover the spectrum of potential criminal activity. However, our concern is that if the Bill were enacted in its current form, it could lead to individuals being brought into contact with the criminal justice system inappropriately. Such net-widening could be counter-productive, have a negative impact on sentencing and community supervision, and would arguably not reflect what was originally intended as a means of dealing with the problems surrounding football.

3. Sacro would also query the Scottish Government’s figures provided on the impact of the legislation. These figures suggest that most offenders could potentially receive Fixed Penalty Notices, many might be dealt with by short sentences and only a small proportion would receive longer custodial sentences or Community Payback Orders. Whilst Sacro acknowledges that the courts will determine the most appropriate sentence in each case, we would suggest that a more effective sentencing approach could be made through the use of Community Payback Orders (CPOs), which have the potential to address the root causes of this type of offending behaviour. For example, the CPO programme requirement could include an obligation for those convicted to attend a programme of groupwork activity around specific football-related offending. Sacro is experienced in delivering cognitive-behavioural based groupwork programmes with a range of offenders. These could be easily adapted to focus on football-related offensive/threatening behaviour. Such a programme could be used with offenders to help them recognise the effects of their behaviour on victims and wider society.

4. Equally, the CPO conduct requirement, which obliges that an “…offender must, during the specified period, do or refrain from doing specified things” could be utilised. This requirement, which would supplement the supervision (of the offender) requirement, could be used to ban the individual from attending football matches or televised events in public houses etc. However, it should be noted that in many circumstances, non-compliance with this requirement might not be known to a case manager until guilt is established. Should the offender fail to comply with the requirement, then the case manager would report it to the relevant court.

5. Whilst Sacro welcomes the underlying principles of the Bill in tackling aggravated offences, Sacro calls for much more focus on addressing the underlying causes of bigotry, hatred and intolerance when applying sentencing options.

Paolo Mazzoncini
Director of Operations East, Sacro

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1 The CPO programme requirement, like the conduct requirement, can only be made when a supervision requirement is in place.
Submission from the Scottish Beer and Pub Association

I refer to the Committee’s request of 20th June 2011 seeking comment from my Association as part of the Committee’s deliberations on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I am grateful for an opportunity to comment.

You will be aware that the Scottish Beer and Pub Association’s members account for 1,200 of the 5,000 licensed public houses in Scotland. Our members promote the responsible sale of alcohol and management in all of its licensed premises, helping to Scotland a safe and enjoyable place to visit and socialise in. Our members also include a number of Scotland’s major brewers and drinks producers. My Association’s sister trade association is the British Beer and Pub Association, the BBPA.

In advance of commenting in detail on the content of the Bill, I would like to offer a general observation on the Bill’s legislative process itself. The Association had no prior involvement in discussing the content of the Bill, nor in offering feedback on this prior to the Committee’s deliberations. My members have concerns therefore that the Bill may generate unintended consequences for their operation which are currently not evident. However, we would offer the following comments on the Bill:

Background

We would highlight that the holders of Premises Licences issued under the terms of the Licensing (Scotland) Act 2005 and related legislation already operate under the terms of Statements of Licensing Policy as issued by the Licensing Board in the area in which they operate.

A number of these Policy Statements already cover issues relating to “offensive” or indeed “sectarian” behaviour. We would bring to the Committee’s attention the Statement of Licensing Policy as agreed by the City of Glasgow Licensing Board which is currently in force and which indeed has been in force in similar terms for a number of years (Link).

In Section 12 of the Glasgow Board’s Licensing Policy Statement, “Policy on the prevention of malicious or ill-intentioned conduct on the basis of race, politics or religion associated with the management of Licensed Premises” that policy specifically covers aspects of behaviour which are to be covered by the Bill. Specifically it states:

“The policy will operate as follows:- In general terms, the Licensing Board looks to Premises Licence Holders not to engage in or permit conduct or activities at licensed premises which cause offence to a reasonable person or which constitute a threat to public order or safety, on racial, political, religious or sectarian grounds or which can reasonably be construed as having such effect or which have the effect, on any one of those grounds, of discouraging a particular part of the community from using the premises. For the avoidance of doubt, the association of any licensed premises with a particular football club or the display of football programmes or football memorabilia within the licensed premises shall not of itself breach the policy.
However, the football memorabilia displayed must not contain any design, insignia, word or groupings of words, which have a political, racial, religious or sectarian content or which could reasonably be construed as inciting political, racial, religious or sectarian hatred or violence.

The Premises Licence Holder shall comply with any order or instruction in the interests of public order and safety given by a Police Constable for the purpose of giving effect to this policy.”

Responsibilities of Premises Licence Holders

Additionally, there is a general expectation that premises licence holders will maintain order on their premises, including not permitting unlawful activity. I would therefore suggest that licence holders already “police” their premises in relation to existing criminal offences. If they do not then they are likely to find themselves the subject of a premises licence review initiated by the police, or indeed by “any person” under the terms of the Licensing (Scotland) Act 2005.

Whilst these responsibilities are accepted by licence holders in relation to their own premises, there is a growing concern amongst operators that increasingly as criminal legislation is broadened out with the creation of new offences, that licensees and their staff more often find themselves in the role of detecting offences and dealing with them. This places themselves and their staff in difficult situations which can often lead to conflict with errant customers, and criminals, to police involvement and perhaps even lead to incidents of violence.

Detailed Response

In relation to the new criminal offences proposed in the Bill which is before the Committee, we would suggest that many of these matters are already addressed by existing pieces of criminal legislation. The belief that further offences need to be legislated for is perhaps the reflection of a perceived lack of an appropriate level of action thus far to address them by the police and by other elements of the criminal justice system.

We must therefore question the need for additional legislation on these matters.

In relation to the content of Section 2 (3) (Regulated football match: definition and meaning of behaviour “in relation to” match), we note the intention (from the Explanatory Notes, paragraph 15) that: “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 being 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 being broadcast.”

It is therefore clear that the proposed offences relating to football matches will be extended to cover licensed premises, primarily pubs, where football is broadcast. As previously highlighted this will significantly extend the responsibilities of premises
licence holders and their staff to detect and address the new offences, raising the issues commented upon previously.

We would have a concern about these new offences being created unless they were unnecessary and not adequately covered by existing criminal legislation.

Implementation

As an Association we would suggest, given that these new offences will cover locations which members of the public would not currently associate with football related offences, that there needs to be a public awareness campaign to reinforce the new legal position, as well as to provide clarity for those operating premises where football matches are broadcast as to what is unacceptable, and indeed criminal, behaviour. We do not believe that this clarity has been provided thus far. Without it, we do not believe that the new offences can be successfully policed and we would be concerned that premises licence holders could find themselves being held accountable, and potentially their licences sanctioned, for incidents being committed on their premises which they did not know to be criminal matters.

Additional Matters

We note in the Financial Memorandum accompanying the Bill that: “76. A formal Business and Regulatory Impact Assessment (BRIA) has not been completed in relation to this Bill. The Cabinet Secretary for Justice does not consider that a BRIA is necessary, as the additional costs of policing and enforcing the offences set out in the Bill will fall largely to public service organisations including the police, Scottish Court Service, Crown Office and Procurator Fiscal Service and the Scottish Prison Service, as well as to local authorities, as set out in this Memorandum.”

As per my previous comments I would suggest that once the Bill is enacted that there will be additional staff training costs for the operators of licensed premises where football matches are broadcast. These would relate to making staff aware of the additional offences that they should be aware of in managing and running their pubs and how to deal with them. There may also be a need for additional security for licensed premises when certain football matches are broadcast. It is difficult to quantify these additional costs in advance of knowing in detail what matters are to be viewed as offences and what conduct would be unacceptable under the Bill.

I trust that our views are of use and we look forward to the eventual outcome of the Committee’s deliberations on these issues. We will of course contribute to the Committee’s further deliberations on these issues going forward.

Patrick Browne
Chief Executive, Scottish Beer and Pub Association
26 August 2011
Submission from the Scottish Catholic Observer

Although not contacted directly during the consultation period on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, I saw the need to contact the Justice Committee on behalf of our readers as the bill comes back before its members today heading towards stage 2.

While acknowledging the difficult task you face legislating on this issue, the Scottish Catholic Observer would like to urge caution and encourage a defined focus.

Caution is required as to what areas fall under the parameters of the bill. For example in 2006 former SCO editor Harry Conroy handed in a petition and addressed the Public Petitions Committee on the issue of the right to bless oneself in public in relation to another football incident involving Artur Boruc.

Focus is also an issue because the definition of the problem is key to the successful outcome of any attempt to tackle it. To this end I attach an SCO article on anti-Catholic bigotry by Professor Emeritus Patrick Reilly as part of the SCO submission.

One last issue that keeps arising is the correct application and enforcement of the law already in place rather than new legislation.

Liz Leydon
Editor, Scottish Catholic Observer
6 September 2011

Article on anti-Catholic bigotry by Professor Emeritus Patrick Reilly

Sectarianism in Scotland is not a level playing field.

Professor Patrick Reilly says current attempts to tackle sectarianism are inadequate, misguided and, in fact, a distortion of the truth, because Scotland has an anti-Catholic problem, not a sectarian one.

Certain major misgivings arise from the way in which the word sectarian is being used in the present ongoing debate. Most of us thought we knew what it meant until Holyrood began talking about it. Roseanna Cunningham has explained what it means, but, to quote Lord Byron, I wish she would explain the explanation. What is disturbing is the evasiveness, the deliberate distortion of the truth rather than revealing it. For the truth is that Scotland does not have a sectarian problem, it has an anti-Catholic one. Not until we call things by their proper names can we hope to find a proper solution.

Secondly, there is the vagueness, the elasticity, of the word as it is being currently used. It has simply become a portmanteau term for offensive. But offensive is not synonymous with sectarian. The very presence in the country of Catholics of Irish ancestry is, for many people, offensive—what else can the ‘Famine Song mean?’ In Holyrood, a Conservative politician identified the existence of separate Catholic
schools as the prime cause of sectarian offence. Plainly, he along with many others finds these schools offensive, but that does not mean that they are sectarian.

The question is why has the word come to be used, more precisely abused, in these totally impermissible ways? The clue is to be found in the key axiom governing debate about religion in Scotland, namely, that you must not fault one side without simultaneously incriminating the other. Consider education. You may say that there is anti-Catholicism in Scotland, but only if you immediately qualify this by adding that Catholics bring this hostility upon themselves by perversely insisting upon retaining their wholly unnecessary and perniciously divisive schools. Both sides are to blame. One might as well blame Alexander Graham Bell for obscene telephone calls. In his case, it is at least true that, without his invention, the calls couldn’t be made—first the phone, then the calls. But bigotry against Catholics long preceded the establishment of Catholic schools. The bigotry came first and it follows that the schools could not have caused the bigotry; what comes after cannot be the cause of what went before.

This axiom of shared blame, of equal responsibility, is perhaps most conspicuous in Scottish football. Neil Lennon gets assaulted, but he deserves it. You must not criticise Rangers FC for an offence unless you indict Celtic FC for the same offence. It is our slavish adherence to this rule that is at the root of our present muddle over sectarianism. You can both present and prove a case against Rangers for being sectarian—UEFA have already done so on several occasions. But it would require the logic of Alice in Wonderland to charge Celtic FC with sectarianism. Whatever their faults may be, they are simply not sectarian, or else the word loses whatever modicum of meaning it once possessed.

It might be possible to prosecute some songs and chants heard at Celtic Park on what very loosely might be described as political grounds, though even here recent developments have made this more problematic. When James MacMillan gave his now landmark speech at the Edinburgh Festival, he was vilified as a supporter of the IRA. But things have changed since then. The men who were interned 25 years ago now sit in government at Stormont—Sinn Fein is now fully integrated into politics in the North of Ireland. Some weeks ago, Queen Elizabeth visited the Garden of Remembrance in Dublin and bowed her head in tribute to men who were executed under her grandfather as traitors to the crown. No doubt loyalists everywhere were offended, but the idea of prosecuting Her Majesty under the envisaged anti-sectarian legislation is something that even Monty Python might envy.

To try including Celtic supporters under sectarian legislation simply will not work. It’s the muddle that ensues when you insist that both sides must be equally guilty. Obscenities directed against the Pope, by contrast, are indisputably sectarian. This explains why Rangers FC have fallen foul of UEFA while Celtic FC have not—one is guilty and the other is not—unless we espouse the ridiculous proposition that UEFA is an anti-Protestant conspiracy.

The new owner of Rangers FC, Craig Whyte, has criticised the Holyrood Government for what he regards as its unfair treatment of his club over the sectarian issue. Significantly, he hasn’t directed his ire against UEFA, who have, after all, already condemned Rangers four times for sectarian offences, whereas up to now, Mr Salmond laid a finger on them. The explanation is that Mr Whyte knows the country he was born in. To challenge Europe would be a piece of folly, to challenge
Scotland is another matter altogether. UEFA clearly knows what sectarian means, Scotland chooses not to know and expands it to cover anything that anyone finds offensive, up to and including the Sign of the Cross, something enacted throughout the world of football without its raising a single eyebrow anywhere else than here. Here’s tae us, wha’s like us? Holyrood already exhibits worrying signs of following the time-honoured ploy of inventing a pseudo-problem to divert attention away from the problem that really matters. It is the same old reluctance to name and shame the real culprits.

I have dealt much with football, not because it is intrinsically important, but because here in Scotland it opens windows upon attitudes and mindsets normally kept discreetly closed.

It is interesting, for example, to ponder the very revealing explanation offered by UEFA at their last encounter with Rangers FC as to why they were taking such an inexplicably lenient stance towards these serial offenders. It would be unfair, they said, to punish too severely one single football team for the sins of a whole nation. Scotland, as UEFA sees it, is, historically and culturally, an anti-Catholic country and Rangers FC simply exemplify this national characteristic in a particularly striking way.

It presented the country with a real quandary. Should this public indictment of the nation be allowed to pass unprotected as the unpalatable but necessary price of staving off possible expulsion from Europe, or should the judgment be scornfully repudiated and the club left isolated to face whatever consequences might follow? It was the old club versus country dilemma in novel form. Significantly, there was no protest, no repudiation. Relief was the prevailing emotion. Better a shameful excuse than no excuse at all.

Does the nation have cause to feel aggrieved at the view from Nijon? Is Scotland being slandered? What is undeniable is that for almost a century, one of our two leading football teams pursued an openly anti-Catholic policy without a single rebuke or remonstration from any authoritative body—sporting, legal, political, educational or religious—in the land. If silence implies consent, then all Scotland consented—apart from a despised minority who were contemptuously dismissed as delusional and paranoid.

Scotland’s shame? Not really, for no one in authority admits to feeling ashamed. When the appalling misconduct of thousands of bigots at football grounds in Scotland—in Scotland alone, be it noted—was televised worldwide during the ludicrously misnamed minute’s silence for the dead Pope, the national anger was directed, not against the hooligans who were caught on camera, but against those who pointed the cameras. Why had these irresponsible fools been allowed to expose our shameful nakedness to a disbelieving, dumbstruck world? Not what happened here, but what they would think of us abroad: this was our real concern. Not to eradicate the filth, cleanse the stables, but to stop foreigners from seeing and smelling it: this is our prime ambition. Rabbie Burns’s wish is stood on its head: not to see ‘ourself as ither see us’ but to prevent these ‘ither’ from seeing us at all: this is our highest aim.
UEFA has warned that Scotland has one last opportunity, so far as football is concerned, to solve its anti-Catholic problem before they solve it for us. Holyrood will not help by blaming everyone rather than the real culprits.
Submission from the Scottish Community Justice Authorities

Scotland’s Community Justice Authorities welcome the opportunity to offer comments on this Bill. In particular Scotland’s Community Justice Authorities welcome the objective of the Bill which is to tackle sectarianism by providing for two new criminal offences:

- preventing offensive and threatening behaviour related to football matches; and
- communication of threatening material particularly where it incites religious hatred.

Given the role of Community Justice Authorities in allocating and prioritising monies for Criminal Justice Social Work Services, our comments concentrate on the financial memorandum contained in the accompanying documents to the Bill. We would also welcome the opportunity to give verbal evidence on these specific matters to the Committee, should the Convener deem this appropriate.

There is an assumption that 15% of summary cases brought under the new legislation will result in a “Community Payback Order”. It is further estimated that there will be between 50 and 100 additional summary cases per annum and that this would therefore result in an additional 8 – 15 Community Payback Orders a year costing between £18k and £36k.

The memorandum states that “against a background of some 14000 community sentences imposed in each year across Scotland, with direct support funding of £100 million from central Government, any additional cost to Local Authorities arising from the new measures are not considered to be significant”.

However given the difficulty in predicting with any certainty the Police and the Courts use of new legislation we welcome the commitment from the Scottish Government to monitor and review these costs in consultation with COSLA once the legislation is implemented.

There are two further recourse considerations we would wish to bring to your attention.

Firstly the costs involved in relation to the preparation of Criminal Justice Social Work reports. We believe the Courts will be particularly anxious to obtain background material about those involved in sectarianism/hate crime.

Secondly we would welcome in the longer term a commitment by the Scottish Government to monitor and review the requirement to provide post release supervision for those whose sentences will require a period of monitoring in the community following release from a custodial sentence.

Finally we welcome the recognition within the policy memorandum that local Government has a vital role in supporting communities to overcome issues such as sectarianism.
Bailie Helen Wright
Chairperson
Community Justice Authority Conveners Group
26 July 2011
Submission from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities strongly supports the Bill’s objective to “root out violent and bigoted attitudes and behaviours from Scottish society and make our communities safer”.1 We emphasise, however, that this cannot be achieved by legislation alone, and that the Bill must be accompanied by a wide range of Government-supported educational and social initiatives.

Scope of the Bill

1) While we appreciate that the Bill is primarily a response to recent football-related incidents, we regret that the offence of “offensive behaviour” relates exclusively to football and does not cover identical behaviour in other contexts, for example at Scottish Defence League demonstrations2 or distributing “threatening, insulting and abusive leaflets”3. It is dangerous to imply that expressing hatred of, or inciting hatred against individuals or communities is less impermissible simply because it does not take place in relation to football, and irrational that the same range of disposals should not be available to the courts for both. We therefore urge that the scope of the Bill should be extended to cover “offensive behaviour” in any context.

2) We are pleased that, contrary to advance publicity, the Bill does not relate only to sectarianism but also encompasses other religious hatreds, and, in respect of “offensive behaviour at regulated football matches”, also other protected characteristics. We are, however, concerned that singling out religion as the only protected characteristic with regard to “offensive communications” not only fails to “contribute to tackling inequalities in Scotland”4, but, on the contrary, risks creating a hierarchy of discrimination.

We agree that “public disorder at football matches can be provoked and worsened by expressing or inciting hatred against particular groups”5, moreover there is ample evidence of offensive and threatening postings on grounds other than religion, for example on Scottish newspaper websites.6

Furthermore, as ACPOS has emphasized:

“any victim of crime can suffer symptoms of depression, anger, anxiety and post traumatic stress … [but] whereas victims of non-biased crime can experience a decrease in these symptoms within two years, victims of bias, or hate crime, may need as long as five years to overcome their ordeal.”7

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1 Policy Memorandum paragraph 5
2 Scottish Defence League: Paisley Demonstration 26 February 2011
3 Leaflet distributor incited racial hatred
http://www.heraldscotland.com/sport/spl/aberdeen/leaflet-distributor-incited-racial-hatred-1.135641
4 Policy Memorandum paragraph 2
5 ibid paragraph 16
6 for example: “Tom Patterson, Shoot a Gypsy, Save a Child “ You people need to wake up to the stark reality of all that is wrong with society. Anytime a gypsy moves into a neighbourhood, lock up your children. They will abuse them in one way or another.”
http://thescotsman.scotsman.com/news/New-website-lists-missing-paedophiles.2827862.jp
and
“John M. Slusser II … I for one am sick to death of the posturing of the last quarter century, bent on forcing the rest of the world into acceptance of the deviant, thats right, deviant behaviour of the so-called gay community. If you want to be an abomination, do so in the confines of your lurid existence away from the public eye. … I say the two global social ills of this day and age are the so-called gay community, and terrorism.”
http://scotlandonsunday.scotsman.com/latestnews/Death-sentence-gay-Syrian-teenager.3883009.jp
7 ACPOS Hate Crime Guidance Manual 2010
“Threatening communications are a serious concern, regardless of whether they are, or can be proven to be, “sectarian” or connected with football⁸, and we therefore urge that the offence of “offensive communications” should be extended to cover all of the characteristics listed in 1(4)(a) to (g).

3) Although clauses 1(2)(a) and (b) make explicit that the offence of “offensive behaviour at regulated football matches” applies to expressing or stirring up hatred against both individuals and groups, there is no similar statement in respect of “offensive communications”. In our experience, bizarrely, this is not always taken for granted. For example, the Press Complaints Commission responded to a complaint that a series of antisemitic comments in the online comment pages of the Scotsman breached the PCC Code:

“I note that you consider Clause 12 (Discrimination) to have been breached. This Clause is designed to prevent individuals being subject to prejudicial or pejorative reference to, among other things, their race or religion. It does not prohibit offensive remarks about a race or religion in general.”

(their emphasis)

However, as ACPOS has stated:

“It has also been shown that any single hate crime can potentially have multiple victims. Whilst all crime can increase the fear of being targeted in people other than the victim, fear of hate crime escalates dramatically in those who share with an immediate victim, the same group identity that has made a victim a target.”⁹

It is clearly nonsense to contend that whilst offensive communications to or about an individual on grounds of his or her religion are unacceptable, identical comments about Jews, Muslims, Catholics, Protestants, etc in general are not, and we urge that this should be made explicit in the Bill.

Sentencing
Following a conviction last year for having posted antisemitic threats on the Scotsman website¹⁰ including “jews are not fit to breathe our air. They must be attacked wherever you see them; throw rocks at their ugly, hooked nose women and mentally ill children, light up the REAL ovens.” (sic), the sheriff deferred sentence saying “I am concerned to protect the public, and it is clear to me that a custodial sentence is appropriate. … [however] a light sentence would only have the effect of turning you, in your own eyes, and in the eyes of your supporters, into a martyr. I choose not to do that. … [The deferral] does not mean you will escape custodial sentence, but that the possibility will be hanging over you for twelve months”. We agree that inadequate sentences only serve to exacerbate the problem, and therefore welcome the additional options that this Bill makes available.

Implementation
Although we welcome the determination of the Police and Crown Office to pursue cases to their conclusion, we are concerned that, due to the actions of third parties, this determination has sometimes been frustrated. We are, for example, aware that no prosecution was possible in other incidences of antisemitic postings on newspaper websites, despite the fact the police


⁸ Policy Memorandum para 32

⁹ ACPOS Hate Crime Guidance Manual 2010


were able to trace and interview the person believed to be responsible, because the newspaper concerned had destroyed the relevant electronic records. We therefore urge that, if the Bill is passed, the Act should be accompanied by guidance for organisations on the retention of relevant electronic data.

**Consultative and Legislative Process**

We have some sympathy with the concerns expressed by others in respect of the extremely short time allowed for consultation and consideration of the Bill, especially since the Minister has acknowledged it may be necessary to introduce further legislation on the same subject later in the session. Piecemeal legislation can only serve to confuse; a single piece of more considered legislation would have been preferable, together with an announcement that existing law would be used to its fullest extent to ensure public order during the forthcoming football season.

In particular, we note that two of the Committee’s three evidence sessions will be held before the closing date for evidence, with the final session only four days afterwards. We expect that there will be a large number of responses to the call for evidence, and do not believe this timescale will allow the Committee fully to consider issues raised, and introduce appropriate amendments. We welcome the Minister’s statement that “The Government has always been fully committed to tackling bigoted and abusive behaviour, including sectarianism, wherever and whenever it occurs”\(^\text{11}\), and, should the short timescale for its consideration prevent the Bill from being amended to reflect this commitment, we call on her to announce a target date for her promised application of the principles of the Bill to Scottish society at large.

Despite these reservations, we support the introduction of the Bill as a “strong message that bigotry and prejudice have no place in a modern, diverse, multi-cultural Scotland”\(^\text{12}\) and hope that it will make a significant contribution to achieving this aspirational objective.

21 June 2011

Note: The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen, and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges. SCoJeC is Scottish Charity SC029438, and its aims are to advance public understanding about the Jewish religion, culture and community. It works with others to promote good relations and understanding among community groups and to promote equality, and represents the Jewish community in Scotland to government and other statutory and official bodies on matters affecting the Jewish community.

In preparing this response we have consulted widely among members of the Scottish Jewish community.

\(^{11}\) [http://www.youtube.com/watch?v=RPZuIlC9ulc&feature=email](http://www.youtube.com/watch?v=RPZuIlC9ulc&feature=email)

\(^{12}\) Policy Memorandum para 64
Submission from the Scottish Episcopal Church

On behalf of the Church in Society Committee of the General Synod of the Scottish Episcopal Church, I am pleased to offer comment in response to the invitation for submissions on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

We wish to commend the Scottish Government for the intentions which lie behind the Bill. Recent expressions of sectarian behaviour in Scotland, particularly in the context of football matches, have been shocking and are unworthy of the tolerant and open society which Scotland aspires to be.

We recognise that there is a responsibility on any Government to act so as to preserve peace and order. However, we have the following particular concerns:

1. The proposed legislation is subject to a ‘fast track’ procedure. Whilst we understand the desire to have the new legislation in place before the commencement of the forthcoming football season, it is often the case that rushed legislation turns out not to be good legislation. The policy memorandum which accompanied the publication of the Bill refers to the establishment of a Joint Action Group which is already considering a range of measures to tackle violence, bigotry and alcohol misuse associated with football. We query whether it is advisable to fast track legislation before the Joint Action Group has completed its work and reported to Scottish Ministers.

It is essential that any new legislation must be effective. We are aware that it may be difficult to secure convictions under this kind of legislation (for example under the Incitement to Hatred legislation which was introduced in Northern Ireland, it proved very difficult to secure convictions). Such considerations argue in favour of a more measured approach to the timescale for introducing new legislation.

2. The proposed legislation addresses symptom rather than cause. However distasteful expressions of sectarian speech and behaviour may be, they are simply the outward signs of a deeper and systemic malaise which afflicts our society. Whilst churches and faith groups need to be particularly sensitive to the religious dimension which is a core element of sectarianism, there are also many other historic patterns and traditions which are part of it. Consequently, we hope that the Scottish Government will establish a broad-based process to enable our society to come to a deeper understanding of the distasteful phenomenon which sectarianism represents so that together we can begin to address its roots.

John F Stuart
Secretary General
23 June 2011
PS Since the above submission was prepared we are pleased to note that the Scottish Government has indicated that it no longer proposes the fast track procedure for the introduction of the new legislation.
Submission from the Scottish Football Association

It has been said that a nation’s football character is determined by the nation’s society and its behaviours. It is perhaps a truism that the character of our game, on occasions, reflects many of Scotland’s problems.

Whilst not related to the subject matter, it is perhaps relevant to draw a comparison between the dwindling number of talented sportsmen and women that this nation has produced in the last decade against the trends pointing to increasing obesity in the Scottish youth of today and the health legacies that, if allowed to pass unchecked, will be awaiting future Governments.

In all modern societies there has been an enormous growth in methods of electronic communication and their technologies in the last two decades. This has changed the Scottish nation’s daily habits with the advent of a reliance on internet, e-mail and social networking sites by a huge number of the population.

We agree that with the pace of growth in such methods of communication and the related technologies there requires to be proper, appropriate and wisely constructed Laws designed to ensure that people behave in an acceptable manner and treat others in a civilized and dignified way. Our experiences within football in recent times have demonstrated that the cloak of perceived anonymity that individuals and groups believe exists by communicating via internet, social networking and telecommunications technologies should be regulated in a way that these individuals and groups become accountable to the Courts for their words and actions. It is unacceptable for hatred against opposition teams, coaches, players or fans to be stirred up by an e-mail, text or website posting from someone with an anonymous account name. Moreso, when that hatred is based upon religious, ethnic or sexual prejudices. Legislation must be introduced to regulate such behaviours and allow the individual to be traced, dealt with by the Courts, and the practice stopped from being brought into our football grounds. Through the medium of television and its transmission of a number of our flagship games worldwide, the behavior of the minority cannot be allowed to tarnish the image of our game, and our nation, across the world. Although such occurrences tend to be infrequent, even one occurrence is once too often.

Someone misbehaving in a football ground, whether in breach of the Criminal Consolidation Act, the Ground Rules or generally, just misbehaving is subject to Laws and should understand that they will be punished appropriately, in a manner proportional to the offence committed. That is the basis of Law. The introduction of the Football Banning Order legislation in Scotland in 2006 has been an additional tool in the toolkit to punish those who have misbehaved at Scottish football. The Courts are now more familiar with their effect and, we believe, that it will be even more effective if used alongside the proposed legislation allowing that the offence can be identified as being football motivated or football related.

However, a balanced and wise approach requires to be adopted by Government in its consideration of the Offensive Behaviour at Football and Threatening Communication (Scotland) Bill to ensure an appropriate, reasonable and effective response is delivered. Through the measures being recommended by the Joint
Action Group we believe that a sense of proportionality, appropriate to football’s issues compared with those ills of Scottish society, is being delivered. It is for the Government, in particular, to ensure that that same sense of proportionality is adopted in its consideration and delivery of the Offensive Behaviour at Football and Threatening Communication (Scotland) Bill.

Stewart Regan
Chief Executive
Scottish Football Association
23 August 2011
Submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of our functions. The Commission mandate is to promote and protect human rights for everyone in Scotland. The Commission is one of three national human rights institutions in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit evidence to the Justice Committee on this Bill. The Commission welcomes the policy objective that underlines this Bill of preventing offensive and threatening behaviour related to football matches and preventing the communication of threatening material, particularly where it incites religious hatred. While the Commission agrees that this is a particular problem within the Scottish society, it considers that there is also a need to address sectarian behaviour in non-football related environments.

The Commission is of the view that there are areas where the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill should be improved. The Commission’s main concern is that the Bill is drafted too broadly, lacking legal precision as to the scope of the new offences such that it may not be considered to comply with the principle of legal certainty and the requirement of lawfulness under the European Convention on Human Rights (the Convention). This submission will provide some examples of these provisions. It is also relevant that the Committee realises that any interference with a fundamental human right such as the right to freedom of expression has to be justified and properly considered in order to be legitimate as well as striking the right balance with other human rights under the Convention.

The Commission welcomes the Scottish Government’s decision to no longer treat the Bill as an emergency legislation. This will provide a robust and appropriate space for debate and scrutiny, leading to better legislation. The Commission believes that the use of expedited or emergency procedures limits the existing short timeframes making proper scrutiny of legislation even more challenging.

Legal Framework

In making its response, the Commission’s draws particular attention to the following (human rights) standards:

- The European Convention of Human Rights (ECHR)
- The International Covenant of Civil and Political Rights (ICCPR)

1 i.e. legal clarity and foreseeability.
2 The Commission raised concerns about the use of emergency procedures in the last session of Parliament, most recently in the context of the legislation which followed the Cadder decision. See for example: http://www.scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment
The following articles of ECHR are particularly relevant:

- Article 5  Right to liberty and security
- Article 7  No punishment without law
- Article 8  Right to private and family life
- Article 9  Right to freedom of thought, conscience and religion
- Article 10 Right to freedom of expression
- Article 11 Freedom of peaceful assembly and association

Restrictions to the right to freedom of expression

From the outset the Commission would like to stress the fundamental importance of the right to freedom of expression. In the context of effective political democracy and respect for human rights, freedom of expression is not only important in its own right, but also it plays a central part in the protection of other rights under the Convention such as freedom of assembly. The European Court of Human Rights (ECtHR) has repeatedly stated that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment. The right to freedom of expression extends not just to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb.

As the Committee is aware, the right to freedom of expression is not absolute, it is a qualified right. As Article 10(2) provides:

"the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of … public safety, for the prevention of public disorder or crime…". Any interference with the exercise of this right must be:

i) prescribed by law,
ii) pursue a legitimate aim (such as the prevention of public disorder), and
iii) be necessary in a democratic society.

The ECtHR has established rules of strict interpretation of the possible restrictions provided for in paragraph 2 of Article 10. Freedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by the parliamentary debates and vote. The Scottish Parliament must decide whether or not such a restriction should be possible.

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3 Lingens v. Austria, 1986; Sener v. Turkey, 2000; Thoma v. Luxembourg, 2001; Maronek v. Slovakia, 2001; Dichand and Others v. Austria, 2002
4 Handyside v UK, 1976, para 49
5 As such there is a balance between the right to freedom of expression and other human rights including the right to respect for private life, and to be free from discrimination.
6 See Sunday Times v.UK (1979)
The Committee may find useful a brief description of the (three) requirements for a legitimate interference with the exercise of freedom of expression mentioned above: in relation to the first requirement, the ECtHR has constantly expressed that it is not sufficient that the interference is prescribed by law. The law itself, adopted by the Parliament, has to be public, accessible, predictable and foreseeable.8

The second requirement refers to the list of the possible grounds for restricting the freedom of expression, which is an exhaustive inventory. The test for whether any particular interference is “necessary in a democratic society” (third requirement) involves consideration of whether it is justified by a pressing social need and the application of the principle of proportionality,9 meaning; ‘were the means proportionate to the aim pursued?’ In addition, the interference must be the minimum necessary to achieve the aim pursued.10 It is not sufficient that the measure is ‘useful’, ‘reasonable’ or ‘desirable’.11 Similarly, there must be ‘relevant and sufficient reasons’ for the restriction.

Every restriction on the right to freedom of expression should be carefully considered in the light of the above conditions. It is, therefore, important that the Parliament is assured that all three requirements are fulfilled, so the interference with the right to freedom of expression will be considered legitimate.

Legal certainty and the Bill

Core principles of the rule of law, legality and predictability of the law, are given expression in Article 7 of the ECHR, which provides that:

“no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”12

Its purposes have been described by the ECtHR as to prevent arbitrary prosecution, conviction or punishment.13 To achieve this purpose, Article 7, amongst other elements provides that criminal law must comply with the principles of reasonable certainty and foreseeability.14 The criminal law must not be extensively construed to the detriment of an accused person (i.e. by analogy).15 As the ECtHR has stated:

“an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will

8 Sunday Times v UK 1979
10 R v Shayler [2003] 1 AC 247 and R v Home Secretary (ex parte Simms) [2000] 2 AC 115
11 See Dudgeon v UK (1981) 4 EHRR 149
12 Article 7 of the Convention is a near word for word repetition of Article 11(2) of the Universal Declaration of Human Rights.
14 Ibid. also Rotaru v Romania, ECtHR, Application no. 28341/95
make him liable.” The Grand Chamber of the ECtHR has found violation of Article 7 where the applicable law was not formulated with sufficient precision.

It is equally important to note that compliance with this principle will facilitate the work of the police, the prosecutor and the courts to enforce and implement the Bill.

Deprivation of liberty and the requirement of lawfulness

It is important that Committee Members, as part of their consideration of the Bill, give thought to the requirements for deprivation of liberty under Article 5(1). Deprivation of liberty requires two key elements:

a) a clear legal basis - in this case the ECtHR refers back essentially to national law;

b) must meet one of six sets of circumstances set out in paragraphs 5(1) (a) to (f).

In addition to compliance with national law, any deprivation of liberty must be in accordance with the Convention itself in order to protect the individual against arbitrariness. The requirement of lawfulness under Article 5 has been interpreted as referring to both procedural and substantial rules of law. The lawfulness requirement refers, inter alia, to the quality of national law, meaning that this should be: “sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

In light of the general nature of a number of the provisions of the current Bill, as noted below the Commission considers that there is a strong likelihood that the Bill as currently drafted would be open to challenge on the basis of the principle of legal certainty and requirement of lawfulness.

Provisions of the Bill

The Commission is concerned at how broadly Section 1: Offensive Behaviour at regulated football matches is drafted. Definitions must be neither over-inclusive nor under-inclusive regarding the aims of the Bill and must be applicable insofar as possible to all individuals equally. Examples of this type of provisions are:

- Section 1(2)(e) which covers:
  “other behaviour that a reasonable person would be likely to consider offensive”

- Section 1(5)(b) which covers:
  “Persons likely to be incited to public disorder are not present or are not present in sufficient numbers.”

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16 Ibid.
17 Kafkaris v Cyprus, Judgment of 12 February 2008, para 139.
18 See Ocalan v Turkey, ECtHR, Application no. 46221/99
19 See Kurt v Turkey [1998] ECHR 44
20 See Ocalan v Turkey, ECtHR, Application no. 46221/99
21 JĖčius v Lithuania, ECtHR, Application no. 34578/97
As expressed above, the law needs to be clear and ascertainable. While the Scottish Government argues that “people know what is reasonable,” the proper question is whether people know what is offensive. The level of public and media debate over the provisions of this Bill bring into question whether the provision as currently drafted is precise and clear enough to allow a person to know what the law is and what is being criminalised. The Commission is concerned that catch-all provisions may fail to achieve the principle of legal certainty required and may fail to strike the proper balance with the right to freedom of expression.

The Commission notes that gender or ‘sex’ is not included in the list of section 1(4). This provision has clearly been drawn recognising that sectarianism is not the only source of threats or offensive behaviour that occurs at football matches. However, gender as personal characteristic/status has not been included. The Commission considers that it is not appropriate to describe the personal characteristics listed in s.1(4) as “things”.

The Commission has similar concerns to those explored above in relation to section 2: Regulated football match: definition and meaning of behaviour “in relation to” match. In particular, the Commission is concerned at how broadly section 2(4) (a) is drafted. This section 2(4) (a) covers:

“A person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match.”

The Commission is unsure what situation intends to be covered and considers that clarification of the Government’s intention in this provision would be welcome.

In addition, from an operational angle the Commission questions whether section 2(1) (b) (ii) [match outside Scotland] can be legitimately enforced extra-territorially for the purposes of section 1. To be effective, legislation should be simple, clear and enforceable (in order to facilitate the work of police forces in Scotland). In the same vein, section 2(3), which includes “any place (other than a domestic premises) at which a match is televised”, stresses how difficult this provision will be to enforce.

Conclusion

The Commission welcomes the policy intention that underlines the Bill. However, the Commission urges the Committee to consider whether the provisions of this Bill are in conformity with the Convention, and especially are clear, precise and foreseeable in its application. It is important that the Bill strikes the right balance between the protection of public order and human rights such as the freedom of expression in our society. These provisions must also be considered in terms of whether they are necessary and proportionate to the aim of preventing offensive behaviour in relation to football matches.

In particular, Members of the Committee should consider:

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23 See also Section 7 – Sections 1(1) and 5(1): offences outside Scotland (which may be unlikely to result in a successful prosecution)
- Whether the provisions of this Bill are sufficiently **clear and precise** so as to enable people to understand exactly what type of behaviour is being criminalised;

- Whether the provisions of this Bill are **necessary and proportionate** to the aim of stopping offensive behaviour at certain football matches;

- Whether there is a **pressing social need** to introduce new offences and **relevant and sufficient reasons** for the restriction; finally

- Whether the provisions under section 1 **improve the existing** common law breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

Diego Quiroz  
Policy Officer  
24 August 2011
Submission from the Scottish Justices Association

General

1. The Scottish Justices Association (SJA) represents over 90% of JPs in Scotland, whose sentencing powers include fines up to £2,500 and imprisonment up to 60 days (subject to the recent restrictions upon short sentences) and the Community Payback Order (CPO).

2. It is thought that, although sectarian offences have generally gone to the Sheriff Court in the past, if the offences in the Bill are enacted, the JP Courts would be required to deal with the lower end of the range of prosecutions. They will, in any case, be required to deal with enforcement of the “fixed penalty” alternatives to prosecution.

The Bill

3. The SJA is aware of the considerable problems of sectarian behaviour related to football in Scotland, though notes it is largely a West of Scotland problem.

4. It notes that there is a considerable existing range of offences which the Policy Memorandum accompanying the Bill concedes cover many of the instances of behaviour complained about. While it recognises a possible argument for at least the first of the proposed two offences in terms of the denunciatory function of the criminal law, the SJA is also concerned at the possible proliferation of new offences covering the same ground as existing offences, exemplified in the Emergency Workers (Scotland) Act 2005.

5. It therefore remains to be persuaded that the problem which this Bill addresses is not best dealt with by sentencing considerations applicable to existing offences, such as the Crime and Disorder Act 1998 s96 and Criminal Justice (Scotland) Act 2003 s74.

6. It is reinforced in this conclusion by consideration of the Bill itself, which contains offences defined with extraordinary detail. This degree of detail is understandable given the protean nature of the problem addressed, but carries a considerable price in comprehensibility.

Conclusion

7. Thus, the SJA sees the Bill as an expensive (noting the costs outlined in the Financial Memorandum) and complicated way of addressing a problem which is already addressed in existing offences.

8. In any case, it detects a certain contradiction between, on the one hand, the creation of new offences with potentially very heavy penalties as a means of denouncing such behaviour and, on the other, the use of “fixed penalties” for some such offences, which almost entirely remove any such denunciation.
9. It also notes that judgment on public order “fixed penalties” should perhaps be suspended until the outcome of the summary justice reform research into the enforcement of “direct measures”.

Scottish Justices Association
2 August 2011
Submission from the Scottish Police Federation

Thank you for the opportunity to comment on the above Bill. I have circulated the Bill and associated documents to members of the Scottish Police Federation’s Joint Central Committee which is our national executive and asked them to comment. What follows is compiled from their views. As you know, on Tuesday 21 June 2011, the Scottish Police Federation’s Chairman, Les Gray, gave oral evidence to the Justice Committee at very short notice. Our internal consultation exercise was ongoing at that time as Les explained and any changed view or emphasis is as a result of responses from our representatives being received by my office since that time.

The Scottish Police Federation’s majority view is that the offences created by the Bill will be useful additions to Scots Law. Some of those who responded to our internal consultation felt that current common law and statute law (principally Breach of the Peace and Threats) could adequately deal with offences relative to the two main areas covered by the Bill. They also felt that stiffer sentences would be the best way of expressing society’s disapproval and would provide a deterrent. Some of our representatives also argued that the Bill should have carried a statutory power of arrest rather than relying on common law powers of arrest.

A significant number of our respondents felt that the Bill was being rushed and that further guidance, even amendment, might be required in light of experience. Training police officers on new laws and procedures is always an issue with new law and in this case the complexities will require a significant training input at significant extra cost. Some of the definitions in the Bill will be open to interpretation by the police (and others) but guidance and court rulings will undoubtedly provide clarity as time progresses.

There is no doubt that if, as seems likely, dealing with these offences will become a higher priority than hitherto, it will mean that extra police resources will be required and this must be taken into account. The reasons for this are that in relation to the Offensive Behaviour at Football Matches, Scottish police forces have for some years been reducing numbers of officers inside stadia. Indeed since the introduction of all seated stadia and the Criminal Law (Consolidation) (Scotland) Act 1995, and greater television coverage of games, by far the majority of football related policing takes place outside stadia. If it is decided to give this new offence a high priority then it seems likely we will have to reverse that trend and increase the numbers of officers within football grounds.

The Federation fully supports the recent creation of Anti-Sectarian and Football Violence police units but if these new offences are enacted then it is likely that greater numbers of complaints from the public will be made about offences and workload will increase for the police in general and not just for officers working in these specialist areas. Whether in relation to increased use of Fixed Penalty Notices or in cases where the accused is arrested or detained, there will be increased costs for the police.

In relation to Threatening Communications by computer or whatever, we will either have to divert officers and staff working on computer crime from what they are...
doing meantime, or increase the numbers of people working in that area of crime for the reasons explained at the end of the paragraph above.

The Scottish Police Federation believes the costs for the police will not be found within existing resources and that the estimates in the Financial Memorandum relating to the police are far too low. It acknowledges how difficult it can be to accurately forecast training and operational costs and would fully support an examination of actual costs in light of experience.

The Scottish Police Federation’s view is that everyone has to be realistic about what the police can achieve. If we wanted to prosecute every speeding motorist we would need a presence at every road junction but we all know that is not going to happen. It is exactly the same with this new legislation. The Scottish Police Federation has often said, give us the resources and we’ll do the job. That applies in this instance too. In addition, with the support of the courts in applying deterrent sentences, clubs in treating offending fans severely and education authorities in getting the anti-sectarian message embedded in learning programmes the Scottish Police Federation believes we can have a positive affect on this in Scotland.

The following comments are in line with the Bill.

Section 1.
In relation to Section 1, at first sight, it may be considered that the circumstances described as constituting an offence of ‘Offensive behaviour at regulated football matches’ could equally constitute a Breach of the Peace under common law. However the majority of our representatives believe that recent court rulings on Breach of the Peace make it desirable in this instance to be specific and to have consideration for Article 7(1) of the European Convention on Human Rights which requires that offences are clearly defined in law.

Section 2.
In relation to Section 2, we have no comments on the definitions of regulated football match or the meaning of behaviour in this context.

Section 3.
We have no specific comments on Section 3 of the Bill on fixed penalties.

Section 4.
We have no specific comments on Section 4 of the Bill on interpretations.

Section 5.
The majority of the representatives of the Scottish Police Federation believes the new offence of threatening communications is a useful addition to Scots Law. Again, it might be argued that the conduct described could constitute a Breach of the Peace or the Scots common law crime of Threats, but again, it is desirable for all concerned to be specific and follow the requirements of Article 7 of the ECHR and provide a clear definition.
Section 6.
We have no specific comments on Section 6 of the Bill on interpretations.

Section 7.
We have no specific comments on Section 7 of the Bill on offences outside Scotland.

Calum Steele
General Secretary
23 June 2011
Submission from the Scottish Youth Parliament

Background to SYP

Our vision is of a stronger, more inclusive Scotland that empowers young people by truly involving them in the decision-making process.

The Scottish Youth Parliament (SYP) is democratically elected to represent Scotland’s youth. We listen to young people, recognise the issues that are most important to them, and ensure that their voices are heard.

In working towards our aims, we support the following values:

**Democracy** – All of our plans and activities are youth-led, and we are accountable to young people aged 14-25. Our democratic structure, and the scale of direct participation across Scotland, gives us strength and sets us apart from other organisations.

**Inclusion** – We are committed to being truly inclusive. The Scottish Youth Parliament believes that all young people have a right to a voice, it doesn’t matter who we are or where we come from. We celebrate our diversity.

**Political independence** – We are independent from political parties. Only by working with all legitimate political parties can we make progress on the policies that are important to young people.

**Passion** – We believe that drive and energy are key to successful campaigning. We are passionate about the key issues and believe that young people are part of the solution, not the problem.

Introduction and context of response

The Scottish Youth Parliament welcomes the opportunity to respond to the Bill. As an organisation, the SYP is a fierce advocate of equality and proudly celebrates the diversity of our membership and the young people of Scotland.

One of the statements included in the SYP’s ‘Change the Picture’ Youth Manifesto is that “Sectarianism in any form should not be tolerated and every young person in Scotland has the right to live without bigotry. We believe that part of the solution lies in the education of young people together regardless of their faith.” This is based entirely on the views of young people – almost 43,000 responses from young people were received in a mass consultation, ‘Picture the Change’ which directly asked young people whether they agreed with the proposed manifesto statements. 79% of young people consulted agreed with the statement, which is now firmly in the Manifesto and together with the other statements included within collectively forms the basis of SYP’s policy and campaigning work. More information on ‘Change the Picture’ can be found at [www.syp.org.uk/our-manifesto-W21page-82-](http://www.syp.org.uk/our-manifesto-W21page-82-).
Coinciding with the initial publication of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, the SYP met with the Scottish Government with a view to engaging with young people in the short term, on an issue which is of concern to many, with the potential of longer-term, sustained engagement between the Government, SYP and other organisations from the youth sector.

To allow for an immediate engagement with young people, the SYP put together a five-question survey. Sixty-five MSYPs, aged between 14 and 25, from across Scotland, participated in the survey during the June 2011 SYP Sitting in Stirling; with a further 34 young people consulted at another event in Glasgow’s East End the following day through Young Scot. The results were shared with the Scottish Government to inform what was at that point intended as emergency legislation. The results of the survey are reproduced in this response together with additional comments, issues and concerns raised by young people taking part in the survey and subsequently.

‘Tackling Sectarianism’ Young People’s Survey Results

The survey results were as follows:

<table>
<thead>
<tr>
<th>On a scale of 1 to 5, how big a problem do you think sectarianism is?</th>
</tr>
</thead>
<tbody>
<tr>
<td>91 votes</td>
</tr>
<tr>
<td>1 (Smallest)</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
<tr>
<td>4</td>
</tr>
<tr>
<td>5 (Biggest)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Have you ever experienced sectarianism first-hand?</th>
</tr>
</thead>
<tbody>
<tr>
<td>82 votes</td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Don’t Know</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>If you have experienced sectarianism, has this been related to any of the following?</th>
</tr>
</thead>
<tbody>
<tr>
<td>83 votes</td>
</tr>
<tr>
<td>Football Match</td>
</tr>
<tr>
<td>March/Parade</td>
</tr>
<tr>
<td>Pub/Club</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Do you think the Government should introduce new legislation to tackle sectarianism?</th>
</tr>
</thead>
<tbody>
<tr>
<td>87 votes</td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Don’t Know</td>
</tr>
</tbody>
</table>
One of the big concerns is people making threats and promoting hatred through text messages and social networking. Do you think this sort of behaviour should be made illegal?

<table>
<thead>
<tr>
<th></th>
<th>SYP Sitting (%)</th>
<th>East End (%)</th>
<th>Overall (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>69.8</td>
<td>80.0</td>
<td>72.7</td>
</tr>
<tr>
<td>No</td>
<td>25.4</td>
<td>12.0</td>
<td>21.6</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>4.8</td>
<td>8.0</td>
<td>5.7</td>
</tr>
</tbody>
</table>

Perceptions of sectarianism and sectarian behaviour

Whilst the results of the survey and response from ‘Picture the Change’ show a clear belief amongst young people that sectarianism is an issue and a priority for action, a number of young people were not immediately aware of what sectarianism was without further explanation, especially those from rural and island areas of Scotland. We found this to be the case both at the SYP Sitting and some of the ‘Picture the Change’ consultation events.

At the East End event, some young people did not always identify some of the behaviour associated with football as sectarian, or at least not always as negative. Additionally, in relation to first-hand experience of sectarianism, it is likely that the figures reflect the geographic spread of young people involved in the Scottish Youth Parliament, in comparison to the proximity of the East End group to a ‘hot-spot’ area.

Online harassment

Though there was strong support for the introduction of legislation to tackle online harassment, concern was expressed about how this could be done effectively (especially amongst those at the SYP Sitting). Young people were concerned as to definitions of unacceptable behaviour and felt this could be a potential ‘mine-field’. It was believed that clarity was essential, however difficult this would be to achieve.

One participant in particular was of the opinion that “any law against [sectarian behaviour] should draw the line at infringing on people’s civil liberties. People should only be charged under that proposed legislation if they’re actually conducting sectarian attacks on a particular person, not if they just go and say ‘I hate all Catholics’ or something along those lines on Facebook. As nasty and stupid as that is, arresting someone for it is rather draconian.”

Whilst essential that the law reflects changing methods of communication and offers appropriate protection against threats, bullying and harassment online, we would recommend further guidance is produced on what is liable to be prosecuted under the new legislation, to ensure clarity on what is likely to be prosecuted as a breach of the law. For instance, if an individual were to ‘like’ a comment that broke the law on Facebook, or ‘retweeted’ an offensive message on Twitter, would they be also subject to prosecution? Additionally, as in the example raised above, would prosecutions be pursued against people making general hateful comments, or would it be reserved for specific threats against individuals?
Coverage of other hate crimes

Whilst the initial focus of the Bill and our survey with young people was on tackling sectarian and related behaviour in response to high profile incidents during the 2010-11 football season, there may be scope to include other hate crimes within the scope of the legislation. Another of the statements from ‘Change the Picture’ is “There should be increased LGBT education and information in all schools to reduce stigma and homophobic bullying”, with 71% of those consulted in agreement. Consideration should be given to whether the Bill can be used to give equivalent protection to individuals subjected to online harassment motivated by prejudice on the grounds of disability, sexual orientation, transgender identity, race, religion and age and we would encourage the Scottish Government to make enforce existing legislation that is already in place to fight sectarianism and other hate crimes.

Conclusion and recommendations

Tackling sectarian and related offensive behaviour is a concern and viewed as a priority for action by young people. In that light the Scottish Youth Parliament supports the introduction of new legislation designed to tackle sectarianism and the principles of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. However, with regard to online harassment and threats, we would welcome the production of guidance to clarify the scope and extent of the law and what actions are liable to face prosecution.

Additionally, clarification of whether the scope of the legislation extends, or could extend, to protection of online harassment motivated by prejudice would be welcomed, as the Bill represents an opportunity to address incidents of bullying and threatening behaviour online.

Whilst the Bill is a positive step towards tackling sectarian behaviour in the context of football matches and threats made online, the problems associated with sectarianism are complex and deep-rooted and must be the target of sustained action by the Scottish Government and Parliament to address the root causes. The Scottish Youth Parliament would welcome any opportunity to work together with decision-makers to tackle the underlying causes of sectarian behaviour in Scotland.

Scottish Youth Parliament
26 August 2011
1. INTRODUCTION

PLEASE NOTE: due to the upsetting nature of some of the evidence submitted under “Evidence of Need” below, the Justice Committee has requested that Stonewall amend or remove parts of it. If you wish to view our original submission, please contact Stonewall Scotland directly or visit our website www.stonewall.org.uk/scotland

1.1 Stonewall Scotland is one of Scotland’s leading lesbian, gay, bisexual and transgender (LGBT) charities. We actively work towards equal treatment for LGBT people in Scotland today.

1.2 Stonewall Scotland welcomes the overall policy objectives of the Scottish Government. The introduction of the Offences Aggravated by Prejudice (Scotland) Act in 2010 clearly demonstrated the Scottish Government’s commitment to tackling discrimination against protected characteristics, by extending aggravations to include disability, sexual orientation and gender identity alongside religious and racial aggravation. We are pleased that the Scottish Government now intends to extend this commitment to areas such as football and threatening communications.

1.3 While we welcome these policy objectives, we have one serious reservation with the bill as currently set out. Our concern is that the second part of the Bill, covering incitement to hatred, is restricted to religious hatred and does not cover any other protected characteristics, particularly sexual orientation and gender identity. It is our belief that future legislation dealing with crimes motivated by hatred should reflect the approach in the 2010 Act. The Scottish Government should continue to promote a level playing field of between different protected characteristics and not encourage varying levels of protection between groups, i.e., a “hierarchy of discrimination”.

1.4 Extending incitement to hatred to cover the grounds of sexual orientation and gender identity would be an important step forward in tackling hate crime and homophobia in Scotland today. Research carried out by Stonewall Scotland prior to the commencement of the Offences Aggravated by Prejudice (Scotland) Act 2010 has shown that two thirds of LGBT people in Scotland had experienced a verbal homophobic attack, and a third had experienced a physical homophobic attack. Research has also shown there is likely to be significant under-reporting of these kinds of offences, particularly verbal threats and abuse, so the true figures are likely to be even higher. More extensive research findings are under paragraph 3.2 below.

2 OFFENCES AT FOOTBALL

2.1 We welcome the proposed offence under clause 1 of the Bill. It has already been acknowledged by the Scottish Parliament that Scotland has
faced serious issues around sectarianism in football in the past, and the opportunity to tackle this and other prevalent issues, such as homophobia, with specific legislation is welcomed. A substantial proportion of offensive and threatening behaviour that occurs at football matches is not always dealt with fully by existing laws, and this legislation will go some way towards tackling the problem.

2.2 Stonewall’s 2009 research report, Leagues Behind, collected the experiences of football fans, amateur football players and football industry executives regarding homophobia in football. The report found that 70% football fans who have attended matches in the last five years have heard anti-gay language and chants targeted at fans, players, managers and officials. Respondents felt that homophobic abuse was treated far less seriously than racist abuse or other types of discrimination, and that the failure to challenge anti-gay abuse and discrimination has contributed to a culture within football where anti-gay abuse is acceptable. Whilst the SFA has developed a code of conduct which is broadcast over the public address system at all Scottish football matches, prohibiting offensive behaviour of all kinds, this does not do enough to actively prevent incidents occurring or deal with those that occur. Additionally, the SFA Code only specifically discourages verbal abuse on the grounds of “race, religion, gender or ability”, not sexual orientation. As such, we are glad to see that the Scottish Government is planning to tackle this problem.

3 THREATENING COMMUNICATIONS

3.1 We welcome the CONDITION A offence as set out under clause 5(2). However, we believe that the Scottish Government should extend the CONDITION B offence set out under clause 5(5), incitement to religious hatred, to cover hatred on the grounds of sexual orientation and transgender identity. We set out our reasons below.

3.2 There is a serious problem with homophobic and transphobic hate crime in Scotland today. Figures recently released by the Crown Office & Procurator Fiscal Service show that in 2010 – 2011 there were 448 recorded hate crimes which were aggravated by homophobia and 14 aggravated by transphobia. This is the first period that mandatory monitoring of incidents with homophobic and transphobic aggravations has been in place across all police forces in Scotland. Stonewall Scotland research (How Safe Are You, 2010) suggests that these figures are affected by under-reporting of incidents. We found that one in three lesbian, gay, bisexual or transgender people in Scotland have been the victims of a physical assault and two in three have suffered verbal abuse; however 61% of these incidents went unreported.

3.3 On the basis of the severity of the hate crime situation, there is no argument for restricting the incitement to hatred offence to religious hatred alone. As reported, homophobic and transphobic hate crime is almost on par with the level of religious hate crime in the same period (693 incidents in 2010 – 2011). The level of under-reporting suggested by Stonewall
Scotland’s research suggests that the true figure for LGBT hate crime is significantly higher than reported.

3.4 **Restricting the incitement to hatred offence to religious hatred would send out an undesirable message about hatred of minorities in Scotland today.** As noted by the Working Group on Hate Crime (October 2004 Report, para 5.4), one of the key values of hate crime legislation is the clear message that it sends out about unacceptable behaviour in contemporary society. By seeming to prioritise one protected characteristic, the Bill as currently constituted suggests that incitement to hatred of other protected characteristics is considered less serious in principle. This concentration on one protected characteristic is out of step with recent pieces of legislation passed in Scotland and the UK in recent years, most notable the Offences Aggravated by Prejudice (Scotland) Act 2010 and the Equality Act 2010.

3.5 **Restricting the incitement to hatred offence to religious hatred would have a corrosive effect on the free and open discussion of important issues.** We are in favour of a free and comprehensive debate around important contemporary issues such as equal marriage, religious civil partnerships, same-sex adoption, and homophobic and transphobic bullying. We feel it is essential for views from across society to be expressed and considered. However, these conversations should be conducted in temperate and reasonable terms and from a level playing field, without some voices being accorded a greater protection than others within the debate.

3.6 **There is a serious legislative gap between Scotland and the rest of the UK.** The policy memorandum (e.g., para. 40) notes that there is a gap in religious protection between Scotland and the rest of the UK. However, it fails to acknowledge that incitement to hatred on the grounds of sexual orientation is an offence in England and Wales under s. 74 of the Criminal Justice and Immigration Act 2008 and that there is no similar law in Scotland. During the passage of the Bill through the House of Lords it was often claimed that such legislation would have chilling effect on freedom of speech. However, since this section came into force on 23rd March 2010 there has been no evidence of any such effect.

4 **EVIDENCE OF NEED**

4.1 **Homophobic websites**

All of these websites are freely available within Scotland and often have Scottish specific, homophobic content, repeatedly linking homosexuality with paedophilia, rape and claims about the ‘gay agenda’.

[http://www.gayconspiracy.info/homotruth.html](http://www.gayconspiracy.info/homotruth.html)

“The natural attraction between girls and boys has been so confused by public celebration of homosexuality and the various eroticsisms of everyday life...” Some material has been removed.

[http://www.intmensorg.info/scotland2.htm](http://www.intmensorg.info/scotland2.htm)
Some material has been removed.

http://ffkfightingforkids.weebly.com/political-perverts--sex-offenders.html
Includes several gay politicians in their list of “Political Perverts”, a list purporting to expose public servants who are paedophiles.

http://www.realstreet.co.uk/2011/03/video-frocks-and-pompoms-for-primary-school-boys/
This site equates educating children about different family makeups with damaging abuse.

4.2 Religious homophobia

There have been numerous homophobic statements made by members of Scotland’s religious community that go beyond the mere expression on religious opinion. Examples include:

http://www.youtube.com/watch?v=CGAmeRxsAzM
http://www.islamicparty.com/commonsense/36movement.htm#tc
“No man or woman of ordinary intelligence who has a gramme of common sense or human decency could conclude other than that homosexuality is a curse, a blight and a bane on mankind, and that as far as possible this perversion should be eradicated, in particular that the young should be kept out of the clutches of its practitioners and advocates.“

Westboro Baptist Church, www.godhatesfags.com
This US based church are a virulently homophobic organisation and have threatened to conduct homophobic protests in Scotland on several occasions. Notably, they intend to picket on 30th October 2011 in Aberdeen. Similar attempts to picket in May 2011 and May 2009 were only interrupted because church members were banned from entering the UK by the Home Secretary. “God hates Scotland – Land of the Sodomite Damned”.

We can provide further evidence of these examples if required.

4.3 Political homophobia

http://www.bpp.org.uk/opposingqueers.html
“The British People’s Party opposes homosexuality as a perversion of nature. We do NOT allow homosexuals and lesbians into membership. If the BPP find any have joined they will expelled immediately! ... You can find members of the Pink Mafia everywhere, like maggots infesting a rotting piece of wood. The BPP call for the law against homosexuality to be brought back and these unnatural sexual practices made illegal once again.”

BNP Flyers. Stonewall has been passed BNP flyers picturing the bodies of dead children and claiming that equalising the age of consent would result in further harm to children. They clearly equate homosexuality to paedophilia and murder.
Similarly, many openly gay politicians are included on the BNP’s list “Liars, Buggers and Thieves” http://liarsbuggersandthieves.blogspot.com/

Planned Scottish Defence League activity. The Scottish Defence League, an organisation known to have virulently homophobic members, has applied to hold demonstrations within Edinburgh. Despite their application being refused the group still intends to hold a “static demonstration” in Edinburgh on September 10th.

All of these groups currently have an active campaigning presence in Scotland. Examples can be provided if required.

4.4 Song lyrics and popular culture

[Note: at the request of the Parliament, we have removed the lyrics cited in Stonewall’s original submission, which can be found on our website]

Threatening, homophobic lyrics in some reggae and rap songs are clearly intended to incite hatred against lesbians and gay men. No legal action can currently be taken to prevent the sale or distribution of such material in Scotland. Many of these lyrics are explicitly violent or advocate violence against LGBT people. As such they would fall under the CONDITION A offence in the bill:

- Beenie Man – Roll Deep
- Beenie Man – Han Up Deh
- Buju Banton – Boom Bye Bye

Other songs, while not as violent, are still clearly threatening in nature and would fall under CONDITION B were this to be extended to cover other protected characteristics. Examples include the following:

- Dr. Evil - Stay Far Away From We
- M.O.D – A.I.D.S
- Sizzla – Azinido
- Kardinal Offishal & Akon – Kill De Dance
- Beenie Man – Zion
- Mavado – Dem a F**

All of the listed lyrics are from songs currently available to buy in Britain from websites such as Amazon or iTunes.

5 CONCLUSION

We are in favour of the overall policy objectives of this Bill and welcome the intentions of the Scottish Government in tackling abuse in sport and threatening communications within society. However, with the extended Bill period, we feel that CONDITION B within the Bill should be expanded to cover other protected characteristics. There is clear evidence of a need for this protection in relation to LGBT related abuse and incitement to hatred. Similarly, there is no argument for denying parity of protection by restricting the incitement of hatred clause to one protected characteristic alone. By extending CONDITION B the Scottish Government
can close the legislative gap between Scotland and the rest of the UK and continue to demonstrate the admirable approach to equalities that it has displayed in recent years.

Stonewall Scotland would be happy to expand upon these points by giving oral evidence.

Alan Wardle  
Interim Director, Stonewall Scotland  
2 September 2011
Submission from Supporters Direct Scotland

1. Supporters Direct Scotland is the national organisation representing football supporters' trusts in Scotland. Supporters' trusts are community benefit co-operatives that seek to bring together responsible football supporters to collectively have a say in the running of the football club they support.

2. Our goal is to promote sustainable spectator sports clubs based on supporters' involvement and community ownership. We represent 33 supporters trusts with an approximate membership of 15,000 individuals in Scotland and other parts of the organisation operate in the rest of the UK and across mainland Europe.

3. The speed with which the proposed legislation has been drafted gives us cause for concern so we welcome the extended time-scale and opportunity for wider debate which we feel will result in a better outcome.

4. Football supporters are already subject to legislation that defines how they can watch their chosen sport. In some cases there are restrictions in the way facilities are used for football matches while followers of other sports using the same facilities are not subject to the same restrictions. This has helped to contribute to a prevailing view that followers of football are more likely to be involved in anti-social or offensive behaviour even though evidence for such a view is not clear.

5. In this respect the legislation as proposed only helps to reinforce this stereotype and would potentially put further restrictions on how football supporters go about enjoying the sport.

6. It particular it appears unreasonable to make certain actions illegal in the context of a regulated football match when the same actions apparently would be acceptable in other public situations, such as going the cinema or attending the theatre.

7. Although we recognise that there are issues about behaviour at and around football matches we are not convinced that the size of the problem has been properly measured or that the evidence exists that these problems will be addressed by this legislation. Those supporters who have been involved in the game since the 1970s and 80s recognise that behaviour at matches has improved out of all recognition and question whether new legislation is required when existing measures have been successful.

8. We believe that the issues this legislation seeks to address are adequately covered by existing legislation and we are not convinced that the measures outlined are clear enough to define the behaviour from which people should refrain. In our research into the behaviour of supporters at football matches people felt confident challenging racist behaviour due to the clear definition and understanding that they would be supported by fellow supporters, stewards and the police. They expressed that they would be much less likely to challenge other behaviour where they believed that the issue was not as well defined and where they could not be sure of receiving the same level of support. The unintended consequence of the proposed legislation therefore may be a reduction in the aspects of self-policing that have undoubtedly
led to the improvement in behaviour over the last 30 years.

9. The events of the last football season have demonstrated that there are issues still to be addressed. However while they may manifest themselves at football matches these are societal problems which go much deeper than football. If we are serious about addressing these problems then we should be serious about the engaging with people and using the full range of solutions rather than simply trying to address them within the football context.

10. The Bill as drafted sets up a number of problems for the authorities, clubs, police, stewards and supporters in that there is no definition of the sectarian behaviour it seeks to address – this increases the chances of inconsistency of application and has the potential to lead to flashpoints within the stadia when action is taken to deal with those who are viewed as indulging in unacceptable behaviour.

11. While there are concerns over many aspects of the Bill the second section concerning Threatening Communications may help to address some emerging problems with online media particularly given how technology has developed in recent years.

12. Aside from the high-profile cases we are aware of people involved in football who have received personal abuse, violent threats and had personal details published online. We take the view that this will dissuade some people from becoming more involved in their club and of being willing to offer their voluntary time. If the part of the Bill addressing online communications can help curb the worst excesses of this and send a message that it will be policed robustly then it would be welcomed by many supporters. However we recognise the difficulty of trying to police the internet and would not want to see this used to curb genuine discussion among people online.

13. As others have noted it is not clear why the types of offensive behaviour as described in the first part of the Bill also are not addressed in regard to Threatening Communications.

14. We would also make the observation that the Bill does not include discrimination on the grounds of gender as an offence.

Supporters Direct Scotland
26 August 2011
Submission from Brian Taylor

I am interested in the **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill** which is currently undergoing investigation by the Justice Committee. I would like to have a say and make a few points on the issue regarding football terrace songs, historic meanings in relation to Glasgow’s two football clubs and beyond.

The measures being taken have been over reacted and unnecessary in modern society Scotland, the threat of sectarianism isn’t what I would call a serious issue in fact more serious crimes, more serious points in Scotland have taken place in the month of June alone which I do not doubt the people of Scotland find more offensive more frightening and more alerting than what songs football supporters chant on the terracing or in pubs related to certain football clubs.

“The bill covers the stadiums to and from the match, covers local pubs showing football fixtures and the use of the internet in terms of hate”

I do believe that the question regarding football related bigotry has been blown out of proportion taking into account that the bill will see a rise of prison sentences from six months to five years given the circumstances for individuals caught in alleged sectarian manner, how the Scottish Parliament and MPs justify this legislation is beyond imagination.

I am not a person to be “in the know” of human right law but the basic of that right has been breached if this proposed bill is to take place - I quote Freedom of Speech-

**Freedom of Speech**

*Article 10 protects your right to freedom of expression. This includes the right to hold and express opinions yourself as well as to receive and impart information and ideas to others.*

*Before the Human Rights Act came into force, the right to freedom of expression was a negative one: you were free to express yourself, unless the law otherwise prevented you from doing so. With the incorporation of the European Convention on Human Rights into English and Welsh domestic law, the right to freedom of expression is now expressly guaranteed.*

*In Handyside v UK (1976) the ECHR stated that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and development of every person. It also made clear that Article 10 applied not only to information or ideas that are favourable and inoffensive but also to those that offend shock or disturb the State or a sector of the population.*

My personal point - the nature of the Old Firm Derby is unique, passionate, tension thriving and explosive and the only domestic fixture that brings Scotland into the light of European football, the Derby does top a few selected European Derbies which have a more serious turn of events off the field in countries like Italy, Germany or
Serbia….but Scotland feels the need to clamp down on football tribalism in the old firm nature?

A supporter calling another supporter of a rival team has it’s meaning on the football terrace for every club, I give you the meaning of the word “Fenian” for instance - it relates to a movement dedicated to ending British rule in Ireland and the name of the movement was “United Irishmen 1798” were you can find the trace of the word Fenian now given the history of Scotland that thousands upon thousands of Irish (large Majority of Catholic - also small percentage of Protestant) immigrants fled the famine of the 1840s to settle in Scotland and world wide, the final result was the creation of Celtic football club by Priest Walfrid for charity and community passion in the time of poor housing estate’s and poor living conditions in the 1800s. In a football sense this is the image of identity for a Celtic supporter.

“Orange” basic understanding of the word Orange means the Monarchy(King William the 3rd Prince of Orange) who maintained the throne of Great Britain to be ruled by a member of the reformed faith “Protestant”, in 1872. Rangers were not founded on being a Protestant football club but for the love of the game itself but the founders were of Church of Scotland but as stated with no intentions of religion but the growing support hailed from the city and outskirts, also note that the time the city of Glasgow and Scotland itself was reformed faith dominating, when the foundation of Celtic came into place the Protestant community adopted Rangers as their club then officially both sides became the club that represented. In a football sense this is the image of identity for a Rangers supporter.

I personally enjoy the intense of the rivalry the history surrounding each club both in religious identification, football achievements and staunch supporting it is incredible to the naked eye and is Scotland’s golden prize.

We all understand that both clubs are not fully supported by the religion which they represent, the commercial view of Rangers and Celtic are in parts of the world which I find remarkable, Azerbaijan, America, Canada and Australia and more world wide. Members from these countries come over to follow their respected teams. I personally have two companions from Germany and Netherlands and they sing songs of the club and enjoy it. Surely the Government must understand the meaning of the club to its supporters not just here in Scotland.

I quote former chief executive of the Scottish Football association Gordon Smith when discussing the issue of sectarianism – October 10th 2007 a piece taken from the statement.

Holding up Celtic as a contrast to Rangers, Smith goes on to expand on his belief that the Celtic Park club are given an easier ride than Rangers in the whole debate about football clubs, history and tradition.

“Celtic make a point of extolling their background and tradition,” Smith says. “They are quite happy to say that they have a tradition of Irish Catholicism, and that they are a club founded by Brother Walfrid and immigrants to this country. And I am very comfortable with that.
“But why is there a problem when Rangers come out and say similar things? Why is it a problem when Rangers come out and say they were set up by people from a Church of Scotland upbringing and that they have a Unionist background?”

In terms of sectarianism in football, Smith goes on to argue that there is an “oversensitivity” on some people’s part towards singing from the stand.

“The issue of sectarianism is topical again but we have to be careful we don’t become oversensitive to it all,” he says. “You simply can’t make laws or rules just because people say they are offended. Rangers fans sing God Save the Queen and Celtic fans boo it: does that mean the national anthem is offensive?

I applaud Mr Smith on this fine piece of material and quite rightly so he outlined that the oversensitivity has breached its limit it just show’s that in the SFA (when Gordon Smith was an employee of the SFA) reality checks can happen and common sense prevails.

Onto the issue of common sense in regards to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill –

For example a young man/women with high expectations in life goes to a Rangers/Celtic v whoever fixture and sings songs in relation to the club’s background (please make no mistake both clubs are steeped in religious/community heritage) and is escorted out by police and charged with sectarian breach of the peace while inside the ground and may face an unlimited fine? 5 year jail sentence? And a fact that the career and expectations will be in tatters, while in my home town of Greenock we have had a knife crime situation which ended in murder of a 17 year old boy….similar to the knife crime in Airdrie another death on Scotland’s streets due to this horrible plague that we know as knife crime culture and we end in Pollock once again at the use of a knife? But so called sectarianism takes major priority? Also takes priority over job creation, drug addiction, homeless and other forms of uneasy life styles which Scotland needs to cope with.

Here are a few incidents that took place under the Scottish Nationalist Party Government which I found rather unsettling which did lead to conviction -

Social care worker found with two thousand child pornography images on his computer was jailed for twenty months but a Rangers fan can sing “No Pope of Rome or the Billy boys” and look at five years if convicted?

A juror who wrecked a 6 million drug trial by contacting the defendant was jailed for eight months.

But a Celtic supporter can sing “Boys of the Old Brigade” or the “soldier song” will face 5 years imprisonment if found guilty?

A teenage yob threatened two children age 11 with a knife was given six months detention.

But a Rangers fans singing “Rule Britannia or the famine song” will end up in court and a possible jail sentence of 5 years?
Heart of Midlothian midfielder Craig Thomson was convicted of preying on two young girls over the internet and fined £4000 plus placed on the sex offenders register but a Celtic supporter will sing The Celtic Way or Paddy McCourt’s Fenian Army and will face 5 year jail time if convicted?

And all because the government claims a section of Scottish society may find them offensive that are coming from within the football arena while it also extends to local pubs showing the matches I am still in risk of jail if I was in with likeminded people? Therefore the next part was brought into question of being in a fellow football supporters club, due the supporter’s club being a public house like normal pubs are accessible to the outside world those inside singing songs of pride or hate can also face football banning orders and fall under offensive categories?...am sorry but I cannot agree how this bill should be given the green light for proceeding into law.

As you may be aware I underlined the “sing/singing” - as at the end of the matter that is all it is.

Football is the working class sport and the national game of Europe (Scotland), the average worker does his given time Monday to Friday for long hours and pays to follow the team for the reason he/she chooses were it be local town, religion identification or success that the team has produced. The SNP needs to realise that this law will tackle behaviour which is normal at the football in terms of letting off stress of a hard week and joy and pride of the team and hatred of the rivals (under football banter), this is normal and not a threat to society in any given form as it takes place within the stadium.

Onto the issue of the internet, online privacy may be breached but common sense must follow that hatred of individuals, creating web pages in relation to hating a manager or a player or even a set of fans does not direct attack or insist of attack on the said above, I feel rather uneasy that I could say the wrong thing out of frustration and the possibility of my door going in to the sound of police forces? Or taken away during the day for questioning?

For example we all hate Neil Lennon, we all hate Walter Smith or we all hate Alex Ferguson does not trigger direct commandments to attack personally if seen in public.

Political interference should be kept away from football altogether, as far I as have thought about the main focus of this bill it will destroy lives in Scotland over singing of songs that have been sung over a long period of time (will go so far as saying since the first chant of the terracing became a reality) and not once affected anyone, And if the bill is enforced into law it could also –

- Destroy careers (by imprisonment unlawfully?)
- Destroy Peoples life styles (name published in papers and sacked from employment?)
- Destroy families across Scotland (the possibility of no father/mother – teenage/adult son or daughter in household because of five year prison sentence?)
Fall in match attendances (the price of tickets is another matter, the fear of jail for supporting your team will be at a very high percentage? Strong possibility!)

Fall in support of SNP – independence (already I have heard claims if this bill is passed people will not seek to vote for the SNP any further? Obviously this from local people who I know)

In light of last year’s events surrounding football you cannot defend the actions of some, aka the attacker on Neil Lennon and the parcel bombers, but out of common sense that was not triggered by singing of anthems which will be targeted and those responsible jailed.

No one should attend a football match in fear but the SNP’s anti sectarian bill will do just that as noted not even the MPs can define what is and what is not sectarian and given a confirmation from Kenneth "Kenny" Wright MacAskill claiming their will be no banned song list for any football ground in Scotland as it is up to the police force and courts to decide while confusion will be everywhere. This just proves that the bill was not thought through and gives the impression that it was forced upon without consideration.

For common sense, freedom of speech and human rights in Scotland - allow Rangers and Celtic to retain their ancient Identities of both Protestant and Catholic, allow supporters to sing of love of their side and hate of their rivals without fear as you need to remember football is passionate, love and tribal and Scotland’s top two is no different. Goverments across Europe wish to stop the violence but why stop the chanting of historic identity and the meaning of them in the process? Nothing is wrong with the song books if you give carefull study as to why they are sung .

I also applaud Neil Doncaster of the Scottish Football Association on stating worse happens elsewhere in Europe in regards to football related problems while in attendance to discuss the proposed bill.

For the sake of Scottish football, the old firm, its supporters and Scotland itself this legislation must not pass it is too extreme for society surrounding football.

Brian Taylor
25 June 2011
1. **Introduction**

Victim Support Scotland is the largest agency providing generic support and information services to victims of crime in Scotland. Established in 1985, the organisation has ample experience in service provision to people affected by crime. Every year our community based victim services and court based witness services support around 165,000 people. We are grateful to be given the opportunity to respond to this new Bill which addresses a very important issue in Scotland, namely by criminalising offensive and threatening behaviours that occur at, or in connection with, football matches.

2. **Offensive behaviours at football and threatening communications (Scotland) Bill**

Football is Scotland’s national game, followed and enjoyed by millions of men, women and children, the substantial majority of whom balance passion and friendly rivalry with a sense of respect. However, not all sporting events pass without incident. We take the view that every person should be able to take part in public sporting activities throughout Scotland without fear of threat, intimidation or violence. Victim Support Scotland’s main concern is with the victims, and potential victims, of those offensive behaviours that do unfortunately occur. It is important that all those affected by these offensive and/or violent behaviours are acknowledged as victims of a crime, treated sensitively, and that there is effective support available to address their needs and issues.

2.1. **A Range of Initiatives is Required to Tackle Sectarianism**

Victim Support Scotland welcomes the Offensive Behaviours at Football and Threatening Communications (Scotland) Bill which we view as an important step in dealing with the issue. However, we do not believe that legislation alone is likely to be a sufficient, or indeed successful, resolution to the problem. Whilst the Bill is essential for setting the standards for what behaviours will be accepted and what will not, eradication of the problem is likely to require a range of additional initiatives aimed at addressing the root causes of violent and discriminatory behaviours and communications witnessed during football matches. Victim Support Scotland does not have the knowledge base or experience to comment on the specific root causes or aetiology of sectarian behaviours, or indeed what the most effective actions / measures are to deal with the problem and as such offer no further comment at this stage.

2.2. **Human Rights Implications**

We acknowledge and commend that the Bill is not intended to restrict fundamental freedoms, such as freedom of expression and freedom of thought, conscience or religion. It is essential that these basic fundamental freedoms are not forfeited as they allow individuals to comment, debate, criticise and argue about the content, meaning and value of different religious beliefs. We acknowledge that the European Convention on Human Rights proscribes that interferences of fundamental freedoms
may be legitimate, when proscribed by law and when necessary in a democratic society in the interest if public society, for the protection of public order, health or morals, or for the protection of the protection of the rights and freedoms of others. ¹ To ensure the new offences do not restrict legitimate freedoms, we encourage the Government’s engagement with the Scottish Human Rights Committee.

2.3. Threatening Communications

With regards to the new offence of threatening communications, the documents issued in accompaniment to the Bill emphasise that the offence has been established largely to criminalise threatening behaviours which incite religious hatred. Victim Support Scotland supports this proposal.

2.4. Operational Policing

Victim Support Scotland is aware that the Scottish Police service has significant experience in policing large sporting events which attract a worldwide audience and would make no further comment in this area which is more appropriately left to the police service to respond to.

3. Summary

Victim Support Scotland supports the introduction of the Offensive Behaviours and Threatening Communications (Scotland) Bill. However, to ensure it will make a positive difference it is essential to recognise that legislation can only deal with action, and there are underlying problems which need to be addressed via other actions in addition to legislation (for example, social and education initiatives), aimed at targeting and tackling the root causes of sectarian offending. We hope that the legislation will limit the amount of offensive and abusive behaviours and communications committed in connection with football games and as such play a vital role in the overall objective of tackling sectarianism in Scotland.

Victim Support Scotland
26 August 2011

¹ For more information, please see European Convention on Human Rights, Article 9, section 2.
Submission from Dr Stuart Waiton

The concern about the moral aspects of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (from here on in known as the ‘Football Bill’) has already been commented upon in the media by Michael Fry (Scotsman 26th May 2011). Elsewhere political concerns have been raised by commentators who highlight a number of issues including the potential of the Bill to increase tension at football games in Scotland. There has also been wider concern about the ‘undemocratic’ time scale of the reading of the Football Bill from church and human rights organisation.

This report will touch upon some of these concerns and raise some other issues with particular reference to an online petition set up by Take a Liberty (Scotland) (with relatively little publicity), which has already received support from 900 signatories.

Key issues being raised below relate to the disproportionate nature of the Bill and the level of punishment being proposed; the issue of ‘offence’ and in particular the lack of context being given when considering the nature of football games and even football blogs; and the apparently discriminatory aspect of the Bill that deliberately targets football fans and the kinds of language often adopted by working class people. With reference to this last point, a question is also raised here about the lack of clarity about the meaning of ‘sectarianism’ in the Bill, and indeed research cited below raises questions about the extent to which we should understand various actions and activities as being ‘sectarian’.

Regarding all of the above, questions are also raised here about the Bill and the potential for it to be seen to undermine the democratic process, to bring the government, parliament and even the law into disrepute, for it to be and to be seen to be discriminatory, and finally for it to potentially encourage a more anxious and intolerant climate across Scotland.

Consultation and legal legitimacy

Since I started to write this report, around half an hour ago, the petition signatories has already increased from 900 to 957. Given that bills often take a year before they are passed, if the Football Bill were to follow ordinary procedures and timescales, it is likely that the petition would end up with tens, possibly hundreds of thousands of people signing it. This lack of concern for public consultation appears to be a problem at a number of levels.

Firstly, the process surrounding the discussion of this Bill appears, and arguably is, undemocratic. Secondly, and perhaps most importantly, there is a serious problem in introducing a criminal law and a criminal offence that substantial sections of the population do not see as appropriate or valid.

In the petition it is clear, despite the many different views being expressed, that there is a general consensus that the offences discussed in the Bill should not be seen as criminal. This does not mean that they should not be seen as wrong necessarily, simply that they should not be criminalised. In a recent Glasgow City Council report on sectarianism (see endnote iv), of the 1029 people in Glasgow surveyed, it was
noted that two-thirds of respondents believed that saying ‘sectarian’ words or chants is ‘always wrong’ (although this does not mean they think it should be necessarily criminal), but also that one-third think that at football matches it is acceptable to chant certain things and use certain words. That at least one third of the population (taking the survey as a representative sample of Glasgow) not only reject the idea of chanting ‘sectarian’ songs at football matches as being criminal but do not even see it as wrong suggests a major problem with the appropriateness of this Bill.

It is hard to think of any other ‘crime’ that is not generally recognised as a crime – not least of all one that can result in being sent to prison for five years. Assault, burglary, rape and so on would find few condoners because the law clearly reflects the sense of right and wrong of the public on these matters. Here, on the other hand, we have a potential criminal law with a severe punishment attached to it that significant sections of the population and potentially even the majority do not believe should be treated as criminal. The ramifications of this for the rule of law and the respect for the law are serious.

Criminalising fans

A serious omission in the Football Bill, in terms of contextualising offensive behaviour, is the ignoring, or even ignorance, portrayed regarding how people actually behave at football matches: Especially, but not exclusively, how the ‘rowdies’ behave.

In the Football Bill the discussion about ‘creating fear’ or causing an offence to a ‘reasonable’ person appears to miss the point of football fandom, chants, slogans, the use of intimidating language and so on. Here the Bill lumps together (confusingly) types of behaviour at a football match, on an online blog and on the street. Pointing, shouting and being offensive in someone’s face on the street is already criminal. However pointing, shouting, being aggressive and offensive at football matches (whether sectarian or not) and online are not seen as criminal but within the act will become so.

Part of the argument presented in the Bill is that these rowdy activities should be seen as leading to ‘public disorder’. At the Cross Party Meeting on Human Rights (held at the Scottish Parliament on Tuesday 21st June 2011), the civil servant defending the Government’s case argued that this was a ‘public disorder’ issue because if the police were not present then disorder would emerge. This is presumptive and denies a difference between words (however unpleasant) and violent actions carried out by football fans.

In the Policy Memorandum of the Football Bill (subsection 52) the point is made that the Bill targets behaviour that will incite public disorder related to football, ‘as well as any other behaviour likely to cause public disorder related to football which would be offensive to a reasonable person in Scotland’. Rather than specifically targeting sectarian or discriminatory behaviour this appears to criminalise potentially any ‘aggressive’ behaviour at football.

Consequently the Bill criminalises ‘rowdy’ football behaviour at any football match in Scotland, ignores the reality and difference between action at a game and action
between individuals on the street and is also potentially discriminatory against people who simply use ‘bad language’. Shouting and screaming at football is consequently to become a serious criminal offence.

One potential offshoot of this is that fans may begin to use the new law to point out those they deem to be ‘being offensive’, thus creating a whole new level of tension at games.

It is undeniable that many fans are offensive at football games. But this is part of the ‘tribal’ nature of the event itself, and indeed is part of the reason why many people love football. If taken onto the street these activities are already seen and treated as criminal. However, to conflate football chanting in a crowd with one-to-one personal intimidation is to see criminal activity when none exists.

Finally, on a different note regarding criminalising fans’ actions, there is constant reference in the Bill to the cases last year of mail bombs and the attack on Neil Lennon. These criminal activities are seamlessly linked with wider (as yet non-criminal) actions of ‘rowdy’ fans and discussed as part and parcel of the same problem.

This would appear to be prejudiced in the true sense of the word where people chanting incorrect slogans in an aggressive manner are connected to mail bombers and those who assault football managers. This literally is to pre-judge potentially thousands of non-violent citizens who do little more than shout and scream on the terraces.

The problem of sectarianism

Perhaps the most contested and arguably most confused aspect of the Football Bill and within the debate about football in Scotland is the issue of sectarianism. That the Bill itself cannot define what this is appears to be problematic. However, if we take it to simply mean an expression of religious bigotry, it is debatable to what extent sectarianism is a major problem in Scotland, even in Glasgow.

Indeed, that the issue is ‘contested’ again raises a serious problem with the speed with which the Bill is being pushed through parliament without sufficient time for discussion.

A core purpose of the Bill is to challenge sectarianism expressed through football. But there are serious doubts that have been raised in academia and in research about the level of sectarianism not only in Scotland but also in Glasgow itself.

Work by Professor Steve Bruce at Aberdeen University questions the extent of religious bigotry in Scotland. Employment, poverty and wider indications of discrimination based on religion are not evident in Scotland. Similarly, there does not appear to be a serious problem at a personal level in terms of inter-marrying. For instance, over half of Scottish Catholics under the age of 35 are married to non-Catholics.
The perception of sectarianism remains relatively high, but the evidence for this is scant. Indeed one argument that is made is that the issue of sectarianism is kept alive more by those who demand ‘we must do something about it’, than by those doing anything based on their sectarian beliefs.

In a useful report published by Glasgow City Council, the exaggerated nature of the belief in sectarianism is expressed, with two thirds of respondents believing sectarianism is a problem and the same number believing that sectarian violence is a problem. But this is in stark contrast to the thoughts and prejudices of the individuals questioned. For example, when asked about who they would not want as a neighbour almost 100 percent said a drug addict, around 30 percent said homosexuals but only one and two percent respectively said Protestants and Catholics (this being a survey of 1029 people, not in Scotland, but in Glasgow). When asked about what sectarian violence they had experienced the survey also found that despite people thinking this was a serious issue, only seven people or 0.7 percent of respondents had experienced sectarian violence while a similar small number had experienced sectarian threats.

Bigotry and prejudice (for example against homosexuals) has clearly not gone away. But serious religious prejudice appears to be limited and also to be declining – with over-60s, for example, being more inclined to have concerns about inter-marrying or negative views based on religious prejudice.

It could be argued that what we are witnessing at Celtic and Rangers games is not only a form of ‘performance’ in terms of the general football fandom, but also a historically based ‘sectarian’ pantomime – a ninety minute war of words (with the occasional idiot jumping on the pitch and rightly getting carted away), followed by the huge majority of even ‘ranting’ fans going home to Catholic wives, protestant mates and neighbours whose religion they care nothing about.

In this respect it is less accurate to say that sectarian passions and rivalry is riding on the back of football. On the contrary, it would appear that football passion and rivalry is riding on the back of an ersatz form of sectarianism. The research appears to suggest that if Celtic and Rangers football clubs disappeared ‘sectarianism’ itself would also largely disappear. Indeed it is rare to find a discussion about sectarianism that is not centred around football. This is strange if we are to believe that this is a societal wide problem of prejudice and discrimination. The problems (to the extent that they are problems at all) that are being discussed should consequently be understood more as an expression of football tribalism than any serious religious prejudice or discriminatory attitudes on the part of either Celtic or Rangers fans.

**Class discrimination**

The Football Bill consciously distinguishes football fan activity from the words and behaviour of artists, comedians and other performers. That football rowdiness is arguably part of a ‘performance’ specific to games is ignored. This aspect of the Bill appears to be wholly discriminatory against football fans who would no longer be treated equally under the law.
Furthermore, and perhaps more contentiously, the focus on what could be described as crude and rude words – Fenian, Tim, Hun and so on – which are more part of everyday language amongst poorer sections of society, means that these people are again potentially criminalised for simply lacking politeness or using what is deemed to be politically incorrect language.

It would appear legitimate to be opposed to the use of such terms morally and politically. But to make them potentially criminal is highly problematic and potentially discriminatory.

The consequences for individuals who are charged under this act, in terms of a criminal record and the chance of losing their job and becoming unemployable, should also be considered more seriously.

The discussion about ‘hate’ at Celtic and Rangers matches appears, in part, to justify the need for the Bill. However, ‘hatred’ at football is part and parcel of the game and should not be taken literally and certainly should not be addressed (if it needs addressing at all) legally. Once again, regardless of individuals’ true beliefs or prejudices, the activity of sections of fans, generally young working class men who are the most aggressive and apparently ‘hate filled’, will be criminalised.

Finally, with regard to ‘hate crimes’, it is worth noting that a study of hate crime in the United States concluded that despite the intentions of the law to target extremists, the result had been that both black and white working class men had simply ended up filling up the prisons because it was they who would blurt out ‘incorrect’ words when drunk or when in a fight and so on. These laws in the U.S. consequently have not targeted racism but have criminalised further poorer sections of society.

By constructing a crime based on a pre-judgement of potential ‘public disorder’ (at a football match when being aggressive and confrontational is part and parcel of the game) results in the criminalisation of working class football fans.

Creating an intolerant cultural climate

Finally, I believe it is worth raising a concern about the freedom of speech aspect of this Bill, not simply in terms of criminalising ranting football blogs or online postings, but more generally about the climate that is created for young people when certain words become ‘unacceptable’ (indeed that can potentially be perceived as criminal). This can have the consequence of limiting speech and thought concerning the nature of sectarianism and racism.

As a university lecturer it is noticeable that students I teach already can find themselves tongue-tied and uncomfortable discussing issues like race and racism. It would be an unhelpful development if the politicisation of ‘correct’ and ‘incorrect’ words regarding sectarianism were to limit the capacity of students and the public more generally to relate to these issues freely.

Rather than a criminalising approach being taken through the Football Bill that appears to embody its own form of intolerance, discrimination and prejudice, Take a Liberty (Scotland) believes the Enlightenment ideal, attributed to Voltaire, that, ‘I may
hate what you say, but will defend to the death your right to say it’, would be a far more tolerant, civilised and progressive framework to relate to issues of prejudice and discrimination.

Dr Stuart Waiton
23 June 2011

\[\text{References}\]

i http://www.scotsman.com/rangersfc/Michael-Fry-A-totally-unnecessary.6774395.jp


iii See http://www.petitiononline.com/1967a/petition.html. I would recommend the comments made by people signing the petition be read to get an idea about the concerns being raised and the depth of anger being expressed against this Bill.


Submission from Professor Graham Walker

The political and media response to the dispiriting events of the 2010-11 football season in Scotland has been lacking in perspective and balance, and has led to a situation where possible legislative changes may bring about regrettable illiberal consequences and may indeed exacerbate the problem they are seeking to address.

The controversy over the Scottish government’s proposed legislation has become mired in imponderable questions around what is and is not acceptable to sing and chant, so much so that, where football in Scotland is concerned, the authorities appear to be more concerned with the words of certain songs than with actual thuggery. The proposed legislation, in its preoccupation with ‘offensive’ singing, may in fact provoke some supporters to be even more defiant in assertion of their identities as they perceive them.

The negative publicity surrounding the last football season certainly damaged Scotland’s external image; yet the eagerness of the country’s political figures and opinion-formers to be seen to be taking action has arguably produced ill-considered and glib proposals. If those who regularly pronounce on ‘Scotland’s Shame’ were serious about addressing it they would have to conduct a proper investigation into its historical causes, into the complex circumstances which sustain it, and indeed into the question of how precisely the issue is defined. The term sectarianism itself has become a convenient label for all sorts of anti-social behaviour, and where the term is defined it is usually done in a reductionist manner designed to heap the blame on one side, or even on one set of football fans.

If it is the case – as I would argue – that Scotland should have confronted the sectarian question long before this, it might be suggested that the impact of the troubles in Northern Ireland was a key factor in causing the delay. From the late 1960s there was a real fear in Scotland of contagion, and perhaps this led many to deny the extent of the problem in Scotland. Perhaps, too, as Scotland largely steered clear of Northern Ireland’s tragedy, it was too readily accepted that problems of an ‘Orange and Green’ nature were without substance. Certainly, the public discussion of the issue in Scotland only gained momentum when the Northern Ireland peace process kicked in during the 1990s. By this time the context for the discussion was very different to what it would have been in the 1960s: there was by the end of the century much more emphasis on ethnicity and identity politics, rather than social class, and much more doubt about the future of the Union and the UK. The sectarianism debate has become linked, if ambiguously, to the constitutional debate about what a ‘New Scotland’ or Independent Scotland should look like. Maybe, more contentiously, the delay in discussing sectarianism has distorted that discussion, and dubious concepts and fashionable preoccupations have been brought to it and have rendered it more problematic.

I highlight the Irish dimension to the question since I believe that any attempt to tackle sectarianism in the football context or elsewhere is glaringly incomplete without it. There is some impatience among commentators about the perceived requirement to become expert in Irish history, and there is a strong tendency to regard this as simply another Scottish problem with a Scottish solution. But the fact that so much attention is paid to the Irish songs – whether Orange or Republican –
sung by Old Firm fans, to the use of ‘Fenian’ and ‘Orange’ as abusive epithets, and to the personal identity profile of Celtic manager Neil Lennon, makes abundantly clear the tangled Scottish-Irish nature of this issue, both historically and in its current manifestations. The events of last season in Scotland indeed fed back into the situation in Northern Ireland. We need to be aware, for example, of the position of the Unionist/Loyalist community in Northern Ireland, the particularity of the Ulster-Scottish link, and the emotional support which a slice of the Protestant community in Scotland lends to this group and its cause, however ill-defined that may be. This is reflected among Rangers supporters just as continuing support for the attainment of a 32 County United Ireland is reflected among Celtic fans. For Ulster Protestants or Unionists there is a real need to feel they belong to a wider ‘British’ family, not necessarily that they represent all that Nationalists see as retrograde about the concept of Britishness.

I suggest that, prior to any new legislation, ways of engaging purposefully with representatives from both sides of the community divide in Northern Ireland be explored. One way of doing this would be to initiate a joint venture between Scotland, Northern Ireland and the Republic of Ireland through the medium of the British-Irish Council, the Secretariat of which is now based in Edinburgh. Scotland needs to become more aware of how the question of segregated schooling has been debated in Northern Ireland, and how changes in the supporters’ culture around the Northern Ireland international team have led to a Celtic player – Paddy McCourt – receiving rapturous acclaim in stark contrast to the abuse meted out to another Celtic player (Neil Lennon) in the 1990s. The issue of Rangers players being abused while on international duty in Dublin has also become a matter of public discussion in the Republic of Ireland.

It would also help if notions of sharp binary divisions and monolithic Protestant and Catholic blocs are effectively challenged in the Scottish debate. If, as many suggest, there is a derogatory concept of the Catholic ‘Other’ abroad in Scotland, then, equally, there is a Catholic tendency to conceive of ‘Protestant Scotland’ as a single community of interest whereas it is a highly diverse and fractured entity, if such it can be called at all. Catholic perceptions of their place in Scottish society often seem to carry assumptions about the Protestant community which make little allowance for denominational and class divisions. Moreover, such perceptions often fail to factor in consideration of how important matters of public interest, such as the Catholic Church’s historically hard-line stance on mixed marriages and how children should be raised in them, impact on non-Catholic Scots. If the point may be extended to football, how well known is it that the General Assembly of the Church of Scotland formally congratulated Celtic for their European Cup win in 1967? How well appreciated is it that the same Church of Scotland campaigned energetically during the 1970s and 80s against Rangers’ apparent practice of not signing Catholic players? The simplistic narrative of an anti-Catholicism supposedly ‘officially’ sanctioned in Scotland needs to be seriously critiqued.

The proposed legislative changes appear to be on firmer ground in relation to the internet and football supporters websites and individual blogs. While liberal objections can again be raised, it is clear that such sites encourage a culture of conspiracy, paranoia and demonization. I believe that lurid postings and extravagant claims of victimhood on such sites may have contributed tellingly to a wider
atmosphere of ethnic and sectarian antagonism last season, resulting in the developments which have been well publicised and which form the basis for the current legislative proposals.

Graham Walker
Professor of Political History
Queen’s University of Belfast
15 August 2011
Submission from YouthLink Scotland

Introduction

1.1 YouthLink Scotland is the national agency for youth work. It is a membership organisation and is in the unique position of representing the interests and aspirations of the whole of the sector both voluntary and statutory. YouthLink Scotland champions the role and value of the youth work sector, challenging government at national and local levels to invest in the development of the sector. YouthLink represents over 100 organisations, including the 32 Local Authority youth work services and all major national voluntary youth work organisations, which in turn support over 300,000 young people in achieving their potential.

Our aim is for Scotland to have a dynamic and accessible youth work sector, which supports young people to become successful learners, confident individuals, effective contributors and responsible citizens.

1.2 YouthLink Scotland, its board, membership and staff are working together to achieve the following outcomes:

- Increased awareness and understanding of the contribution made by youth work to achieving key policy agendas.
- Policy and legislation which better reflects the needs and aspirations of the youth work sector and the young people they work with.
- A clear strategic approach to improving youth work practice in Scotland, increasing the quality of youth work opportunities for young people.
- A clear strategic approach to workforce development, increasing the quality and quantity of training opportunities for youth work staff and volunteers.
- Improved communication and networking across the sector, with external stakeholders and the media, resulting in increased recognition of the positive contribution made by youth work and young people.
- Sustainable investment in youth work

1.3 YouthLink Scotland has a track record in successfully delivering anti-sectarian work in partnership with the Scottish Government, having developed Beyond a Culture of Two Halves, an anti-sectarian training toolkit for use with young people and adults, which was piloted in a variety of settings such as youth groups, schools, young offenders’ institutions, prisons and football clubs and was delivered in partnership with the Government, SPL, SFA, Rangers and Celtic FC and the Scottish Prison Service.
General comments on the Bill

2.1 YouthLink Scotland fully supports the policy aims of the Bill and agrees that the Scottish Government must be seen to be taking action to address the issue of sectarian hatred and violence before the start of the new football season.

2.2 However, our view is that the legislation may require amendments in order to strengthen it and ensure that it will be as effective as possible. We echo some of the concerns of other stakeholders that the speed at which the legislation is being introduced has reduced the opportunities for full and proper scrutiny of the Bill. Our concern is that this could result in legal challenges being made to the Bill which could potentially reduce its effectiveness in achieving its outcomes, i.e. deterring sectarianism and other forms of bigoted behaviour.

2.3 Alongside effective legislation, there also needs to be a national public education campaign supported by work in local communities and across different generations, so that sectarianism becomes regarded as morally unacceptable in the same way that, for example, drink driving has become. Too often sectarianism is framed as a football/West of Scotland issue yet it is a social problem for Scotland as a whole, and has much broader effects as incidents of sectarian violence bring our international reputation into disrepute, resulting in a potential loss of investment and creating damage to our recovering economy.

2.4 The positive outcomes that have been achieved though youth work initiatives such as Beyond a Culture of Two Halves risk being undone if we do not also invest in work that reaches young people’s broader social milieu, specifically their families and communities. In our view this work needs to be intergenerational and will need to consider the ways that attitudes and behaviours are developed and are rooted within family and other personal relationships. YouthLink Scotland has undertaken work with young offenders who have been convicted of offences with a sectarian element, and the young people have told us that while they may be convinced of the need to change their views, sectarian attitudes are prevalent in their families and communities and they feel they will not be in a position to challenge these views once they are released. For these reasons and others, behavioural and attitudinal change is notoriously difficult to achieve and will not happen overnight. Nevertheless, we must be ambitious and invest in this work in order to ensure there is no place for bigotry and hatred of any kind in Scottish society. There is a need to tackle sectarianism as a specific Scottish issue, but we must link this to work to tackle other forms of intolerance such as racism, sexism and homophobia.

2.5 YouthLink Scotland can contribute to this broader education and marketing strategy from the youth work angle, but we can also engage with community development networks through our links to Community Learning and Development which encompasses adult education and community capacity-building. It is important to ensure that any public education strategy encompasses a broad range of partners and is not limited to youth work and schools. For example, we need to bring on board the consumer and trading standards councils so that those responsible for manufacturing and selling offensive merchandising can be brought to account.
Section 1 offence

3.1 We agree that the seriousness of the issues surrounding sectarianism, and other forms of hatred, at football matches needs to be specifically addressed. We welcome the decision to include all the protected characteristics covered by existing legislation under this offence, i.e. religion, race, disability, gender, sexual orientation and transgender identity.

3.2 Section 2(1)(a): We are concerned that junior leagues and school football are not covered by the Bill. The definition used is ‘regulated football match’ as defined in section 55(2) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which is limited to teams that are representing a country/territory, are members of the SPL or SFL, Football League, FA Premier League, Football Conference or League of Wales. If we recognise that sectarianism is a problem at all levels of Scottish society then we cannot limit this legislation to regulated football matches alone.

3.3 In Section 2(3) reference is made to ‘any place (other than a domestic premise) where a regulated football match is being screened’. We seek clarity over whether ‘any place’ would include settings such as premises used by a youth group.

3.4 In relation to subsection (2)(c) we have some concerns in relation to the civil liberties of individuals travelling to locations where matches are being played. (2)(4)(a) states that ‘a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match’ which we feel may be open to misinterpretation and could lead to challenges to the legislation on the grounds of infringement of human rights. Individuals with no intention of attending or watching a match may be caught up in a crowd, yet could still be charged with an offence under the legislation as it applies regardless of the individual’s intentions.

Section 5 offence

4.1 In terms of a consistent approach to tackling inequalities, we feel that the decision to limit the legislation on threatening communications in Condition B to religious hatred is inconsistent with the approach taken in Section 1. We would recommend that all protected characteristics are included, and not just religion. This would allow for a more coherent approach to be taken in relation to the rest of this legislation and may help prevent the need for additional legislation to cover all the protected characteristics further down the line.

4.2 We welcome the decision to cover the expression or incitement of hatred towards both individuals and groups under Section 5. Offensive sectarian comments are often posted on online forums about Catholics or Protestants generally as well as being directed at specific individuals, so it is important that such comments are covered by the legislation and that there should not be a loophole which allows hate-filled statements to be expressed.

4.3 We support the concerns raised by the Equality Network in their response in relation to the limitations of the new legislation when compared to the Public Order
Act 1986, which covers the offence of stirring up racial hatred. This existing offence is broader as it is not limited to threatening communication, but also includes abusive and insulting communication. It also covers communication that is likely to stir up racial hatred, not just communication that is intended to do so. We recommend that the wording of the legislation under Section 5 is revisited in order to include other forms of hatred, and to extend the scope of the offence to reflect the wording of the Public Order Act 1986.

4.4 However, there are also important caveats in relation to freedom of expression, and our view is that this issue has considerable potential to weaken the legislation, or result in it being misused or misapplied. The Cross-Party Working Group on Religious Hatred (2002) was of the view that ‘a law against incitement to religious hatred could conceivably be used to prevent public preaching that the adherents of other faiths were in error. A law against incitement to religious hatred might also hinder people from discussing openly their concerns about particular religious practices that they might regard as harmful, whether within their own or another faith.’ YouthLink Scotland disagrees with the Working Group’s conclusion that religious incitement should not in itself be an offence, and that religion is different from race in that individuals choose to belong. Individuals may be subject to offensive and threatening behaviour because of the group they are perceived to belong to, regardless of what they actually believe. We do however agree that there is potential for legislation on religious hatred to be misused, e.g. by adherents of a particular faith who claim that the beliefs of other religions are erroneous and wish to prosecute those who criticise beliefs or practices associated with their religion.

4.5 We agree with the views of the Equality Network in their response (para 20-1) that the English legislation in section 29J of the Public Order Act 1986 provides a useful comparison as it provides specific protection for the expression of criticism of religions and their practices.

4.6 We also support the Equality Network’s argument (para 22) that unrecorded speech outwith domestic premises should be covered by the legislation. We are unclear as to whether a speech inciting religious hatred at a rally or demonstration, for instance, would be considered an offence under this legislation.

4.7 We recognise the difficulties involved in addressing the issue of offensive songs, chants, signs and slogans and that the context is crucial in determining whether these communications are intended to express or incite hatred. However we feel that the legislation needs to specifically address these concerns. While a list of prohibited songs etc would not be workable, there is a risk that the lack of specificity in the legislation could lead to the expression of religious faith, e.g blessing oneself, being classed as an offence in certain circumstances, and that this would conflict with the right to free expression of religious belief under Article 18 of the United Nations Universal Declaration of Human Rights, to which the UK is a signatory. There are no easy solutions to these issues, but we feel that the legislation is at risk of being misinterpreted and misused unless it specifically addresses these concerns.

YouthLink Scotland
23 June 2011
LORD ADVOCATE’S GUIDELINES ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL (AS INTRODUCED)

Purpose

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

Offences

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

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

OFFENSIVE BEHAVIOUR AT FOOTBALL MATCHES

The offence provides the police with powers to deal with offensive or threatening behaviour in relation to football matches that is liable to incite public disorder and is intended to address the problem of offensive and threatening conduct, including singing and chanting and the display of offensive flags and banners (in particular, those of a “sectarian” or racist nature) which are known to incite public disorder associated with football matches.

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

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

- Expressing hatred of, or stirring up hatred against an individual or group of persons based on their membership (or presumed membership) of a religious group, a social or cultural group with a perceived religious affiliation, a group defined by reference to colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity or disability;

- Behaviour that is motivated (wholly or partly) by hatred of such a group;

- behaviour that is threatening; or

- other behaviour that a reasonable person would consider offensive including, but not limited to, sectarian songs or chants.

The offence can be committed:

(a) at the ground where a regulated football match is being held, on the day on which it is being held;

(b) while the person is entering or leaving (or trying to enter or leave) the ground where the match is held;

(c) on a journey to or from a football match - A person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and a person’s journey includes breaks (including overnight breaks); and

(d) any place (other than domestic premises) at which such a match is being broadcast.

**Regulated Football Match**

The definition of a “regulated football match” is similar to the definition in the Football Banning Orders legislation and a Football Banning Order could be imposed where there is a conviction for this offence. It also covers behaviour in public venues where football matches are being broadcast, whether by outdoor screens or public houses on the day of the match. There is a presumption that the prosecutor will seek a Football Banning Order if there is a conviction under this legislation or for any offence if the behaviour is football related.
On a journey to or from a football match

If the person is believed to have been intending to attend a match, the report must include evidence to support this contention. The offence also applies to persons regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, for example those who travel to football matches solely to indulge in violence or other offensive behaviour.

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

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

INCITING PUBLIC DISORDER

Type of Behaviour

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

The singing of songs and chants or the display of banners, that is clearly motivated by hatred on racial, religious, cultural or social grounds or by hatred of a group based on their sexual orientation, transgender identity or disability 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.

General Approach

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

- measures to prevent disorder being in place, such as a heavy police presence; or
- because all or the vast majority of those present participated in the offensive or threatening behaviour, including where all or the vast majority of opposition supporters have left the ground.
The offence **WILL NOT**

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

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

**Choice of Charges**

Disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace or as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of offensive behaviour at a football match, such behaviour at or related to football matches should be reported as that offence in preference to a common law breach of the peace or contravention of section 38. It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence. If appropriate, these aggravations can be added to other charges libelled on the same complaint.

**THREATENING COMMUNICATIONS**

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

**Scope of the offence**

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

- threatens a person or people of a general description with serious violence or death, or incites others to kill or commit a seriously violent act against a person or persons of a particular description, or which implies such a threat and where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm; or
• consists of threats made with the intent of stirring up religious hatred.

Defence

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

Definitions

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

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

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

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

Type of Behaviour

Threats of Serious Violence or Death

The material communicated must be intended to cause fear or alarm (or is communicated with recklessness as to whether fear and alarm is caused) for an offence to be committed.

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

Threats with the Intent of Stirring up Religious Hatred

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

Freedom of Expression

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

The offence **WILL NOT**

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

**Choice of Charges**

Threatening communications can, in certain circumstances, be prosecuted as other offences including breach of the peace and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of threatening communications the conduct should be reported as an offence of threatening communications in preference to any other offence unless the conduct is of such seriousness that the appropriate penalty is likely to exceed 5 years. In such circumstances, consideration should be given to libelling an offence of breach of the peace. Where the charge involves threats with the intent of stirring up religious hatred, it is not appropriate to add an aggravation in terms of prejudice relating to religion to this offence. If appropriate, the aggravation can be added to other charges libelled on the same complaint.

**Offences outside Scotland**

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

In relation to offensive behaviour at football matches, this can only be committed outwith Scotland when the match involves a national team appointed to represent Scotland or a team representing a club that is a member of a football association or league based in Scotland.
In relation to threatening communications, this offence will also apply to a communication made from outside Scotland if the person making it intends the communication to be read, listened to or seen primarily in Scotland. This ensures that someone based outside Scotland, who may well may travel frequently to Scotland for the purposes of, for example, attending football matches, cannot evade prosecution if he or she makes threatening communications from outside Scotland targeted e.g. at people involved in Scottish football or inciting religious hatred in Scotland.

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

**Custody/Use of Undertakings**

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

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

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

**Football Liaison Prosecutors**

Each COPFS, Federation has a dedicated Football Liaison Prosecutor (FLP). The FLPs will engage with the Football Coordination Unit Scotland (FoCUS) that has been tasked with taking the lead on strategic thinking on the policing of Scottish football and will support the delivery of a consistent approach to the investigation and enforcement of offences related to football. The FLPs will liaise closely with, the police and other key partners to:

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

Contact details for FLPs

North Federation
East Federation
West Federation
I am writing to clarify one aspect of the evidence given by Professor Tom Devine to the Committee on 13 September 2011. In his evidence Professor Devine alluded to previous research that was conducted following the implementation of section 74 of the Criminal Justice (Scotland) Act 2003. This was a specific piece of work commissioned by the Scottish Government. The research analysed detailed information on cases reported between 1 January 2004 and 30 June 2005 containing charges aggravated by religious prejudice under Section 74. The findings can be found at:

http://www.scotland.gov.uk/Publications/2006/11/24133659/0

In his evidence to the committee, Professor Devine stated that:

“The Lord Advocate …has a team looking at such data for the entire period from 2003 to the present, the findings from which could be extraordinarily interesting and potentially explosive.”

It may be helpful if I clarify the position as set out by Professor Devine which is not entirely accurate. I can confirm that the Scottish Government did announce a number of initiatives following the meeting of the Joint Action Group on football earlier this year, one of which was that further analysis of Section 74 of the Criminal Justice (Scotland) Act 2003 would be carried out. However, this research would cover cases reported in either a financial or calendar year. Steps are in train to commission this work.

I trust this clarifies the position.

Rt Hon Frank Mulholland QC
Lord Advocate
14 September 2011
Thank you for your letter of 14 September [Annexe B] seeking response to specific questions. For ease of reference I will follow the numeration used in your letter.

1. I am unable to confirm that the statement is correct. Under the auspices of the JAG I have been appointed to chair a Review Group to consider this type of issue. I attach the approved Terms of Reference of that group for your information. As you will see the Review Group is tasked with reviewing existing rules regarding clubs’ responsibilities and appropriate ways of sanctioning unacceptable conduct. I believe it would be inappropriate to prejudge the outcome of work to be undertaken by the Review Group. You will also see that the vice chairmanship of the group lies with the SFA.

2. Any response to this question is rendered otiose by reason of my explanation above.

3. Any response to this question is rendered otiose by reason of my explanation above.

4. The SFA is the body to which any appeal must go currently.

5. This matter is at the very heart of the work to be done by the Review Group. It would be inappropriate for me to prejudge the outcome of that work.

6. Any such complaint will be considered by the SPL in the light of its existing Rules and the Guidance for Clubs issued in 2007. A copy of that Guidance is attached for your reference [Annexe A].

7. The SPL will await the outcome of the work of the Review Group before considering whether any change is required to current procedures.

8. The premise of this question appears ill-founded. However, typically any sub-committee of the SPL Board which is convened to consider disciplinary matters is constituted by a majority of independent members (e.g. the Chief Executive, Company Secretary and the Chairman of the SPL). Over the past Season a number of SPL clubs have been found guilty of misconduct by this process and have been fined heavily. I trust that this demonstrates clearly that in dealing with disciplinary issues, the SPL is able to (and does) act without prejudice or favour.

9. An extract from the Match Delegate Report is provided to the SFA. This deals with the UEFA Fair Play system and includes consideration of positive supporter behaviour. I would have no objection to sharing the entire report with the SFA although much of the content would not be relevant to or indeed of interest to the SFA.
10. These reports are examined by SPL staff and matters of importance are
drawn to the attention of the Company Secretary and, if necessary, the SPL Board
for follow-up which might include disciplinary action. Certain analysis is drawn from
the reports (e.g. condition of playing surfaces) and reported to the SPL Board as a
matter of routine on a periodic basis.

11. Such matters have been dealt with as a result of the reports. Outcomes have
ranged from a decision being taken that there is no case to answer through to
disciplinary action being taken and substantial fines being levied on member clubs.

I trust that this response is helpful to the Committee.

Neil Doncaster
Chief Executive
20 September 2011
Annexe A

Guidance for Clubs on Unacceptable Conduct

Unacceptable Conduct at a Stadium on the occasion of an Official Match

SPL Rules H7.5, H7.6 and H7.7 describe the responsibilities of Clubs on this matter. They are included here for ease of reference.

H7.5 The Home Club in any Official Match must ensure, so far as is reasonably practicable, (i) good order and security; (ii) that policies and procedures have been adopted and are implemented to prevent incidents of Unacceptable Conduct; and (iii) that any incidents of Unacceptable Conduct are effectively dealt with, all at its Stadium on the occasion of an Official Match.

H7.6 Each Club must ensure, so far as is reasonably practicable, that its Players, officials, supporters and any person exercising a function for or connected with the Club do not engage in Unacceptable Conduct at a Stadium on the occasion of an Official Match.

H7.7 Any failure by a Club to discharge a requirement to which it is subject by virtue of Rules H7.5 and/or H7.6 shall constitute a breach of these Rules.

In considering any alleged failure to discharge the requirements of SPL Rules H7.5 or H7.6, resulting in a breach in terms of SPL Rule H7.7, the Board or, as the case may be, a Commission shall, take into account whether the Club has complied with this Guidance.

In determining whether all reasonably practicable steps have been taken by a Home Club it is recognised that stadium operations in the run up to and during an Official Match are subject to the control of the local police match commander and other decisions taken by the public authorities. Whether to intervene in the case of an incident of Unacceptable Conduct during the course of an Official Match will be subject to determination by the police, and not necessarily by the Home Club.

Guidance

The Club should

- issue a statement that it will not tolerate any form of Unacceptable Conduct. This statement should include details of the action that the Club will take against those who engage in such conduct and explain the types of behaviour which will constitute Unacceptable Behaviour.
- publish its statement in full in all matchday programmes and similar Club publications.
- display copies of its statement permanently and prominently throughout and at entrances to the stadium.
replace any defaced copies as soon as reasonably possible and, in any event, before the next Official Match in the stadium.

make announcements over its public address system condemning all forms of Unacceptable Conduct at matches.

make it a condition of their season and matchday tickets that the holders do not engage in any form of Unacceptable Conduct.

for Official Matches which have been designated as “All Tickets” and / or where the Home Club has issued tickets to the Visiting Club to sell to its own supporters:

  o the Home Club should take names and addresses and obtain consent to the disclosure of same to the Visiting Club of all those to whom tickets for the visiting support area are sold by the Home Club;

  o the Visiting Club should take names and addresses and obtain consent to the disclosure of same to the Home Club of all those to whom tickets for the visiting support area are sold by the Visiting Club;

  o the Home Club and Visiting Club should exchange details of those to whom they have sold tickets to the visiting support area if requested to do so.

take disciplinary action against any official or employee who engages in Unacceptable Conduct.

contact other SPL Clubs to ensure that they understand its policy regarding Unacceptable Conduct.

encourage a common strategy between stewards and police for dealing with incidents of Unacceptable Conduct.

as soon as reasonably possible and, in any event, before the next Official Match remove from its stadium any and all graffiti, propaganda or the like which encourages or promotes Unacceptable Conduct.

develop pro-active programmes and make progress towards raising awareness of its campaign to eliminate Unacceptable Conduct in conjunction with, amongst others, supporters, schools, voluntary organisations, local authorities, local businesses, sponsors, police and players’ representatives.

It is for each Club to apply the above guidance to its particular circumstances. It is also for each Club to compile its own record of compliance with the guidance.

Iain Blair, Secretary
18 June 2007
Letter from the Convener to the Scottish Premier League

I reiterate the Committee’s thanks to you for appearing before us at very short notice in June. I quite understand why it was not possible for the SPL to send a representative to yesterday’s meeting and I offer my personal apologies that, owing to the tight scheduling of this bill, we were not able to provide you with more notice.

At yesterday’s meeting, the Committee had an interesting and helpful evidence-taking session with a panel of witnesses that included the SFA. The discussion touched on issues relating to the governance of Scottish football, and the Committee agreed that I should write to you with some questions for the SPL that arose from that discussion.

I would be very grateful for your responses on the following:

**Restoration of disciplinary functions to the SFA:** SFA witnesses explained that they were currently engaged in a process that they anticipated would see the return of disciplinary functions against SPL clubs to the SFA:

1. I would be grateful if you could confirm that this is broadly correct from the SPL’s viewpoint and what you see as the advantages of reverting to this approach.
2. It would be helpful if you could confirm in particular (a) what assurances or actions you would require in order to agree to the return of those functions, and (b) the anticipated timescale for the return of those functions.
3. What if any relationship does the SPL envisage having with the SFA in any decision making process if and when the SFA resumes having disciplinary functions?
4. Do you anticipate that it would be the SFA rather than the SPL that would have the final say in any appeal process?

**Current use of SPL disciplinary powers:** The Committee recognises that it would be preferable if disorderly behaviour at football matches could, as much as possible, be dealt with by football clubs and football governing bodies themselves, rather than having to have recourse to the criminal law. With that in mind, we would appreciate your answers to the following:

5. Given the concerns and actions by UEFA and others, what actions could the SPL take or consider taking against a premier league club if offensive behaviour has taken place in or around the club’s ground or if its travelling supporters engage in this behaviour?
6. What process is used at present to make a determination of any such complaint?
7. Are the SPL (whether or not in partnership with the Scottish Football Association) looking to change any procedure regarding such complaints?
8. Given the SPL is made up of member clubs, what can it do, and what does it do, to demonstrate that it is acting without prejudice or favour?
**Match delegates’ reports:** The SFA explained yesterday that at present these reports go only to the SPL, and that it is for the SPL to deal with them as they deem fit:

9. I would be grateful if you could confirm that it is correct that all match delegates’ reports are sent to you and are not shared with or passed on to the SFA.

10. I would also be grateful if you could explain what process is then followed within the SPL to deal with those reports.

11. Have you dealt with any discipline or misconduct matters as a result of any report and, if so, what were the outcomes?

It would be helpful to have a response by no later than next Thursday (22nd) if at all possible, so that we are able to consider your response before discussing our draft report to Parliament.

Christine Grahame MSP
Convener
14 September 2011
Present:

Mary Fee (Committee Substitute) Kenneth Gibson (Convener)
Alex Johnstone Derek Mackay
John Mason (Deputy Convener) Margaret McCulloch
Paul Wheelhouse

Apologies were received from John Pentland.

1. **Decision on taking business in private:** The Committee agreed to take items 3 and 4 in private.

2. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill:** The Committee took evidence on the Financial Memorandum of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill from—

   Richard Foggo, Head of the Community Safety Unit, and Peter Conlong, Senior Economist, Prisons, Community Justice and Law Reform Analytical Unit, Scottish Government.

3. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private):** The Committee considered the key themes arising from the evidence session and agreed to write to the Justice Committee.
Decision on Taking Business in Private

The Convener (Kenneth Gibson): Good morning everyone, and welcome to the third meeting of the Finance Committee in this session. I am sorry that we are kicking off a few minutes late, but I understand that that is because of difficulties at visitor services and not because of difficulties to do with our guests.

I ask all members to turn off mobile phones, pagers and so on. I record apologies from John Pentland, who is being replaced today by Mary Fee, the substitute member for Labour. In accordance with section 3 of the code of conduct for members of the Scottish Parliament, I ask her to declare any interests that are relevant to the committee’s remit. Any declaration should be brief, but sufficiently detailed to make clear to any listener the nature of the interest.

Mary Fee (West Scotland) (Lab): I have no declaration to make.

The Convener: Thank you very much.

Agenda item 1 is a decision on taking business in private. The committee is asked to agree to take items 3 and 4 in private. Item 3 is to consider the oral evidence from the Scottish Government officials on the financial memorandum to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill and whether any issues arise from the session that we wish to highlight to the Justice Committee, which is the lead scrutiny committee on the bill. Any comments that we make to that committee will be published.

Item 4 is to consider the revised terms of the written agreements between the committee and the Scottish Government, the Scottish Parliamentary Corporate Body and the Scottish Commission for Public Audit. The revised agreements will be published on our website.

Are members content to take those two items in private?

Members indicated agreement.
Scotland worldwide. We believed—and still do—that action was necessary and justified.

The bill seeks to supplement, complement and clarify the existing laws in these areas. We see no issue with the fact that the new offences cover ground that is already criminal. It is an entirely appropriate thing for the Parliament to do as it has done many times before and seek to single out in a new named offence specific behaviour already caught by general criminal laws such as breach of the peace. That will ensure that those guilty of that specific behaviour can be readily identified. That point is critical in understanding our basic proposition in the financial memorandum, which is that, as much of the behaviour is already criminal, there will not be a significant number of arrests that would not have otherwise taken place. If we had proposed to criminalise behaviour not already at risk of being criminal, our analysis would have been quite different.

Some people have suggested that the calculations and estimates that we provide are extremely low, given our ambition to eradicate sectarianism and other forms of offensive behaviour from football, the internet and elsewhere. That leads me to make two crucial points. First, the calculations and estimates in the financial memorandum cover only the net or additional cost of these new criminal offences; they do not cover the wider cost of policing and tackling sectarianism, even in football or on the internet. Such action by the police, prosecutors and others is already core business, so the bill does not create significant new burdens on agencies.

Secondly, it is crucial to recognise that the bill is not intended to be a sectarianism bill in the sense of a single solution to that deep problem. This is the first targeted action in a long-term commitment to tackle the issues. The Minister for Community Safety and Legal Affairs will make clear the nature and scope of the longer term work and the committee may take an interest in what the minister says on the subject. It is likely to be in the longer term work that we see the full expression of how we plan to prevent rather than react to the issues. Evidence provided to the Justice Committee questioned whether the balance of resources was sufficiently focused on prevention.

Preventative spend is a focus for this committee. The bill is not the single solution to sectarianism; that will require longer term work, including a focus on prevention. There are clear preventative aspects to the implementation of the measures in the Bill, such as the smarter and more effective use of police resources to support early and effective intervention and deterrence.

I will comment more specifically on questions raised about the capacity of the current system to deal with the impact of the new offences. June seems a long time ago and it may be that the time to reflect over the summer has caused us to rethink our calculations and estimates. The financial memorandum provides unit costs and estimates of the upper and lower limits of additional cases in the criminal justice system. Since the financial memorandum was prepared in June, we have continued to assess whether the estimates hold and I can confirm that we believe that they do. We will not seek to amend the financial memorandum.

That is testimony to the quality of the work done in June by Peter Conlong and his colleagues, with the support of all relevant partner agencies. Since June, we have convened a strategic implementation group consisting of the Association of Chief Police Officers in Scotland, the Crown Office, the Scottish Court Service, the Scottish Prison Service, and local government representatives covering community justice authorities. I confirm that the group has indicated its continued endorsement of the calculations and estimates made in June and set out in the financial memorandum.

My letter to the committee set out two further developments which, while not essential to the implementation of the bill, will contribute to the efficient and effective targeting of existing resources to tackling the issues. That is the basic approach set out in the financial memorandum. The first development is the new national policing co-ordination unit in which the Scottish Government will invest £1.8 million over the next two years. The second is the three new football liaison prosecutors appointed by the Lord Advocate from within the Crown Office, and therefore without needing additional resources. Both measures put us in an even better place in terms of confidence that we can introduce the new offences without a disproportionate impact on already hard-pressed public services.

The Convener: Thank you for that robust defence of the financial memorandum. Does Mr Conlong want to add anything before we take questions?

Peter Conlong (Scottish Government): Not at this stage.

The Convener: I will kick off—no pun intended—with a few questions. Mr. Foggo has talked about the cost of the bill. In oral evidence to the Justice Committee on 21 June, Les Gray of the Scottish Police Federation said:

“I do not think that either £0.5 million or £0.7 million will scratch the surface of what is required. ... Over the past two years, in particular, the police service has been actively removing police officers from football grounds in order to reduce costs. In order to enforce this legislation properly, we will have to reverse that trend and bring in more officers
to police these games before, during and after matches and, for example, check out public houses.”—[Official Report, Justice Committee, 21 June 2011; c 38-9.]

You said that there would not be a significant number of arrests and prosecutions but, were prosecutions to take place, section 5(7) of the bill specifies “that the maximum penalty is 5 years imprisonment and a fine not exceeding the statutory maximum.”

I do not imagine that many people will get the maximum penalty, but that would have significant costs. Given that we are talking about additional court time, additional prison time, community payback orders and more officers, will you reiterate how you come to the sum that has been quoted as the cost of the implementation of the bill?

10:15

Richard Foggo: I will ask Peter Conlong to explain the methodology of the calculations and estimates in a moment.

When Mr Gray gave evidence to the Justice Committee in June, he did so alongside Assistant Chief Constable Campbell Corrigan, who provided a clear explanation of a slightly different view of how the bill will work. Mr Gray takes the view that, as he put it at the committee, the issue needs to be hammered and that resources need to be poured in at football grounds and public houses to tackle it.

We simply take a different view, based on advice from Assistant Chief Constable Campbell Corrigan, who is the head of football policing at the Association of Chief Police Officers in Scotland. He has made it clear that policing today is based more on intelligence-led, focused and targeted approaches and that the idea of significant numbers of police constables raiding pubs and wading into large crowds at football matches no longer represents the contemporary policing of football. Although Mr Gray believes that a particular policing approach is required, Campbell Corrigan has assured us that that does not necessarily represent the best approach to policing licensed premises and football stadia, and we are comfortable with that.

There has been considerable criticism that the new offences cover behaviour that is already criminal, but it is actually positive that we are not seeking to criminalise behaviour that is not already criminal, because that means that the behaviour is already part of core business for the police and others further on in the justice system. That behaviour already has to be dealt with in the policing of licensed premises and football stadia and in the reaction of the courts.

Before I ask Peter Conlong to talk about the methodology and calculations, I point out that we are talking purely about the net or additional costs beyond the costs of the already substantial number of arrests and prosecutions that relate to football, the internet and other situations.

Peter Conlong: In reaching the net figures that Richard Foggo talks about, we distinguished between solemn cases, which are particularly expensive in terms of the court process and the disposals that they result in, and summary cases. We estimate that there will be seven to 15 additional solemn cases and about 70 to 150 additional summary cases. Based on those ranges for the potential number of additional cases, we went on to estimate the legal aid, prosecution and court costs. As I say, solemn cases are significantly more expensive than summary ones. Paragraph 56 in the financial memorandum summarises the unit costs that we used.

Moving beyond the court costs, there are the costs of disposals. We based the likely disposals on typical disposals for existing religiously aggravated offences. That led to our estimates that about 10 per cent of summary cases will result in custodial disposals, about 15 per cent will result in community payback orders, and the majority—75 per cent—will result in fines. When we went on to estimate the costs of the custodial disposals, we assumed that, in summary cases, on average the sentence would be about six months. It could be up to a year, but experience of existing religiously aggravated offences suggests that, on average, it is a bit lower than that. For solemn cases, the sentence could be up to five years, but we assumed that it will typically be about three years. Moving down from that, the actual sentences that are served will be one and a half years for solemn cases and about three months for summary cases. Multiplying all that gives us the estimates that appear in the financial memorandum.

I should also mention the costs for community payback orders. Those have not been around for very long, so we do not have direct data on them. However, we have taken what we know about the costs of the disposals that CPOs have replaced, which include supervised attendance orders, community service orders and probation orders, and come up with a weighted average to work out what the cost of a basic CPO would be. On top of that, we have added in the costs of requirements that are meant to be additional to a CPO. Those might include rehabilitative programmes, which could be significantly more expensive.

I emphasise that all those unit costs are based on existing experience and that, if anything, they probably tend towards the conservative end of the
spectrum. That gives you the estimates that are in the financial memorandum.

**Alex Johnstone (North East Scotland) (Con):** I accept the general thrust of your answers, and you made clear in your opening statement that you do not expect the bill to throw up enormous additional costs over and above what is currently spent on policing and legal costs. However, I am slightly concerned that this particular area has, over the years, occasionally thrown up individual high-profile cases that have caught the public imagination and certainly been taxing on the legal system.

Given the figures of between £0.7 million and £1.5 million per annum that you have presented today, my concern is whether the bill could occasionally—perhaps exceptionally—throw up individual cases that could break the bank.

**Richard Foggo:** I am not sure that I would use the phrase “break the bank”; I think the criminal justice system is robust. It is clear that the figures are estimates. In introducing any new criminal offence, or indeed any law, we must use the good offices of Peter Conlong and his colleagues to make estimates, and we have to build into that a risk-based approach that looks at average figures. It is possible that there could be significant cases that would place a particular burden on the criminal justice system, but we have tried to average that out and manage the risk.

It would be difficult for us to estimate the costs for that, given that, as you said, such cases would be unexpected and could not be predicted—how many would we be talking about?—so we accept that our figures are estimates. We accept that there is a range and that the criminal justice system would have to be sufficiently robust and flexible to be able to ensure that it could accommodate such cases.

Having spoken to the Scottish Court Service, the Scottish Prison Service and the Scottish police service, I am confident that we are constantly challenging our own figures. It does us no good for those figures not to stack up. Since June, those conversations have been relentless, and at each point we have asked similar questions and received the answer that the system can cope.

The strategic implementation group was asked whether the system can cope with spikes. That might be the closest in our language to the example that you are giving. We have assurances that the integrity of all those systems would cope with occasional spikes that would average out across a trend, leading to the sort of figures that we are talking about.

I am sorry if that sounds very civil service—perhaps I should just have said, “Yes, we will cope”—but it is a fuller answer, if that is helpful to the committee.

**The Convener:** Paragraph 60 of the financial memorandum states:

“On average, an Old Firm game costs £328k to police, with Sunday fixtures costing £346k and weekday fixtures costing £282k.”

It goes on to state that, on average, 478 officers are deployed for each fixture. Could the cost to the public purse be minimised by imposing a higher cost on clubs for policing fixtures where there are expected to be problems?

**Richard Foggo:** My understanding is that the terms of charging for the policing of football matches are set out in the Police (Scotland) Act 1967. You will understand that that act is about to receive considerable attention in relation to the creation of a single national police force. That will entail some review of the current charging regime.

The figures that we have presented are a reflection of what it is currently lawful for the police to charge, although the actual rates are subject to negotiation locally. Any change would have to come through primary legislation, which is not something that we are looking at in relation to the bill. We note the figures and impact on both the police and clubs, but we have not actively looked at the charging regime for the policing of football games.

**John Mason (Glasgow Shettleston) (SNP):** I will ask about a couple of issues. First, I want to go back to the fundamental assumption that there will not be any additional prosecutions once the bill is passed. In a sense, I find that disappointing because clearly a lot of behaviour at the moment is not acceptable and the police or whoever feel that the current legislation on breach of the peace is not sufficient to bring prosecutions. It seems to me, therefore, that it is obvious that there should be a lot more prosecutions under the bill. I know that when we introduced the anti-smoking legislation it was largely self-policing, but it is incredibly optimistic to think that this legislation will be self-policing.

**Richard Foggo:** There are two things to say. First, we do not say that there will be no additional prosecutions. As we state in the financial memorandum and as Peter Conlong has made clear, our upper estimate is that there will be more than 160 additional prosecutions at solemn and summary level. That is on top of the fixed penalty notices that the bill allows for. Second, we are clear that our figures come from a detailed discussion with the agencies involved.

I will get to your fundamental point. You might describe as disappointing the idea that there will be no additional prosecutions, but we would describe it as hopeful and the result of a whole
range of measures being brought together. We agree fully with Assistant Chief Constable Campbell Corrigan that we will not police our way out of the issue.

Let us take an example. We are often asked why the police do not go mob-handed into very busy away and home supports at football games and make mass arrests. We know that there are practical reasons for that linked to destabilising a crowd and causing problems that go beyond that, but much more critical is the use of smart policing to ensure that we do not need to do that. We need to look at the leaders and those most guilty of the offences, and we need to look at targeted interventions that send out a strong signal.

We hope that the legislation will have a strong deterrent effect. You gave the example of the smoking ban, and we have proven examples that we do not have to arrest and prosecute absolutely everyone who falls in the ambit of offences. If we make high-profile arrests and prosecutions, we can send out a strong signal. Over time, that will have a deterrent effect, which will become a preventative effect, and ultimately we will see a reduction in offences.

Let me be clear that we do not say that there will be no additional prosecutions. There will be a substantial number of additional prosecutions—there will be an initial spike in the number. Our hope is that, over time, that number will reduce. The smoking ban is a good model. There will have to be a cultural shift so that people in Scotland understand that certain behaviour is simply intolerable. We suggest that, at the moment, people are not as clear as they should be about whether the behaviour that we are talking about should be tolerated. We hear time and again that the behaviour that we are talking about whether the behaviour that we are talking about should be tolerated. We hear time and again that it is simply banter or what happens at football. We suggest that, at the moment, people are not as clear as they should be about whether the behaviour that we are talking about should be tolerated.

Fundamentally, we hope that this is a tipping point. With a push, over a year or two and with a number of additional prosecutions, we will send out a strong signal and achieve a longer-term social effect.

John Mason: I will follow on from that with my second question. You said that we would not raid pubs, for example. I have pubs in my constituency on both sides of the divide. The whole population of the pub sing songs—that is already on Facebook, so we can all see it and we have the intelligence. You seem to suggest that we will sort out the problems if we have more intelligence. How do we sort out a pub?

Richard Foggo: I admit that, as always, those of us working on the issue in the civil service are amateurs. We are not police officers, so we have to depend on the best expert advice. We spoke at great length to the police about how licensed premises are policed. Similar to the situation with mass crowds at football games, it is a sign of failure to go mob-handed into a licensed premises. Quiet work is done in advance with the licence holder, and all the sophisticated proactive work is done to set the environment to minimise the opportunity for such behaviour. In that regard, dealing with mass sectarian chanting is no different from dealing with other already-criminal behaviour in licensed premises.

It is not as if all behaviour in licensed premises is tolerated. Sophisticated regimes deal with criminal behaviour by the clientele of pubs and clubs. The management of the offences in the bill would be no different from that of other offences that take place in pubs. Smart policing, smart licence holders, well-trained staff and well-trained doorman will all have a significant impact and will mean that we do not have to arrest our way out of the problem.

10:30

Margaret McCulloch (Central Scotland) (Lab): I have a couple of questions. You say that you do not expect to spend more money than you have estimated, but surely you have set aside contingencies for spending more. Where would the money to cover extra costs come from?

Richard Foggo: As I said to Mr Johnstone, the figures are our best estimates, which the experts on the subject have confirmed. We understand that the world could intervene and that the situation could take a turn for the worse, which would cause us to revise our estimates.

The strategic implementation group to which I referred in my introduction is a standing committee. When Assistant Chief Constable Campbell Corrigan said at the Justice Committee meeting in June with Les Gray that he wanted ongoing review of our policing cost estimates, we made a commitment to that. The group will monitor and adjust any expectations.

The limits that we have set go to a maximum of not much more than £1.5 million a year. The directorate for justice’s budget is considerably more than £1 billion a year. We do not think that the amounts could not be accommodated comfortably in the contingencies in the justice budget. Increasingly, budgets are under pressure and every penny counts, so we will not increase our estimates without absolutely the best evidence. However, as the strategic implementation group’s chair, I assure the committee that we will not look to hide if people tell us that we need to do more.

The First Minister has said that he wants the problem to be eradicated. That claim is big and it
means that we need to ensure that public authorities have the funding to back that political commitment. I assure the committee that the strategic implementation group will—if necessary—adjust upwards the estimates that are required to back the two new criminal offences.

Margaret McCulloch: Do you guarantee that, if you need extra money that exceeds the budgets that you have set, you will not take it from other sources, so that other areas will not suffer as a result?

Richard Foggo: We will not be able to print new money—money will always have to come from somewhere. However, a clear, risk-based, open and robust discussion will take place to ensure that, if we must prioritise the work more, we will look for the necessary funding from areas that we can afford to deprioritise. To be clear, I say that, as always when we have allocated budgets from the Parliament, if we must increase one budget, another budget must decrease. I make no bones about that. That requires us to do what anyone else who manages a budget must do—to reprioritise in-year or at the end of the year. We would calculate robustly where we could afford to find the money to resource this very high priority.

Margaret McCulloch: You agree more with Campbell Corrigan and you disregard what Les Gray said. You seem to take one side of the discussion and not to have a balanced view. To achieve a balanced view, would it be better to speak to another expert, so that you have three experts’ input rather than one person’s point of view against another’s?

Richard Foggo: I thank you for picking me up on that. I have also spoken to Les Gray about the issue. I choose Campbell Corrigan’s view not because it is more convenient, but because we understand that a range of partners disagree with Mr Gray and agree more with Mr Corrigan. I was not expressing a personal preference.

I should also say that we are now in a position in which there are record levels of funding for front-line policing in Scotland. There is a continued commitment to having at least 1,000 extra officers on the street. I think that the public would ask whether we really need more police officers than are provided for by that very substantial commitment to police an issue that is already core business for the Scottish police service. I think that the public would expect us to challenge Mr Gray and anyone else who might for that purpose alone be looking for additional police officers on top of those extra 1,000 officers. I assure you that we have challenged everyone in the system, and that no one—other than, perhaps, Mr Gray—tells us that additional police constables will be required. We have listened to Mr Gray, and we will continue to do so. If he or others can convince us that more police officers will be required and can provide us with evidence, we will listen and take that on board.

Paul Wheelhouse (South Scotland) (SNP): I have two questions, the first of which relates to the on-going assessment of risk. At this stage, have you made any assessment of the probability that the figures will exceed the range that you have suggested? Will you expand on that?

Richard Foggo: The strategic implementation group brings a little more structure to the robust calculations that were made in June. I admit that June was a busy period for us, given that we introduced the bill as emergency legislation. We are very proud of the fact that those assessments still stand up to scrutiny in the cold light of day.

The strategic implementation group met two weeks ago. The primary question for that group, the expert members of which we are entirely dependent on, is whether our estimates and our assessment of risk are still valid. Every agency confirmed that they are comfortable that the financial memorandum continues to set out the most plausible picture of the current risk around the issues in question.

Paul Wheelhouse: My second question relates to the assumptions in the model. I am not disputing the analysis that you provided—I just want to ensure that I understand it. Do your cost estimates take account of the cost of unsuccessful prosecutions and potential appeals against prosecution?

Peter Conlong: In practice, most prosecutions are successful. In effect, I addressed the point that you raise by building conservatism into the unit cost estimates, so everything is shaded on the high side. Let us take the example of prison costs. The figure that we used in the financial memorandum was £40,000 per annum, but the latest figure from the Scottish Prison Service is £38,500. Everywhere I have built in what, as an economist, I would call optimism bias. I have ensured that the margin of error is on the conservative side.

You are right that there will be costs associated with unsuccessful prosecutions but, in the big scheme of things, they are likely to be negligible in comparison with prison costs, for example. I take your point, but such matters have been accounted for elsewhere through optimism bias.

The Convener: The questions that Mary Fee was going to ask have already been answered, so we will move on to Derek Mackay.

Derek Mackay (Renfrewshire North and West) (SNP): My question is about current costs. You have already touched on the contribution that some football clubs make to policing costs. I
accept your argument that the bill will not change drastically the level of policing by virtue of the nature of policing, but you have said that changing the component of contributions to costs would require a change in primary legislation. Do you not think that, given that there is a greater focus on behaviour at football matches and that we are having to create an offence that relates specifically to football matches, there should be a greater focus on who pays for what in terms of policing? How would the contribution to the cost of policing football matches that football clubs make compare with the costs that other commercial organisations—airports, large shopping centres or organisers of large events—have to pay for policing their businesses?

Richard Foggo: I cannot do much more than repeat what I said earlier: we have not looked at the charging regime.

I am also the secretary to the joint action group that brought together the football authorities, the police, and Celtic and Rangers, which the First Minister set up in March following a particular old firm game. The figures in the financial memorandum to which you refer were exposed as part of that discussion.

However, there will still be debate at local level. Although the primary legislation would have to be changed to adjust the overall regime, it is still up to local decision making by the clubs and police to establish broad parameters, particularly the definition of what is called the footprint. I should explain, without getting technical, that you can charge for policing costs in order to cover a wider area beyond the stadium; however, that wider area is relatively limited and, as members might remember from the debate in March, criminal behaviour including domestic abuse was happening hundreds of miles from stadia. That is a very considerable and on-going debate.

I know that in evidence to the Justice Committee people have disputed the way in which we might seek to charge for, say, a husband 100 miles from a football stadium deciding to abuse his wife simply because the opposing team has scored a goal or a match has gone the wrong way. We have avoided that very significant and quite deep debate. The charging regime is not a necessary part of financing and implementing these provisions alone; it is simply a general fact about policing of football. Discussions about that are on-going but—thankfully, given the difficulty of the issue—it has not been among the many things on which the bill team has had to concentrate. As I have said, we are aware of the issue, but having a new, revised or refreshed charging regime for the policing of football is not critical to this bill.

Derek Mackay: You said that this was the first targeted action on sectarianism with more to follow. Might what you are talking about be a consideration in the more that is going to follow?

Richard Foggo: My understanding is that the charging regime is based on the Police (Scotland) Act 1967, which I am led to believe will come under considerable scrutiny with the introduction of a single police force in Scotland. I have no information as to whether that part of the 1967 act will be considered; all I am saying is that if the act is under consideration, the sections in it that cover charging are at least likely to be looked at.

The Convener: The bill’s title refers not only to offensive behaviour at football but to threatening communications, so I want to ask a question about communications. Paragraph 32 of the explanatory notes says:

“Subsection (2) provides that “communicates” means communicates by any means other than by unrecorded speech alone. As such it includes communications made by post, on the internet through websites, email, blogs, podcasts etc, by printed media, et cetera.”

What are the estimates for the costs of policing such communications and how have they been arrived at?

Richard Foggo: That is a good question. In our discussions, we quite often spend the vast majority of our time talking about the football aspect of the bill. Indeed, six months ago, I would not have believed that I would know as much about football as I now do. Given that we get distracted by football, I am grateful that you have asked about the threatening communications offence, because it raises a number of critical issues. As with our approach to offensive behaviour, we have got right into the heart of contemporary policing and prosecution of internet offences, which is growing core business for the police service in Scotland. This offence does not relate only to or seek to regulate the internet, but unfortunately the fact is that the internet is a very common means through which people behave in the way that we are seeking to capture.

The issue has given rise to a lot of questions: whether we fuddy-duddy civil servants actually understand the nature of social media, whether we know how young people are involved or express themselves in such media, and whether we have any sense whatever of what young people in Scotland today are doing on Twitter and all the rest. We have, therefore, felt an absolute obligation to get right to the heart of how internet offences are policed and prosecuted. All I can do is repeat the assurance that we have received from the agencies involved—the Crown Office, with its sophisticated technical investigation and evidence-gathering mechanisms, and the police—that practice in this area was already expanding. The offence did not need to be introduced to
ensure that the agencies saw increasing their focus on the internet as being critical. I point to the recent riots down south and the healthy debate on the back of a very painful subject. If the committee does not mind, I will step out of my bill role into my broader role or day job—which is head of community safety policy—which I have almost forgotten, given the focus on the bill.

10:45

Over the next five to 10 years, community safety policy will focus primarily on the internet and other non-traditional forms of communication, while not forgetting knife crime, gang violence and antisocial behaviour. We have included that in our estimates of volume and unit costs, which include up to a maximum of 55 additional new cases every year in relation to threatening communications. In addition, we have started a longer-term and wider policy debate about the roles of the internet and social media in relation to community safety. We will use that debate to make sure that we review and reconsider any of our estimates for introduction of the new offence. The issue is critical, and not just in relation to the bill.

The Convener: You talk about an estimated 55 additional prosecutions, but what will it cost to look at all those websites? It takes time to look at blogs, e-mails, podcasts and so on. Has the additional cost to the police of spending time looking at and for those communications been included in the estimates?

Richard Fogg: In relation to the offensive behaviour at football matches provision, we have included the option of a fixed penalty notice. We have not done that for threatening communications. That is part of our demonstrating that we believe that the threatening communications offence is likely to be prosecuted for more serious cases only. Some examples have used existing legislation in the past few weeks, such as the small outbreak of social media use and blogging during the rioting, and the hate sites about leading figures in Scottish football.

We understand the difficulties with gathering evidence, and we make it clear that we need to take a targeted and intelligence-led approach. All I can say is that, having visited and spoken to people who do that—Parliament might want to take evidence from them—it is a fascinating and difficult area. We do not underestimate the challenges.

I am sorry to repeat myself, but all the experts have contributed to our estimated figures, so there is no hidden cost. We understand exactly how difficult it is to police the internet. I take some encouragement from those who are already doing that with some recent high-profile cases. There seems to be a myth that people are immune and anonymous on the internet, but I am encouraged to see how sophisticated the police and prosecutors’ evidence gathering is. Just the other day, I heard—as did the Cabinet Secretary for Justice and other ministers—the head of the new football unit say that he wants the public to understand that there is no anonymity on social media. I am comforted that, long before the bill’s provisions will be enacted, the police are already, as core business, responding and reacting to the internet. By the time the offence is introduced, there will be a sophisticated policing and prosecutorial response to the internet. It is not the introduction of the proposed offence that will place a financial burden on the criminal justice system.

The Convener: Thank you. Before I allow colleagues to raise any final additional questions, I have one to raise myself. Nil by Mouth talks about the “disparity of central spending between the £1.8 million provided to the National Football Policing Unit (2) and the £527,250 awarded for anti-sectarian educational and prevention projects. (3).”

The committee is of the view that preventative spending is going to be increasingly important, particularly because of declining budgets. Do you have a comment on that particular issue?

Richard Fogg: I will just repeat something that I said during my introductory remarks. We are mindful of the committee’s and others’ justified and correct focus on preventative spend, not only as an economic and efficiency measure but because it is often the right thing to do.

In my day job, I have been for the past five or six years the chief government sponsor of the national violence reduction unit, and I have worked very closely with Detective Chief Superintendent John Carnochan. Anyone who has worked with him will know that the importance of prevention is built into any discussions. I will remark on something that John Carnochan says to me regularly. In focusing on prevention, we must never forget to contain and manage the problem. Preventative action can take a long time to take effect, and communities must have confidence that, until that preventative work takes effect, safety and security in communities will be maintained. I repeat that this is the first of a range of measures that will, no doubt, be further focused on social preventative action. This first step is—to use John Carnochan’s phrase—about “stabilising the patient”.

Scotland was massively badly affected by last season’s football, and its reputation was besmirched around the world. We believe that we need to contain and manage the problem in order to allow ourselves to focus on the real prize, which is tackling attitudinal sectarianism and other
expressions of hatred. That will come only through education, right from the early years. I would like to make it clear that this is not a sectarianism bill—this is not "the sectarianism bill", or the Government's prospectus on sectarianism. This is a first action that has been taken effectively to stabilise the patient and to give comfort to our communities that the most serious problems are being dealt with. It will clear some space and create capacity to allow agencies beyond the police and others to undertake the long-term attitudinal and societal work that will ultimately deliver.

As the chief sponsor of the bill, I hope that, within five years, the bill is never being used and never has to be used. That would be a sign of success. I will take no pleasure from there being an increasing number of prosecutions under my offence. If, in five years' time, I am back before the committee or the Justice Committee and being asked why on earth, after five years, the provisions are not being used, I hope that it will be recognised as a sign of tremendous success. Prevention will be the focus of the overall sectarianism agenda, but this is a first and critical step in giving communities confidence that we are containing and managing the problem—or, to use John Carnochan's phrase, we are stabilising the patient.

John Mason: My question is on a slightly different issue. Before the summer, there were suggestions that there might be legal challenges to the bill. Two of the areas in question were freedom of speech and whether we can get involved in telecommunications, which is generally a reserved matter. I presume that, if there were legal challenges, there would be costs involved. Are we fairly sure that there will not be legal challenges and costs?

Richard Foggo: Anyone in Scotland is entitled to seek legal redress on any issue if they feel that they have just cause. I could not possibly tell you who might want to challenge the bill or on what grounds. What I can tell you—without referring to the petition that is before the Court of Session—is that from our legal advisers right up to the Lord Advocate and the Advocate General, people are comfortable with the bill's competence. The bill would not have been accepted by the Presiding Officer and would not have been passed by the Lord Advocate if it was felt that there was any basis for challenging its competence, whether in relation to the provision in the Scotland Act 1998 regarding telecommunications, or in relation to the European convention on human rights. Our primary duty in drafting legislation is that we must act within the law, and we remain absolutely confident that, although anyone in Scotland may want to challenge our view, we have clear legal opinion that there is no problem with competence, nor with any breach of any article of the ECHR.

Margaret McCulloch: The bill is really good at looking at and trying to tackle the sectarianism problem, but I wonder whether there are not already laws that cover that problem. If there are, could not the £1.8 million that we intend to spend on the bill and the on-going costs over the next few years be moved into preventative spend on educating young people in schools and going into clubs? Could it not be used to enable the police to go into areas where we think there will be examples of people being offensive? I am also concerned that you feel that, in five years’ time, nobody will be criminalised for the offensive behaviour. Will the money that we are putting into the bill not be completely wasted? Could it not be diverted to other areas, from which we could see more positive results?

Richard Foggo: I will clarify my proposition: in five years’ time, I might be before the committee celebrating because there have been no prosecutions—not because the offences would have become moribund and would not be being used, but because they would not be needed. That is an entirely different point.

Parliament has on many occasions since it was created seen fit to introduce a statutory offence that covers behaviour that was already criminal. The Emergency Workers (Scotland) Act 2005, the legislation on genocide, slavery and servitude and the legislation on stalking all introduced offences that were already clearly criminal under Scots criminal law. The Parliament, in its wisdom and under a range of Administrations, decided that there were good reasons to introduce those offences. There was an understanding in the Parliament that public outrage about particular behaviour demanded a response.

I note Dr Kay Goodall’s excellent evidence to the Justice Committee. I recommend it to the committee not because it supports our position, but because it is fundamentally good-quality thinking that challenges us in the bill team. I have no hesitation in recommending to you evidence that challenges some of our positions. In her evidence to the Justice Committee yesterday, Dr Goodall made the point that duplication may be a concern for lawyers and jurists but, although that is one consideration, it is a legitimate response for a democratic Parliament to name behaviour that it finds outrageous and considers to be beyond the pale. If a Parliament wishes to do that, it is crucial that it does so. I offered you some examples of the Parliament doing that in the past, across all political persuasions. Those exist to be referred to.

In our evidence gathering, we asked football fans what would be most effective in changing their behaviour. Two things came out top on that
list. The first was a football banning order. Football fans are precious about going to see football and will go to any lengths not to be stopped from doing so. However, our evidence also told us that what they feared beyond not seeing football was, crucially, a criminal record.

If somebody has a conviction for a general common-law offence such as breach of the peace, there is no way for an employer or anyone else to identify the sort of behaviour in which the person engaged. However, the introduction of a named offence that specifically identifies already criminal behaviour will make it clear. Employers in Scotland will be able to identify with absolute clarity people who work for them or who seek employment from them who have engaged in the behaviour on which we are legislating. It will not be a general conviction for breach of the peace or assault; rather, the person will have been found guilty of offensive behaviour at football, with all that that entails, or of communicating threatening material.

That is an entirely legitimate measure for us to take, so duplication is not a concern for us at all. Rather, it is a long-understood tradition that Parliaments name particular behaviour that is already criminal.

The Convener: There being no further questions, I thank Mr Conlong and Mr Foggo for not only answering our questions, but for doing so in such detail and with such passion. In the future, they should not describe themselves as “fuddy-duddy civil servants”—I have seen no evidence of that today.

We will now go into private session to discuss the evidence that we have just heard and to consider what themes we might wish to forward to the Justice Committee, which is the lead committee for the bill.

10:59
Meeting continued in private until 11:43.
Justice Committee

Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2

Response from the Scottish Government

I am writing to attach the Scottish Government’s response to the Justice Committee’s report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I am extremely grateful to the Committee for the effort taken in scrutinising the Bill in particular given the amended timetable.

I welcome the unanimous recognition by the Committee that there is a significant issue in Scottish football that requires to be tackled. Whether it be expressions of racist, religious and other forms of hate including celebrating terrorist organisations; whether at a football match or on the internet, such behaviour is entirely unacceptable in a modern Scotland. As the victims of hate crime will testify, none of this is just banter and those who deny that such behaviour exists or that it does terrible damage both to real people and our nation’s reputation have contributed to the problem festering for far too long.

I believe we are now mature enough and strong enough as a society to take on this appalling behaviour and ensure that our national game is not tainted by the actions of a mindless minority. I know the decent majority agree, with 91% of Scots supporting this tougher stance on the bigots and peddlers of hate.

The Bill provides the tools police and prosecutors have asked for to eradicate such behaviour. These new tools are intended to complement and enhance not replace the tools already available, and I remain entirely confident that they are proportionate and necessary. I accept the obligation the Government is under to ensure that new laws are clear. We will be bringing forward amendments to deliver on this obligation and I am grateful to the Committee and those who provided evidence for their expert contributions, which have greatly assisted.

The desired clarity however will come not just through the provisions of the Bill but in supporting guidelines, professional training and additional resources. I know that the Lord Advocate, who is responding to your report separately, will be considering revisions to the Guidelines to Chief Constables, which will greatly assist. The appointment by the Solicitor General of 3 dedicated football liaison prosecutors will also ensure that there is a consistency of approach across Scotland. We are already beginning to see the benefits delivered by the new national football policing coordination unit made possible by a £1.8 million investment from the Government. We are also working with Scotland’s football authorities and clubs to ensure that their commitment to eradicate this behaviour is helping deliver long term change. All of this vital work is about providing coordination and clarity to support the introduction of the Bill’s provisions.

The Bill represents just the first step on the journey to a safer and more inclusive Scotland, where difference is celebrated without recourse to hate and the divides of the past are healed. This is difficult and long term work that will require us to come
together across agencies, the length and breadth of Scotland, to support individuals and communities from the earliest years to those with the most entrenched views. I will ensure that as this wider and deeper agenda develops that the Committee receives early sight of proposals to allow us to work closely together.

Roseanna Cunningham
Minister for Community Safety and Legal Affairs
1 November 2011
SCOTTISH GOVERNMENT RESPONSE TO THE JUSTICE COMMITTEE’S REPORT ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL AT STAGE 2

Background to the Bill

31. It is, however, important to note at the outset that the Government envisaged the Bill as a response to the widely reported events that occurred on and off the pitch during the 2010-11 Scottish Premier League football season. This included threatening mail, including parcel bombs, being sent to certain individuals apparently because of their links to particular football clubs (Celtic in particular) and hateful messages being posted online. The Government has presented the Bill as complementary to the work of the Joint Action Group, comprising representatives of the Government, the Old Firm, football authorities and the police, set up in the aftermath of a particularly stormy Celtic-Rangers match on 2 March 2010, although not every member of the group has, in the end, fully signed up to the Bill. It was, and is, the Government’s view, that new laws are needed to address the problem.

Government Response: The Government welcomes the Committee’s acknowledgement of the context in which we are taking forward this legislation. The events of last season shamed Scotland and cannot be allowed to happen again. However, the issues we seek to address did not just emerge in the last football season. For too long we have seen sectarian and other hateful behaviour tarnish our national game and our country’s reputation. Not banter, but hate; and not just hate but hate that leads to violence and disorder. 91% of Scots have indicated they want to see tougher, more effective action to tackle this issue. The Bill sends the strongest possible message that such behaviour is completely unacceptable and is a necessary first step in achieving the long term attitudinal change needed to remove sectarianism from our society.

Dealing with sectarianism, bigotry and hatred: the wider context

45. The Committee notes that the Government does not consider that the Bill is a solution in itself to what the Government sees as Scotland’s sectarian problem. We would be interested to know what other non-legislative action the Government proposes to take, and invite it to clarify whether it has examined, or proposes to examine, for example work done in Northern Ireland.

Government Response: The Government is clear that sectarianism is not confined to football and will not be solved by legislation on its own. However, we have to recognise that there have been particular sectarian problems associated with Scottish football and it is absolutely right that the Government is taking action to address them as an immediate priority.

Achieving the long term attitudinal change that is required to tackle this insidious issue once and for all will require considerable effort from every part of Scottish society and we do not underestimate the challenges that lie ahead. However, it is essential that the work to tackle sectarianism is underpinned by robust legislation.
that will ensure that the police and courts have the tools to tackle those who continue to indulge in sectarian and other offensive behaviour.

The Government will be taking forward a broad range of actions to tackle sectarianism. Two approaches are of particular interest. First, the shift in public policy toward prevention. This Bill will contribute to preventing sectarian problems associated with football and expressed on the internet and elsewhere, by providing a clear deterrent. However, prevention means something deeper: working systematically back to the early years to change attitudes before they get a grip. In the end, the Government’s hope is that the measures in this Bill are no longer needed because the behaviour it seeks to address has been eradicated.

Secondly, the Government is interested in how sectarianism impacts on the lives of individuals and their communities. Not just overcoming the negative manifestations of sectarianism through the criminal law but building on the assets of individuals and communities to promote the positive, assets such as pride and passion for identity and culture. We do not believe that the manifest or impact of sectarianism are uniform across Scotland, or that a one-size-fits all approach to resolving these issues is appropriate. Central to our approach will be seeking the views of communities, and responding to identified need. We fully acknowledge the work of the many charities, voluntary groups and particularly individuals within those communities who have recognised the negative impact that sectarian behaviour has had on them and had the courage to do something about it. We believe that the key to eradicating sectarianism once and for all is to work with individuals and communities at grass roots level, break down real and perceived barriers and create strong cohesive communities so that everyone, regardless of background, can live with dignity and respect.

Finally, the Government is interested to learn how sectarianism is being tackled elsewhere, and look at whether good practice can be adapted and tailored to address the issue in Scotland. This will include but not be limited to the experience in Northern Ireland, experience we can access due to excellent established links between the respective administrations.

46. The Committee draws to the Scottish Government’s attention some witnesses’ concerns that the Bill should not bring large numbers of young people into the criminal justice system. We note the general availability within the criminal justice system of diversions from prosecution and non-custodial disposals in appropriate cases.

Government Response: The Government note and share the Committee’s concerns about dealing proportionately with offending by young people. This issue has been raised and is being discussed by the Strategic Implementation Group, who are overseeing the work necessary to bring the Bill’s provisions into force. The Group’s membership includes officials responsible for Youth Justice as well as the Police and the Crown Office and Procurator Fiscal Service. As the Committee notes, diversion from prosecution and non-custodial disposals are an important consideration along side the formal measures available through the Children’s Hearings system. As indicated in the Policy Memorandum and Financial Memorandum, the Government is confident that existing arrangements, including the
Lord Advocate’s Guidelines on ‘Reporting to procurators fiscal of offences alleged to have been committed by children’ and the recently published Diversion from Prosecution Toolkit, will ensure that children and young people are dealt with appropriately and are not brought into contact unnecessarily with the criminal justice system.

**Procedural history of the Bill**

52. The Committee recognises that the Scottish Government accepted the case for taking more time to consider the Bill. We warmly thank those witnesses who appeared before us in June for agreeing to do so at extremely short notice and before they had had the time to fully consider and discuss the implications of the Bill. Their testimony helped secure more time for consideration.

53. Following the First Minister’s comments, the Parliament went on to approve the general principles of the Bill at Stage 1 (by a majority of 103 to 5, with 15 abstaining).

**Government Response**: The Government welcomes the Committee’s support for the revised timescale for consideration of the Bill and the Parliament’s endorsement of the general principles of the Bill at stage 1.

**“Sunset clauses” and provision for review of the legislation**

59. The Committee notes that the Scottish Government may be receptive to the inclusion of a provision in the Bill requiring the Scottish Government to undertake formal review of the legislation after an appropriate point, should it be enacted. The Committee would welcome the inclusion of a review provision.

**Government Response**: The Minister indicated in evidence to the Justice Committee that the Government were open to including a review clause. Given that the Committee would welcome such a provision, the Government will bring forward an amendment to the Bill at Stage 2 to include a review provision, requiring the Government to report to Parliament on the operation of the legislation in practice after it had been in place and operating for a reasonable length of time.

**The role of the media**

91. The Committee notes the important role the media play in relation to the reporting of Scottish football. This places an onus on the media to use this power responsibly.

**Government Response**: The Government shares the Committee’s view that the media have an important role to play when reporting on Scottish football. The media should be conscious of their responsibility to act responsibly when fulfilling their role in reporting on events and their ability to act as a force for good in helping to bring about the longer term attitudinal change needed in our society if we are to eradicate sectarianism.
Stigma, public awareness, and improving the recording of hate crimes

135. The Committee pursued the issue of data capture with the Lord Advocate. He was asked whether, under the current law, it would be possible to capture in formal records what type of conduct (e.g., religious bigotry, racism, homophobia, etc.) had been prosecuted. He said that it was his understanding that it would be very hard to do so “working within the confines of the current IT system.” (We take the Lord Advocate to be referring to cases where a conviction for an offence involving hateful or offensive behaviour has been obtained but where, for whatever reason, a statutory aggravation was not attached to the charge.)

136. It was put to the Lord Advocate that enacting the section 1 offence would not in itself guarantee increased clarity as to why someone had been convicted under the provision (i.e., for instance, whether they had been convicted for chanting that was racist rather than homophobic). There might for example need to be sufficient precision in the charge before the court for the relevant data to be captured. The Lord Advocate conceded that this was “a valid point” and that he would “go away and think about it” before finalising his guidelines on the Bill.

Government Response: This will be responded to by the Lord Advocate.

Committee conclusions on the section 1 offence

137. The Committee believes that there are lasting problems surrounding offensive behaviour in Scottish football that need to be dealt with. Most football supporters are law-abiding; they are passionate about their team without being hateful or offensive. A minority cross the line. The Committee accepts that football matches are not always places for the thin-skinned but arguments that the hatefulness sometimes evident there forms part of a “pantomime” atmosphere are not convincing. There can be no excuse for provocative and hateful displays of bigoted behaviour in any public environment.

Government Response: The Government agrees with the Committee’s views in their entirety. The Bill makes clear that there is no place in a modern Scotland for sectarian or racist or homophobic behaviour or songs and chants in support of terrorist organisations. Especially in the context of provoking public disorder, these are not victimless crimes. Banter and passionate support for football teams, even passionate opposition to other football teams, is the lifeblood of football. Sectarianism and other expressions of hate are not. They poison football and all they touch. The people of Scotland have said they will no longer tolerate this poison and the public disorder that follows from it. The Bill provides the police and courts the tools they have asked for to help eradicate this poison from Scottish football.

138. A majority of the Committee support the new offence of offensive behaviour at football. The majority believe that the Government has made the case that there are gaps in the law that do not enable the police and prosecutors to target offensive behaviour effectively.

Government Response: The Government is convinced that the Bill will clarify and strengthen existing law, as was testified to by all the police experts who gave
evidence to the Committee. This is not about replacing existing law – existing laws will remain available - but about giving even better and sharper tools to the police and prosecutors to allow for a more effective response to an issue that has proven to this point intractable.

Furthermore, this is an issue over which many appear resigned to accept the status quo; believing change to be impossible. The Government reject such pessimism entirely and sees legislation as a proper way of expressing a commitment to transform attitudes and expectations. As Parliament has done many times previously, it is entirely proper to seek to use legislation to register public outrage about a particular form of behaviour, even when that behaviour is, to some degree, already criminal. Such action sends the strongest possible message that sectarianism and other offensive behaviour related to football is unacceptable and will be dealt with severely. This will then demonstrate that with determination we can achieve change, the resulting optimism will be critical in the long term, difficult work of eradicating sectarianism from society as a whole. The Government believes that the people of Scotland wish such a hopeful signal to be sent and it is important therefore that Parliament unites behind that view to meet this demand.

140. The Committee would welcome clarification from the Lord Advocate as to whether section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is being used this season to prosecute cases of offensive behaviour at football matches. If so, we would also welcome an assessment from the Lord Advocate of the efficacy of that provision in obtaining convictions.

**Government Response:** This will be responded to by the Lord Advocate.

141. The Committee agrees that it is important to label offences so that it is clear whether a hate crime has been committed and, if so, what type of hatred it is. “Naming and shaming” can be an important weapon in the criminal law’s armoury, in helping to change attitudes about what is considered socially unacceptable. The Committee would welcome clarification that the Crown Office and Procurator Fiscal Service are seeking to ensure the right data is captured for football-related offences.

**Government Response:** This will be responded to by the Lord Advocate.

142. The Committee agrees it is important that Scottish football polices itself effectively. This includes taking firm action against clubs, elements of whose support bring the game into disrepute. The Committee agrees that the football authorities have failed to take firm action to deal with offensive behaviour at football. Over many years, they have allowed the issue to drift. If firm action had been taken earlier, offensive behaviour at football might have been stamped out, or at least significantly reduced.

143. It is for the SFA and the SPL to determine once and for all who has authority in relation to disciplinary issues concerning the supporters of SPL clubs. We are dismayed that the two bodies do not appear to be close to resolving this issue at a time when clear leadership, and effective joint working, is badly needed. We would expect this matter to be dealt with as a matter of urgency.
**Government Response**: The Government notes the Committee’s conclusions regarding the football authorities, their strong views on this matter and their desire for the issues to be addressed as a matter of urgency. The Government is working actively with the football authorities in the Joint Action Group to address these and other problems relating to football. The Joint Action Group has made considerable progress but the Government recognises that more progress needs to be made and know that the football authorities share that view, together with the desire to address the crucial issue identified by the Committee. For this reason a sub-group of the Joint Action Group has been established to consider football’s role in tackling offensive behaviour. This sub-group will report its findings to the Joint Action Group in December.

**The section 1 offence: more detailed issues**

146. Some concern has been expressed in the evidence about the degree of certainty the Bill can deliver. Concerns were expressed about a lack of clarity about what would be a criminal offence. Neither the Minister nor the Lord Advocate ever sought to argue before the Committee that the Bill could provide complete clarity. Instead, they consistently repeated that, in determining the criminality of behaviour under section 1, context is fundamental. After discussing and considering various hypothetical examples during the course of our evidence-taking, this is a proposition the Committee is content to accept.

147. After due consideration, the Committee also accepts the argument that it would be unhelpful for the legislation to identify and proscribe particular songs, chants, banners etc. Leaving aside the possible drafting difficulties inherent in such an approach, witnesses have stressed that, were such provisions written into the Bill, some football supporters would see getting the better of the drafting as an enjoyable challenge, and would quickly find new ways, not covered in the legislation, of expressing the same sentiments. The Committee accepts that this would risk making a mockery of the criminal law.

**Government Response**: The Government welcomes the Committee’s support for our approach to these important issues.

149. The Committee notes a general view amongst 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.

**Government Response**: The Government notes that the Committee itself accepts that context is fundamental in the application of the legislation in practice but notes that view was not shared by all witnesses. The Government has noted the specific issues raised by the Committee and will seek to clarify the Bill’s provisions in a number of ways, including by bringing forward amendments to the Bill (see the responses to paras 153, 196, 231 & 237 below). The Government also notes the intention of the Lord Advocate to provide further clarity through amendment to his Guidelines to Chief Constables.
Offensive behaviour

153. The Committee is supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. We invite the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.

Government Response: The Government notes the Committee’s support for the inclusion of categories beyond sectarian hate in relation to the section 1 offence and the invitation to consider the inclusion of age and gender. The Government also notes the very detailed and thoughtful consideration by the Equal Opportunities and Justice Committees on the same issue in the context of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Given the complex arguments presented in the course of the consideration of the 2009 Act, the Government will bring forward an amendment to allow for the extension of the offence to cover additional characteristics including age and gender at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.

“Behaviour that a reasonable person would be likely to consider offensive”

163. The Committee invites the Scottish Government to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights.

Government Response: The Government notes the concerns referred to by the Committee but remain firmly of the view that the provisions of the Bill are proportionate, justified and in compliance with ECHR. The freedom of speech of law abiding football fans in Scotland – who form the vast majority – remains protected. The Bill is intended to impact on the small minority who, wrongly, have for too long considered themselves free to express threatening and hateful views regardless of the public disorder that might ensue. The Government is clear that, for example, songs and chants supporting terrorism or terrorist organisations are offensive to any reasonable person and should be caught by the Bill where they are likely to incite public disorder. The Government recognises the need to assist the public in understanding the scope of the offence and will seek to clarify that in a variety of ways. The Government notes that there are recent examples of football supporters modifying their behaviour to remove offensive and sectarian elements, which indicates that supporters are very well aware of where the boundaries of acceptability lie. The Government welcomes and supports this self-regulation by football supporters.

167. In his first appearance before the Committee, the Lord Advocate was asked for his views on the application of section 1(5)(b) to a pub where all those present support the same club or to a supporters’ club. He replied that he did not want to rush into providing an answer but hoped to be able to write to the Committee on the issue at a later date. At the present time, we have not yet received any further clarification from the Lord Advocate on this point. Nor is the issue covered in his draft guidelines to police officers.
Government Response: This will be responded to by the Lord Advocate.

170. The Committee notes the Scottish Government’s assurances that the purpose of the section 1 offence is to protect public order in relation to football matches rather than to create a “hate crime” that outlaws certain behaviour whether or not anyone else is present to be offended or provoked. We seek the Scottish Government’s views on whether this could be made clearer in the drafting of the section 1 offence.

171. The Committee would also welcome the Scottish Government clarifying its views – whether in the legislation or in, for example, the Lord Advocate’s guidance to the police – as to the section 1 offence’s application to venues such as supporters clubs, where it may be presumed that those present would generally be of a like mind. At the same time, the Committee recognises the basic right of all employees to work in a dignified environment, free from language or behaviour that they may consider offensive towards them.

Government Response: The Government’s view is clear; hateful and threatening behaviour which risks causing public disorder is unacceptable anywhere. It should not be tolerated at matches, on the way to and from matches or in supporters clubs or anywhere else football is televised. Neither is it acceptable in stadia when opposition fans are not present to be offended or provoked, or when measures are in place to make public disorder unlikely. There remain risks in such situations. For one thing, such expressions of hate are communicated by radio and television, potentially provoking public disorder elsewhere. Also, the Government is not so pessimistic as to believe that simply by supporting a particular football club the sectarian and hateful views of fellow supporters will be tolerated or accepted. Nor should they. The Government is aware of examples where unacceptable behaviour by football fans has caused outrage not just amongst opposition fans but amongst fellow fans. Hence the rejection of the idea that simply being surrounded by fellow supporters excludes the risk that disorder ensue. That is why the Bill makes the provision it does at section 1(5)(a) & (b). Those provisions send out a strong message that there is no home for such behaviour in a modern Scotland, and certainly not in the supporters clubs and other venues where such views may gain acceptance.

The Government accepts that there are practical limitations on the enforcement of section 1(5)(b) but believes that it is essential that this legislation makes clear that such behaviour is never acceptable.

Televised matches

195. The Committee acknowledges that offensive behaviour that may provoke public disorder can be a problem in relation to matches televised in public places (pubs for instance), that this sort of behaviour is unacceptable, and that it may sometimes be necessary to apply the criminal law to deal with it. If there is to be a new offence of offensive behaviour at football matches, we accept that it is appropriate that it cover televised matches. But the Scottish Government should consider whether the parameters of the offence in relation to televised matches need to be made clearer.

Government Response: The Government welcomes the Committee’s support for the inclusion of televised matches in the Bill’s provisions and note the Committee’s
comments about the need for clarity about the parameters of the offence. The Government’s view is that the Bill should tackle all bigoted, sectarian and other offensive behaviour related to football, including televised matches and highlights shown in a public place. The Government recognises the need to assist the public in understanding the scope of the offence and will seek to ensure there is greater clarity on this as we take the Bill forward and implement it in practice.

**Travel to and from the match**

196. The provisions in the Bill concerning travel to or from matches raise similar questions about whether or not particular situations are covered. We accept that some of the worst manifestations of offensive behaviour that provokes public disorder can occur when fans are travelling to a match (often with little concern about whether they actually get inside the stadium) and that it is appropriate to seek to make provision for this. Again, we invite the Scottish Government to consider whether there is scope to make the relevant provisions any more clear.

**Government Response:** The Government welcomes the Committee’s support for the Bill’s coverage of such problematic behaviour. We should not allow for a situation where someone – even with no intention of going to football or awareness that a game is on - can hurl sectarian abuse at groups of supporters or can willingly join in with offensive behaviour likely to cause public disorder and not be arrested. We will bring forward an amendment to make clear that the Bill’s provisions apply to those who join in such unacceptable behaviour, as well as those who choose to provoke people going to or from a football match.

**The Section 5 Offence: Threatening Communications**

217. The Committee supports efforts to prevent hateful and inflammatory communications online and in other types of new media. There is a need to make sure that our laws are robust and up-to-date, in order to deal with this fast evolving milieu. It would be a matter of concern if gaps in the current law prevented the successful prosecution of serious cases of hateful communication. Not all Members are wholly convinced that the Scottish Government has made a clear case that those gaps exist, particularly in view of recent successful prosecutions under the current law.

218. However a majority of the Committee are prepared to support the proposal for a new offence of threatening communications. The majority notes that the creation of this offence may provide greater certainty to online users about what is and is not legally acceptable under Scots law.

**Government Response:** The Government remains of the view that the Bill clarifies and strengthens existing law and sends the strongest possible message that such behaviour is completely unacceptable. The Government believes it is important that Parliament unites behind that view and responds to the demands of the people of Scotland.

220. The Committee would welcome the Government (a) giving consideration to our queries and recommendations below on how the provision might be made more
effective, and (b) providing further information to the Committee on whether and, if so, why, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 is not considered adequate to prosecute threatening online communications, despite a number of apparently successful recent prosecutions.

Government Response: This will be responded to by the Lord Advocate.

221. The Committee invites the Scottish Government to note the comments of some organisations about the danger of drawing large numbers of children and young people into the ambit of the criminal law or the Children’s Hearing system via the new offence of threatening communications.

Government Response: See the response to para 46, above.

Condition B and freedom of expression

231. The Committee notes that the Scottish Government is open to considering the inclusion of a provision protecting freedom of speech in relating to the new offence of threatening communications, to provide assurance that section 5 of the Bill does not inhibit the free, open and, perhaps at times offensive expression of views on religious matters. We would welcome such a provision.

Government Response: The Government have made clear that the Bill will not infringe legitimate freedom of expression but that we do not have any objection in principle to the incorporation of an explicit freedom of expression clause. Given that the Committee would welcome such a provision in relation to condition B of section 5, the Government will bring forward an amendment to the Bill at Stage 2, which we hope will serve to allay any concerns on this matter.

Widening the ambit of the section 5 offence?

237. The Committee recognises differing views on whether to widen section 5 to cover other categories of protection and acknowledges that this is an issue that would require more consideration. The Committee therefore invites the Scottish Government to consult on widening section 5 at an appropriate point should the Bill be passed.

Government Response: The Government notes the concerns about the lack of consultation on the implications of widening section 5 and the Committee’s conclusion that such consultation should be undertaken after the Bill is enacted. The Government will therefore bring forward an amendment to allow for the extension of the offence to cover additional characteristics at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.

The exclusion of unrecorded speech

242. The Committee would not support the widening of the section 5 offence to include unrecorded speech, because we recognise the civil liberties implications of creating a law that, perhaps unwittingly, has the potential to criminalise private conversation or conversation within domestic premises.
Government Response: The Government notes the Committee’s view that the offence should not be widened to include unrecorded speech.

243. The Committee would welcome clarification as to whether a live stream of a speech or conversation would be deemed to be “unrecorded speech” under the Bill.

Government Response: The Bill includes recorded speech only, so ‘live speech’ even where broadcast or ‘streamed’ (over the internet) is not covered. Live, broadcast or streamed speech would only be covered if it was recorded and that recording was then communicated.

Enforcement of section 5

254. The Committee notes the resource implications of section 5, if it were enforced to its full extent. We consider that this points to the likelihood of it being used for “exemplary” purposes to deal with extreme cases of threatening behaviour online. The Committee would welcome the Scottish Government clarifying what resources and training are being provided to law enforcement services to deal with online crime generally. We note the suggestion that an advisory committee of experts might be appointed to assist in the development of effective law enforcement in the online sphere.

Government Response: The Government notes the Committee’s comments about potential resource implications but would re-emphasise that the additional cost of the Bill’s provisions are relatively limited, partly for the reasons identified by the Committee. The Government remains of the view expressed in the Financial Memorandum that:

“... much of the behaviour that the provisions cover is already criminal and therefore liable to prosecution. There is well-established case law on the use of breach of the peace, for example, in cases similar to those set out in these provisions. The new measures do, however, bring clarity and strengthen the law. It is not necessarily the case that the estimated number of additional arrests, prosecutions, and custodial or other sentences will entail a significant new or additional financial burden, as there may well have been arrests, prosecutions and disposals anyway.” (para 45).

In setting out the case for the Bill, the Government has not sought to quantify the current costs of dealing with such offences nor of the much wider costs of dealing with online crime more generally and precise information on those costs is not therefore available, though paras 69 to 71 of the Financial Memorandum do set out the general background in relation to investigation of e-crime and its relationship to the section 5 offence.

The Strategic Implementation Group for the Bill, is giving consideration to these issues, where they are specific to the Bill, including training provision for all relevant agencies on every aspect of the Bill. In relation to the section 5 offence in particular, the new national football policing coordination unit (FoCUS) are leading on training for law enforcement, working with partners across the UK. Through the Strategic
Implementation Group, the Government has asked that the Committee is provided with information on the measures already being put in place by the police to assist with implementation of the Bill.

**Extraterritoriality**

255. *Given the absence of clear national barriers online, the Committee accepts the case for an extraterritorial provision in respect of the offence of threatening communications. The Committee expects that use of it would be restricted to exceptional cases, where it is considered in the national interest to pursue a conviction and there is reasonable prospect of it being successful.*

**Government Response:** The Government welcomes the Committee’s support for the extraterritorial provision in respect of the offence of threatening communications. While such offences may be committed furth of Scotland, they are clearly closely connected to Scotland and it is only right that we should take all possible steps to address such activity where we can.

It appears likely that anyone indulging in such offensive behaviour relating to Scottish football supports a Scottish team. It is therefore possible that they will travel to Scotland to attend matches. We therefore envisage that the majority of prosecutions for extraterritorial offences will follow an arrest in Scotland – and not abroad - where there is evidence that an extraterritorial offence has been committed, and the police have intelligence that the offender will be in Scotland.

Prosecution is a matter for the Lord Advocate, but the Government agrees with the Committee’s conclusion that, other than the instances outlined above, the application of the extraterritorially provisions is likely to be restricted to exceptional cases, where it is considered in the public interest to pursue a conviction and there is reasonable prospect of it being successful.
I attach the Crown Office and Procurators Fiscal’s response to the Justice Committee’s Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I welcome the Committee’s support of new offences to address these issues and acknowledge your comments seeking further clarity on various aspects of the provisions.

As you know from my evidence, I fully endorse the introduction of specific offences relating to offensive behaviour at football matches and threatening communications. The offences will provide an invaluable tool for the police and prosecutors to target and tackle the unacceptable behaviour that has been associated with football. The offences will also assist in providing certainty and clarity for the police and prosecutors when dealing with such conduct.

In the report, the Committee raised specific issues that relate both to my own role and as the Minister with responsibility for the prosecution of crime. I attach a response to these issues and, in particular, those set out at paragraphs 135, 136, 140, 141, 167, 195 and 220.

As I advised the Committee when I gave evidence on 20 September, the Guidelines to Police, are currently draft Guidelines and they will be revised to take into account of any amendments or further observations by the Committee or Parliament during the passage of the Bill. The latest draft guidance to Chief Constables includes further guidance on the type of conduct and behaviour covered by the provision relating to offensive behaviour at football matches and the televising of football matches. I have highlighted the additional text.

To respond to some of the concerns raised in your Report and to facilitate discussion at the next stages of the Bill, I intend to make the draft guidelines available via SPICe prior to the debate in Parliament on 3 November.

I hope this response is helpful.

The Rt Hon Frank Mulholland QC
Lord Advocate
1 November 2011
COPFS Response to Justice Committee Report

135. The Committee pursued the issue of data capture with the Lord Advocate. He was asked whether, under the current law, it would be possible to capture in formal records what type of conduct (eg religious bigotry, racism, homophobia, etc) had been prosecuted. He said that it was his understanding that it would be very hard to do so “working within the confines of the current IT system.” (We take the Lord Advocate to be referring to cases where a conviction for an offence involving hateful or offensive behaviour has been obtained but where, for whatever reason, a statutory aggravation was not attached to the charge.)

It is accurate that under the current law that it is not possible to capture the specific type of conduct libelled in a breach of the peace or Contravention of S38 of the Criminal Justice and Licensing (Scotland) Act 2010 in the absence of an aggravation being libelled.

It may assist to explain that Crown Office and Procurator Fiscal Service (COPFS) uses a live operational case management system, specifically designed to receive criminal and death reports from the police and other specialist reporting agencies and to manage these cases for prosecution purposes. The information held on the system is structured for these operational needs, rather than for statistical reporting or research purposes.

The COPFS database can extract information relating to charges reported with an aggravation and the decisions taken in such cases. I attach a link to the most recent COPFS publication relating to all Hate Crimes (including Religious Aggravations) which is published on the COPFS web site: www.copfs.gov.uk/Publications/2011/05/Hate-Crime-Scotland-2010-11. This contains data on the numbers of charges reported and decisions taken in the last 5 financial years.

It should be highlighted that offences aggravated by religious prejudice cover all forms of religious intolerance and the COPFS databases cannot identify whether the behaviour is sectarian nor does it specify whether the incident is football related.

As you are aware data of this nature was previously extracted by research commissioned by the Scottish Government in 2006. This requires examination of each police report. The Scottish Government has agreed to undertake similar analysis on an annual basis.

136. It was put to the Lord Advocate that enacting the section 1 offence would not in itself guarantee increased clarity as to why someone had been convicted under the provision (ie, for instance, whether they had been convicted for chanting that was racist rather than homophobic). There might for example need to be sufficient precision in the charge before the court for the relevant data to be captured. The Lord Advocate conceded that this was “a valid point” and that he would “go away and think about it” before finalising his guidelines on the Bill.
Under the proposed new offence in Section 1 of the Bill, this data should be identifiable and extractable. The advantage of the proposed legislation is that Section 1 of the Bill relates solely to offensive behaviour at football matches and a conviction of a contravention of Section 1 will inform prosecutors that the accused has previously offended in a context related to football. This will inevitably result in a motion for a football banning order to be requested and will alert prosecutors to the fact that the accused has previously offended in such a manner.

In addition the precise nature of the conduct such as expressing hatred of a group of persons based on their colour or sexual orientation will be libelled under the specific subsections of section 2(a). So, for example, an offence based on prejudice due to colour or sexual orientation would be libelled as an offence under Section 2(a)(iii) and 2(4)(a) and section 2(a)(iii) and 2(4)(e) respectively. The particular offence and statutory provision will be recorded on the criminal history of the accused which will enable the prosecutor to identify the specific type of offending that led to the conviction.

140. The Committee seeks clarification from the Lord Advocate whether Section 38 was being used this season in arrests at football

There have been police reports submitted to COPFS libelling offences of breach of the peace with religious aggravations where appropriate and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 has been libelled as an alternative charge. However, for the reasons set out in response to paragraph 135 above, COPFS cannot identify how many football related section 38 charges or breach of the peace charges have been reported as the COPFS database cannot identify the specific behaviour libelled in the charge.

The charge libelled is dependant on the facts and circumstances of each case. As previously advised s38 has certain limitations that can cause difficulties. In particular the offence requires that a person behaves in a threatening or abusive manner which is likely to cause fear or alarm to a reasonable person, and which the person intends or to cause fear or alarm or is reckless as to whether it causes fear and alarm. Whether the behaviour is likely to cause fear or alarm to a reasonable person is an objective test and evidence of factual fear and alarm is necessary to proof of these offences. This is an additional hurdle that is not required in the proposed section 1 offence and in the particular setting of a football match this requirement can cause evidential difficulties.

In cases involving conduct at football matches, defences have been run that the Crown has failed to prove that the conduct caused fear and alarm or that the conduct was intended to cause such fear and alarm.

In addition section 38, requires conduct of a threatening and abusive nature which is more limited than the envisaged conduct of an offensive or disorderly nature. Further, it does not link the behaviour with the likelihood of inciting public disorder, which is the behaviour that the Bill is seeking to address. It is of note that the terms of section 38 have yet to be tested by the court and it is by no means certain that the courts will hold that conduct that the new offence will cover will be held to constitute
an offence under section 38.

With regard to offences committed at games played by Scottish football clubs elsewhere in the world, neither breach of the peace nor section 38 could be used as they do not contain the relevant extraterritorial powers to allow prosecution in Scotland.

The introduction of a bespoke offence designed to specifically deal with such conduct will allow legal certainty and avoid the need for COPFS to “shoe horn” offending behaviour into the requirements of existing law. With regard to offences committed outwith Scotland, the new offence will enable action to be taken to prosecute those who engage in offensive or threatening behaviour where Scottish clubs are playing in Europe and elsewhere.

141. The Committee agrees that it is important to label offences so that it is clear whether a hate crime has been committed and, if so, what type of hatred it is. “Naming and shaming” can be an important weapon in the criminal law’s armoury, in helping to change attitudes about what is considered socially unacceptable. The Committee would welcome clarification that the Crown Office and Procurator Fiscal Service are seeking to ensure the right data is captured for football-related offences.

I refer to the response in relation to paragraphs 135 and 136 above.

167. In his first appearance before the Committee, the Lord Advocate was asked for his views on the application of section 1(5)(b) to a pub where all those present support the same club or to a supporters’ club. He replied that he did not want to rush into providing an answer but hoped to be able to write to the Committee on the issue at a later date. At the present time, we have not yet received any further clarification from the Lord Advocate on this point. Nor is the issue covered in his draft guidelines to police officers.

The Crown’s understanding is that section 1(5)(b) would apply where all present support the same team. The Lord Advocate will insert guidance on this point in his Guidelines.

195. The Committee acknowledges that offensive behaviour that may provoke public disorder can be a problem in relation to matches televised in public places (pubs for instance), that this sort of behaviour is unacceptable, and that it may sometimes be necessary to apply the criminal law to deal with it. If there is to be a new offence of offensive behaviour at football matches, we accept that it is appropriate that it cover televised matches. But the Scottish Government should consider whether the parameters of the offence in relation to televised matches need to be made clearer.

The Lord Advocate’s guidelines have been revised to provide further clarification on the parameters of the offence.

220. The Committee would welcome the Government to provide further on information to them on whether and, if so, why, section 38 of the Criminal
Justice and Licensing (Scotland) Act 2010 is not considered adequate to prosecute threatening online communications, despite a number of apparently successful recent prosecutions.

There have been a number of difficulties with prosecuting such offences.

The most common statutory provision that applies is a contravention of the Communications Act 2003. However, as a result of case law, doubt has been expressed about the definition of “sending” a communication and whether sending includes posting, blogging or using or accessing social networking sites such as Facebook. The new offence specifically addresses this issue.

Furthermore, offences under the Communications Act 2003 are prosecutable only summarily. Some of these cases have seen very offensive and postings that glorify someone’s murder or contain threats to kill someone, and such conduct would merit prosecution on indictment. The Bill addresses this difficulty.

In order to circumvent the difficulties of prosecuting under statute, breach of the peace and contraventions of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, have been libelled but there are limitations to the use of such offences that would be alleviated by the enactment of a bespoke offence targeted at such offending. As with the offensive behaviour section, evidence of factual fear and alarm is necessary to proof of these offences. Whether the behaviour is likely to cause fear or alarm to a reasonable person is an objective test. The threatening communications offence removes the need to prove that the person making the threat intended to carry it out and on proving that the behaviour actually caused fear and alarm.

At present, current legislation could not be used where the offence is committed outside Scotland. This means that a person can evade criminal liability by making threatening communications (whether by sending them in the post or posting on the internet) from outside Scotland, even if the person making it intends the communication to be seen primarily in Scotland. The new offence will enable action to be taken to prosecute those who commit these offences.

Furthermore, as previous advised, unlike elsewhere in the UK, there is no specific offence in Scots law criminalising threats made with the intent of inciting religious hatred. This is an obvious gap when compared to elsewhere in the UK and it is clear, therefore, that legislation is required to address it.
LORD ADVOCATE’S GUIDELINES ON THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) BILL (AS INTRODUCED)

Purpose

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

Offences

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

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

OFFENSIVE BEHAVIOUR AT FOOTBALL MATCHES

The offence provides the police with powers to deal with offensive or threatening behaviour in relation to football matches that is liable to incite public disorder and is intended to address the problem of offensive and threatening conduct, including singing and chanting and the display of offensive flags and banners (in particular, those of a “sectarian” or racist nature) which are known to incite public disorder associated with football matches.

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

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

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

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

Regulated Football Match (including televised matches)

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

On a journey to or from a football match

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

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

The offence also specifies that persons can be regarded as having been on a journey to or from a regulated football match whether or not the person attended or
intended to attend the match. This includes those who travel to towns and cities where football matches are being played solely to indulge in violence or other offensive behaviour.]

**Televised matches**

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

**INCITING PUBLIC DISORDER**

**Type of Conduct and Behaviour**

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

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

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

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

- Songs/lyrics which promote or celebrate violence against another person’s religion, culture or heritage
- Songs/lyrics which are hateful towards another person’s religion and religious leaders, race, ethnicity, colour, sexuality, heritage or culture
Behaviour that is offensive to the reasonable person

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

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

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

General Approach

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

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

The offence WILL NOT

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

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

Choice of Charges

Disorderly and offensive behaviour at football matches can, in certain circumstances, be prosecuted under the common law as a breach of the peace or as a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of offensive behaviour at a football match, such behaviour at or related to football matches should be reported as that offence in preference to a common law
breach of the peace or contravention of section 38. It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence. If appropriate, these aggravations can be added to other charges libelled on the same complaint.

THREATENING COMMUNICATIONS

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

Scope of the offence

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

- threatens a person or people of a general description with serious violence or death, or incites others to kill or commit a seriously violent act against a person or persons of a particular description, or which implies such a threat and where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm; or
- consists of threats made with the intent of stirring up religious hatred.

Defence

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

Definitions

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

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

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

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

Threats of Serious Violence or Death

The material communicated must be intended to cause fear or alarm (or is communicated with recklessness as to whether fear and alarm is caused) for an offence to be committed.

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

Threats with the Intent of Stirring up Religious Hatred

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

Freedom of Expression

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

The offence WILL NOT

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

Choice of Charges

Threatening communications can, in certain circumstances, be prosecuted as other offences including breach of the peace and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 - threatening and abusive behaviour. If there is sufficient evidence for the offence of threatening communications the conduct should be reported as an offence of threatening communications in preference to any other offence unless the conduct is of such seriousness that the appropriate penalty is likely to exceed 5 years. In such circumstances, consideration should be given to libelling an offence of breach of the
peace. Where the charge involves threats with the intent of stirring up religious hatred, it is not appropriate to add an aggravation in terms of prejudice relating to religion to this offence. If appropriate, the aggravation can be added to other charges libelled on the same complaint.

**Offences outside Scotland**

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

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

In relation to threatening communications, this offence will also apply to a communication made from outside Scotland if the person making it intends the communication to be read, listened to or seen primarily in Scotland. This ensures that someone based outside Scotland, who may well may travel frequently to Scotland for the purposes of, for example, attending football matches, cannot evade prosecution if he or she makes threatening communications from outside Scotland targeted e.g. at people involved in Scottish football or inciting religious hatred in Scotland.

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

**Custody/Use of Undertakings**

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

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

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

**Football Liaison Prosecutors**

Each COPFS, Federation has a dedicated Football Liaison Prosecutor (FLP). The FLPs will engage with the Football Coordination Unit Scotland (FoCUS) that has
been tasked with taking the lead on strategic thinking on the policing of Scottish football and will support the delivery of a consistent approach to the investigation and enforcement of offences related to football. The FLPs will liaise closely with, the police and other key partners to:

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

Contact details for FLPs

North Federation
East Federation
West Federation
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 1, No. 28  Session 4

Meeting of the Parliament

Thursday 3 November 2011

Note: (DT) signifies a decision taken at Decision Time.

Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2: Christine Grahame, on behalf of the Justice Committee, moved S4M-01170—That the Parliament notes the Justice Committee’s 1st Report, 2011 (Session 4): Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2 (SP Paper 21).

James Kelly moved amendment S4M-01170.1 to motion S4M-01170—

Insert at end—

“; further notes the number of verbal and written submissions that raised concerns about the bill; believes that the Scottish Government has failed to make the case for the requirement for new offences contained in the bill, that it lacks clarity, would lead to confusion, be difficult to enforce if implemented and cannot be supported, and believes that a more proportionate response to dealing with the problems in relation to Scottish football would be to give greater consideration to the use of existing laws, to work with football authorities and promote positive interventions in communities and the education system.”

Motion without Notice: Alison McInnes moved without notice that, under Rule 8.14.3, the debate be extended for 10 minutes. The motion was agreed to.

After debate, the amendment was disagreed to ((DT) by division: For 53, Against 64, Abstentions 0).

The motion was then agreed to (DT).
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (Stage 2 Report)

The Presiding Officer (Tricia Marwick): The next item of business is a debate on motion S4M-01170, in the name of Christine Grahame, on the Justice Committee’s report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at stage 2.

I call Christine Grahame to speak to and move the motion on behalf of the Justice Committee. Ms Grahame, you have a tight 14 minutes.

14:41

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): I open the debate as convener, and accordingly my contribution will be apolitical. I offer my gratitude to my deputy convener, who for perfectly valid reasons wishes to be freed from those apolitical shackles, thus consigning me to summing up. That is worse for members, as they will have to listen to me for a tight 14 minutes and possibly another 10. I got my revenge and my sympathies in first.

On behalf of the Justice Committee, I thank the Minister for Community Safety and Legal Affairs and the Lord Advocate for their responses to our report, and the Lord Advocate for providing the committee with his draft guidelines, which I think the committee and the wider public found—and will find—helpful.

It is unusual to find ourselves debating a committee report on a bill when stage 1 is long over. However, it is appropriate that we have been given chamber time, because the bill has aroused a lot of interest in the wider world, and the issues that the committee uncovered deserve a wider airing. Further to that, the debate underlines the significant role of committees in holding the Government to account.

The bill was introduced in June. It is a response to the events of the previous football season both on and off the pitch. There were a number of incidents, ranging from the small to the sinister. The latter included the sending of suspect packages to particular individuals, apparently for no reason other than their faith background or footballing allegiance.

We might disagree on the best approach in legal and policy terms to deal with the problem, but we all agree that that type of behaviour is utterly unacceptable and needs to be tackled.

The events of the previous season have tended to be labelled as part of Scotland’s sectarian
problem. It may be news to some, but the word sectarian is not to be found in the bill. Each of us probably thinks that we know what it means, but it emerged in the evidence that there is no one clear definition. As the evidence from Nil By Mouth put it, sectarian is a word that “transcends its dictionary meaning” in Scotland.

Nevertheless, it is clear that the bill’s intention is to tackle sectarianism along with other types of unacceptable behaviour. The committee unanimously accepts that there is a continuing sectarian problem in Scotland, and that it is not found only at football matches. We agree with the Scottish Government that no one piece of legislation will solve the problem.

I turn now to procedure and evidence. Members will recall that the Government’s original plan was to deal with the bill by the summer recess through the emergency procedure, to have it ready in time for the new football season. As members know, as convener I expressed my disagreement with that, as did others. However, in the very limited time that the Justice Committee had in June, we undertook to hear evidence from the police, legal experts, representatives from football and civic society, and the Government. There was a mixture of views about the merits of the bill and about the appropriateness of the use of the accelerated procedure.

Shortly afterwards, the First Minister announced that he was minded to propose a lengthier timetable for consideration if Parliament agreed to the bill’s general principles at stage 1, which duly came to pass. It may be that the committee’s evidence sessions contributed to that change of heart—I certainly hope so.

In any event, I think that of all the new committees, we hit the ground running—and we were the better committee for it. As convener, I am glad that the committee had the opportunity for more extended consideration of the bill. There can be circumstances in which it is necessary, on balance, to expedite procedures on grounds of urgency, but in general, legislation benefits from robust, measured and careful scrutiny.

It is no secret that there are differences of opinion—to put it mildly—between committee members on the bill. However, if Parliament agrees to it we will end up with a better and stronger act because of the longer time that we have taken over it. I thank committee members for dealing with one another in committee in a civilised and collective manner, despite their differences. I am sure that that will continue and will be reflected in the tenor of the debate.

The committee heard from 33 individuals or organisations that gave evidence in person. We also received 83 formal written submissions on the bill as well as letters and e-mails from the public. I thank all those who provided evidence, particularly those who gave evidence at extremely short notice in June. Four committee members—myself included—attended an old firm match at Ibrox in September. That was extremely instructive, especially for those of us—I am one—who had not hitherto rated ourselves as aficionados of the beautiful game. We did not simply attend the match, which we hardly watched; we spent time with the police, stewards and supporters before and after the game to get a rounded picture of the reality of an old firm encounter and the preparations involved in it. I express my thanks to all who facilitated our visit.

I turn to the content of the bill, which is a bill of two halves—there end the footballing allusions—that creates two new and distinct offences. That fact, too, is often overlooked. One offence relates to offensive behaviour at football; the other relates to threatening communications. The more complex aspects of the bill are found in some of the details of those two new offences.

The chamber is well aware that the committee divided on the key question whether the new offences were necessary. A majority of members accept that we need a new law to address offensive behaviour at football that is not based on the “fear and alarm” formulation found in the current law. The majority likewise accept that there may be shortcomings that prevent effective prosecutions for some threatening communications. The majority also note what the Lord Advocate referred to as the “transformative effect” that legislation can sometimes have in changing attitudes towards what is and is not socially acceptable—we have the example of the ban on smoking in public places. A minority in the committee disagree, doubtful that the case for new criminal laws has been made, and think instead that the existing laws should be more rigorously applied. We will hear both sides of the argument this afternoon.

As convener, I will focus on the many areas in which the committee speaks with one voice. Much of this relates to the detail of the two offences. Whatever committee members’ overall views, I hope that we can at least agree that there is continuing potential to test the robustness of the bill at the amending stages, which is a task for all of us, including the chamber at stage 3.

The first offence—I will call it the football offence for shorthand—requires three elements to be proven: first, that there is offensive behaviour; secondly, that that behaviour occurs “in relation to a regulated football match”;
and, thirdly, that the behaviour is likely to provoke public disorder. I stress that all three elements must be present.

Margo MacDonald (Lothian) (Ind): On the question of what constitutes offensive behaviour, is it offensive for some people very occasionally to chant in the region of Easter Road "If you hate the"—expletive deleted—"Jambos, clap your hands"?

Christine Grahame: I thank Margo MacDonald for that intervention and direct her to the Lord Advocate’s guidelines, which address such details in particular. I will deal with the issue later in my speech if I have time; if not, I will address it in my summing up.

The committee had some queries about the drafting. There is more on that in our report and I will use what time I have to focus on just two points. The first of those is the meaning of "offensive behaviour". The definition that is used in the bill is wide. It is not restricted simply to behaviour with a sectarian element—something that, as I have said, has been missed in the hubris surrounding the bill so far—as it includes expressions of racist or homophobic hatred, for instance. Committee members generally accept that approach. One area in which we had concerns relates to the definition of offensive behaviour as including

"other behaviour that a reasonable person would be likely to consider offensive."

The catch-all nature of that provision concerned some witnesses, including the Law Society of Scotland and the Scottish Human Rights Commission. The Scottish Government has made the point that the reference to a "reasonable person", which has a definitional track record in existing case law, ought to prevent the provision from being misapplied. Nonetheless, I expect some further discussion of the issue at stage 2.

The second of the three elements—that the behaviour must be

"in relation to a regulated football match"—relates, broadly speaking, to a match involving the national team, a match involving teams in the Scottish Premier League or the Scottish Football League, or to cup matches involving those teams.

I point out that the bill gives a wider meaning than we might expect. For example, offensive behaviour in and around a football match may also be caught, but so is offensive behaviour when people are travelling to a match, including breaks—even overnight breaks—on the way there. People do not have to make it to the match, or to have intended to get there, to be caught by the bill.

Hugh Henry (Renfrewshire South) (Lab): Will the member give way?

Christine Grahame: Can I make some progress? I think that what Mr Henry wants to ask me about is dealt with in the Lord Advocate’s guidelines, which give examples of how one might evidence the offence.

Hugh Henry: No, it is not.

Christine Grahame: Does Mr Henry still wish to intervene?

Hugh Henry: Christine Grahame talked about regulated football matches. Will she confirm that, under the bill, it would be an offence to sing certain songs in a pub on the day of a regulated football match, but it would not be an offence to sing those songs one week later when no football match was on?

Christine Grahame: I was wise to ask Mr Henry to look at the Lord Advocate’s guidelines because they deal with that point. I will discuss televised matches and matches shown in public houses. Behaviour in the vicinity of a televised match—unless the TV is in the person’s home—is also caught within the definition. If I have time and nobody else addresses it, I will give examples in my closing speech. If Mr Henry has read the Lord Advocate’s guidelines, he will know that they addresses his concern on that.

The committee fully accepts the evidence that some of the worst behaviour from a very small number of people occurs when they are on the way to a match, often little concerned about whether they get there. We also recognise that there can be a problem with fans’ behaviour while they watch a match in a pub. Nonetheless, we found the wording to be wide ranging and found ourselves discussing some hypothetical examples and whether the bill would cover them. I do not have time to cover those, so I ask members to have a good look at the Lord Advocate’s guidelines. I know that they are in draft and that there are concerns with them—the committee would like some of their content to be in the bill, where appropriate—but examining them would assist members.

I will address the second offence—threatening communications—which I do not want to miss out, as many have done. It has been mostly overlooked by the media in particular and, thus, the public. I am tempted to refer to it as “the internet offence”, as that is how it has largely been seen. However, it is important to stress that “communication” means practically all forms of communication, with the important exception of direct speech.
There are two circumstances in which the crime can be committed. One—condition A—is where a communication is made that “contains or implies a threat ... to carry out a seriously violent act” of a sort that would cause a reasonable person fear or alarm. That is a high test. The other circumstance—condition B—is where the person makes a threatening communication with the intent of stirring up religious hatred.

Members should note that football has nothing to do with that offence. The Lord Advocate’s guidelines give examples that show how freedom of speech still exists. The Government is considering introducing a freedom of speech section into the bill.

Monitoring what happens online, identifying the culprit, assembling the evidence and enforcing the law would be a challenge. That is potentially a Herculean task, particularly when one takes into account the bill’s extra-territorial aspects. For that reason among others, I welcome the Government’s acceptance of the committee’s recommendation that the bill should contain a review provision to enable its effectiveness to be evaluated in the future.

Football is Scotland’s national game, with many thousands of passionate followers. Songs, chants and banners are part of the theatre of football. Fans are integral to that excitement and drama. I and banners are part of the theatre of football. Thousands of passionate followers. Songs, chants evaluated in the future.

I move,

That the Parliament notes the Justice Committee’s 1st Report, 2011 (Session 4): Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2 (SP Paper 21).

The Deputy Presiding Officer (John Scott): I thank Christine Grahame for completing her speech within her time.

14:55

James Kelly (Rutherglen) (Lab): I welcome the opportunity to speak in the debate. I point out that previous versions of the Business Bulletin had errors and that the amendment in my name is supported by David McLetchie for the Scottish Conservatives, Alison McInnes for the Liberal Democrats, Patrick Harvie for the Greens, and Margo MacDonald.

Scottish Labour condemns sectarianism without fear or favour, as I am sure every member of the Parliament does. I regret that some comments against those of us who have criticised the bill have characterised us as not supporting attempts to wipe sectarianism from Scottish society, which is not the case. We have reached a genuine position. We have difficulties with the bill, which we will present genuinely this afternoon. We should not be undermined for our motives. I am happy to take criticism for what I say, but not for my motives.

I will concentrate on three aspects: the process that the Government has followed; the problems that have arisen from the bill; and the way forward in tackling sectarianism.

We all know that the issue began as a result of the cup replay match back in March, which was followed by a furore in the media and the establishment of the joint action group. Other regrettable incidents that took place in March, which involved parcel bombs and internet postings, were roundly condemned by everyone in the Parliament.

In the election’s aftermath, the Government got itself into a place where it felt that something had to be done. When Governments adopt the approach that they need to do something, they sometimes rush in, get their action wrong or mixed up and do not take people with them. That has happened on this occasion.

Back in June, we were told in private briefings that we needed the bill quickly because the clubs wanted it in time for the start of the football season. However, when the clubs appeared before the Justice Committee, Rangers Football
Club said that the first that it knew of the bill was from reading about it in the papers.

The Minister for Commonwealth Games and Sport (Shona Robison): Mr Kelly has forgotten an important part of the process. It was the police who asked for the bill. Strathclyde Police’s chief constable demanded that something be done. I apologise if Mr Kelly was going to mention that, but that is an important part of why action was taken. The police asked for something to be done and for legislation to be introduced.

James Kelly: I draw Ms Robison’s attention to Mr House’s comment last week that the emphasis in his comments to the First Minister was on dealing with violence that happens around old firm games. As we all know, in many cases, violence occurs hours away from the match and many miles from the stadium. The fact remains that the Government misled Opposition party spokesmen by briefing us—

Members: No.

James Kelly: It did—that is the case. The Government told us that the clubs wanted the legislation, but it is on the record that the clubs told the Justice Committee that the first that they knew about the bill was when it was published.

When the Minister for Community Safety and Legal Affairs came to the Justice Committee in June, she was perhaps badly prepared. To be kind to her, that was in the rush to introduce legislation, but her comments at that meeting caused fear by appearing to suggest that making the sign of the cross or singing the national anthem might be appearing to suggest that making the sign of the cross or singing the national anthem might be caught under the bill.

John Finnie (Highlands and Islands) (SNP): Will the member take an intervention?

James Kelly: No. Let me develop my point.

The minister’s comments caused consternation in the country. I see that she is shaking her head, but that undermined the bill’s credibility and was one of the main reasons why the timetable had to be extended.

Derek Mackay (Renfrewshire North and West) (SNP): Will the member give way?

James Kelly: No, I will not.

I have a lot of respect for the Lord Advocate, but he allowed himself to be drawn too far into the political process. He fronted the bill in the Daily Record and The Times. The second time that he came to the Justice Committee to discuss the bill, in essence he did so to look after the minister and to ensure that she did not get into further difficulty. At that point, the process was undermined.

We were told that we needed the bill because of gaps in existing legislation. However, during the summer, there have been convictions for sectarian singing, including on trains, and for inappropriate Facebook postings. That begs the question why the bill is needed when the current legislation is being used effectively.

Mark McDonald (North East Scotland) (SNP): Will the member take an intervention?

James Kelly: No, I will not.

Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which has only just come into force, deals with some of the gaps in breach of the peace law. Surely we should have taken time to reflect on the effect of that provision.

There are clear problems of clarity in the bill. Margo MacDonald gave an example of that. Christine Grahame put great faith in the Lord Advocate’s guidelines, but the bottom line is that they do not answer Margo MacDonald’s query. When I put questions about specific situations to the minister and the Lord Advocate in the committee, the answer was that it will be down to the police to decide. That is unfair. It is passing the buck and is not the correct way forward.

Roderick Campbell (North East Fife) (SNP) rose—

Kevin Stewart (Aberdeen Central) (SNP): Will the member give way?

James Kelly: No, I will not give way.

There are clear issues with the bill. The Scottish Human Rights Commission pointed to the legal principle of certainty. We could create a situation in which people could be charged but might not have known at the time whether they were committing an offence. When the minister was at the committee, she could not be specific about what would be an offence under the bill, so how can we expect the public, police and prosecutors to understand that?

The Scottish National Party Government has concentrated too much on football. The committee heard evidence that only 14 per cent of offences with religious aggravation occur in and around football stadiums. Sectarianism is much more complex, so it is wrong to focus simply on football. We need a more comprehensive approach. Johann Lamont and I have held several meetings with churches, supporters groups and Nil by Mouth to explore a more constructive approach.

Joe FitzPatrick (Dundee City West) (SNP): Will the member take an intervention?

James Kelly: I am sorry, but I am short of time.

I agree with Christine Grahame’s point about the football authorities. The SFA, the SPL and the clubs could do more. There is no doubt that, if points could be deducted from clubs, supporters
would be less likely to sing “The Billy Boys” or “The Boys of the Old Brigade”. That would focus attention.

More needs to be done on education. I was interested to note in an answer to a parliamentary question that it is only within the past month that the minister had discussions with the education secretary about how to take the issue forward in the education field.

The bill is not fit for purpose, and I appeal to the Government and the minister to withdraw it, to think again and to build a consensus in Parliament and the country so that we can move forward as one to tackle the blight of sectarianism.

I move, as an amendment to motion S4M-01170, to insert at end:

“; further notes the number of verbal and written submissions that raised concerns about the bill; believes that the Scottish Government has failed to make the case for the requirement for new offences contained in the bill, that it lacks clarity, would lead to confusion, be difficult to enforce if implemented and cannot be supported, and believes that a more proportionate response to dealing with the problems in relation to Scottish football would be to give greater consideration to the use of existing laws, to work with football authorities and promote positive interventions in communities and the education system.”

15:05

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I welcome the Justice Committee’s contribution in assisting with the scrutiny of the bill. It has prepared a constructive report that was informed by the evidence, particularly the 83 pieces of written evidence that provide a detailed and expert backdrop to the debate. We might not have understood it from Mr Kelly’s comments, but the majority of those submissions supported the bill.

On Tuesday, the Scottish Government published its formal response, as did the Lord Advocate, who also laid a copy of his revised draft guidelines in the Scottish Parliament information centre. I thank the committee convener for her opening remarks.

I read my stars today—they were quite interesting. They tell me that I should pop down to the basement where they are running a special offer on patience. Apparently it is easy to get, within my means, and just what I need. I cannot think of a more prophetic set of stars for the debate this afternoon, because patience is what I need.

It is worth reminding ourselves that the bill gained majority support at stage 1 in June. Parliament agreed the principles of the bill, which means that it accepted that a problem is infecting Scottish football and wider society, and must be tackled. The task for us now is not to question whether action is necessary but to set out what we need to do and how we need to do it to deliver on the commitment that was made to Scotland in June. As evidenced by the survey that was done during the summer, the Scottish people have set the challenge of delivering once and for all a solution to a problem that the overwhelming majority of people are sick to the back teeth of. In company with the First Minister, I am prepared to accept that challenge and I hope that the Parliament is too.

Margo MacDonald: Will the minster give way?

Roseanna Cunningham: I will let the member in if she will allow me to get a bit further into my speech.

I still hope that we can find common purpose. It is premature for members to come out against the bill before a single amendment is lodged. Despite the column inches that have been dedicated to the bill, it is easy to forget that the process is still in its beginning that it is to its end. With stages 2 and 3 still to come, there is much to play for, and there is scope for the Parliament to help to shape the bill so that it contributes to making a Scotland that we all want. I actively welcome any and all constructive suggestions.

Margo MacDonald: I hope that the minister will accept this as being constructive. Scottish football does not have a problem. Two of the clubs that play in the premier league have a problem with some of their supporters. It is not Scottish football. Tell Auchinleck Talbot Football Club that it has a problem.

Roseanna Cunningham: With respect, the problem does go beyond the two clubs. The difficulty is that those two clubs—along with a third and possibly a fourth and one or two others that sometimes get caught up in the issue—dominate the majority of the publicity around the debate and Scottish football. It is therefore, almost by definition, a problem for Scottish football. The involvement of the Union of European Football Associations also showed us that it will be a continuing problem if we do not address it.

Johann Lamont (Glasgow Pollok) (Lab): Will the minister give way?

Roseanna Cunningham: I will let the member in but not yet.

The first issue is necessity. I welcome the unanimous recognition by the Justice Committee that there is a serious issue affecting Scottish football that has gone unchallenged for too long, and that action is needed—and 91 per cent of Scots agree. That is reflected in the majority support for the bill at stage 1, and in the
preponderance of the evidence that was submitted to the committee.

That agreement on the challenge that we face as a nation in relation to the sectarianism and hate infecting our national game remains the basis of a possible consensus. The imperative now is how to make it work.

**Johann Lamont:** The minister talked earlier about the importance of common purpose. It would help the debate if she would at least acknowledge that those who are expressing concerns about the bill in the chamber or elsewhere are not doing so because they do not want to address sectarianism. Impugning the motives of those who do not agree with her solution does not take us one step forward. I urge the minister, in the interest of consensus, to recognise that those who do not agree with her solution are not people who do not want to address the problem.

**Roseanna Cunningham:** Sadly, a great deal of James Kelly’s speech undermined the very points that Johann Lamont is trying to make.

This is not easy work. If it were, successive Governments and Parliament would have tackled it successfully by now. However, just because it is not easy does not mean that it is not necessary. That work involves challenging the pessimism that pretends that this is just how football is, how it always has been and how it always will be. We must reject the politics of despair and the politics of ayen been and offer Scotland the politics of hope.

I know that I will run out of time. I understand that I have only nine minutes.

**The Deputy Presiding Officer:** You have 10.

**Roseanna Cunningham:** Thank you. I want to run very quickly through some of the more key issues—I dare say that other things will come up in the debate.

The idea that there is no problem was mooted during the course of the committee’s evidence taking. I regret that there are people who think that this is not a problem, because it is a problem—that is important. We know that it is a problem. Sheriffs comment on it—even the clubs comment on it. Despite James Kelly’s characterisation of the situation, we have Rangers on the record in June saying that it supported and was encouraged by the Government bill that had been introduced. Only a couple of weeks ago, Peter Lawwell of Celtic made the very points that we are making about some of the chanting that goes on even on the club’s own side; he said that he was inundated by complaints from Celtic fans about what was happening. So, we are talking here over the heads of a very small minority of people who do not want their behaviour challenged to the vast majority of football fans, who are just as fed up with all the behaviour that takes place as are the vast majority of the people of Scotland.

**Neil Findlay (Lothian) (Lab):** Will the minister take an intervention?

**Roseanna Cunningham:** No. I really need to get on.

Of course it is not just at football matches that we have to deal with this problem. There is a problem on the internet, which is being dealt with, too, because the poison is not just the words; there are real consequences for those who are threatened and intimidated.

I turn to the argument that the existing law is adequate. James Kelly talked about section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. I do not have time to go into detail, but I will give him five very good reasons why section 38 is not sufficient: it does not cover extra-territorial acts, which this legislation does; it does not include a public order test, which this legislation does; it does not include any reference to incitement to religious hatred, which this legislation does; it does not do the naming and shaming that this legislation does; and it does not provide the democratic leadership that this legislation does. So, I am afraid that the existing law is not adequate, which is a failure of us all in the past to get it right for the future. Some people may say that no law is ever going to be perfect. That may very well be true, but it does not mean that we stop trying.

There are a great many other issues to cover. James Kelly prayed in aid the Scottish Human Rights Commission to support the position that he was taking on the back of what it had to say. We are in constant dialogue with the commission and one would not have known from what James Kelly said that it actually endorses the aims of the bill. It has one specific concern about one specific subsection. James Kelly may put that look on his face, but I was talking to Allan Miller only this morning, so I can tell him that that is the SHRC’s position. It is important to put that on the record, because the SHRC is the body that this Parliament set up to comment on precisely such issues. We are in constructive dialogue with the SHRC about the single issue about which it has some concerns. It is important that that constructive dialogue take place. I am just sorry that there has not been more constructive dialogue in some other directions.

There are many things that I am probably missing out. We talk about clarity, which is improved by the bill. It will make a difference. The police have indicated that the situation is clearer now. They feel that the legislation is more reliable
and gives them a better tool to use when they are confronting the behaviour of the fans who are causing the biggest difficulty.

I have to say that, on the basis of all the information that we have and given the support of the Crown Office, the Lord Advocate, the police and the SHRC and the on-the-record comments by the key football clubs, the Opposition parties are left in the interesting and curious position of being the parties that like to say no, whatever the question is.

We agree that there is an issue. We should agree with the Lord Advocate and the police that the current response is inadequate. As a Parliament, we should focus on creating the best and most effective measures that we can to give our hard-pressed police and prosecutors the tools that they have asked for so that they can help to remove the hate and threats that damage communities.

I welcome the chance to participate in this debate. I will seek to respond to whatever comments members make, but my hope is that the debate can take us closer to the Scotland that we want. I remind all members that the bill is in a process that is still open and that they still have an opportunity to be constructive about what they want.

To James Kelly, I say that I listened patiently to him for 10 minutes but I did not hear one constructive comment about what he would do as opposed to what he does not want to do.

15:16

David McLetchie (Lothian) (Con): I am leading for the Conservatives in this debate in place of my colleague, John Lamont, who is on his way to New York to participate in Sunday’s marathon in aid of his local branch of the National Osteoporosis Society. Sponsorship of his run is still available.

In my substitute capacity, I welcome the debate, which is in some respects a continuation of the one that was held on 23 June and that which ended in such dramatic fashion with the First Minister bowing to the weight of public and parliamentary opinion and pulling the plug on what was a ham-fisted attempt to rush the bill through Parliament. It was hoped that the additional time for consideration that was thereby given to the Government, the Justice Committee and other interested bodies would result in an improved bill that would enjoy widespread support. However, as James Kelly’s amendment points out, that is far from being the case. The minister was somewhat unkind to Mr Kelly because, as I read the amendment, it seems to be absolutely full of constructive comments and suggestions. Perhaps the minister should study it a little more carefully.

In fairness to the Lord Advocate, I am pleased to note from the guidelines that he has published, which have already been referred to, that songs or lyrics that are sung

“in support of terrorist organisations”
or which glorify or celebrate

“events involving the loss of life or serious injury”

would be within the scope of the proposed new offences, as he would seek to apply them. That relates to a point that I made in the previous debate on this matter, which is that sectarianism, in the wider sense of the word and in the context of Scottish society,

“embraces attitudes and positions that are born out of the history of Ireland”—[Official Report, 23 June 2011; c 1001.]

and cannot simply be viewed in the context of religious hatred.

Christine Grahame: Will the member give way?

David McLetchie: I will do so in a minute.

The very fact that, in his guidelines, the Lord Advocate has tried to present a more balanced approach to sectarianism should lead him and the Government to conclude that the aggravation provision that was enacted by Parliament in the Criminal Justice (Scotland) Act 2003, which concentrates exclusively on the religious aspect of sectarianism, is hopelessly lopsided and should be repealed.

The normal way of tackling an issue is to define the problem and then come up with an answer. However, the Scottish Government has actually run away from defining the problem, and it is not alone in having done so. The bill—part 1, at least—is meant to focus on football-related behaviour and public disorder that is grounded in sectarian activities and hatred. However, we cannot even agree on what constitutes sectarianism. Some people maintain that it is exclusively founded on religious hatred and contempt, in particular for the Roman Catholic religion, and deny that there is such a thing as political sectarianism that is founded on the expression of support for republican and terrorist organisations. I do not agree with that in the context of Scottish society, but it is a pretty fundamental point.

However, instead of trying to address it, we dance around the issue and, in the bill, try to cover such behaviour in a wide ranging, much criticised and highly contentious catch-all provision to which the Scottish Human Rights Commission objects and which, if it were removed, would unbalance the whole bill in terms of the Lord Advocate’s guidelines.
Who would have thought, in the heady days of May, that we would see a banner displayed at a football match that read, “SNP Weak on Criminals - Tough on Fans”.

How they must have winced at SNP mission control when they saw that one. I wonder whether its display would constitute grounds for arrest under the proposals in the bill.

In the context of the 2003 act, I note from the Lord Advocate’s guidelines that the statutory aggravation should not apply to an offence that is prosecuted under the provisions of this bill, should it be enacted. That is a sensible position, but it does not detract from the fact that the aggravation itself remains a lopsided and unbalanced measure.

Christine Grahame: Will the member take my intervention?

David McLetchie: I am sorry. I beg Christine Grahame’s pardon.

Christine Grahame: I wanted to come in when David McLetchie quoted the Lord Advocate’s draft guidelines by referring to “Songs/lyrics in support of terrorist organisations ... Songs/lyrics which glorifies or celebrates events involving the loss of life or serious injury”.

What he did not go on to say was that “It should be noted that in order for a criminal offence to be committed under this offence, in addition to proof that the song/lyrics are threatening or offensive, it must be proved that the conduct was likely to incite public disorder.”

David McLetchie: That is certainly an important caveat; it is like the “fear and alarm” caveat under breach of the peace law. Both must have an element that is likely to cause concern to the wider public.

The Law Society of Scotland has produced, for our benefit, a detailed critique of the bill. It says that the proposals will not add to existing law but will merely confuse the situation. The Church of Scotland makes the very good point that bad legislation is worse than no legislation at all. As we all know, the measure reeks, to be frank, of being yet another manifestation of the “Something must be done” syndrome. It is the desire to preach sermons from a political pulpit, which may all be very worthy and noble, but in a practical sense add nothing of value to the main body of our law and make its implementation and enforcement all the more problematic.

We should also be wary of legislation that, in the broadest sense, impinges upon our liberty to associate, speak freely and voice opinions—even when they may be robustly or sometimes even coarsely expressed, and even if the thin-skinned may be offended or—as is more likely in the context of football—may claim to be offended.

The incorporation in the bill of a section that would protect free speech—as the First Minister has indicated will be done—will not make matters better. It will make matters worse because it will add to the confusing morass that the police, prosecutors and the courts will have to wade through before they can decide whether the conduct that has been complained of amounts to an offence.

I think that my time has expired, although I would like to say more.

The Deputy Presiding Officer: It has expired.

David McLetchie: Thank you for your patience and forbearance, Presiding Officer. We look forward to seeing what will happen at stage 2.

15:23

John Finnie (Highlands and Islands) (SNP): I thank Christine Grahame for her balanced resumé of the Justice Committee’s report. There has been some mention—but not a great deal—of the background to the bill. I will list a few reasons.

There has been threatening mail, parcel bombs, hateful online messages, and a football manager was attacked at a game, which was screened around the world—someone was attacked at their place of work. That is on top of the usual mayhem for residents and embarrassment to the overwhelming majority of decent football supporters. Our postal workers, police and prosecutors have to deal with that.

The public expected the Government to act—as James Kelly said, there was a furore in the media—and it did act. Clearly, it acted too swiftly for some and the balanced approach that has been taken by the First Minister in extending the period of consideration of the bill was welcomed and played a great part in having the general principles of the bill adopted by 103 votes to five, which is something that seems to have been forgotten at later stages of the discussion.

This is a very specific bill, which deals with—

James Kelly: What has the Government done since it paused in June to try to win over the support of other parties?

John Finnie: I think that that is evident. James Kelly sat through the committee with me and he knows what has been going on, although he seems to have forgotten a lot of it.

The bill deals with offensive behaviour at football matches; it does not seek to cure social problems. Those matters will be dealt with in other ways, and education will be the key. The bill also deals with threatening communications. We have
heard a number of members talk about public support for action—not least about the 91 per cent who, as recently as 4 September, strongly backed action to tackle sectarianism.

There has been detailed scrutiny of the bill. The minister appeared twice before the committee and answered comprehensive and detailed questions. Similarly, on the Lord Advocate’s guidance, I suppose that socially people often ask, “What if this happened?” and “What if that happened?” We should therefore be grateful for the draft guidance, which clarifies many of the issues.

Neil Findlay: John Finnie has mentioned the guidance. The Justice Committee convener and the minister referred to it, too. How will it be relayed to fans? Surely we will not stand at Parkhead and Ibrox handing out to football fans guidance from the Lord Advocate? How will we articulate to fans what is and what is not an offence?

John Finnie: That is for other people to decide in the communication strategy that will flow from the bill’s being passed—as I hope it will be. There will have to be a public education process. Guidance goes to the football clubs and, as Neil Findlay knows, the supporters are engaged with the football clubs.

The Lord Advocate, as the senior law officer, is someone to whom we should be turning for advice: we should also turn to the practitioners. We heard from the Scottish Police Federation representing the front-line officers who represent 98 per cent of all Scottish police officers; the Association of Scottish Police Superintendents, representing the people who largely make up the match commanders; and the Association of Chief Police Officers in Scotland, which provides the strategy. We also heard very compelling evidence from the British Transport Police, who relayed the effects of the travel chaos that is visited on the general travelling public by football supporters—of whom I am one. That compelling evidence removed any ambiguity about some of the effects of the legislation on travellers.

There has been some dispute about issues outwith the immediate curtilage of the football grounds, but the references are similar to those that are contained in the football banning orders, with which there have been no issues. I ask those who are unwilling to support the bill whether they are opposed to doing something about this problem. We hear that they are not, but are they opposed to helping the people who are tasked with the work—namely, the police officers? We hope that they are not. Police officers do a very demanding job, which includes defending decent football fans, our communities and the travelling public.

An awful lot could be said about the evolving nature of breach of the peace—the catch-all offence. The legislation is clear and the minister covered the additional aspects of it. We are not inventing anything through the reasonable person test. Police officers are called on day in and day out to exercise judgment about situations in which they find themselves.

Margo MacDonald: I seek more information. Did any of the police evidence suggest that the police think that the measures would make it easier for them to police such events? If so, would they require more officers on the ground or could they do it with the same number or fewer?

The Deputy Presiding Officer: You are in your final minute. Please finish your speech within the six minutes.

John Finnie: Police deal with additional legislation all the time and are confident that they can deal with this bill.

To sum up, I will refer to the three questions that I mentioned the last time we discussed the bill. Is it necessary? Clearly, it is. Is it legitimate? It most certainly is, and the human rights aspects were clearly laid out by the minister. Is it proportionate? I attend football matches and I have nothing to fear from the bill. There have already been welcome improvements in supporters’ behaviour. I hope that that will continue and that the provisions will not need to be used. The bill will bring added value. I hope that members will support it.

The Deputy Presiding Officer: We are now very tight for time, so I would be grateful if members could stick to a tight six-minute limit.

Michael McMahon (Uddingston and Bellshill) (Lab): It is not so long ago that Fergus Ewing, as Minister for Community Safety, told the Parliament that the SNP Government did not believe that “a further strategy specifically on tackling sectarianism”—[Official Report, Written Answers, 5 February 2008; S3W-8846] was needed, yet here we are, two years later, debating the most illiberal bill that has ever been put before the Parliament—supposedly to address a problem that not so long ago the Government was complacently dismissing.

I am on record for criticising the then First Minister, Jack McConnell, and his Scottish Executive because their anti-sectarianism strategy was, although important and well intentioned, fundamentally flawed due to there being at its heart an implicit lack of appreciation of the impact of racism and sectarianism on the Irish community in this country in particular. The issue is not about there being two sides of the same coin. Each side
has its own problems, which have their genesis in different sources, and they manifest themselves differently on each side. Unfortunately, that is clearly not apparent to the Scottish Government, whose anti-racism and anti-sectarian strategies still tend to ignore the distinct experience of the large multigenerational Irish minority in this country.

The bill fits into that guileless and simplistic continuum, and comments on the subject—from the First Minister down—clearly expose the fact that the Government has little understanding of the problem. Instead of seeing issues around football as being visible symptoms of religious intolerance, the bill seeks to identify football as the cause of religious division. Records show that in the 1790s only 39 Catholics lived in the city of Glasgow, but there were 43 anti-Catholic societies in existence, which had a total membership of more than 10,000, so although football undoubtedly provides the arena in which some overt sectarian conflict in Scotland is exhibited, in bringing forward the bill, the Scottish Government appears to be genuinely ignorant of the true nature of religious intolerance in this country, or else it is deliberately trying to use football to create a political smokescreen. Either way, the bill will not work, and it is much more likely to exacerbate the problem and heighten the antagonism that already exists between football fans than it is to offer any effective solution to it.

Derek Mackay: The member seems to be developing an argument that some parts of Scottish society are not protected. If he thinks that the law is not yet good enough, what changes to the bill does he propose that would make an impact on sectarianism in this country?

Michael McMahon: I would not make legislative change. I will come on to the changes that I would make.

I am proud to be a Celtic supporter, and I am proud of the fact that my team was founded to combine professional football with charity for the local Irish community in Glasgow at that time. At its inception, Celtic Football Club was supported by Michael Davitt, the great Irish nationalist—indeed, Fenian—leader of the Irish Land League. Many of the songs that are sung by Celtic supporters today refer to the tradition from which Davitt came. Equally, many people of Scottish, Ulster Scots and/or British Protestant backgrounds see their songs as being expressions of their religious, political and cultural inheritance, which is as much of a source of pride and distinction to them as the Irish nationalist disposition is to many from the Irish community in this country.

When the First Minister claims that he wants to stop people reliving 1690 and 1916 on our streets, I ask him to reflect on that glib sentiment and to ask himself how prepared he would be to consign William Wallace and 1297 or Robert the Bruce and 1314 to the dustbin of history, and to set the celebration of his culture and heritage aside just because it may give offence to someone.

This is one issue where a one-size saltire does not fit all. Many observers believe that the bill will be no more than a victims charter that invites fans to take offence. We know from our mailbags that football fans are already spying on rival fans and reporting offences, so although the Government claims that the bill is a means by which religious intolerance will be tackled, it is actually the Government that is showing intolerance. It is somewhat ironic that it is the vilified football fans who have best articulated the case against this draconian and illiberal proposed legislation.

Demonising and criminalising fans of any club for their beliefs shows astonishing intolerance by the Government of behaviour that does not conform to its narrow view of Scottish society. The bill is not the solution. Education, the promotion of understanding and the development of mutual respect between the diverse traditions in Scotland is the route that we should pursue. I do not want my religion and culture to be tolerated; I want it to be celebrated.

Sectarianism is a strand that runs through our national tartan; it will take a skilled and thoughtful hand to unpick that thread. The bill is not a scalpel to be utilised in that task but a blunt set of shears that will rip through the fabric of Scottish society and leave it tattered and torn.

Parliament is, rightly, unanimous in its opposition to sectarianism but it is not united on the desirability or potential efficacy of the bill in dealing with the historical societal scars that have been left by centuries of religious division and hatred.

I urge the Government to think again about the bill. In the words that are sung loudly and proudly at Celtic Park, “Let the people sing.”

15:36

Colin Keir (Edinburgh Western) (SNP): It has been fascinating to be a part of the debate from within the Justice Committee. Listening and reading differing views has shown just how passionate people are about the subject.

Ninety-one per cent of the public agree that stronger action needs to be taken to tackle sectarianism and offensive behaviour associated with football in Scotland.

Johann Lamont: Will the member take an intervention?

Colin Keir: Not at the moment.
I am heartened that so many people within the game of football support the Government’s drive to stamp out the offensive behaviour that has blighted our national game for so long.

During evidence sessions in the Justice Committee, I found it odd that some representatives of football supporters trusts believe that there is no problem. One said:

“Nothing that happened last season—or, indeed, in any recent times—justifies separate legislation that is aimed solely at football supporters.”

At the same meeting, another said that

“the debate on the bill has been conducted in an air of slight unreality.”—[Official Report, Justice Committee, 6 September 2011; c 157.]

Given the actions taken against some of the senior management of Celtic Football Club and a former member of the Scottish Parliament, as well as recent comments by club officials, I find those statements strange to say the least.

Johann Lamont: The member said that 91 per cent of the public support action on sectarianism. Does he agree that 100 per cent of people in the chamber want to address the problem of sectarianism, particularly those of us who are close friends of Trish Godman, who had to deal with the problem that he mentioned? Will he accept that, in order to progress, we should start with the basic principle that everybody here wants to tackle the problem but some are not convinced that the bill is the way to do it?

Colin Keir: I would like some alternatives to be put forward before I can accept that.

Graham Spiers, a journalist from The Times, said in evidence to the committee:

“There has been some denial and supporters groups have had to be dragged to the table kicking and screaming to get certain songs banned.”—[Official Report, Justice Committee, 6 September 2011; c 181.]

The issue of self-regulation, and who is ultimately responsible for the behaviour of supporters, is brought up. All football clubs have been involved in various initiatives over the years, and they should be commended for that.

There are problems, however. UEFA has disciplined Rangers Football Club on more than one occasion because of the actions of its supporters. Why, then, has the SFA not used its powers as a national association to do more and to discipline Scottish clubs for similar offences? After all, offensive behaviour at football matches has been around for decades. In his evidence, Graeme Spiers condemned the football authorities:

“The Scottish football authorities have been cowardly about this issue. They have been scared to act. Nothing would make supporters stop being bigoted in the arena more than the thought that their clubs might be docked points.”—[Official Report, Justice Committee, 6 September 2011; c 196.]

The reason, of course, is that the SFA does not have the power to do that. It gave the power of discipline away to the Scottish Premier League, which is a private group of businesses that will never hand out severe discipline because it would only hurt them.

I am heartened by comments from officials of the SFA and SPL that they are fully signed up to the eradication of the offensive behaviour that is seen around football and that they support the new legislation. Perhaps a new dawn awaits. However, I hope that the issue of who really runs our national game is discussed at a future meeting of the football joint action group.

Some witnesses were concerned about free speech and the effects of the European convention on human rights. I agree that those issues are vital in any discussion, and they will be addressed as the bill progresses. However, passion for our national game has been replaced by the offensive actions of a minority of supporters that should not be tolerated.

There is no doubt in my mind that the views of the Lord Advocate and the police are correct. There is pressure on breach of the peace law, and obtaining convictions is becoming more difficult. As the minister said, the bill would give the police the power to prosecute fans who have shamed Scotland abroad, which they are currently unable to do.

At present, there is no incitement to religious hatred offence in Scotland. The bill will change that, and we will be able to name and shame the perpetrators who shame our national sport and country. It should be remembered that the actions that are taken must be in the context of the situations that police officers face. The police and law officers believe that that can be done, and I agree with them.

Every political party that is represented in the Parliament has said that it is committed to ending the scourge of offensive behaviour at football matches. Indeed, much of the discussion in the Justice Committee has shown that there is a huge amount of agreement on many issues. It is therefore disappointing that Labour lodged the amendment.

The bill is the first step in an on-going process that will bring an end to the shame that we should have addressed many years ago. I urge those who oppose it to ask themselves what their alternative is. It is clear that their view is a minority one not only in the chamber but throughout the country.
What precisely is the point of the bill? The first announcements said that it was about sectarianism—bold and stark—and that the proposal was alleged to be supported by a chief constable, the old firm clubs and others. However, at committee we heard from club representatives that the first they knew of the proposals was from the newspapers. In addition, we now see Stephen House distancing himself somewhat, because he reported to his police authority last month that his original intentions in seeking a meeting with ministers were around the violence associated with old firm matches. In fairness, he added that his force was supportive of Government attempts to deal with bigotry and hate crimes, although any new legislation would still leave his officers dealing with violent attacks and domestic violence.

Margo MacDonald: I wonder whether this point could help us understand the dilemmas experienced by Chief Constable House and, I think, my friend the convener of the Justice Committee. In introducing the proposed measure, she explained that the Government had felt that the proposed law had to be introduced because of the parcels that were sent to some people. She said that that happened because of their faith or which team they support. Can I suggest that those are not one and the same but quite different and that they require different approaches?

Graeme Pearson: Of course I accept that. It is also clear that in the interim period, as we awaited the arrival of the new laws, offenders were successfully prosecuted throughout the summer for sectarian offences.

What is the way forward and what is the action plan? We should hold progress on the bill for 12 months to give the football authorities, under the auspices of the joint action group, the responsibility for bringing good conduct to their clubs; to gather statistics and analyse the scale and nature of the problem and the responses, particularly football banning orders, which have been underused up to now; and to ensure that the sports authorities deal with sectarian behaviour by withdrawing season tickets, closing turnstiles for matches or, as in Turkey last month, having only women and children spectators, or by imposing fines and, what is worst of all, the deduction of points.

Football pundits at committee described the SFA response as cowardly. That response has to change. Members will know that some clubs—led by Aberdeen Football Club—are already in the era of games being played with no police presence, which is the future.

We should ensure that the money raised from fines is given to third-sector groups such as Nil by Mouth, to support initiatives such as Glasgow City Council’s sense over sectarianism and to monitor
on-going progress and cause a report to come back to Parliament that assesses progress and options at the end of the season.

Members should know that prisoners in our prisons from across the so-called divide live and watch old firm games together without sectarian problems. Why?

The Deputy Presiding Officer: You must close, please.

Graeme Pearson: It is not because of the threat of arrest—they are already in jail—but because of the knowledge that the authorities will withdraw the privilege of seeing the match and that that will impact on other prisoners. If it works in prison, why should it—

The Deputy Presiding Officer: Thank you very much, you must close.

15:48

Alison McInnes (North East Scotland) (LD): Let me make it clear from the start that I unite with everyone else in the chamber to condemn sectarianism and to strive to bring about an end to bigotry and intolerance. There should be no place for it in our country.

The committee heard evidence that tackling sectarianism is not something that we can do in isolation from the top down. Lasting change needs to come from within our communities. Paragraph 36 of the committee report states:

"Evidence from organisations working with children and young people has underlined that both the problem and the solution start early. Attitudes towards ‘difference’ and ‘otherness’—both negative and positive—are ingrained from an early age. Parents and other early-years role models have a crucial role to play in helping nurture positive attitudes and respect for difference. So does education."

Law making should be a measured and considered process that takes our citizens with us through detailed scrutiny and evidence taking. It ought not to be driven by a desire to seize the headlines. The Scottish Parliament has built a reputation for being open and consultative. Our procedures have been widely recognised as a good way to do business—until now.

There has been widespread criticism of the something-must-be-done approach that the Scottish National Party has taken on the matter. It was wrong to try to legislate on such a complex matter with emergency legislation. That is the real root of the problem: hastily drafted legislation introduced in the first few weeks of a new Administration. I am glad that in June the First Minister was forced to back down and give ground, because it gave the Justice Committee time to have a limited consultation and evidence taking. That evidence has been reported to Parliament today, and our report exposes the extent of the dangers inherent in the bill.

I thank everyone who gave evidence to the committee and the clerks who assisted us so ably. We had many insightful contributions from organisations such as Nil by Mouth and Action for Children Scotland that have a great deal of knowledge about the impact of sectarianism. There were measured and thoughtful responses from scores of organisations and individuals representing a good cross-section of Scottish society. Is the Government really saying that their views count for nothing and that the only voices worth listening to are those of our police and prosecutors?

It is plain that the bill is ill thought out and will do little to address the underlying problems associated with sectarian behaviour. It strays blithely into restrictions on freedom of speech and verges on hate thought crime. Those are compelling reasons not to support the bill, which is why I am particularly annoyed that the minister chose to paint those opposed to it as obstructive and partisan. Scots rightly expect a much more constructive and reflective response from their Government when such fundamental issues are raised.

Only committee members who belonged to the Government party felt able to lend their qualified support to the bill. All the other committee members have concluded that it is unnecessary and unworkable and will have far-reaching and unintended consequences. They do not believe that the Scottish Government has made the case for the necessity of a new offence; instead, they believe that a more proportionate response to the problems in Scottish football would be to give more consideration to the use of existing laws, enforced effectively and combined with other non-legislative measures.

Members should note that in the past six months there has been a marked increase in prosecutions under the existing legislation for both sectarian chanting and internet abuse. The minister told the committee that the new offence will not tackle hugely different behaviour:

"we are turning breach of the peace into a more concrete offence so that people are clear about what is being tackled."—[Official Report, Justice Committee, 21 June 2011; c.17.]

The evidence we heard contradicted that. Professor Devine said:

"the issue of offensive behaviour is by no means clear cut. Throughout the process, members have continually asked witnesses to define such terms and, in my personal view, the answers have been intellectually unconvincing."—[Official Report, Justice Committee, 13 September 2011; c 242.]
The committee report is frank. Paragraph 148 says:

“uncertainty still surrounds some key issues”.

Paragraph 149 says:

“the Committee notes that it is also important to ensure that the legislation itself is robust”.

Paragraph 163 says:

“The Committee invites the Scottish Government to reflect on concerns that the ‘catch-all’ test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech”.

Paragraph 195 says:

“the Government should consider whether the parameters of the offence ... need to be made clearer”.

Finally, paragraph 196 asks

“whether there is scope to make the relevant provisions any more clear”.

The Government considers that the lack of clarity in the bill can be addressed by the Lord Advocate issuing guidance on how it should be interpreted. The trouble with that approach is that guidelines can change. Relying on that kind of soft law to clarify legislation is a dangerous road to go down. Scots deserve better and they have the right to understand what would constitute an offence.

The catch-all nature of section 1(2)(e) that refers to

“behaviour that a reasonable person would be likely to consider offensive”

has caused many to raise concerns, as have the religious hatred provisions. Shelagh McCall of the Scottish Human Rights Commission told the committee:

“Offensive speech is protected by article 10 of the European convention on human rights. The European Court of Human Rights in Strasbourg and domestic courts have repeatedly said that not only popular speech but offensive, unpopular, shocking and disturbing speech is protected”.—[Official Report, Justice Committee, 20 September 2011; c 279.]

At times during the evidence taking it felt like we had strayed into the pages of “Alice in Wonderland”. The bill appears to enable a conviction for offensive behaviour even when no one is there to be offended. A person may be regarded as having been on a journey to or from a regulated match, and therefore subject to the new legislation, whether or not they attended or intended to attend the match and whether or not their journey included overnight breaks.

We were urged not to worry about ECHR compliance, because the Lord Advocate assured us that he cannot act in a way that is incompatible with ECHR. That is a circular argument if ever I heard one—we might keep the Supreme Court busy on that.

The Government has a majority, so it can pass this law, but there is a real risk that it will do more harm than good. It has already alienated people. Does the Government have the sense not to press on? I urge it to put its efforts instead into practical measures that would make a difference.

15:54

**Humza Yousaf (Glasgow) (SNP):** I appreciate the chance to speak in this incredibly important debate.

Before getting into the substance of the bill and addressing some of the issues that it raises, I will make an observation. I have watched various hustings between the three Labour leadership contenders, and it has been heartening to hear that they all recognise that their defeat in the previous Holyrood election was down not only to the SNP’s excellent record—I am paraphrasing slightly there—but to how poorly Labour performed in opposition.

Malcolm Chisholm noted in a recent article that many of Labour’s arguments

“can be brushed aside as Labour once again opposing for opposition’s sake”.

I could not agree more.

**Malcolm Chisholm (Edinburgh Northern and Leith) (Lab):** For the sake of accuracy, Humza Yousaf should point out that I accepted that there was a legitimate role for strategic opposition on a whole range of issues, of which this may well be one.

**Humza Yousaf:** That is a position for Labour to take.

I could not agree more with Malcolm Chisholm’s statement, given that the amendment in the name of James Kelly before us today does little to show that anything has changed.

I have no doubt that, as Johann Lamont said, Scottish Labour and every other party in the chamber want to tackle the problem head on. We all view sectarianism as a cancer on our society. In addition, we all want to be able to attend football matches, go to pubs to watch football games and travel to and from stadiums without having to listen to a chorus of offensive chants that are sung to target other people’s nationality, race or religion.

**Hugh Henry:** Will the member take an intervention on that point?

**Humza Yousaf:** Nothing would excite me more.

**Hugh Henry:** Humza Yousaf seems to suggest that he does not want to listen to offensive chants
and songs. However, he has written to a number of members of the public to say that he does not have a problem with offensive songs being sung at football matches. Is that still his view? Will the legislation still allow offensive songs to be sung at football matches?

**Humza Yousaf:** I suppose that, as I was reading selectively from Malcolm Chisholm’s article, I should forgive Hugh Henry for reading selectively from my words. I was talking about banter and unpleasant singing, not bigoted singing. I resent the accusation that I would somehow stand up for bigoted and sectarian singing, because I think that it is deplorable.

I am disappointed with the Scottish Labour amendment precisely because it is a do-nothing amendment. It says that the case has not been made but it does not say how, and it claims that there is confusion but does not say where. Throughout the whole process, including today’s debate, Labour has failed to bring forward a single amendment to the bill or any useful suggestions.

Every police and law enforcement official who has come before the Justice Committee has confirmed that new legislation is needed because of gaps in the law and the effect that legislation could have on shifting public attitudes. While I appreciate his experience on the matter, it is particularly astonishing to hear Graeme Pearson, a former deputy chief constable, contradict the opinion, advice and pleadings of his former colleagues who ultimately have to deal with the aftermath of such despicable behaviour week in and week out. There is no doubt in my mind that if Mr Pearson had still been in his previous employment—

**Graeme Pearson:** Will the member give way?

**Humza Yousaf:** I need to crack on.

If Mr Pearson had still been in his previous employment, he would have been the first one to demand the new legislative powers.

**Graeme Pearson:** I have repeatedly said in the Justice Committee that there is not a police officer in the land who does not call for more powers or want to have more legislation.

I gave an outline of an action plan, so while we may not have come up with any amendments to the legislation we have certainly come up with suggestions. We hope that the Government will consider them in the positive spirit in which we have offered them.

**Humza Yousaf:** We agreed on the principles of the legislation at stage 1. Now we need amendments and positive construction.

After last season’s madness, the members of all parties were united in the belief that something had to be done, none more so than lain Gray, who said that he

"accepts the need to legislate on sectarianism."—[Official Report, 6 October 2011; c 2588.]

The honest truth is that those of us who attend football matches, particularly in Glasgow and Edinburgh, know that some of the singing that goes on around us is vile and toxic and often causes—or has the potential to cause—public disorder. We have become acclimatised to it, and as a result we refuse to challenge it. There is no doubt that, as a society, we need to shift public attitudes to make the acceptable unacceptable.

The Parliament has passed similar laws in the past, such as the Emergency Workers (Scotland) Act 2005. However, the amendment that the Opposition party has lodged rests on the belief that existing laws should be used to tackle the behaviour in question, which flies in the face not only of what lain Gray has said but, more importantly, of what the police and law enforcement agencies have pleaded for. To suggest that it is simply an issue of better enforcement of existing laws is an insult to our police and those who serve to uphold the law.

We have heard the ridiculous suggestion from some members that a list of songs should be added to the bill to provide clarity so that football fans would know what behaviour will be criminalised. Why are we happy to accept that context and police discretion are vital for breach of the piece but not for this piece of legislation? No one would bat an eyelid if I were to make monkey noises and gestures with my young nieces and nephews, but everybody would understand the intention and seriousness of the same noises and gestures if they were made at a football match in front of a black player.

We still have the committee amendment stage to come. Today’s debate would have provided the perfect opportunity for others to provide constructive and clear suggestions. However, as the Opposition motion stands, it is difficult to come to any conclusion other than that Scottish Labour is opposing the bill for opposition’s sake. Yes the issue is difficult, yes it is sensitive and, yes just about any action that we take on it will no doubt be opposed in some way, shape or form by somebody. However, that alone should not scare us away from taking decisive action.

It was famously said that if one wishes to avoid criticism, one should say nothing, do nothing and be nothing. The Government has shown that it is open to amendments. I urge my colleagues across the chamber to treat the issue with the seriousness that it requires. Let them lodge specific amendments and let us reach consensus on an issue that deserves nothing less.
Roderick Campbell (North East Fife) (SNP): I welcome the committee's report. It seems a long time since stage 1, when most members accepted that there is a problem that needs to be addressed through legislation. However, we are where we are.

Some critics say that the existing legislation means that there is no need for the bill. For example, in its evidence to the committee, the Law Society took the view that section 1 of the bill does not improve the common-law offence of breach of the peace, which, as we now understand it, requires a public element. The Law Society believes that breach of the peace, together with section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which was passed to deal with situations in which there is no public element, should be sufficient. Although I do not doubt that there is an overlap—common-law breach of the peace and the offence in section 1 proceed on the basis that they are judged by the effect of the accused's behaviour on others—there are differences. For example, section 38 of the 2010 act also requires intention, and a defence could be that the accused did not intend to use threatening and abusive behaviour. Also, section 38 does not make a link to the likelihood of inciting public disorder.

In addition to the issue of intention, as the Lord Advocate says, whether behaviour is likely to cause fear or alarm to a reasonable person is an objective test, and evidence of actual fear and alarm is necessary. That introduces hurdles that are not part of section 1 of the bill. Therefore, although it may be true that section 38 of the 2010 act and the common-law offence of breach of the peace together cover the majority of situations that section 1 of the bill may be seen to address, it is wrong to assume that they cover all situations. I am happy to accept the Lord Advocate's comments in that respect.

When James Kelly recalled the Lord Advocate's appearance before the Justice Committee, at which he commented on what songs might or might not be caught by the bill, Mr Kelly did not mention two words that were in the Lord Advocate's speech: "circumstances" and "context". Those two words are also in the Lord Advocate's guidelines, if Mr Kelly cares to read them.

Even if I am wrong—even if the Lord Advocate is wrong—and the critics are right that section 1 adds nothing to the existing legislation, that takes no account of the transformational aspect of legislation.

James Kelly: Can the member tell us which of the convictions that were secured during the summer would have used the new legislation?

Roderick Campbell: I am not sufficiently familiar with the specifics. The minister might provide that information later if the member requires it. I am not sure which convictions he is referring to.

As the Lord Advocate said to the Justice Committee:

"Legislation can be transformational. ... it can change society's behaviour and its attitude towards behaviour, and that should never be overlooked."—[Official Report, Justice Committee, 20 September 2011; c 309.]

As Dr Kay Goodall said in her written evidence:

"The decision to create new legislation, even where it overlaps with existing law, can be justified. Creating specific named offences can aid public discussion and encourage public support. Doing this also makes it easier in practice to monitor reporting, recording, prosecution and conviction of the offences."

Margo MacDonald: Will the member give way?

Roderick Campbell: I would like to press on.

Given the Lord Advocate's comments this week on data capture and, in particular, his answer that under the current law it is not possible to capture the specific type of conduct that is libelled in a breach of the peace case or under section 38 of the 2010 act unless it is specifically libelled, Dr Goodall's comments have some resonance.

The Church of Scotland rightly said:

"Law works at its best when the majority of the population think that it represents a collective will".—[Official Report, Justice Committee, 22 June 2011; c 82.]

Let us remember the opinion poll that was taken in September: 89 per cent of Scots believe that sectarianism is unacceptable in Scottish football and 91 per cent agree that further action is necessary.

Ruth Davidson (Glasgow) (Con): Will Roderick Campbell give way?

Roderick Campbell: No, I would like to press on.

If we were to abandon the bill now, as Opposition members seem to think that we should, that would send the wrong message to Scottish society.

I welcome the Government's intention to consult on extending the protected categories to include age and gender, which are the missing protected categories from the Equality Act 2010. I also welcome the Government's commitment to amend the provisions on travel to and from football matches and to clarify provisions on matches.

I share the committee's concerns about the impact that the catch-all test in section 1(2)(e) might have on freedom of expression and speech under the European convention, but I am glad to
note that the Scottish Human Rights Commission is continuing discussions with the Government on that section.

On songs and chants in support of terrorism and terrorist organisations, I note again the Government’s response that such songs and chants, which are offensive to any reasonable person, should be caught by the bill if they are likely to incite public disorder.

The Government has said that it recognises the need to assist the public in understanding the scope of the offence and will seek to clarify it in a variety of ways. That is an important part of the education process. We need to press on with that if we are to go forward. I am also pleased that the Government has some evidence of self-regulation by football crowds. Long may that continue.

In an ideal world, the committee could have taken evidence on the operation of section 38 of the 2010 act in relation to the proposed offence in section 5. In any event, however, we know that section 38 is not specifically directed at incitement to religious hatred and, unlike the situation south of the border, we currently do not have such legislation.

I am pleased by the Government’s acceptance of the need for a specific, declaratory section on freedom of expression. It is a sensible move. We need to make it clear that freedom of expression is not under threat.

Legislation is only part of the answer, but let us try to work together to make a better bill rather than abandon it altogether.

16:07

Neil Findlay (Lothian) (Lab): Religion, sectarianism and bigotry are a political minefield, and I have no doubt that all the speeches in the debate will be scrutinised carefully by observers. However, I have to take part because it would be a dereliction of my duty not to. I cannot sit back passively and watch as the bill proceeds, because of its potential to criminalise many impressionable, inexperienced, mostly young men in my region and my country.

The bill is my first experience of seeing legislation progress through the Parliament. I have to say that it has not been pretty to watch. It appears to be a knee-jerk reaction in response to events at one football match. That is not to say that sectarianism is not a blight on our society—of course it still is—or that we should not seek ways to tackle that blight. Of course we should, but is the bill, with its narrow focus on football, the correct way to go?

Before the summer recess, the minister told us that the bill simply had to be passed before the beginning of the football season or there would be serious problems ahead. We were told that those who did not support it were soft on bigotry and playing into the hands of those who spout prejudice. For many members from all parties who have a lifelong commitment to equality and have fought against class, gender and racial discrimination all their lives—whether Mr McLetchie in the law, Mr Harvie in the third sector or many of the trade unionists in the Labour Party—that is nothing short of an insult.

All through the debate in June, SNP member after member slavishly tucked in behind the minister only for the First Minister to leave them high and dry at the last minute when he saw the mess that he was in. I guarantee that, if the Labour Party was ever foolish enough to try to introduce such a proposal, Labour members would have the courage and the integrity to speak up.

Christine Grahame: Will the member take an intervention now?

Neil Findlay: Certainly.

Christine Grahame: Mr Findlay should at least give me credit—I think that I was the first person to say publicly that the bill should not be emergency legislation and that it should follow the normal track.

Will Mr Findlay please advise the Parliament whether he opposes the bill’s second part, which is on threatening communications? I hear his arguments about the first part, but what about the second part? Nobody is addressing that.

Neil Findlay: We will come on to that.

Christine Grahame nearly criticised the First Minister earlier in the process but did not quite do so. Did we see the behaviour that I described from anyone in the SNP? No. Its members gave the minister unquestioning support, despite the bill’s obvious flaws. I remind SNP back benchers that so. Did we see the behaviour that I described from anyone in the SNP? No. Its members gave the minister unquestioning support, despite the bill’s obvious flaws. I remind SNP back benchers that any SNP member who opposes the bill should at least have the courage and integrity to speak up. I guarantee that, if the SNP was ever foolish enough to try to introduce such a proposal, SNP members would have the courage and the integrity to speak up. They are here to represent their constituents and to hold the Executive to account as much as we are. They are here to make good legislation and not to be sycophantic cheerleaders for the Government, no matter how badly conceived any proposal is.

Following his election victory, the First Minister said that the SNP did not have a monopoly on good ideas and that it would govern by consent, so why are elected members from all Opposition parties who raise legitimate concerns about the bill’s practicalities derided and dismissed, whereas leaders of the Catholic church—for the record, that is my church—who raised similar concerns were treated to caramel logs and Tunnock’s teacakes at Bute house? I congratulate religious and civic leaders on their role in helping us to force the Government to give the bill more time, but talk of governing by consensus rings hollow when all the
issues that other parties have raised have been dismissed as opposition for opposition’s sake.

**Humza Yousaf:** Will the member take an intervention?

**Neil Findlay:** No, I want to crack on, as I do not have much time.

We should address sectarianism in society. The McConnell Administration did very good work on that; Nil by Mouth, Young Scot and youth groups also do great work. Our schools up and down the country work collaboratively with neighbouring schools. We will tackle sectarianism substantively through education and cultural change and not by extending class prejudice and demonising working-class football supporters. That is what is happening—the bill is an attempt by middle-class commentators to impose their view of the world on a group of people whom they deem to be boisterous, crude, aggressive and distasteful. Classing all football supporters as bigots seems to be fair game. That is an insulting form of prejudice.

Why should legislation set offensive behaviour solely in the context of football? If people are offended and are in a state of alarm or fear through another’s actions, do we not have legislation to cover that already? The bill will increase problems and encourage football fans with ulterior motives to accuse rival fans of committing an as yet undefined offence.

The punishments are clearly disproportionate, and freedom of expression issues arise, too. Members who are old enough might remember the classic “Not the Nine O’Clock News” sketch from the 1980s in which a racist police officer is berated by his boss for his overzealous record of arresting a man who turns out to be black. The list of hundreds of heinous offences included the charges of walking on the cracks in the pavement and loitering with intent to use a pedestrian crossing.

**The Deputy Presiding Officer (Elaine Smith):** Mr Findlay, you need to conclude.

**Neil Findlay:** In the same vein, we were treated to the comedy talents of the minister, who advised the committee of the new offences of singing the national anthem and making the sign of the cross in an aggressive manner. This is like some tinfoil dictatorship where the national anthem could be outlawed and carrying out a symbolic Christian act could have someone in the pokey.

**The Deputy Presiding Officer:** Mr Findlay, you really need to conclude now.

**Neil Findlay:** When the law is beyond satire, the law is an ass.
legislation, that is not recorded as a football-focused public disorder crime. The new legislation will let us correlate data about offenders. That dossier will be important in considering measures such as football banning orders and how to tackle the problem more seriously.

Margo MacDonald: Will the member give way?

Patrick Harvie: Will the member give way?

Bob Doris: I want to make progress, but I will take one more intervention. I will take one from Margo MacDonald, with apologies to Patrick Harvie.

Margo MacDonald: How are we to define objectively the term “offensive behaviour” when standing at a football ground? One person is offended by swearing and one is not. In my little corner of my football ground, I tell people not to swear because I find it offensive—and they tell me other things.

Bob Doris: I am sure that the member does that. She gets to the crux of the matter, but the other pieces of legislation that I highlighted have similar issues and challenges. We have to consider the guidelines, have a test of reasonableness and build in a bit of common sense, just as has to be done in relation to all the pieces of legislation that the Tories and others want us to use more effectively.

A second positive aspect of the bill is the important provision to enable the conviction of football supporters for misconduct abroad. I will talk about issues to do with Rangers supporters abroad although, if I have time, I will mention comments from Celtic supporters, to try to be as balanced as possible. In 2005-06, UEFA fined Rangers after a match with Villarreal abroad. That was for the breaking of a team bus window but, at the time, UEFA said that the discrimination in the songs that Rangers supporters sang was a Scottish problem and that it would not take action because Scottish society should do so. If we fast forward to 2006-07, we find that Rangers were fined €12,000 after a game with Osasuna in Pamplona after evidence was found on YouTube. UEFA changed its approach. It no longer said that Scotland should deal with the issue; it decided to step in and deal with it. On 10 March 2011, charges of discriminatory behaviour and a €40,000 fine were upheld in relation to a match against PSV Eindhoven.

I stress two points. The vast majority of football supporters, including travelling Rangers football supporters, behave impeccably. The reason why I make the point is that we currently have no powers to shine a light on the behaviour of Scottish football supporters abroad, no matter which club they support. I am not willing to have UEFA act when Scottish society and the Parliament can do so. We have a responsibility to do that. That is a positive aspect of the bill.

I have been lobbied quite a lot about a discussion between Christine Grahame and Professor Devine at the Justice Committee on the distinction between political views, support for terrorist organisations and religious sectarianism. There was a feeling that the bill would target Celtic supporters more than it would target other supporters. I have read that debate and sought clarification on it, and I can say that that is not the case. If I thought that the bill was designed to target one set of supporters over another, I would not support it. The bill is not about targeting supporters but about targeting the problems of discrimination, bigotry and sectarianism in Scotland. Even at this late stage, I hope that the Parliament can come together to do that.

16:20

Hugh Henry (Renfrewshire South) (Lab): There is no doubt that sectarianism is a pernicious evil. As someone who was at the receiving end of sectarian behaviour when I was growing up, I understand what it must be like to be at the receiving end of racist or homophobic behaviour or other behaviour that results from prejudice and discrimination. It is not pleasant and we should tackle it.

To put the debate into context, the Scotland that my children have grown up in is different from the Scotland that I grew up in, so we have to keep a sense of proportion when we seek to address such problems. When I look at the bill, I am not quite sure whether we are tackling sectarianism or offensive behaviour at football matches. Bob Doris ended his contribution by saying that we should be tackling discrimination and bigotry wherever it arises, but much of the discussion has been about tackling offensive behaviour.

I do not know whether it was Christine Grahame or one of the other SNP members who said that the issue is about two football clubs. No, I am sorry: sectarianism is not about two clubs—[interruption.]

Members should check the record; it will be on the record.

Michael McMahon: It was Margo MacDonald.

Hugh Henry: I am sorry; it might have been Margo MacDonald. I apologise if that is the case.

Margo MacDonald: Will the member give way?

Hugh Henry: No, I am sorry.

Sectarianism is not just about football and it is not just about two clubs. It is about the accountancy firm that asked me what religion I was when I went there for a job. Sectarianism is
about the middle-class golf clubs and bowling clubs that will not allow people of certain religious persuasions to become members. That is the type of sectarianism that we need to root out across Scotland. It is not just about football fans.

Much of what we are addressing today has been predicated on the so-called game of shame. I was at football matches in the 1970s when there was real shame, fear and violence, when hundreds of people were throwing bottles, cans and other implements at the so-called opposition and they were landing on their own team’s fans. People were being led out with their heads split open and blood streaming down their faces. Hundreds of arrests were made at football matches in those days. That was a real problem and we dealt with it.

At this game of shame that we hear about, three people were sent off for bad behaviour on the field. When we look at their names, we see that two of them had no relationship to sectarian backgrounds in the west of Scotland; they would probably not know what we are talking about.

Bob Doris: Will the member take an intervention?

Hugh Henry: No, thank you.

Two people on the touchline—a manager and an assistant manager—squared up to each other. Somehow that contributed to the game of shame but, just a few weeks earlier, when Craig Brown confronted another official, that was nothing to do with sectarianism; it was just bad behaviour. Half of the arrests made at the game of shame were for smoking in the toilet. Where is the sectarian game of shame that we talk about? It was bad behaviour by well-paid professionals.

Humza Yousaf: Will the member give way?

Hugh Henry: I will quote Humza Yousaf and then I will let him in. He said: “football fans can be as unsavoury and offensive as they like to each other - as unpleasant as that may be - without fear of arrest.”

Humza Yousaf: That is exactly the point. I hate to drag Mr Henry back to the bill, as nice as it is to hear his views about matches that he has attended in the past. However, the point is that fans can be as unpleasant as they like—Margo MacDonald said that she finds swearing offensive—as long as it does not incite public disorder. I do not understand why the Labour Party members cannot get that through their heads. From all the contributions from Labour members, I am no clearer whether they want to see the bill withdrawn. If they do, why did they agree to vote for it at stage 1? Were they just following their chief whip’s orders? Hopefully, Mr Henry can clarify that.

The Deputy Presiding Officer: I am afraid that you have only one minute left, Mr Henry.

Hugh Henry: Humza Yousaf talked about whether chants and slogans will cause disorder. Will those who sing a verse of a song that talks about “rebellious Scots to crush”, which is offensive to many people, incite disorder? Will people who sing “The Boys of the Old Brigade” be arrested for singing that song? If an imaginative songwriter comes up with a song to praise the British head of state laying a wreath to commemorate the boys of the old brigade, will that be offensive and will it render people liable to arrest for singing such a song?

The bill is full of inconsistencies. It is flawed. It is wrong. It will not help to solve the problem; it will add to the problem. It will not help to tackle sectarianism. The Government is going to create further problems. Ultimately, there will be issues of freedom of speech. The Government is being inconsistent and illogical and, unfortunately, it is not helping address the problem.

Humza Yousaf: That is exactly the point. I hate to drag Mr Henry back to the bill, as nice as it is to hear his views about matches that he has attended in the past. However, the point is that fans can be as unpleasant as they like—Margo MacDonald said that she finds swearing offensive—as long as it does not incite public disorder. I do not understand why the Labour Party members cannot get that through their heads. From all the contributions from Labour members, I am no clearer whether they want to see the bill withdrawn. If they do, why did they agree to vote for it at stage 1? Were they just following their chief whip’s orders? Hopefully, Mr Henry can clarify that.

Johann Lamont: Will the member take an intervention?
Willie Coffey: I do not have any time. I am very sorry, but I have already cut my speech down to five minutes.

That will not be easy and there will be countless opponents of the bill forming a wall to prevent it going through.

The events that led us to where we are today must rank as some of the most disgraceful in our history—all the world looked on in disbelief. It is bad enough for ordinary citizens who have lived with these problems for generations but, as legislators, surely we now have a duty to act and to try to work towards a solution to help our great game of football.

The bill is not intended to be the complete package—there are other issues that will require our attention in the future—but the wider public support something being done here. The Lord Advocate tells us that the law as it stands is not sufficient to help us. Police and prosecutors also tell us that they need help to deal with the problem.

As the minister and other colleagues have said, two criminal offences will be created: offensive behaviour likely to incite public disorder; and making communications containing threats intended to incite religious hatred. We can argue, as we have done today, whether they are sufficient, clear or even enforceable, but there is public support for measures that will begin to face down the minority who confuse freedom of speech with the freedom to express threatening and hate-filled views of their fellow men and women and thereby risk serious public disorder.

Along with colleagues in the Parliament, I had the privilege of attending the recent British-Irish Parliamentary Assembly meeting, where I met some wonderful people: nationalists, unionists and republicans—elected members coming together in a spirit of co-operation to maintain the peace process and foster closer links among the Celtic and British nations. Even there, among the most respected politicians of our generation, tensions can rise between the traditions. The responsibility on all our shoulders is great indeed, but there is a clear willingness to work together to move forward.

In the context of a debate like this, surely it has to be possible to hang up our brightest colours and sing in honour of our own football club and history without resorting to attacking and vilifying our opponents for their religion and their history. Even as a fervent Kilmarnock supporter, I say to our two great Glasgow football clubs that, when they next come to Rugby park, by all means let us hear about James McGrory and Paul McStay and about Jim Baxter and John Greig, in a positive celebration of the greatness of those footballers.

The Irish writer Malachi O’Doherty summed things up perfectly when, reporting on the breathtaking visit of Queen Elizabeth to Dublin in May this year, he said:

“You cannot now stand for the Soldier Song without a sense that the Queen herself is in spirit standing beside you. The gesture of laying the wreath at the garden of remembrance in Dublin was so potent that the question must be asked why it was not possible before.

And just as a shrill note has been removed from the Soldier Song, surely God Save the Queen need never again sound embarrassing or repugnant in Irish nationalist ears. After an Irish President has stood for it beside the Queen in the middle of Dublin before a memorial to the icons of the Irish revolution, Patrick Pearse and James Connolly.”

If the heads of state can set that fine example, surely the rest of us can follow it.

I ask the Labour Party to drop the amendment. It does nothing to help to tackle the problem that, in 2011, when presented with an open goal and a chance to collectively show the bigots the red card, Labour was found wanting and did nothing.

The Deputy Presiding Officer: Mr Coffey, I would be grateful if you could conclude.

Willie Coffey: We should get behind the Scottish Government and send a clear message that Scotland is moving forward to a brighter future, where tolerance, mutual respect and understanding are the real signs of progress in this nation.

The Deputy Presiding Officer: I apologise to Margo MacDonald and Patrick Harvie for being unable to call them.

Alison McInnes (North East Scotland) (LD): On a point of order. Could I move a motion without notice to extend the debate to allow those two people to speak? It is an important debate—equivalent to a stage 1 debate, really—and I believe that, as the Greens and Margo MacDonald signed the amendment, they ought to be given an opportunity to speak in the debate.

The Deputy Presiding Officer: I asked to have that checked. I am afraid that I must suspend Parliament for a moment to allow us to double-check that point.

16:32
Meeting suspended.

16:34
On resuming—

The Deputy Presiding Officer: I am inclined to take a motion without notice to extend the debate by 10 minutes and delay decision time until 10 past 5.
Motion moved,

That, under Rule 8.14.3, the debate be extended for 10 minutes.—[Alison McInnes.]

Motion agreed to.

The Deputy Presiding Officer: I call Patrick Harvie. You have four minutes.

16:34

Patrick Harvie (Glasgow) (Green): I am very grateful to the Presiding Officer and to Alison McInnes. It is important that all members who have expressed a view outside the chamber have the chance to put some of their opinions on the record.

At times during the debate, if those of us who are against the bill have not been accused of this, it has at least been implied that opposing the bill is the same as not caring about, not knowing about or not understanding the problem. There have been extreme portrayals of positions on the bill. The bill has been portrayed as a solution, once and for all, to the problem of sectarianism in society, with opposition to it showing a lack of concern or a lack of care.

It is not the first time that I have experienced such a dynamic on a piece of legislation. Neil Findlay mentioned that this is his first experience of legislation. My first experience of a bill going through the Scottish Parliament was the Antisocial Behaviour etc (Scotland) Bill. Some members portrayed that bill as the great single solution to all the problems in their communities and portrayed its opponents, including many SNP members who had criticisms of it, as not caring about, knowing about or understanding the problem. The same accusations were made at that time.

There are elements of the same motivation in relation to this bill as there was in relation to the Antisocial Behaviour etc (Scotland) Bill: the idea that we have to be seen to do something. Sending a signal is never a motivation for legislation that I have been very happy with. Many of the same concerns exist about this bill as existed about the Antisocial Behaviour etc (Scotland) Bill. This bill in no way engages with the root causes of the problem that it seeks to identify. It has been expressed, in evidence to the committee, that there is a risk that aspects of it could do more harm than good.

I will respond briefly to Bob Doris’s comments, because I tried to intervene on his speech. He talked about having a spotlight and a focus on football matches as the context for some of this behaviour. I am afraid that that is not an accurate description of at least half of the bill. One half of the bill—one that has had less scrutiny than much of the rest of it during the debate—is about threatening communications.

Bob Doris: Will the member give way?

Patrick Harvie: I am afraid that, given the time that I have available, I cannot let the member in.

That part of the bill is about threatening communications that do not specifically relate to football or to football matches. It is drawn so broadly that it could apply to a huge range of media, including music. Music that is circulating in popular culture calls for lesbian, gay, bisexual and transgender people to be murdered. I might be content with some scrutiny, control and regulation of that, but it has not been subject to any real thought; it will happen as a side effect or a consequence of the bill rather than as its core motivation. We should have taken evidence on those issues if we wanted to have legislation that could even conceivably impact on those other areas of life.

There are also ambiguities about the meaning of the offence in part 1 of the bill; indeed, there are so many that it is very hard to pin down what the legislation will do, what its impact will be, what kind of people will be convicted and for what behaviour. Those points have been made repeatedly.

I will certainly engage with amendments at stage 2 if I can. I must admit that the amendments that I am most likely to bring are one amendment to delete part 1 of the bill and one amendment to delete part 2, because I do not think that they are fixable. I urge the Government to withdraw the bill at this stage because, as we all thought after the stage 1 debate, there is scope to change the contents of the bill, not just its timescale. I will vote for James Kelly’s amendment.

16:39

Margo MacDonald (Lothian) (Ind): I thank the chamber for doing what we should do more often, which is to adhere to the normal rules of debating. We should give and receive explanations and further examine the topic under discussion. I am sorry if that comment makes me sound like old granny grump.

I accept—I think that everybody who has criticised the bill does so—that, in introducing the bill, the Government meant well. All of us, if we are honest, know that there are still threads of sectarianism in Scotland, but as we have heard clearly this afternoon the definition of sectarianism has not been pinned down in the bill. We must do that first. That was why I tried to correct Hugh Henry, because I thought that it was important. I did not say that Rangers and Celtic were necessarily sectarian in their behaviour or that...
their fans were—I said that they had a problem. I refuse to take seriously the idea that sectarian abuse is hurled by the Rangers fans at the Celtic fans when most of the guys coming out of the tunnel for quite a while were good Sicilian boys who crossed themselves before the start of the match. I am not making light of it; I am just trying to say that that is how it seems from this football fan’s point of view.

I support neither Rangers nor Celtic—I hope that they always get beat. I know that such behaviour and attitudes can leech into other clubs, but other clubs do not have big problems. The big problems lie with those clubs and that is why I support the sensible suggestion that, if we move on with this legislation, the clubs should bear the burden of disciplining their supporters. We should take points from them: that costs them their place in the league, it costs them money and it means that they have to sell their best players. The people who know about football are nodding their heads. They know that that is the most effective method to use against displays of bad behaviour, hooliganism or whatever we want to call it—by which I mean the chants that are offensive to most people.

As I have suggested, we also have to pin down the question of how we will judge what behaviour is offensive and what is not. Some folk grow up in houses where people swear all the time, so they are not particularly offended when they go to a football match and the guy sitting next to them knows only one adjective.

I know that the convener of the Justice Committee was upset that not enough attention had been paid to the communications provisions in the second part of the bill. As Patrick Harvie said, once again, it had good intentions. We have had one debate, but we need more and we need it to be about the second part of the bill. That is where we can be effective. We can change behaviour by tackling such means of communication more effectively than by going to a football match and thinking that we might influence behaviour. At matches, people are hyped up and are not completely themselves. They cannot take drink into the grounds, but some of them have a good bucket beforehand and they do not behave how they would behave in other circumstances or other company.

In short, I hope that the Government accepts that it made a brave effort. Nobody wishes its intentions or aims any ill. Many people were cited as supporting the bill, but they did not support it—they supported its aims. Perhaps the bill has not come up to scratch in achieving those aims and the Government will not lose face if it admits that. We can then all get back to thinking about how we can tackle sectarianism properly and over a much longer period of time than that in which we might expect one bill to make a change.

16:43

Ruth Davidson (Glasgow) (Con): Today’s debate has been vigorous, with flashes of passion and even temper, but it has also been welcome. Parliaments should not be afraid of difficult issues, nor should they shy away from tough questions. No Parliament serves its country by picking only the low-hanging fruit.

I, like others, recognise and welcome the First Minister’s decision to give Parliament more time to scrutinise the bill, to take evidence and to attempt to navigate the difficult waters that such legislation entails. I hope that the Government recognises that the chamber is united in the goal of tackling sectarianism. Not one member—not one—wants to see a Scotland where vile, offensive and criminal acts are perpetrated against other Scots simply because of the football team they support or the faith they profess. I have seen today neither Humza Yousaf’s opposition for opposition’s sake, nor Neil Findlay’s assertion of a Government attempt to demonise all football fans. If the time that the Parliament has taken had made huge material improvements to the bill, I believe that the debate would have taken a different course. That is not the case, however. The Government has failed to convince many that the changes that it proposes will improve the situation rather than simply muddy the waters.

Such worries have been raised in the chamber before. Both Annabel Goldie and Iain Gray have done so at First Minister’s questions and the response was disappointing. The messengers were attacked, as were the people who had raised legitimate concerns. There was no acknowledgement that more work might need to be done. Raising such worries is not about party politicking. We need to ensure that we get such things right, as they are too important to get wrong.

It is not a case of just the Conservative, Labour, Liberal Democrat and Green parties saying, “Let’s proceed with caution and consideration”; the same is being said by the Law Society of Scotland, the Scottish churches and the ordinary people of faith who have been writing to their MSPs because they are genuinely worried that their Christian teaching and debate might be in jeopardy because of the second part of the bill.

I welcome the fact that the Government has given an indication that it will look at freedom of speech concerns but, as with other elements of the bill, there is a need to provide clarity rather than confusion. That takes us to the nub of the issue, which is the need to have in place a
legislative framework that is clear, proportionate and easily enforceable. On each of those three fronts, the Government has failed to make the case that the new offences that are contained in the bill are required.

On the issue of clarity, Aidan O’Neill QC, who is a leading human rights lawyer, has described the bill as “the worst drafted Bill I’ve ever seen.”

The Law Society made several points about the fact that we do not have a clear definition of what constitutes an offence, which have been echoed by David McLetchie, Neil Findlay, Hugh Henry and Patrick Harvie. The minister even said, when she was asked by my colleague John Lamont whether singing the national anthem constituted an offence, that it depended on the circumstances.

We do not have a clear definition of what “in relation to” a match includes. Does it apply just to people who are at the ground, to those who are wearing football colours or to those who are in a pub that has football on? Does a person have to be watching the football while it is on? Does it have to be a live transmission feed? Is it possible to prove that someone is watching the football while it is on? We also have no clarity on what constitutes causing offence to a reasonable person.

The continued prevalence of sectarian incidents and the worrying events that took place in the most recent football season in my region of Glasgow rightly focused minds across the chamber. Everyone in the Parliament wants to get to grips with the issue, which should not be allowed to fester in a 21st century Scotland.

Patrick Harvie and Graeme Pearson—who is possibly the most qualified person in the Parliament to comment on operational issues—have raised real fears that the wish to get things done has taken the Scottish Government down the route of viewing the creation of new offences as the only option, rather than looking across the piece to see what is the best option. That is why I must echo the point that James Kelly’s amendment makes, which is that, as the bill moves forward, greater consideration should be given to the use of existing laws.

There is more work to be done within football, as Christine Grahame, James Kelly and Colin Keir said. It is not acceptable that, when the governing bodies of the game and the league are asked by the Parliament to step up to the plate on sectarianism, the rallying cry of “It wasnae me” is all that is heard.

Throughout the debate, the minister and others have asked for constructive comments. Despite Humza Yousaf’s assertion, I counted more than a dozen from Graeme Pearson alone about changes that could be made that would have positive outcomes.

We have seen hundreds of successful prosecutions for breach of the peace at football matches and beyond under the existing legislation. Provision is made for religious prejudice as an aggravating factor in prosecutions. We have seen successful prosecutions, such as that of Stephen Birrell, for threatening communications. That is what we already have. We need to consider greater use of those laws, plus others, such as those that relate to football banning orders, which are underutilised. In addition, we need further preventative measures such as education and early intervention. Most of all, we need the football authorities to step up and the culture to change.

The Deputy Presiding Officer: I would be very grateful if you could conclude.

Ruth Davidson: Sure, I will do so.

The Church of Scotland has issued a statement in which it says: “bad legislation is worse than no legislation at all and we urge the parliament to ensure that if this legislation is to be passed it should be amended to be fit for purpose.”

We back the amendment and want to see changes being brought before the Parliament at stage 2.

16:49

Johann Lamont (Glasgow Pollok) (Lab): I say genuinely that I come to the debate more in sorrow than in anger. We have had an allegation that somehow we are opposing the bill for opposition’s sake. First, the Government should note that the amendment is supported by the Opposition parties across the board. It should also note that Labour members have worked hard to be as co-operative as possible because we recognised the seriousness of the issue.

As I said in June, I learned a lesson from the previous election. Where we can work with the Government, we will. That does not mean that we will suspend our critical faculties; nor does it mean that everything that we say that calls the Government to account is opposition for opposition’s sake. If there is a lesson from the debate, it is not just a lesson for the Opposition. It is a lesson for the Government that when people say serious things about serious issues, the Government ought not to try to close down the debate on the basis that it is opposition for opposition’s sake. If we are having to open our minds to new ideas, I urge the Government to do the same.

I promised in June that if there was a pause I would not celebrate or describe it as a U-turn. I
said that I would welcome it. If, even at this late stage, the Government says, “We hear you and we understand your concerns. We will step back and work with you to consider legislative and other measures that will address the problem”, I will not celebrate. I will welcome it and I will congratulate a mature Opposition, working with a mature Government. That option remains open to the Government. I urge the Government to take it.

Why would anyone in the chamber—someone who represents my city, whose constituents suffer from sectarianism—oppose something just for the sake of it?

John Mason (Glasgow Shettleston) (SNP): Because they are scared.

Johann Lamont: Will the member say that again?

John Mason: I suggest to the member that she is scared to take action.

Johann Lamont: I have never in my life been scared to take action, but I want to take action that will make a difference.

We raised concerns. The charities raised concerns. The churches raised concerns. I am particularly troubled by comments made to me by the Church of Scotland that if the legislation is derided, it will give succour to those who do not want to take any action on the issue.

There is an issue about giving a signal. I agree that that is sometimes what legislation is for, but if this legislation is not effective, the signal will be, “These people can continue as they did before.” We do not want to make a bad situation worse. We were offered a pause but what we got was a freeze, with no negotiation, discussion or clarity about how things could be changed.

Sectarianism is not just about football, and concerns about football are not just about sectarianism. At this week’s Health and Sport Committee, Harry Burns gave startling evidence that neurosurgeons were identifying to him an increased incidence of head injuries among children—and repeat admissions for head injuries—around the time of football matches. The fear and alarm of a child facing violence in their family home may not be audible on Sky Sports, but it is as much of a scandal as any other issue that we need to address.

A member at the back of the chamber said that the bill does not seek to solve all social ills. We recognise that football is a vehicle and that sectarianism and its manifestations turn up elsewhere. We know that an early analysis of section 74 statistics suggested that less than 20 per cent of offences are football related. We need to think about what happens in our communities. We need to tackle the offence. If we cannot define an offence, we cannot expect a police officer to decide what would cause offence to a reasonable person—never mind in Spain, where that challenge will also apply under the bill. For example, if a person is in the pub and is abusing someone with vile sectarian language, that is an offence if the football is on. If the television is broken and that person says the same thing, it is not an offence. What signal does that give? It does not make sense.

The Government has said that it does not want to identify other issues. If the minister will listen, I suggest a four-year programme of action with the three themes of education, intervention and rehabilitation. I suggest a programme of grass-roots intervention, education and anti-sectarian measures that can be firmly embedded in the curriculum. Lots of things can be done, but one critical thing is this: we need to make this generation the one that defeats sectarianism. That must start in our schools—if that is the programme of government, we will support it. Even at this stage, I urge the Government to believe us when we say that we want to tackle the problem with the Government. We want to work with our young people so that the next generation will not suffer in the way that this one does.

16:55

Roseanna Cunningham: Once again, I welcome the contribution by the Justice Committee, and I thank most members for their contributions in the debate and throughout the parliamentary process.

I remind members that we agreed to the principles of the bill back in June. In doing so, we accepted that there is a problem infecting Scottish football and wider society that must be tackled. Subsequently, we understand that 91 per cent of Scots agree that there is such a problem and believe that stronger action is needed to tackle it.

I feel that I have to repeat myself ad nauseam. We have never for a single moment suggested that the bill is the single answer to all football disorder in general or to sectarianism in particular. I say in response to all the confessional speeches from Labour back benchers that they do not have a monopoly on unfortunate experiences growing up in Scotland, and I urge them not to talk and behave as though they do. They do not necessarily speak for everybody.

I want to say a great number of specific things. Virtually nothing constructive has been said by a member of the Opposition, with the exception of Graeme Pearson and possibly Johann Lamont at the very end of her speech. It is interesting that there has been very little discussion about the last part of the amendment. That may be because
Labour members know that virtually everything that is mentioned in that part is already being done by the Government.

I have addressed the existing deficiencies in legislation. Johann Lamont seems to suggest that, by passing the bill, we will automatically repeal the existing legislation, but we will not. Offences will remain offences. We are ensuring that a choice of charges is available to the police, which will allow us to do the work that we need to do and to identify the offence. Actually, what is and is not football related cannot be identified in a lot of criminal proceedings.

A constant theme ran through many of the contributions from the Opposition. It has been suggested that somehow everything is either/or—that we either do what has been proposed or we do other things. That is not true. We can pass the bill and do other things. The Government wants to do as much as it can across the board.

Patrick Harvie: Many members of the Opposition parties have asked what many aspects of the bill will mean in practice. Does the minister accept that there are still huge areas of doubt, uncertainty and ambiguity? For example, why is condition A in section 5(2) broad enough to cover all forms of hate crime, but condition B is specific to religion? There are so many areas of ambiguity that it is hard to know what we would be passing if we passed the bill.

Roseanna Cunningham: I do not agree with Patrick Harvie on that. If he reads our response to the committee, he will see that we are opening the door for potential future amendments. It is important that we have a full debate on some of the issues that have been raised, but it is a fact that virtually all criminal activity depends on facts, circumstances and context. That applies whether we are talking about the offence in question or any other criminal offence that is charged in Scotland. The facts and circumstances can change everything. My colleague Kenny MacAskill had a wonderful description of Romeo’s speech at Juliet’s balcony. We all think that that is a great example of prose poetry in history, but what happened could equally be a breach of the peace; indeed, it could even be stalking in certain circumstances. The same thing could be a breach of the peace, stalking or welcome.

The other thing that everybody—[Interruption.]

The Presiding Officer (Tricia Marwick): Can we please hear the minister?

Roseanna Cunningham: Everyone on the Opposition seats has also pretty much ignored the fact that the first offence is not just about offensive behaviour, but about linking that to the likelihood of public disorder.

Ruth Davidson attempted to make as constructive a speech as she could in the circumstances, but there was a bit of confusion in what she said because she talked about the need for amendments going forward. However, that is not what she signed up to vote for today. She signed up to vote to kill the bill completely. Either she does not understand the process or she is deliberately being just a little unclear.

I could go through speech after speech from Opposition members that did not contain a single constructive contribution. I exempt from that criticism Graeme Pearson, whose contribution provided a singularly different tone, which I welcome. He made many interesting practical suggestions, a number of which are being discussed or taken forward, some of which may be reserved and the rest of which I am perfectly happy to talk to him about. His suggestions were a constructive intervention, which was singularly unusual in the debate.

There were some very unfortunate contributions. I want to remind members, particularly Neil Findlay and Michael McMahon, of what Peter Lawwell, chief executive of Celtic Football Club, said:

“Chants glorifying the Provisional IRA are totally unacceptable. It is an embarrassment to the club. We don’t want it, we don’t need it … it is wrong, and it is an embarrassment to the club and embarrassment to the majority of supporters. We were inundated by complaints from our own fans after the game at Tynecastle.”

That game was on 2 October.

Michael McMahon: Will the minister take an intervention?

The Presiding Officer: The minister has 40 seconds in which to wind up.

Roseanna Cunningham: The truth of the matter is that there is real concern about what is happening. Even at this late stage, I urge Opposition members to think a bit more constructively about the matter and to come on board for some of the discussions that can be had even now. We have stage 2 and stage 3 to do, so let us move forward on that basis.

The Presiding Officer: I call Christine Grahame. Ms Grahame, you have until 10 minutes past 5.

17:02

Christine Grahame: The debate was relatively temperate and civilised, with flashes in-between. I thank all members who spoke. I point out that the committee agreed that sectarianism is a problem in Scotland; no one on the committee said otherwise.
I was interested in what Graeme Pearson and Johann Lamont said about the domestic violence that takes place after football matches. Interestingly, on the day that we went to the match at Ibrox, the police had made early visits to households with a history of domestic violence to warn the people there not to carry the result of the match home with them one way or another. Although that issue is not pertinent to the subject of the debate, I wanted to remind members of it.

Several points were not touched on in our report. I think that there is a role for the media, which can sometimes pour fuel on the fire with regard to what happens on football terraces and pitches. The committee took note of that.

If the bill proceeds to stage 3, the committee would want a review of the legislation’s operation. I say to Neil Findlay that we were cautious about the communications part of the bill with regard to young people’s online language, which will be very different from that of people of my generation. We are aware of difficulties in that area. Aside from that, though, the committee was pretty well fully supportive of efforts to prevent hateful and inflammatory communications online, although not everyone agreed that the bill would deliver that.

It is a pity that not enough attention has been paid to the second part of the bill, although I understand why that is the case. I say to Margo MacDonald that the police fully supported the bill. If it is enacted and its proposals are implemented, we hope that they will be preventative and will not require additional policing. As to the test of what is offensive, that takes place in courts in Scotland every day in the context of different cases. I am grateful to David McLetchie for drawing attention to the 2003 legislation, which got me in a bit of a pickle. He is right to say that it was, in fact, lopsided. That is where I felt that there might be a gap in the law.

John Finnie was challenged on where the guidelines might be found. The draft guidelines are in the public domain; they are on the committee’s website for anyone who wants to look at them.

Neil Findlay: Does the member seriously think that anyone going to a match will go online to check what constitutes an offence?

Christine Grahame: The guidelines do not exist in a vacuum; they are already being consulted on with all the parties involved. The thing about good law is that people should know where these things are and that work is taking place.

I realise that I am paraphrasing, but Mr McMahon was correct to say that football provides an arena for sectarianism and that it exacerbates the problem. Although I did not agree with the rest of his speech, I thought that that was a fair point. I do not want to lean on the Lord Advocate’s guidelines too much, but if Mr McMahon looks at them again he will find that they contain some common sense and should help people understand the direction of the legislation.

Michael McMahon: Will the member give way?

Christine Grahame: I want to proceed, but I might give way to the member in a while. In any case, the key point is that public disorder has to be incited, which means that context and intent have to be taken into account.

Colin Keir’s contribution was very useful to the committee. I am not a football person myself, and he—correctly—drew the committee’s attention to the role of the SFA and SPL and reminded us that Premier League clubs are commercial entities that rely on revenue from advertising and television coverage. Measures such as not allowing them to play in public or deducting points from them and therefore causing them to lose their position in the table might prove to be a very important sword of Damocles to be hung over them. We all agree that they have been slow to do anything about this.

I have huge regard for Graeme Pearson’s experience as a match commander and thought that he gave a useful speech outlining the ancillary things that could be done outwith the legislation. I am very glad that he mentioned the cooperation between the police, the staff and the club stewards, which we saw clearly on our visit to Ibrox. It was a well-oiled machine, a disciplined army of people ensuring that nobody came to any harm.

I said that I was a bit disappointed that not much was said about the second part of the bill. Alison McInnes is quite right: we must start with solutions and start early. I remind her, however, that we were standing outside Ibrox with a family and the mother said that she had brought her children to the ground for the first time because the behaviour had improved. Education does not take place just within the school; it takes place on the terraces, watching the way other people, players, managers and officials behave at the match.

There were problems for the committee about hate crime. I will not go into it, but at paragraph 170 of our report we indicate concerns about whether anyone has to be present for there to be an offence. The Government will look at that.

Humza Yousaf reminded us, as the minister has, that we are in a funny position: we are going into stage 2. This is the raw state of a bill. By no means, if it proceeds, is this what it will look like at the end of the day. That is very important. I think that people were taking the view that this is it, this is the tool. He also reminded us that some songs are toxic and meant to be toxic—they are meant to provoke—and have very little to do with enjoying the match. All is context and intent.
Roderick Campbell—as usual he was very lawyerly, as befits his advocate background—analysed the law as it stands. He reminded us of the requirement under the breach of the peace provisions for a public element and for intention and that, according to the Lord Advocate—I take this, to some extent, from Roderick Campbell’s contribution—there is a gap in the law, in that some matters cannot be dealt with under the criminal law. The bill is intended to fill that gap, on top of its intention to be—the word of the day—transformational. In other words, the bill is intended to make a change in the way the public behaves, such as we have already dramatically achieved with the ban on smoking in public places.

Patrick Harvie: Does the member think that the debate on the bill and the Government’s pushing ahead with it has so far helped to create culture change and to calm the mood at Old Firm matches, or has it made it worse?

The Presiding Officer: Christine Grahame, you have 30 seconds.

Christine Grahame: I welcome vigorous debate, which is what we have had. That is exactly why the committee wanted to bring the report to the chamber and have a debate. I welcome all these matters.

Finally, I say to Neil Findlay that I have been called many things in my life, but a sycophant is a new one. Hugh Henry is witness to the fact that, on the news at 10, I was the first person to say that the bill should not be emergency legislation and that I wanted the Justice Committee to have an opportunity to take evidence and bring it to the chamber. That is exactly what we have done today. My goodness, I am looking forward to stage 2.

The Presiding Officer: That concludes the debate on the Justice Committee’s report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at stage 2.
Decision Time

The Presiding Officer: The next question is, that amendment S4M-01170.1, in the name of James Kelly, which seeks to amend motion S4M-01170, in the name of Christine Grahame, on the Justice Committee’s report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at stage 2, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
MacDonald, Margo (Lothian) (Ind)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Milton, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and
The Presiding Officer: The result of the division is: For 53, Against 64, Abstentions 0.

Amendment disagreed to.

The Presiding Officer: The next question is, that motion S4M-01170, in the name of Christine Grahame, on the Justice Committee’s report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at stage 2, be agreed to.

Motion agreed to,

That the Parliament notes the Justice Committee’s 1st Report, 2011 (Session 4): Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2 (SP Paper 21).
I am writing to provide you with a copy of the Government’s proposed amendments to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, laid earlier today. Subject to clearance by the Parliamentary authorities, they will be published in today’s Daily List and tomorrow’s Business Bulletin.

As was made clear in the Justice Committee’s constructive report on the Bill, there is broad agreement that there is a significant issue affecting Scottish football, which has an unacceptable and often disproportionate impact on wider society. Far from inevitable, far from harmless, sectarian hate poisons our national game and spreads beyond football stadiums. It can have no place in the Scotland we all want to live in. The Lord Advocate and Scottish police service have made clear that existing legal measures are not adequate, and the football authorities have welcomed strengthened legislation to support their efforts to tackle these issues. Government and Parliament have a duty to respond.

The Government’s amendments are therefore aimed at strengthening and clarifying the Bill in the ways identified by the Justice Committee’s report; in particular by providing an express provision on freedom of expression. That, together with increased clarity on other measures, should provide reassurance to football supporters and others that the Bill will not impact on the behaviour of the law abiding majority. It is not the intention of the Scottish Government to in any way restrict the legitimate right of people to hold and express their religious beliefs, even when those beliefs involve criticism of the beliefs and lifestyles of others, whether religious or not.

I have attached a summary of all the Scottish Government amendments laid today along with a copy of the amendments themselves. These amendments should be read alongside the revised draft of the Lord Advocate’s Guidelines to Chief Constables, which provide a very clear explanation of the expectations placed on police officers in using these new measures.

I hope you find this helpful and I would be very happy to provide any other information you or the Committee would find helpful. A copy of this letter will be placed in SPICe – bib. Number 53417.

Roseanna Cunningham MSP
Minister for Community Safety and Legal Affairs
15 November 2011
‘Freedom of speech’ - Amendment 11: This amendment provides an explicit ‘freedom of expression’ protection with regard to section 5(5) – the offence concerning threats intended to incite religious hatred. It is similar to the equivalent provision at section 29J of the Public Order Act 1986 – the equivalent legislation in England and Wales.

‘Journey’ - Amendments 2, 4, 5, 6 & 8: Amendment 4 is intended to clarify the situation regarding when the offence is committed on a journey to a regulated football match. It explicitly provides that a person who engages in behaviour constituting an offence under section 1 (e.g. sectarian chanting or otherwise offensive behaviour) who is not on a journey to a regulated football match, but who directs the behaviour at, or joins in with, people who are on a journey to a regulated football match, commits the offence. Amendments 2, 5, 6 & 8 are consequential amendments.

‘Power to amend offensive behaviour offence’ - Amendment 9: This amendment provides a power for Scottish Ministers to modify by order the definition of the behaviour covered by the offensive behaviour at football offence, the groups against whom it is an offence to express hatred and the definitions of those matters in section 4. This power would enable the offensive behaviour at football offence to be widened to include hatred on grounds of e.g. gender and age. The power is subject to affirmative resolution procedure.

‘Power to amend threatening communications offence - Amendments 10, 12 & 13: Amendment 13 provides a power to modify, add or remove groups against which it is an offence to make threats intended to stir up hatred. This power would enable the threatening communications offence to be widened to cover additional characteristics. The order-making power also enables the freedom of expression (amendment 11) to be modified to take account of any changes to the scope of the offence (e.g. to match any widening of the offence to cover additional characteristics). The power is subject to affirmative resolution procedure. Amendments 10 & 12 are consequential amendments.

‘Review clause’ - Amendment 14: This amendment provides for a ‘review clause’ to be added to the Bill. It requires that the Scottish Government reports to Parliament on the operation of the offences during a period beginning on the day that the offences come into force and ending 2 years after the 1 August next occurring after that day. The report must be laid in Parliament not later than 12 months after the end of this period. This is intended to ensure that the report will cover two full football seasons.

‘Commencement’ - Amendment 15: This amendment deletes section 8 of the Bill, which provided for the Act to come into force immediately on Royal Assent (as had originally been proposed when the Bill was introduced under emergency procedure). It provides for the Act to come into force by Order made by Scottish Ministers.
‘Regulated football match’ - Amendments 1, 3 & 7: These are minor drafting amendments which ensure greater consistency in the way the Bill refers to regulated football matches.
Section 2

Roseanna Cunningham

1 In section 2, page 2, line 24, after <a> insert <regulated>

Roseanna Cunningham

2 In section 2, page 2, line 29, after <if> insert <-

(aa)>

Roseanna Cunningham

3 In section 2, page 2, line 33, after <the> insert <regulated football>

Roseanna Cunningham

4 In section 2, page 2, line 34, at end insert <, or

(ab) it is directed towards, or is engaged in together with, another person who is—

(i) in the ground where the regulated football match is being held on the day
    on which it is being held,

(ii) entering or leaving (or trying to enter or leave) the ground where the
    regulated football match is being held, or

(iii) on a journey to or from the regulated football match.>

Roseanna Cunningham

5 In section 2, page 2, line 35, leave out <(2)(a) to (c)> and insert <(2)(aa) and (ab)>

Roseanna Cunningham

6 In section 2, page 2, line 37, leave out <(2)(a) and (b)> and insert <(2)(aa) and (ab)>

Roseanna Cunningham

7 In section 2, page 2, line 38, after <the> insert <regulated football>

Roseanna Cunningham

8 In section 2, page 2, line 39, leave out <(2)(c)> and insert <(2)(aa) and (ab)>

After section 4

Roseanna Cunningham

9 After section 4, insert—
<Power to modify sections 1 and 4>

(1) The Scottish Ministers may by order—

(a) modify section 1 so as to—

(i) add or remove a description of behaviour to or from those for the time being listed in subsection (2) of that section,

(ii) vary the description of a behaviour for the time being listed in that subsection,

(iii) add or remove a thing to or from those for the time being listed in subsection (4) of that section,

(iv) vary the description of a thing for the time being listed in that subsection,

(b) modify section 4 so as to—

(i) add or remove a definition to or from those for the time being mentioned in subsection (2) or (3) of that section,

(ii) vary a definition for the time being mentioned in either of those subsections.

(2) An order under subsection (1)—

(a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,

(b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,

(c) is subject to the affirmative procedure.

Section 5

Roseanna Cunningham

10 In section 5, page 4, line 29, leave out <religious hatred> and insert <hatred on religious grounds>

After section 5

Roseanna Cunningham

11 After section 5, insert—

<Protection of freedom of expression>

(1) For the avoidance of doubt, nothing in section 5(5) prohibits or restricts—

(a) discussion or criticism of religions or the beliefs or practices of adherents of religions,

(b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,

(c) proselytising, or

(d) urging of adherents of religions to cease practising their religions.

(2) In subsection (1), “religions” includes—
(a) religions generally,
(b) particular religions,
(c) other belief systems.

Section 6

Roseanna Cunningham

12 In section 6, page 5, line 3, leave out "Religious hatred" and insert "Hatred on religious grounds"

After section 6

Roseanna Cunningham

13 After section 6, insert—

<Power to modify sections 5(5)(b) and 6

(1) The Scottish Ministers may by order—
   (a) modify section 5(5)(b) so as to—
       (i) add or remove a ground of hatred to or from those for the time being mentioned in that section,
       (ii) vary a ground of hatred for the time being mentioned in that section,
   (b) modify section 6 so as to—
       (i) add or remove a definition to or from those for the time being mentioned in that section in consequence of a modification made under paragraph (a),
       (ii) vary a definition that relates to a ground of hatred for the time being mentioned in section 5(5)(b).

(2) An order under subsection (1) may—
   (a) specify grounds of hatred by reference to hatred against groups of persons, or individuals, of specified descriptions,
   (b) specify such descriptions by reference to specified personal characteristics,
   (c) in relation to any ground added by the order, modify this Act so as to make such provision for the same or similar purposes as that in section (Protection of freedom of expression) as the Scottish Ministers consider necessary or appropriate,
   (d) remove or vary any provision made under paragraph (c).

(3) An order under subsection (1)—
   (a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,
   (b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,
   (c) is subject to the affirmative procedure.>
After section 7

Roseanna Cunningham

14 After section 7, insert—

<Report on operation of offences

(1) The Scottish Ministers must lay before the Scottish Parliament—

(a) a report on the operation of the offence in section 1(1) during the review period, and

(b) a report on the operation of the offence in section 5(1) during the review period.

(2) A report under subsection (1) must be so laid no later than 12 months after the end of the review period.

(3) In subsections (1) and (2), “the review period” means the period—

(a) beginning on the relevant day, and

(b) ending 2 years after the 1 August next occurring after the relevant day.

(4) In subsection (3), “the relevant day” means—

(a) in relation to a report under subsection (1)(a), the day on which section 1 comes into force,

(b) in relation to a report under subsection (1)(b), the day on which section 5 comes into force.>

Section 8

Roseanna Cunningham

15 Leave out section 8 and insert—

<Commencement

(1) This section and section 9 come into force on the day of Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.>
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 9                           Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Patrick Harvie
22 In section 1, page 1, line 11, leave out <hatred of, or stirring up hatred against> and insert <, or stirring up, malice and ill-will towards>

Patrick Harvie
23 In section 1, page 1, line 16, leave out <hatred of, or stirring up hatred against> and insert <, or stirring up, malice and ill-will towards>

Patrick Harvie
24 In section 1, page 1, line 19, leave out <hatred of> and insert <malice and ill-will towards>

David McLetchie
16 In section 1, page 1, leave out line 22 and insert—

<(  ) expressing support for an organisation listed in Schedule 2 to the Terrorism Act 2000 (c.11), or

(  ) glorifying or celebrating events involving the loss of life or serious injury.>

Patrick Harvie
25 In section 1, page 1, line 23, leave out <hatred is> and insert <malice and ill-will are>

David McLetchie
17 In section 1, page 2, line 17, at end insert—

<(  ) It may not be libelled in an indictment or specified in a complaint that an offence under subsection (1) is—

(a) racially aggravated under section 96 of the Crime and Disorder Act 1998 (c.37),
(b) aggravated by religious prejudice under section 74 of the Criminal Justice (Scotland) Act 2003 (asp 7), or
(c) aggravated by prejudice relating to disability, sexual orientation or transgender identity under the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (asp 8).

Section 2

Roseanna Cunningham

1 In section 2, page 2, line 24, after <a> insert <regulated>

Roseanna Cunningham

2 In section 2, page 2, line 29, after <if> insert «—

(aa)»

Roseanna Cunningham

3 In section 2, page 2, line 33, after <the> insert <regulated football>

David McLetchie

18 In section 2, page 2, line 33, leave out from <or> to end of line 34

Roseanna Cunningham

4 In section 2, page 2, line 34, at end insert «, or

(ab) it is directed towards, or is engaged in together with, another person who is—

(i) in the ground where the regulated football match is being held on the day on which it is being held,

(ii) entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or

(iii) on a journey to or from the regulated football match.»

David McLetchie

4A As an amendment to amendment 4, line 6, leave out from <or> to end of line 7

David McLetchie

19 In section 2, page 2, line 35, leave out subsection (3)

Roseanna Cunningham

5 In section 2, page 2, line 35, leave out «(2)(a) to (c)» and insert «(2)(aa) and (ab)»

Roseanna Cunningham

6 In section 2, page 2, line 37, leave out «(2)(a) and (b)» and insert «(2)(aa) and (ab)»
In section 2, page 2, line 38, after <the> insert <regulated football>

In section 2, page 2, line 39, leave out subsection (4)

In section 2, page 2, line 39, leave out <(2)(c)> and insert <(2)(aa) and (ab)>

In section 2, page 2, line 39, leave out <(2)(c)> and insert <(2)(aa) and (ab)>

In section 2, page 2, line 39, leave out subsection (4)

In section 2, page 2, line 39, leave out <(2)(c)> and insert <(2)(aa) and (ab)>

In section 4, page 3, line 23, leave out <hatred> and insert <malice and ill-will>

In section 4, page 3, line 23, leave out <hatred> and insert <malice and ill-will>

In section 4, page 3, line 37, leave out subsection (4)

In section 4, page 3, line 37, leave out subsection (4)

In section 4, page 3, line 38, leave out from <whether> to end of line and insert <by means of the broadcast transmission of pictures>

In section 4, page 3, line 38, leave out from <whether> to end of line and insert <by means of the broadcast transmission of pictures>

After section 4

After section 4, insert—

<Power to modify sections 1 and 4>

(1) The Scottish Ministers may by order—

(a) modify section 1 so as to—

(i) add or remove a description of behaviour to or from those for the time being listed in subsection (2) of that section,

(ii) vary the description of a behaviour for the time being listed in that subsection,

(iii) add or remove a thing to or from those for the time being listed in subsection (4) of that section,

(iv) vary the description of a thing for the time being listed in that subsection,

(b) modify section 4 so as to—

(i) add or remove a definition to or from those for the time being mentioned in subsection (2) or (3) of that section,

(ii) vary a definition for the time being mentioned in either of those subsections.

(2) An order under subsection (1)—
(a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,
(b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,
(c) is subject to the affirmative procedure.

Section 5

Patrick Harvie

28 In section 5, page 4, line 11, leave out <suffer fear or alarm,> and insert <believe that the threatened or incited act, given the circumstances, was likely to be carried out>

Patrick Harvie

29 In section 5, page 4, line 13, leave out <fear or alarm> and insert <a reasonable person to believe that the threatened or incited act, given the circumstances, was likely to be carried out>

Patrick Harvie

30 In section 5, page 4, leave out lines 14 and 15

Patrick Harvie

31 In section 5, page 4, line 15, leave out <fear or alarm> and insert <a reasonable person to believe that the threatened or incited act, given the circumstances, was likely to be carried out>

Patrick Harvie

32 In section 5, page 4, line 29, after <up> insert <—

(i)>

Roseanna Cunningham

10 In section 5, page 4, line 29, leave out <religious hatred> and insert <hatred on religious grounds>

Patrick Harvie

33 In section 5, page 4, line 29, leave out <religious hatred> and insert <malice and ill-will on religious grounds>

Patrick Harvie

34 In section 5, page 4, line 29, at end insert—

(ii) hatred against a group of persons based on their membership (or presumed membership) of a group defined by reference to a thing mentioned in subsection (5A),

(iii) hatred against an individual based on the individual’s membership (or presumed membership) of a group defined by reference to a thing mentioned in subsection (5A).
(5A) The things referred to in subsection (5)(b)(ii) and (iii) are—

(a) colour,
(b) race,
(c) nationality (including citizenship),
(d) ethnic or national origins,
(e) sexual orientation,
(f) transgender identity,
(g) disability >

Patrick Harvie

34A As an amendment to amendment 34, line 2, leave out <hatred against> and insert <malice and ill-will towards>

Patrick Harvie

34B As an amendment to amendment 34, line 5, leave out <hatred against> and insert <malice and ill-will towards>

Patrick Harvie

35 In section 5, page 4, line 31, at end insert—

<(  ) It is a defence for a person charged with an offence under subsection (1) by virtue of Condition A being satisfied to show that communication of the material took place in the course of a theatrical or other artistic performance or a rehearsal for such a performance.>

After section 5

Roseanna Cunningham

11 After section 5, insert—

<Protection of freedom of expression

(1) For the avoidance of doubt, nothing in section 5(5) prohibits or restricts—

(a) discussion or criticism of religions or the beliefs or practices of adherents of religions,
(b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,
(c) proselytising, or
(d) urging of adherents of religions to cease practising their religions.

(2) In subsection (1), “religions” includes—

(a) religions generally,
(b) particular religions,
(c) other belief systems.
Patrick Harvie

11A As an amendment to amendment 11, line 3, leave out <section 5(5)> and insert <this Act>

Section 6

Patrick Harvie

36 In section 6, page 4, line 40, at end insert—

<(  ) “Disability” means physical or mental impairment of any kind.>

Roseanna Cunningham

12 In section 6, page 5, line 3, leave out <“Religious hatred”> and insert <“Hatred on religious grounds”>

Patrick Harvie

37 In section 6, page 5, line 3, leave out <“Religious hatred” means hatred against> and insert <“Malice and ill-will on religious grounds” means malice and ill-will towards>

Patrick Harvie

38 In section 6, page 5, line 9, at end insert—

<(  ) “Transgender identity” means any of the following—

(a) transvestism,
(b) transsexualism,
(c) intersexuality,
(d) having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender,
(e) any other gender identity that is not standard male or female gender identity.>

Patrick Harvie

39 In section 6, page 5, line 12, after <(4)> insert <and section 5(5)(b)>

After section 6

Roseanna Cunningham

13 After section 6, insert—

<Power to modify sections 5(5)(b) and 6

(1) The Scottish Ministers may by order—

(a) modify section 5(5)(b) so as to—

(i) add or remove a ground of hatred to or from those for the time being mentioned in that section,

(ii) vary a ground of hatred for the time being mentioned in that section,

(b) modify section 6 so as to—>
(i) add or remove a definition to or from those for the time being mentioned in that section in consequence of a modification made under paragraph (a),

(ii) vary a definition that relates to a ground of hatred for the time being mentioned in section 5(5)(b).

(2) An order under subsection (1) may—

(a) specify grounds of hatred by reference to hatred against groups of persons, or individuals, of specified descriptions,

(b) specify such descriptions by reference to specified personal characteristics,

(c) in relation to any ground added by the order, modify this Act so as to make such provision for the same or similar purposes as that in section (Protection of freedom of expression) as the Scottish Ministers consider necessary or appropriate,

(d) remove or vary any provision made under paragraph (c).

(3) An order under subsection (1)—

(a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,

(b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,

(c) is subject to the affirmative procedure.

After section 7

Roseanna Cunningham

14 After section 7, insert—

<Report on operation of offences

(1) The Scottish Ministers must lay before the Scottish Parliament—

(a) a report on the operation of the offence in section 1(1) during the review period, and

(b) a report on the operation of the offence in section 5(1) during the review period.

(2) A report under subsection (1) must be so laid no later than 12 months after the end of the review period.

(3) In subsections (1) and (2), “the review period” means the period—

(a) beginning on the relevant day, and

(b) ending 2 years after the 1 August next occurring after the relevant day.

(4) In subsection (3), “the relevant day” means—

(a) in relation to a report under subsection (1)(a), the day on which section 1 comes into force,

(b) in relation to a report under subsection (1)(b), the day on which section 5 comes into force.>
David McLetchie

14A As an amendment to amendment 14, line 6, at end insert—

<(1A) A report under subsection (1) must in particular—

(a) set out the objectives intended to be achieved by this Act,
(b) assess the extent to which those objectives have been achieved during the review period,
(c) assess whether and to what extent those objectives remain appropriate,
(d) set out conclusions.>

David McLetchie

14B As an amendment to amendment 14, line 9, after <(1)> insert <, (1A)>

Section 8

Roseanna Cunningham

15 Leave out section 8 and insert—

<Commencement

(1) This section and section 9 come into force on the day of Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.>
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

“Hatred” versus “malice and ill-will”
22, 23, 24, 25, 26, 33, 34A, 34B, 37

Notes on amendments in this group
Amendments 33 and 37 are direct alternatives for, respectively, amendments 10 and 12 in the group Section 5 offence: Condition B: grounds of hatred

Section 1 offence: supporting terrorism and glorifying events
16

Statutory aggravations not to be applied to section 1 offence
17

Section 1 offence: references to “regulated football match”
1, 3, 7

Notes on amendments in this group
Amendment 7 is pre-empted by amendment 19 in the group Section 1 offence: places where match is televised

Section 1 offence: behaviour directed at, or engaged in together with, those attending or travelling to a regulated football match
2, 4, 5, 6, 8

Notes on amendments in this group
Amendments 5 and 6 are pre-empted by amendment 19 in the group Section 1 offence: places where match is televised
Amendment 8 is pre-empted by amendment 20 in the next group
Section 1 offence: those on a journey to or from a match
18, 4A, 20

Notes on amendments in this group
Amendment 20 pre-empts amendment 8 in the previous group

Section 1 offence: places where match is televised
19, 21, 27

Notes on amendments in this group
Amendment 19 pre-empts amendment 7 in the group Section 1 offence: references to “regulated football match” and amendments 5 and 6 in the group Section 1 offence: behaviour directed at, or engaged in together with, those attending or travelling to a regulated football match
Amendment 21 pre-empts amendment 27

Power to modify sections 1 and 4
9

Section 5 offence: Condition A: fear or alarm test
28, 29, 31

Notes on amendments in this group
Amendment 31 is pre-empted by amendment 30 in the next group

Section 5 offence: Condition A: recklessness test
30

Notes on amendments in this group
Amendment 30 pre-empts amendment 31 in the previous group

Section 5 offence: Condition B: grounds of hatred
32, 10, 34, 36, 12, 38, 39, 13

Notes on amendments in this group
Amendments 10 and 12 are direct alternatives for, respectively, amendments 33 and 37 in the group “Hatred” versus “malice and ill-will”

Section 5 offence: Condition A: defence of artistic performance
35

Protection of freedom of expression
11, 11A

Review of operation of offences
14, 14A, 14B

Commencement
15
3. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill:** The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 1, 3, 5, 6, 7, 8, 10, 12 and 13.

The following amendments were agreed to (by division):
- 2 (For 6, Against 0, Abstentions 3)
- 4 (For 6, Against 0, Abstentions 3)
- 9 (For 5, Against 2, Abstentions 2)
- 11 (For 6, Against 0, Abstentions 3)
- 14 (For 6, Against 0, Abstentions 3)
- 15 (For 6, Against 0, Abstentions 3).

The following amendments were disagreed to (by division):
- 22 (For 0, Against 6, Abstentions 3)
- 18 (For 1, Against 5, Abstentions 3)
- 19 (For 1, Against 5, Abstentions 3)
- 27 (For 1, Against 5, Abstentions 3)
- 28 (For 0, Against 5, Abstentions 4)
- 30 (For 0, Against 5, Abstentions 4)
- 11A (For 1, Against 5, Abstentions 3)
- 14A (For 1, Against 5, Abstentions 3).

Amendment 37 was pre-empted.

The following amendments were moved and, with the agreement of the Committee, withdrawn: 16, 17, 32 and 35.

The following amendments were not moved: 23, 24, 25, 4A, 20, 26, 21, 29, 31, 33, 34, 34A, 34B, 36, 38, 39 and 14B.
Sections 1, 3, 4, 7 and 9 and the long title were agreed to without amendment.

Sections 2, 5, 6 and 8 were agreed to as amended.

The Committee completed Stage 2 consideration of the Bill.
The Convener: We move on to item 3. This is the first day of stage 2 proceedings on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I hope that we will be able to complete our consideration today, but if we cannot do so, I will stop at an appropriate moment and we will continue at next week's meeting.

There are members of the committee who have not sat through a stage 2 before, so it might be helpful if I explain some of the processes. We have amendments to amendments—if I confuse everyone on this, it is not my fault. The committee must first decide whether to accept an amendment to an amendment before taking a decision on whether to agree to the amendment itself.

That was lesson 1; lesson 2 is on pre-emption. When an amendment pre-empts another amendment, that means that it is seeking to remove text that the succeeding amendment is seeking to amend. If the first amendment is agreed to, the succeeding amendment cannot be moved, because the text that it seeks to change no longer exists. It is therefore pre-empted.

I can feel headaches coming on, but I will go on to direct alternatives. When two or more amendments are described as direct alternatives, that means that they are seeking to remove and replace an identical piece of text, usually but not always a single word or a number. If two or more amendments are described as direct alternatives, the decision on the last of the direct alternatives will stand, regardless of whether previous alternatives were agreed. If you agree to amendment A and then to amendment B, it is amendment B that will stand.

I should point out that there is an error in the groupings document, which describes amendments 12 and 37, which would amend section 6, as direct alternatives. They are not; amendment 12 pre-empts amendment 37. I apologise for any confusion, on top of the confusion that I have probably already caused.

For the benefit of members who have not sat through a stage 2 before, I will go on to explain some of the processes. We have amendments to amendments—if I confuse everyone on this, it is not my fault. The committee must first decide whether to accept an amendment to an amendment before taking a decision on whether to agree to the amendment itself.

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For the benefit of members who have not sat through a stage 2, I will take the process slowly rather than at my usual breakneck speed, so that we ensure that everyone follows what is going on.

I welcome the Minister for Community Safety and Legal Affairs, and I also welcome a non-committee member, Patrick Harvie. Members should have copies of the bill, the marshalled list and the groupings of amendments.

Section 1—Offensive behaviour at regulated football matches

The Convener: Amendment 22, in the name of Patrick Harvie, is grouped with amendments 23 to 26, 33, 34A, 34B and 37. I advise members that amendment 33 is a direct alternative for amendment 10 in the group with the heading “Section 5 offence: Condition B: grounds of hatred”. I repeat that amendment 12 pre-empt amendment 37.

Patrick Harvie (Glasgow) (Green): This group of amendments seeks to achieve one change throughout the bill—replacing the term “hatred” with the term “malice and ill-will”. Before I explain why, I will give members a wee bit of background. I was keen to see the groupings of amendments for today’s meeting but, when I opened the file, I was slightly disappointed that a wider range of amendments had not been offered for the committee to consider. The bill has been substantially criticised by the Opposition parties, and I expected the committee to be offered more options.

I felt that it was important to lodge amendments for three broad reasons: first, I wanted to suggest serious changes that I felt were important; secondly, I wanted to give the committee options; and thirdly—with this particular group of amendments—I wanted to explore the reasoning behind the way in which the bill is drafted. On a couple of occasions, I have asked why the term “hatred” has been used instead of the term “malice and ill-will”, but I have not really been given a reason.

As members will know, during the previous session of Parliament, I introduced a bill on hate crime—relating specifically to aggravated offences. That worked as a hand-out bill, and I worked closely with Government ministers and officials to try to get the drafting right. We considered at some length the various terms that could be used, and it was pretty widely accepted that “malice and ill-will” was the term used throughout other pieces of hate crime legislation. After the Offences (Aggravation by Prejudice) (Scotland) Bill was passed, some members thought that a consolidation bill would be the next step but, without such a bill to square off all the different elements of hate crime legislation, we should stick to the form of words that is currently used—“malice and ill-will”.

When responding to the debate on this group, I hope that the minister will be able to explain whether the two different terms will have different meanings in practice. If so, I hope that she will
explain what the differences are and why they are appropriate. If there is no difference in meaning—and I cannot see a reason for introducing one—why are we using a different term in this bill, and will we then need to make retrospective changes to all other pieces of hate crime legislation already on the books, to reflect the new wording? The word “hatred” is obviously simpler for people to understand but, if using the word introduces the possibility that courts will interpret the terms differently, it seems to me that we should change all the legislation at one time, rather than doing so in a piecemeal manner.

For the purposes of debate, I suggest that members ignore the fact that amendments 34A and 34B amend a later amendment of mine in a different group. I simply wanted to ensure that the committee, regardless of its decisions on future groups, had the option of replacing “hatred” with “malice and ill-will” throughout the bill.

If other drafting matters arise, we can return to them at stage 3, but I hope that the minister, as well as discussing the amendments specifically, will be able to discuss in general terms why a change in language has been introduced, and why the change has been applied to this bill only, rather than to hate crime more widely.

I move amendment 22.

James Kelly (Rutherglen) (Lab): I note Patrick Harvie’s comments—as ever, he made them in a cogent manner.

The Labour position on all substantive amendments will be to abstain. It seems to me that, when the Scottish Government paused back in June, which was welcomed by all, the process was frozen. It also seems to me that the Scottish Government has not interacted with the process, has not listened to the concerns that have come through in the evidence and has, therefore, adopted a take-it-or-leave-it approach on the bill.

I think that everyone agrees that we must support all practical attempts to oppose sectarianism. We must support the authorities and the existing legislation, including the Criminal Justice and Licensing (Scotland) Act 2010, under section 38 of which there have been 99 prosecutions, even though it came into force only recently.

I firmly believe that the Government has failed to build a consensus in the Parliament and in the country. Therefore, even at this late stage, I appeal to the Government to put the bill on hold, to work with the other parties and with groups in the country to support practical measures to tackle sectarianism and, if it genuinely feels that there remains a case for introducing legislation, to make that case and to build support for it. If that case is proven, we will certainly be prepared to look at it, after a period of reflection.

The Convener: You have stated the Labour Party’s position.

We will hear from Humza Yousaf, followed by Roderick Campbell.

Humza Yousaf (Glasgow) (SNP): I do not think that I had my hand up first—I think that it was Alison McInnes who did.

The Convener: Oh, sorry.

Humza Yousaf: I will let Alison go first, of course.

The Convener: Thank you for chairing. I always feel that there is some kind of a coup coming from your direction—I will be ready for it.

Alison McInnes (North East Scotland) (LD): To respond to Patrick Harvie’s comments, during stage 1, I gave serious consideration to whether it would be possible to lodge amendments that would fix the bill. I came to the conclusion that the bill raised so many concerns that it would be impossible to amend it effectively. The minister’s amendments are broadly cosmetic and she has not addressed some of the deep-seated criticisms that have been made of the bill. The bill is so deeply flawed that any attempt to amend it would compound the problem. Some of the more complicated amendments that we will look at today raise further issues to do with consultation.

The Convener: Rather than call you each time, should I take it that that was a broad statement about the position that your party is taking, such as the declaration that the Labour Party made?

Alison McInnes: I intend to abstain on almost all the amendments. There is one amendment that seeks to give the minister greater powers, which I will oppose.

Humza Yousaf: On amendment 22, I, too, would like to know whether there is a legal difference between “hatred” and “malice and ill-will”. I appreciate the fact that, regardless of what Mr Harvie’s views on the bill are, he has engaged with the process by lodging amendments that are in some respects constructive. I think that those who do nothing and say nothing will be judged for that.

Roderick Campbell (North East Fife) (SNP): I have some sympathy for Patrick Harvie’s views, but the bill is directed at offensive behaviour at football, so I think that it should be consistent with the part of the Police, Public Order and Criminal Justice (Scotland) Act 2006 that introduced football banning orders, which used the term “hatred”.
David McLetchie: Patrick Harvie's amendments raise interesting issues to do with what the boundaries are between "hatred" on the one hand and "malice and ill-will" on the other. I suspect that the use of the latter term represents a slight softening and broadening of the offence.

We should also look at the issue in the context of trying to define the boundaries of the offences that the bill seeks to create. Later, we will debate an amendment on the protection of freedom of expression, in which we learn that it is all right to dislike, ridicule, insult or abuse someone. We have an interesting situation in which, on the one hand, a distinction is being made between "hatred" and "malice and ill-will" with regard to what is or is not prosecutable while, on the other, it is being suggested that all manner of other conduct that many would regard as offensive will be covered by freedom of expression. That simply demonstrates that the boundaries of these offences are very difficult to define. It might be that Patrick Harvie's use of the term "malice and ill-will" is no better than the minister's use of the term "hatred", but the fact is that, in this area, some very difficult boundaries need to be policed. Indeed, as far as I could divine from the committee's report, that issue is at the root of many of the general concerns about the bill that were raised in evidence.

Graeme Pearson (South Scotland) (Lab): In view of Humza Yousaf's remark that there needs to be positive engagement with the bill and that silence will be judged afterwards, I feel that I need to comment. I had no intention of saying anything more than James Kelly has already said, but I will associate myself with some of David McLetchie's comments.

I feel that I cannot offer any help through amendments because I think that the current approach is defective and ill advised. I concur with everything that James Kelly has said about taking a more positive approach to engaging with the various elements that might contribute to an outcome that we would all desire. Given the absence of proper statistics or any picture of what we are trying to resolve, given the publication of statistics only in the past week, which further mires the whole issue, given the now consistent use of banning orders, with more such orders being given out in the past six months than in the past couple of years, and given the creation of an anti-sectarian unit, which has been in operation for six months and seems to be enforcing legislation that is already defective but is working in a positive sense to put people through the courts and convict them, I feel that we are in danger of producing legislation merely to be seen to be taking action. Indeed, I fear that that action has already contributed to a very negative climate. Temperatures are rising among the various members of the public who are engaging on this matter and it seems to me odd that there is a focus on those who watch football to the exclusion of the rest of Scotland's population. It does not seem to be a modern way of dealing with these matters.

I was not going to make this final comment, but now I feel duty bound to. I thought that Humza Yousaf's recent comments in the press about the confusion—

The Convener: I would prefer it if members did not refer to other members. Please make your point.

Graeme Pearson: A committee member's comments this week on the committee's confused position and lack of clarity did the committee no service. I have made my position clear right from the outset and thought that in doing so I had used straightforward language. We might disagree on the way forward, but my position all through the process has been clear and consistent. I would much prefer it if there were no disinformation—it does not help the situation.

The Convener: The member should bear with me, but I will deal with that matter with the committee itself.

John Finnie (Highlands and Islands) (SNP): Given that Graeme Pearson has been dealing with legislation for decades, it should be very clear to him that the bill is targeted at aspects of behaviour at football giving rise to public disorder and threatening communications. There is clearly public support for the bill—indeed, people thought there was parliamentary support for it—and, with regard to Graeme Pearson's comment on the need to be seen to be taking action, I believe that the Government absolutely needs to be seen to be acting to deal with assaults on people at their place of work and the mayhem that happened just a few short months ago.

The Convener: This has been more like a stage 1 debate than a debate about stage 2 amendments. I have allowed members to have their say but, from now on, I suggest that we will deal the specific amendments. I felt it only appropriate to let members put their feelings on record—although Colin Keir should not feel the need to do so if he does not want to—and we will now move on. I ask the minister to deal with the specific amendment.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I will attend to Patrick Harvie's comments. I thank him for the explanation of his intention in lodging amendment 22 and the other amendments in the
Patrick Harvie’s amendments seek to replace the term “hatred”, where it occurs in the bill, with the term “malice and ill-will.” I am aware that the term “malice and ill-will” has been used in legislation concerning statutory aggravations, such as the Offences (Aggravation by Prejudice) (Scotland) Act 2009 and section 74 of the Criminal Justice (Scotland) Act 2003, which provides for an aggravation by religious prejudice. However, the drafting of the bill reflects the football banning order provisions in the Police, Public Order and Criminal Justice (Scotland) Act 2006, which also use the term “stirring up hatred”. The use of the same term in the bill means that the two pieces of legislation are aligned. There is little difference in meaning between the terms “hatred” and “malice and ill-will” but, in the context of the bill, we think that it is more appropriate to follow the plainer approach of the football banning order provisions, which we are trying to be consistent with in other respects.

Members will note that the two approaches—the use of the term “malice and ill-will” in the 2003 act and the use of the term “hatred” in the 2006 act—were taken by the Labour-Lib Dem coalition. I suspect that the use of the plainer language in the football banning order provisions was to make it much more easily understood by those who might be impacted by that legislation but, obviously, I was not as closely involved in the discussions at that time.

I assure Mr Harvie, if he is concerned about this, that the difference in wording will not have any adverse read-across for the operation of the statutory aggravations. With that explanation and assurance, I hope that he will withdraw amendment 22 and not move the others, because I feel that the Government’s position is perfectly reasonable.

I listened with care to David McLetchie’s remarks. I think that he ignores the fact that the section 1 offences have all to be connected to public disorder, which is the difference between those and the second offence.

Patrick Harvie: I can assure the minister that I am always relaxed, particularly when I am moving amendments at such a consensual committee.

The Convener: We are consensual even when we disagree with one another.

Patrick Harvie: One or two members have suggested that my amendments are not necessary, because the bill is essentially unfixable. I am open to being persuaded of that case, as I do not know whether the bill is fixable, but I think that it is important to air some issues and to explore the reasons why it has been drafted in a particular way.

It has been suggested, particularly by David McLetchie, that the boundaries of either definition—“hatred” or “malice and ill-will”—are unclear. I would probably agree with that. I lodged the amendments not to suggest that one term should, in all circumstances, trump the other but to explore the reasoning behind their use. The minister says that, although there is little difference in meaning between the terms, the reason for using “hatred” in the bill is to be closer to the football banning orders legislation than to the statutory aggravations. The question, for me, is the character of the bill—what kind of bill is it? The bill is not specifically about football. Some aspects of it are specifically about football, but the second offence is not. Even the first offence, which is about football, brings in, in section 1(4), a much wider range of hate crimes than the sectarianism issue, which often characterises the debate on the bill. The bill is not a football bill or a sectarianism bill; it is a hate crime bill.

Many aspects of the bill, particularly the provisions on incitement to hatred, seem closer in character to existing hate crime legislation than to legislation governing football and, specifically, football banning orders. There seems to be a case for saying that we should be using hate crime legislation as the template and as the source of language and definitions. I recognise that that might not be the committee’s view, but I press the amendments not to suggest that one term should, in all circumstances, trump the other but to explore the reasoning behind their use. The minister says that, although there is little difference in meaning between the terms, the reason for using “hatred” in the bill is to be closer to the football banning orders legislation than to the statutory aggravations. The question, for me, is the character of the bill—what kind of bill is it? The bill is not specifically about football. Some aspects of it are specifically about football, but the second offence is not. Even the first offence, which is about football, brings in, in section 1(4), a much wider range of hate crimes than the sectarianism issue, which often characterises the debate on the bill. The bill is not a football bill or a sectarianism bill; it is a hate crime bill.

The Convener: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 6, Abstentions 3.

Amendment 22 disagreed to.

Amendments 23 and 24 not moved.

The Convener: Amendment 16, in the name of David McLetchie, is in a group on its own.
David McLetchie: One of the weaknesses of the bill is its failure to define sectarian behaviour, although addressing sectarian behaviour, particularly in the context of football matches, is the motivation behind it. As I have said several times in debates in the Parliament on the subject, sectarian behaviour in Scotland cannot be viewed solely in the context of religious hatred directed towards Roman Catholics. It also manifests itself in hostilities and affiliations that arise from the history of Ireland, where a conflict of divisions between Catholics and Protestants certainly play a part but there are also strong and secular republican and loyalist traditions. Regrettably, conflicting desires to bring about constitutional change or defend an existing constitutional order have been reflected not just in political debate but in the activities of paramilitary and terrorist groups on both sides.

I welcome the fact that the broader perspective on sectarianism and sectarian behaviour is shared by the Scottish Government and is reflected in the guidelines that the Lord Advocate has published. The guidelines indicate that section 1(2)(e)—

“behaviour that a reasonable person would be likely to consider offensive”—

will encompass

“Songs/lyrics in support of terrorist organisations”

and

“Songs/lyrics which glorifies or celebrates events involving the loss of life or serious injury.”

It is not clear to me why such offensive behaviour manifests itself only in songs and lyrics, according to the guidelines. Could not offensive also be caused by the exhibition of banners and flags that do the same thing or the wearing of T-shirts or other articles of clothing that carry offensive slogans or offensive symbols? The minister might explain that.

Be that as it may, the intention behind amendment 16 is to incorporate a specific provision in the bill, alongside the religious hatred provisions, and at the same time to remove from the bill the paragraph (e) offence, which was the subject of much adverse comment in the evidence that the committee received and reflected in its report to the Parliament, which we recently debated. Amendment 16 would define terrorism and terrorist groups by reference to the organisations that are on the proscribed list that is compiled by Her Majesty’s Government under the Terrorism Act 2000, which embraces the Irish Republican Army and its various derivatives and splinter organisations, as well as loyalist paramilitary groups.

The problem with the statutory aggravation that the Parliament enacted in section 74 of the Criminal Justice (Scotland) Act 2003 is that it is one-sided, in that it focuses solely on religious hatred rather than on wider forms of sectarian behaviour and, as such, has been rightly resented as an unbalanced piece of legislation. We risk making exactly the same mistake in the bill. It will not be sufficient to throw a catch-all section into the bill and leave the definition of behaviour that will or will not be prosecuted to the Lord Advocate’s guidelines.

If one is going to take that approach, logically all unacceptable behaviour could be covered by the generalised offences of paragraphs (d) and (e) of section 1(2), leaving all specifications—including those relating to religious and other hatreds—to the guidelines for prosecutors issued by the Lord Advocate.

What we have at present is a half-and-half approach to the problem. It is likely to satisfy no one, and it has been born of an unwillingness and reluctance to firmly grasp the sectarian nettle.

10:30

The Convener: While you are grasping that nettle, will you move your amendment please?

David McLetchie: Ouch! I move amendment 16.

The Convener: As no other committee

Roseanna Cunningham: Amendment 16 would, as David McLetchie said, narrow the coverage of the

“Offensive behaviour at regulated football matches”

offence by deleting section 1(2)(e). That would mean that the offence would no longer catch

“other behaviour that a reasonable person would be likely to consider offensive.”

I cannot agree with the view that the existing section is too wide or is unclear. The notion that it is too wide fails to take account of the fact that the offence applies only where there is a risk of public disorder. A failure to note the link to public disorder has characterised the debate all the way through. We should keep that in mind.

The “reasonable person” test is well known and understood, in both civil and criminal law. It is not sufficient simply for an individual or individuals to be, or claim to be, offended. The behaviour would have to be deemed offensive by a reasonable person, and it must risk causing public disorder. That is spelled out in the Lord Advocate’s draft guidelines on the bill.

The Lord Advocate’s guidelines also provide examples of behaviour that might fall into the
category of other offensive behaviour. The guidelines make very clear that it will cover the behaviour provided for in amendment 16, including support for terrorism. The Government’s position is therefore that amendment 16 is unnecessary, as it would narrow the bill’s coverage of other offensive behaviour, and because the provisions that it seeks to add to the bill are already covered.

David McLetchie referred to other possible acts of offensive behaviour, such as displaying certain banners and wearing certain T-shirts. His points may be ones for the Lord Advocate to consider in his guidelines. However, Mr McLetchie has raised this matter in Parliament’s debates on the bill, and he has raised it with me personally, so I thank him for the way in which he has approached the issue. In that spirit, I am happy to give an undertaking that the Government will actively consider Mr McLetchie’s points before stage 3. I therefore urge Mr McLetchie to withdraw amendment 16 at this stage, and to continue dialogue with me and the Lord Advocate.

David McLetchie: I welcome the minister’s comments, in light of which I will seek to withdraw amendment 16 and not press it to a vote at this stage.

Amendment 16, by agreement, withdrawn.

Amendment 25 not moved.

The Convener: Amendment 17, in the name of David McLetchie, is in a group on its own.

David McLetchie: Amendment 17 is derived from the Lord Advocate’s guidelines, to which we referred in the debate on amendment 16. With reference to both the offence created under section 1 and the offence created under section 5, the guidelines stipulate that it is not appropriate to add an aggravation on the grounds of religious or other hatreds and prejudices when prosecuting those offences. I believe that that instruction should be incorporated into the bill. The Government’s position is that new laws are required in order that free-standing offences relating to offensive behaviour at football matches are defined and prosecuted. If that is the case, I see no need to charge a person with a statutory aggravation in respect of behaviour that, in itself, is directed towards exactly the same end.

It would be particularly absurd to add a statutory aggravation under section 74 of the 2003 act to an offence under the bill, given the unsatisfactory and unbalanced nature of section 74 in the first place.

I move amendment 17.

Roseanna Cunningham: The substance of the offence is concerned with hatred in a way that makes it inappropriate also to libel an aggravation that an offence under section 1 was motivated by prejudice. That is spelled out in the Lord Advocate’s draft guidelines on the bill, which clearly state:

“It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence.”

The Government’s position is that amendment 17 is unnecessary as the provisions that it adds to the bill are already covered by the Lord Advocate’s guidelines.

Having discussed the matter with David McLetchie and the Lord Advocate, I know that David McLetchie is aware that the Lord Advocate is considering the points that he has made. I thank him again for bringing the matter to our attention at an earlier stage. In view of the on-going consideration, I ask him to treat the amendment as he did amendment 16 and withdraw it so that we can continue those conversations prior to stage 3.

David McLetchie: I welcome the minister’s remarks and look forward to further discussion and dialogue with her and the Lord Advocate. In the light of what she has said, I am happy to withdraw the amendment.

Amendment 17, by agreement, withdrawn.

Section 1 agreed to.

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

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 3 and 7. I draw members’ attention to the pre-emption information in the list of groupings.

Roseanna Cunningham: I will be brief, as amendments 1, 3 and 7 are minor technical amendments. They will ensure greater consistency in the references in section 2 to a “regulated football match”.

It has been suggested that section 2(1)(b) applies to any football match involving a team playing in a Scottish league, including amateur teams, and not only to “regulated football matches”. Amendment 1 clarifies that only regulated matches involving the Scottish national team or our Scottish Premier League and Scottish Football League clubs are covered by the provision. The Law Society of Scotland, which was the originator of the concern, appears to have misread the bill’s provisions. The amendments make no substantive change to the bill but are minor drafting amendments to ensure consistency.

I move amendment 1.

Amendment 1 agreed to.

The Convener: Amendment 2, in the name of the minister, is grouped with amendments 4 to 6
Roseanna Cunningham: I draw members’ attention to the pre-emption information in the list of groupings.

The Convener: That is perfectly all right.

Roseanna Cunningham: I reassure new members that it is not just new members who make mistakes at stage 2.

There is no doubt that some of the worst manifestations of offensive behaviour that provokes public disorder occur when fans are travelling to or from a match. I welcome the support in the committee’s report for the bill’s coverage of such problematic behaviour. The Government’s response to the committee’s report confirmed that we would respond to the committee’s recommendation that the journey provisions should be clarified by lodging amendments at stage 2.

Amendments 2, 5, 6 and 8 are consequential to amendment 4, which makes it clear that the “Offensive behaviour at regulated football matches” offence can be used to prosecute people who are not on a journey to or from a football match but who either join in with offensive singing or other behaviour by people who are on such a journey or engage in offensive behaviour that is directed at such people. That underlines that no one can hurl sectarian abuse at groups of supporters or willingly join in with offensive behaviour that is likely to cause public disorder, even if they individually have no intention of going to a football match.

I urge the committee to support the amendments in the group. I move amendment 2.

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Amendment 3 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 18, in the name of David McLetchie, is grouped with amendments 4A and 20. I draw members’ attention to the pre-emption information in the list of groupings.

David McLetchie: The purpose of the amendments is to remove journeys to or from a regulated football match from the environments in which an offence under section 1 can be committed. They are exploratory amendments to seek further clarification from the Government of its approach in light of the concerns that the Law Society of Scotland raised in its recent submission to members.

We all know that public disorder can arise in the context of journeys to or from a football match, but it is arguable that the Government is trying to spread the net too widely, raising concerns as to the provability and enforceability of the offence. It is a lot more difficult when one considers that a journey to or from a football match includes a journey to or from an establishment or place where a match is being televised, which could be a public park or square with a big screen or, more typically, a pub or club.

The Government has sought to amend the journey provisions in line with its undertaking in response to the committee’s report, but I argue that there is much to be said for dropping the provision altogether and relying on the existing laws in relation to breach of the peace and public disorder for acts committed in the circumstances in question. That would avoid our getting tangled up in knots as to whether such acts can be brought within the terms of the specific offence.

The problem is that, in such circumstances, it will be far easier to gain a conviction for breach of the peace than a conviction under section 1, so for safety’s sake, the prosecution will libel both offences but still have to spend a great deal of time and energy trying to secure a conviction under the new provision, whereas a guilty plea may well have been tendered to a simple breach of the peace charge. For that reason, I would welcome a further explanation from the minister of why the offence is essential, in view of the practical difficulties that it may occasion.

I move amendment 18.

Humza Yousaf: I appreciate what Mr McLetchie is saying, and if it was not for the reassurance that the British Transport Police gave the committee, I might not have been content with the provision.

I was disappointed that during the committee’s investigations there were no submissions from transport companies. I wonder whether the minister has had discussions with ScotRail,
Strathclyde partnership for transport or other travel companies, and what their feedback was on the enforceability of the offence that covers journeys to or from a match.

Roseanna Cunningham: The Government’s view is that the bill should apply to any sectarian abuse or other offensive behaviour related to football that is likely to cause public disorder, including in relation to journeys to or from matches. As I have indicated, amendments 4A, 18 and 20 would mean that such behaviour on the way to or from matches would not be caught by the bill.

The comments that I made on the previous group of amendments also apply to this group, as it is clear from the committee’s report that it supports the bill’s covering journeys to and from matches. The previous set of amendments were calculated to provide some clarification in respect of some of the committee’s comments.

Superintendent David Marshall of the British Transport Police gave evidence to the committee on 13 September, and I think that it is important that I read back into the record what he said:

“football-related disorder with a sectarian or religious connotation is a problem. As I said at the very start, this is core business for British Transport Police. It certainly happens every week; indeed, it seems to happen every other day ... I make it very clear, though, that this is not just a Rangers and Celtic issue; we police Scotland’s national railway network and this type of behaviour is manifested by football supporters of every single club in the country.

As for the scale of the problem, the fact that British Transport Police has the third highest record for successful applications for football banning orders might give the committee a flavour of our operational activity with regard to policing football supporters.”—[Official Report, Justice Committee, 13 September 2011; c 233.]

10:45
For our part, the bill’s provisions again relate to journeys reflecting the drafting of section 51(8) of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which relates to football banning orders. The football banning order provision has been law for a number of years and I am not aware that the police, prosecutors or the courts have had any difficulty in applying the definition. We believe that the same will be true of the bill.

On the enforceability of the legislation, Superintendent Marshall said:

“Does the bill provide us with additional powers? Yes. Does it provide greater clarity around travel to and from a regulated football fixture? Yes. Does it provide us with additional legislation to which officers can refer? Absolutely ... We welcome the bill.”—[Official Report, Justice Committee, 13 September 2011; c 229-30.]

That is a fairly unqualified statement by the officers whose job it is to deal with travel to and from football matches. The importance of the bill covering journeys to and from matches was underlined by the statistics that we published last week on the scale of religious hate crime across Scotland. They show that around a third of such crimes that related to football occurred at football stadia, so the vast majority of such football-related offences take place away from football grounds, including on journeys to or from matches.

Regarding Humza Yousaf’s comments, none of the train or bus operating companies has approached us directly. In the case of trains, the enforceability of the bill is a matter for the British Transport Police, so it is its comments that we have taken on board.

I urge the committee to reject amendments 4A, 18 and 20.

David McLetchie: Superintendent Marshall’s comments should be viewed in the context in which he and his fellow officers operate, which is journeys to and from football matches conducted on a train, whereas the bill is not confined to journeys to and from football matches but includes journeys to and from a public house or a public park, most of which will not be undertaken on one of the trains that are policed by Superintendent Marshall. I respect his comments on the bill, but they do not prove the point or address the specific concerns that have been raised. In fact, one might read into his comments that he and his officers deserve congratulation for their zealous use of the existing legislation relating to football banning orders. In some respects, it simply proves the point that diligent application of the existing law might achieve much the same effect without the need to wander into new legislative territory. I press amendment 18.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McLetchie, David (Lothian) (Con)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)
The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 18 disagreed to.

Amendment 4 moved—[Roseanna Cunningham].

Amendment 4A not moved.

The Convener: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 4 agreed to.

The Convener: Amendment 19, in the name of David McLetchie, is grouped with amendments 21 and 27. I draw members’ attention to the pre-emption information shown on the groupings paper.

I call David McLetchie to move amendment 18 and to speak to the other amendments in the group.

David McLetchie: You mean amendment 19, convener.

The Convener: I beg your pardon. I mean amendment 19. I need new glasses. This will happen more than once today.

David McLetchie: Amendments 19, 21 and 27 are probing, exploratory amendments on issues arising from the report of the committee—in particular, on the scope of the offence under section 1, as it applies to televised football matches.

In its response to the committee report, the Government expressed the view that the bill should tackle all sectarian and other offensive behaviour related to football, including at televised matches and highlights that are shown in public places. The Government went on to say that it recognised the need to assist the public in understanding the scope of the offence and would seek to ensure greater clarity on the matter as we take the bill forward and implement it. However, that response is not reflected in any amendments that have been lodged by the Government, which suggests that it is satisfied with the drafting of that aspect of the bill, notwithstanding the criticisms of it that have been voiced in evidence to the committee. The purpose of amendment 19 is to seek further explanation of why the Government believes that further clarification is not necessary, regardless of those concerns.

I move amendment 19.

Patrick Harvie: Like David McLetchie, I seek to explore with amendment 27 what the Government intends to cover in terms of places where the offence could be committed. Section 2(3), which David McLetchie seeks to delete, mentions “a reference to any place (other than domestic premises) at which such a match is televised”.

Amendment 27 would amend a later part of the bill, which defines “televised”. At the moment, section 4(4) says that a televised football match is one that is “shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise.”

I suggest that the committee consider changing that to mean specifically a match that is viewed “by means of the broadcast transmission of pictures” and not by other means. The current definition is extremely broad; it covers not only the scenarios that most people would expect ought to be covered, such as a pub with a big screen showing a football match live to a bevvy group of fans, but, for example, someone whipping out their mobile phone and playing a clip that is being streamed live over the internet or a highlight that they have stored previously.

Over the next few years, particularly once 4G networks and public wi-fi are much more available in towns and cities, we will see a proliferation of such devices. Under the bill, a park or a train in which a small group of fans gather round to watch a clip or a live broadcast on a mobile device would become venues in which everyone would be subject to the provisions, regardless of whether they were aware that the clip was being broadcast. It seems to me that the offender or the person who is committing the behaviour that would be regarded as an offence would not even need to be aware that a transmission was being shown on a screen, and that the owner of the premises or the organiser of the event would not need to be taking responsibility for the screening for the provision to kick in.

We are talking not only about large, organised screenings but about situations in which someone showed a clip of a regulated football match on any screen at all. The wording might have been
appropriate five years ago, when the proliferation of mobile devices and screens was not anticipated, but we should now be extremely cautious about creating a situation in which anyone, simply by whipping a mobile phone out of their pocket, can create the circumstances in which what is intended to be a fairly tightly defined set of offences can suddenly become active.

I hope that members will recognise that restricting the provision to “broadcast transmission of pictures” would catch most situations that people would, according to common sense, think ought to be covered, but exclude many other situations that will become increasing likely in years to come.

John Finnie: The important point is that the size of screen would not affect the nature of public disorder that could result from the offensive behaviour that arises from viewing the screen. Patrick Harvie is right that the situation is evolving, but we have to deal with the present situation. The size and location of the screen seems to be immaterial; it is the offensive behaviour that the public expects us to respond to.

Humza Yousaf: Mr Harvie raises some very interesting points. It seems that internet transmission, for example, would be covered by the definition that he proposes in his amendment. It would be good to get clarification of that, because nowadays a lot of public houses where I go to watch matches broadcast them using internet transmission.

Patrick Harvie: Is the member able to take an intervention?

The Convener: Yes. I am happy to let him do that. I was going to let you sum up at the end after we have heard the minister—in fact, you will not get to sum up, because David McLetchie has the lead amendment in the group, so he will sum up.

Patrick Harvie: Can I intervene?

The Convener: Of course you can.

Patrick Harvie: My understanding is that “broadcast” does not cover the internet, because it is not available through the airwaves—“broadcast” refers to transmission of television.

Humza Yousaf: Thank you for that clarification. I would be quite worried if the definition was narrowed down not to include internet transmission because, as I said, a number of public houses show games—be they past games or live games—via internet streaming. It would be good to hear whether the minister has had any advice on that point.

Roseanna Cunningham: This is the kind of interesting debate that can happen if we forget that the key part of the offence is about joining in and taking part in activity that is likely to cause public disorder. It is important that we keep it in mind that anybody who is not joining in or not taking part in any activity that is likely to cause public disorder will not be affected by any of the provisions.

Amendments 19 and 21 would remove televised matches from the scope of the offensive behaviour at regulated football matches offence. I know that the committee carefully considered the scope of the offensive behaviour offence. The Government’s response to the report welcomed the committee’s conclusion that it is “appropriate that it cover televised matches.”

The Scottish Government is trying to remove unacceptable songs, chants and other behaviour from football in Scotland where those cause, or are likely to cause, public disorder. We know that that type of behaviour takes place not only in football stadiums, but in pubs, clubs and elsewhere that matches are broadcast. We know from recent experience that matches that are broadcast in public places can cause real problems.

However, amendments 19 and 21 would give individuals the freedom to take their poisonous singing and chanting into pubs and clubs across the country when there are football broadcasts. That cannot be tolerated. Chanting and other offensive behaviour that are likely to incite public disorder are unacceptable at the match, watching it in the local pub or, indeed, on a screen in the centre of Manchester.

I urge the committee to resist amendments 19 and 21.

I thank Mr Harvie for his explanation of the purpose of amendment 27. It would narrow the definition of “televised” so that it covers only matches being televised “by means of broadcast transmission of pictures”.

It might be helpful if I explain that the inclusion of a reference to matches being televised other than by means of broadcast transmission of pictures is intended, deliberately, to put it beyond doubt that matches that are televised using new technologies, such as internet streaming, are televised matches for the purpose of the offence. We do not want to be in a position whereby the offence is rendered ineffective because technological changes mean that televised matches can no longer be said to be “broadcast” in the traditional sense.

I therefore ask that Mr Harvie withdraw amendment 27 and that, if he does not, members vote against it.
The Convener: He has not moved it, so you do not need to do that.

Roseanna Cunningham: I am sorry.

The Convener: I made a mistake as well. We are all making mistakes today.

11:00

David McLetchie: It has been an interesting debate. In relation to this group and other amendments, the minister has made a great deal of the qualification about inciting or occasioning public disorder, but the problem is that public disorder does not need to have taken place. The provision relates to conduct that is “likely to incite” public disorder. Indeed, as we see from the bill, there might be no public disorder if an event is well policed. There could also be no one present to be incited to public disorder. We are making a judgment as to whether, if people were present, such conduct would incite them to public disorder, assuming that there were no police officers in the vicinity to restrain that disorder. Too much reliance is being placed on the public disorder qualification, because it is not an absolute qualification relative to what actually happens; it is, rather, a judgment in relation to things that have not happened, but which are then coupled with other aspects of the offence.

In relation to the section 1 offences, we must remember that three elements have to be proven. The first is that the offence must have taken place at a football match. Secondly, there is the content of the offence itself, and thirdly, there is the public disorder aspect. We cannot simply say, “About the qualification of what goes on in the middle, the other aspects don’t matter because it is all qualified by the third one”, particularly when the third one is, in many instances, highly theoretical and just as much a matter of judgment as what might or might not be offensive to the public.

The Convener: I take it that you are pressing amendment 19 to a vote.

David McLetchie: Yes.

The Convener: I point out that, if amendment 19 is agreed to, I cannot call amendments 5, 6 and 7 because they will be pre-empted.

The question is that amendment 19 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McLetchie, David (Lothian) (Con)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)

The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 19 disagreed to.

Amendments 5 to 7 moved—[Roseanna Cunningham]—and agreed to.

The Convener: Amendment 20, in the name of David McLetchie, has already been debated with amendment 18. If amendment 20 is agreed to, amendment 8 will be pre-empted.

Amendment 20 not moved.

Amendment 8 moved—[Roseanna Cunningham]—and agreed to.

Section 2, as amended, agreed to.

Section 3 agreed to.

Section 4—Sections 1 and 2: interpretation

Amendment 26 not moved.

The Convener: Amendment 21, in the name of David McLetchie, has already been debated with amendment 19. If amendment 21 is agreed to, amendment 27 will be pre-empted.

Amendment 21 not moved.

Amendment 27 moved—[Patrick Harvie].

The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McLetchie, David (Lothian) (Con)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 27 disagreed to.

Section 4 agreed to.
The Convener: Before we go any further, I point out that it is my intention to have a five-minute break at about 11.15. Do members want a break?

Members indicated agreement.

The Convener: Right. We will have a break for the minister’s and my sake at about 11.15, and I can get my other glasses.

After section 4

The Convener: Amendment 9, in the name of the minister, is in a group on its own.

Roseanna Cunningham: Amendment 9 will create an order-making power to modify and add groups against whom it is an offence to express hatred under the first offence. I note the committee’s support for the inclusion of categories beyond sectarian hate in relation to the first offence, and the invitation to consider the inclusion of age and gender. I note also the committee’s conclusion that the threatening communications offences should not be widened without consultation. The Government’s view is that we should take equal concern in relation to the first offence. I also note the detailed and thoughtful consideration in the previous session of Parliament by the Equal Opportunities Committee and Justice Committee of the same issues in the context of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, and the fact that that bill was not so amended.

Given the committee’s views and the complex arguments that were presented in consideration of the Offences (Aggravation by Prejudice) (Scotland) Act 2009, we need to take a middle course. I have therefore lodged amendment 9 to allow for the extension of the bill to cover additional characteristics at a later date. That will permit proper consultation and full consideration of the evidence. 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. I urge the committee to support the amendment.

I move amendment 9.

Roderick Campbell: I welcome the minister’s comments. When we discussed the issue in preparing our report, most members took on board the fact that two of the protected characteristics under the Equality Act 2010 are missing from the bill. However, I have heard what the minister has said and I think that the middle way is probably the best approach.

Alison McInnes: I understand the minister’s reasoning and she appears to be well-intentioned, but I feel some disquiet about amendment 9 because it would mean that the offences in the bill could be extended without proper consultation. We have warned against adding other groups without proper consultation because we would then not be aware of the impact of that. The amendment will allow ministers at the stroke of a pen—by order, rather than after discussion—to add or remove any behaviour or vary the description of the behaviour or the list. The amendment will allow ministers to redefine the offence, which is a dangerous piece of lawmaking. I oppose it.

John Finnie: I might have misunderstood, but I thought that I heard the minister say clearly that any changes would happen only if Parliament voted in favour of them.

Roseanna Cunningham: There are a variety of ways of amending legislation. The most common is by negative instrument, with which committees are perhaps most familiar. However, in this case, we are suggesting that any changes would be made using the affirmative procedure, which means that the Parliament as a whole would have to vote on them and it would not be done simply “at the stroke of a pen”.

I am saying that I will consult, if it is in my remit to do that. It is the intention to consult and to consider the evidence fully. We take that view because of the balance of the debate in relation to the 2009 act, when neither the Justice Committee nor the Equal Opportunities Committee could come to a confirmed view on whether such extensions were necessary.

Indeed, if I read rightly even some of the organisations, such as those that deal with the aged, were not certain that it would be greatly helpful. It may help if I quote the Justice Committee report of 2009, which says at paragraph 135:

“the Equal Opportunities Committee ... recommended that the Bill should not be amended to include a gender aggravation”.

The Equal Opportunities Committee took the same view in respect of an age aggravation.

All I am saying is that there is clearly more to the matter than meets the eye and that before any changes are made in respect of age and/or gender, we should consult properly and have Parliament vote on it. It is not intended that that would be done by the stroke of a ministerial pen.

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and
Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)

Abstentions
Kelly, James (Rutherglen) (Lab)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 5, Against 2, Abstentions 2.
Amendment 9 agreed to.

Section 5—Threatening communications

The Convener: Amendment 26—I am sorry; it’s these glasses again. Amendment 28, in the name of Patrick Harvie, is grouped with amendments 29 and 31. I draw members’ attention to the pre-emption information that is shown on the groupings paper.

Patrick Harvie: The offence of threatening communications evokes some of the same concern that I have in relation to other offences, which is the ambiguity and lack of clarity about what would be regarded as an offence and what would not. The test in relation to threatening communications in section 5 (2)(b) and (c) is for “a reasonable person to suffer fear or alarm”.

My concern is that that is not a tough enough test and not a high enough bar. It could be—I suggest it is—subject to fairly loose interpretation. I can say that from experience of the one time that I was charged with breach of the peace following a demonstration at Faslane, when two great big burly police officers testified that they were caused great fear and alarm by the fact that I was sitting quietly in the road.

“Fear and alarm” is often used in a loose way and I am concerned that this will happen in relation to this offence. We are talking about a serious offence that can attract a sentence of up to five years in prison. For an offence of such seriousness we should be making it clear that we are talking about serious and credible threat, not something trivial, unintentional or, perhaps, something that is said in jest. I draw members’ attention to the experience of Paul Chambers south of the border, of which many people will be aware. The scenario is generally described online as the “Twitter joke trial”. Nearly two years ago he sent a message by means of Twitter, which would be covered as an electronic communication within this section.

The Convener: What are you doing? You are not playing tunes or something, are you?

Patrick Harvie: No. Wi-fi is switched off; I am reading from the screen, if that is all right.

The Convener: That is fine. I thought that you were texting or something, while we were sitting.

Patrick Harvie: Thank you. I apologise, for the purposes of the Official Report. The message that was sent was this:

“Crap! Robin Hood airport is closed. You’ve got a week and a bit to get your shit together otherwise I’m blowing the airport sky high!”

It was a joke—a bad joke, in very bad taste and it probably should not have been done, but it should not have been treated as a serious criminal offence. The gentleman was, in the end, only fined about £1,000, I believe, but as a result he lost his job and was subjected to nearly two years of legal process. The offence in section 5 is much more serious and could attract a sentence of five years in prison.

If we are to create such an offence, we should be clear that there must be a serious and credible threat. Therefore, I suggest that, rather than talk about the likelihood that a reasonable person would “suffer fear or alarm”, we should talk about the likelihood that a reasonable person would “believe that the threatened or incited act, given the circumstances, was likely to be carried out”.

11:15

I ask members to consider amendment 28 together with amendment 30, which is in the next group and which would remove recklessness as a condition for the offence. If we expect to subject people to a criminal process that could lead to a sentence of up to five years in prison, we should be talking about serious, intentional and credible threats. Taken together, amendments 28 to 31 would replace the “fear or alarm” condition with a requirement for a realistic expectation that a threat was serious, and would remove the recklessness condition from section 5.

I hope that members will accept that if we create a serious offence, it ought to be for serious threats and not for something trivial. Trivial matters have been taken seriously and have prompted overreaction by the criminal justice authorities south of the border. We do not want the same thing to happen here. If it did, I suspect that it would bring this entire area of legislation into disrepute.

I move amendment 28.

Roderick Campbell: Am I right that we are dealing at the moment with “fear or alarm” and not recklessness?

The Convener: Yes.
Roseanna Cunningham: As Patrick Harvie said, amendments 28, 29 and 31 would remove from condition A of the threatening communications offence the requirement that a communication

“would be likely to cause a reasonable person to suffer fear or alarm”.

and replace it with a requirement that the prosecution prove that a reasonable person would believe that the threat

“was likely to be carried out”.

That would significantly raise the threshold for an offence to be committed. I accept that, in a sense, that is what Patrick Harvie wants to do, but it does not pay regard to the fact that a threat of serious violence can cause real fear and alarm to a victim without the victim having to believe that it is likely that it would be carried out. I am unclear as to how a victim would be able to make that assessment, anyway. If we proceeded in that way and it was then proved that it was never intended that the threat be carried out, I wonder whether the fear and alarm would be dismissed. I find it difficult to understand exactly what Patrick Harvie wants, because it seems to me that if someone sends messages that terrify the living daylights out of people without their thinking that the specifics in the message might be carried out, that should be taken every bit as seriously as a situation in which it can be proved that a specific threat is intended to be carried out.

A drawback of existing legislation is the requirement to prove that it was intended that something be carried out. Care needs to be taken, because we might exclude from the offence people whose behaviour is, in my view, unacceptable. Even the small possibility that a threat of serious violence or murder might be carried out could seriously disrupt the life of the recipient.

I hear what Patrick Harvie says about joke communications, but I rely on good sense in the decision-making process in the criminal justice system in Scotland when it comes to prosecuting offences. However, I ask members to remember the situation earlier this year and what we saw on the internet and in other places. I therefore urge the committee to reject amendments 28, 29 and 31.

Patrick Harvie: I confirm that my intention is to raise the bar and to exclude certain behaviour from the offence. I repeat that, in creating a serious offence with a serious penalty attached to it, we should reserve it for serious circumstances. We should be clear that more trivial issues are not covered by the offence. That is very much my intention. The minister says that real fear and alarm can be caused without a realistic expectation that the threat would be carried out. I do not doubt that and I am sure that it can be. The question is whether that is serious enough to attract a penalty of up to five years in prison. I do not think that it is. There is no doubt that some of the behaviour that my amendments would exclude from the offence is bad behaviour and not very nice, but the question is whether it is serious enough to be covered by the criminal offence.

After I was elected in 2003, one of the first things I had to do was deal with proposed antisocial behaviour legislation. In making criticisms of the penalties, whether criminal or otherwise, for being too broad or for being applied in response to public expectations rather than what was the best thing to do in the circumstances, I got tired of hearing the reply that we should just have faith in the system, that people would only ever use the legislation proportionately and sensibly and that the law did not need to clarify what would be appropriate situations in which to use various penalties. However, I believe that the law should be clear. When we create a serious criminal offence that could result in someone losing their job, home or family, we should be clear that that is reserved to very serious circumstances. At present, the bill does not reserve the offence to serious circumstances and runs the risk that trivial matters will be treated as though they are serious. We should seek to limit the offence. Therefore, I will press amendment 28.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 5, Abstentions 4.

Amendment 28 disagreed to.

Amendment 29 not moved.

The Convener: This is a good point at which to have a short break.
11:22
Meeting suspended.

11:31
On resuming—

The Convener: Amendment 30, in the name of Patrick Harvie, is in a group on its own. I draw members’ attention to the information on pre-emptions that is given with the groupings.

Patrick Harvie: I have removed my coffee cup from the table and I apologise for being unaware of the convener’s expectations in that regard.

The Convener: I set high standards, Mr Harvie.

Patrick Harvie: High standards indeed.

I will not speak on amendment 30 for very long; I have already covered most of the arguments. By removing the recklessness element, amendment 30 would seek to raise the bar somewhat on the offence covered by section 5. As I suggested, the offence that is being created is serious enough that it should apply to intentional threats rather than to threats when an accused person has been suggested to have been reckless as to whether they caused fear or alarm in a reasonable person.

I move amendment 30.

Roderick Campbell: If we were to agree to amendment 30, it would put us out of step with section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, under which there have been 99 prosecutions, as was said earlier. Section 38(1)(c) of the 2010 act contains the wording “intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.”

We risk backtracking from the 2010 act, which would be the wrong way to go.

The Convener: There are too many lawyers on this committee, Patrick.

As no one else seems to wish to comment, I invite the minister to respond.

Roseanna Cunningham: I am not sure that I agree with the comment about there being too many lawyers.

The Convener: Neither do I. I was just stirring it up.

Roseanna Cunningham: If there are, it seems perfectly appropriate.

As Patrick Harvie has suggested, amendment 30 would delete section 5(2)(c)(ii), with the effect that the offence of communicating material that consists of, contains or implies a threat or an incitement to carry out a seriously violent act against a person would be committed only where the accused intends, by making the communication, to cause fear and alarm.

The recklessness test to which Mr Harvie refers is another fairly well-known test in criminal law. It is not an unusual test to apply. Although I accept that he makes a reasonable and legitimate point here, I think that it will be obvious to him that the Government does not agree with it.

I ought to make one or two comments on the disposals available in respect of the offences. Mr Harvie and Mr McLetchie both commented on the limit of five years. We should be a little clearer, on the record, that the potential for a jail sentence of up to five years, or a fine, is available only if there is an indictment. On a summary complaint, the limit is up to 12 months, or a fine.

Our expectation is that the vast majority of these offences would be brought by a summary complaint, rather than on indictment, although we cannot preclude an indictment from being drawn up on occasion. While it is certainly true that a charge on indictment carries the potential for a jail term of up to five years, everybody on the committee will know that raising complaints on indictment is reserved for only the most serious offences. I hope that everybody will accept that.

Amendment 30 would mean that the fear and alarm caused to a victim by someone recklessly making threats would simply be ignored and I therefore urge Mr Harvie to withdraw the amendment.

Patrick Harvie: I note the minister’s response. I continue to believe that an offence of this seriousness should be related to intentional threats, rather than to—let us face it—accidental threats. If somebody intends to cause fear and alarm, it is clear that we should treat that seriously, but if they are simply reckless as to whether the relatively low bar of the fear and alarm test is reached, it is probably only too likely that very trivial incidents will be treated as serious and covered by the offence. We must bear in mind not only that the sentence handed down to an individual accused is important, but that being put through that legal process for what could be a very trivial matter can impact on someone’s livelihood, their family relationships and their standing in the community. Therefore, I will press amendment 30.

The Convener: I point out that if amendment 30 is agreed to, I cannot call amendment 31, which will be pre-empted.

The question is, that amendment 30 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Graeme, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Pearson, Graeme (South Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Kelly, James (Rutherglen) (Lab)
Yousaf, Humza (Glasgow) (SNP)
McLetchie, David (Lothian) (Con)
Lauderdale) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Finnie, John (Highlands and Islands) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 0, Against 5, Abstentions 4.

Amendment 30 disagreed to.

Amendment 31 not moved.

Amendment 32, in the name of Patrick Harvie, is grouped with amendments 10, 34, 36, 12, 38, 39 and 13.

Patrick Harvie: When the Government and I discussed in the previous session of Parliament the contents of the hate crime bill that I brought to Parliament, which turned into the Offences (Aggravation by Prejudice) (Scotland) Act 2009, we considered incitement to hatred. There was substantial controversy and debate at Westminster when the proposals on incitement to religious hatred were introduced there, and there was clearly a legitimate space for debate about whether Scotland should go down the same route and create incitement to hatred offences. Fairly quickly a strong consensus appeared across the political parties and other interested organisations that that was not the way Scotland wanted to go. I was therefore slightly surprised that, in a few lines in the bill that we are considering now, a very broad incitement to hatred offence is created—I refer to condition B in section 5, on threatening communications.

I am still concerned about the inclusion of incitement to hatred in the bill. Obviously, there will be debate later about a free speech defence. I worry that no free speech defence will ever be watertight enough to satisfy me that including incitement to hatred in the bill is the right way to go. However, if such provision is to be made—if the Government is determined to continue developing incitement to hatred as part of this legislation—I am really unclear as to why it relates only to religious hatred.

The first sections on offensive behaviour relate to general hate crime grounds and include a wide range of categories of hate crime. Condition A, in section 5, on threatening communications, also relates to a wide range of characteristics that can be grounds for hatred. I am puzzled about why condition B in relation to threatening communications—the incitement to hatred aspect—is limited to religion alone.

Amendment 34 expands condition B to include a list that is the same as the list elsewhere in the bill—my other amendments in the group are consequential on amendment 34. The amendment leaves religion in, so the religious hatred aspects are still included in the legislation, but it broadens the provision to include the other categories.

Members will be aware from correspondence from their constituents and from academic research that those other forms of incitement to hatred take place in relation to race, nationality, ethnicity, sexual orientation and transgender identity, and that many such incidents are very serious.

I am not entirely convinced that a provision on incitement to hatred is the right way to respond to those problems of behaviour, some of which I would be the first person to find unacceptable and to view as needing some kind of response. However, if incitement to hatred is the way that the Government is going, I am unclear about why the provision is limited to incitement to hatred on one ground and does not include others.

I am keen to hear the views of members and the minister on the matter and to hear what the minister has to say on the other amendments in the group. I will respond to her comments on those when I sum up.

I move amendment 32.

Roseanna Cunningham: Amendments 10, 12 and 13 have been lodged to allow for a power to modify groups that are in, add groups to or remove groups from section 5(5)(b) and section 6 against which it is an offence to make threats that are intended to stir up hatred.

Amendment 13 is the main amendment. It allows for additional groups to be added to the scope of the threatening communications offence. That responds to the recommendation in the Justice Committee’s report, which suggests that any widening of the threatening communications offence to cover hatred of other groups should proceed on the basis of wide engagement and consultation. Based on appropriate evidence and debate, the power would allow the offence to be widened in the future. Some of the comments that I made in our discussion about age and gender again apply.

The Scottish Government proposes to amend the bill to provide for an explicit provision covering freedom of expression. As indicated by Patrick Harvie, we will discuss that.

Amendments 10, 12 and 13 provide for a power to make appropriate consequential changes related to the freedom of expression provision as a
result of the addition of any new grounds of hatred. The power will require to be exercised through an order under the affirmative procedure. I restate that that will give Parliament the opportunity to have its say. In advance of any use of the power, we will consult further—as recommended by the committee—to allow evidence to be gathered.

Amendment 13 supports the committee’s recommendation and I urge the committee to support it.

The first bit of the bill relates clearly to football and football-related offences. The second offence arose out of, in particular, the widely publicised internet communications that we saw earlier this year, and we looked at such communications in respect of religion and sectarianism.

Amendments 10 and 12 are technical drafting amendments that adjust the current wording to fit better with the new power that is proposed in amendment 13. They make no change of substance.

Patrick Harvie’s amendments seek to widen the scope of condition B of the threatening communications offence to cover colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability.

I note that the Justice Committee’s discussion during its consideration of the bill focused overwhelmingly on religious hatred and sectarianism. We therefore agree with the committee’s recommendation that, if we were to go down the road that Patrick Harvie suggests, we would require to hold a proper consultation and to take proper evidence on any extensions.

We are not convinced that sufficient evidence has been presented to justify widening the scope of condition B, but we do not preclude that from happening in future. With that in mind, we lodged amendment 13, which will, should sufficient evidence be presented, give us the power to extend by affirmative order condition B to include threats that are intended to stir up hatred against other groups. In line with the committee’s recommendations, I urge members to resist the amendments in the name of Patrick Harvie and to support the Government’s amendment 13 and the amendments that are consequential on amendment 13.

11:45

Roderick Campbell: I have a lot of sympathy with Patrick Harvie’s amendments, having referred to the issue at stage 1. I do not want to speak for the whole committee but, at the end of the day, although we might all have felt the same, we took the technical view that sufficient evidence had not been presented to warrant his amendments. The Government’s position is reasonable in the circumstances.

Alison McInnes: Not only did we think that we did not have sufficient evidence, but we did not have enough time to explore the ramifications of extending the scope of condition B. Given that there are already serious concerns about the religious hatred part of the bill, it would be folly to extend it further without more discussion.

Notwithstanding the minister’s earlier comments about amendment 9, I have the same reservations about amendment 13, and my disquiet remains. I oppose the extension of powers. The matter is complex and the affirmative procedure is a flimsy protection against a quite significant shift. I therefore oppose amendment 32.

Humza Yousaf: My points largely echo those of Roderick Campbell. My gut feeling is that the offence should be widened, but I am not keen to do that without more consultation and hearing more evidence on the matter. As Patrick Harvie said, when Westminster discussed religious hatred, there was a substantial debate and controversy that lasted almost a year. We have not had or taken the time to explore the matter.

On Alison McInnes’s point about the affirmative procedure, I am keen to hear the Government’s summing up. The minister says that any order would come before Parliament—

The Convener: It is for Patrick Harvie to sum up, although I am happy to let the minister come in again if she feels that it is necessary.

Humza Yousaf: Perhaps the minister could come in again, either now or later. I am not too familiar with affirmative orders. I know that Parliament gets a say in such orders but does the committee get another chance to have a say?

Roseanna Cunningham: Yes.

The Convener: Yes, it would depend on the Parliamentary Bureau but any order would probably come to the committee.

Minister, do you want to say anything before I call Patrick Harvie again?

Roseanna Cunningham: No, I am content with what I have said. I reassure Humza Yousaf that the committee could do what it wanted with the investigation of an affirmative instrument.

Patrick Harvie: I have to say that I am still pleased to have lodged the amendments, which has allowed the discussion to take place. The minister indicated that making such a change would require broad engagement and consultation, and other members, including Humza Yousaf, have said that we should not create such legislation without broad engagement.
and consultation. That makes my point about the bill itself and the creation of offences relating to incitement to hatred or the stirring up of religious hatred. Such legislation requires care to be taken and detailed consideration to be given, and I do not think that the bill has had that care and consideration. I am afraid that the discussion of my amendments in the group has reinforced my view that a strong case has not been made for including provision on incitement to hatred in the bill. I will come back at stage 3 with an amendment to remove such provision altogether.

On that basis, I seek the committee's permission to withdraw amendment 32.

Amendment 32, by agreement, withdrawn.

Amendment 10 moved—[Roseanna Cunningham]—and agreed to.

Amendments 33, 34, 34A and 34B not moved.

The Convener: Amendment 35, in the name of Patrick Harvie, is in a group on its own.

Patrick Harvie: We are getting there, eh?

Amendment 35 stands on its own and seeks to introduce a defence in relation to artistic performance. Section 5(6), says

“It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable.”

I am seeking to add to that. My amendment says:

“It is a defence for a person charged with an offence under subsection (1) by virtue of Condition A being satisfied to show that communication of the material took place in the course of a theatrical or other artistic performance or a rehearsal for such a performance”.

The minister might argue that the existing defence is broad enough and covers that circumstance. It would be useful if that could be made explicit on the record.

I thought that it was worth highlighting that situations that are otherwise covered by the offences that are created in the bill arise as a result of entirely consensual participation in intentionally scary entertainment. I am not talking about the typical ghost train, but more adult forms of entertainment—

The Convener: The clerk has just said to me that stage 2 of this bill is scary entertainment. I do not think that it is.

Patrick Harvie: You could be talking about so much of our job.

There are slightly more adult forms of entertainment—

David McLetchie: My God.

The Convener: You have engaged Mr McLetchie's interest, Mr Harvie, but I do not want any illustrations. Just pursue your point.

Patrick Harvie: I am glad that Mr McLetchie is still with us.

There are forms of entertainment whose intention is to provoke genuine, real fear, rather than to deliver a slight scare. I think that it is perfectly legitimate for people to engage in that on a consensual basis. I would like the minister to say whether she regards the existing defence as covering all circumstances in which an artistic performance is the context of something that could otherwise conceivably be considered an offence under the legislation.

I move amendment 35.

The Convener: If no one else wishes to come in on the subject of scary entertainment, I invite the minister to respond.

Roseanna Cunningham: I am grateful to Mr Harvie for his explanation. As he indicated, amendment 35 would seek to add an additional defence to the threatening communications offence. It would add to the existing defence of reasonableness, although the additional defence would apply only to an offence under condition A.

The additional defence is that the communication took place

“in the course of a theatrical or other artistic performance or a rehearsal for such a performance.”

I reassure Patrick Harvie that that was one of the main things that we were thinking about when we drafted the existing defence. It would be part and parcel of a reasonableness defence that the act was undertaken in the context of artistic expression, which can go wider than simply theatrical performance. There is some precedent for that sort of defence in existing United Kingdom legislation in relation to the supply of imitation firearms and knives, so, again, it is an area of the law that is relatively well understood.

The Government's view is that the additional defence would not provide any additional protection. Artistic and theatrical performance will be covered by the defence of reasonableness.

We have some questions about the drafting of the amendment, in particular whether a specific defence in relation to theatrical or artistic performance would cast doubt on the generality of the reasonableness defence, for example, in relation to journalism.

In law, when one begins to define these things, the things that have been left out become subject to scrutiny and people wonder whether they should be treated differently. We do not intend that to be the case. A reasonableness defence should
apply across the board and people should feel able to avail themselves of it in areas other than artistic expression or whatever. I hope that Mr Harvie accepts those reassurances and I am grateful to him for bringing the matter up in the way that he did. I give him an absolute reassurance that artistic expression is precisely what the reasonableness defence is designed for.

Patrick Harvie: I thank the minister for her response. It is useful to get those comments on the record and I seek the committee’s permission to withdraw amendment 35.

Amendment 35, by agreement, withdrawn.

Section 5, as amended, agreed to.

After section 5

The Convener: Amendment 11, in the name of the minister, is grouped with amendment 11A.

Roseanna Cunningham: Amendment 11 seeks to recognise explicitly that the threatening communications offence does not adversely impact on the rights of individuals to discuss and debate religion and religious beliefs. The committee’s report indicated that committee members would welcome a provision that provides assurance that section 5 does not inhibit free, open and potentially critical expression of views on religious matters.

The fact is that any legislation that is put before the Scottish Parliament must comply with the European convention on human rights. Our view was that the bill was compliant and that the convention rights applied in it—and, indeed, the bill was already signed off in that respect—but it was clear that some areas of Scottish civic society were agitated and concerned about the issue. As a result, we have agreed simply to restate the position in the bill.

By adding the section proposed in amendment 11, we are providing reassurance that we are not affecting individuals’ right to discuss and criticise religion or voice “expressions of antipathy, dislike, ridicule, insult or abuse” towards religion or the beliefs and practices of those who adhere to a religion. That includes an individual’s right to try to convert people to their religion or religious beliefs.

The intention of the offence is not to prevent legitimate religious discussion and debate but to prevent the kind of communications that we saw during the last football season when individuals were threatened with serious harm. It is important to remember what the provisions are about. Given that the amendment responds to the committee’s recommendations, I urge members to support it and accept that the Government is responding to real concerns that have been expressed outside Parliament.

Amendment 11A seeks to extend the provisions in amendment 11, which provides assurance that “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, or ... urging of adherents of religions to cease practising their religions" are protected in relation to condition B in section 5, to cover both offensive behaviour at football under section 1 and threats of serious harm under section 5(2).

We do not believe that such a measure is necessary. We have not been made aware of any concern that the offences in section 1 are capable of being read in such a way as to interfere with the rights of persons participating in discussion or criticism of religion, even in harsh or offensive terms, and we would resist the amendment on those grounds. Accordingly, I urge the committee to resist amendment 11A and to accept amendment 11.

I move amendment 11.

Patrick Harvie: The minister fairly describes the intention behind amendment 11 as introducing a means of protecting freedom of expression. One of the most serious criticisms of the bill is that it contained no such provision when it was introduced.

I must admit that, after the extent of the debate at Westminster when comparable legislation was introduced and the months of debate—which Humza Yousaf mentioned earlier—on the introduction of the free speech defence into that, I find it startling that no such provisions were incorporated into the bill before it was introduced. However, one is now being introduced.

12:00

If we want to have certainty around the free speech defence, we should ensure that it covers the whole bill. In the first sections, which introduce the offence of offensive behaviour at football matches, the offence includes comparable behaviour such as “expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of”, among other groups, “a religious group” or “a social or cultural group with a perceived religious affiliation".

I find it odd that, if a free speech defence is required for condition B behaviour in section 5, we will not apply the same defence in relation to section 1, which deals with very similar behaviour, albeit in different circumstances. The minister will point out that section 1 deals with the likelihood of public disorder and not the actuality of it, but the same behaviour is identified as the source of an offence. If the same behaviour is identified, it would be reasonable to have the same defences available.

I also take issue with the minister’s suggestion that regulated football matches are not places where criticism or discussion of religion—

“expressions of antipathy, dislike, ridicule, insult or abuse ... proselytising, or ... urging of adherents of religions to cease practising their religions”—

are likely to happen. I think that they can happen there, and the same defence ought to exist in relation to that behaviour as exists in other circumstances. I therefore think that it is important to use amendment 11A to broaden out the defence to cover the whole bill.

I move amendment 11A.

David McLetchie: Particularly Patrick Harvie’s amendment 11A but also the minister’s amendment 11 are interesting in their broadening of freedom of expression, as they get to the heart of the issue of the boundaries of the offences that we are discussing.

The minister suggests that the proposed section is, arguably, unnecessary because all our legislation is governed by the European convention on human rights. If that is the case, the convention will apply equally to the section 1 offence and the section 5 offence. We must therefore ask ourselves whether section 5 is a broader expression of freedom of speech than is provided for in the ECHR or whether it is simply a statement of the same. If it is simply a statement of what is encompassed by the ECHR, it will apply to an offence under section 1 as well.

Patrick Harvie says that

“expressions of antipathy, dislike, ridicule, insult or abuse”

towards adherents of a particular religion may take place at football matches in Scotland. They certainly do take place at football matches in Scotland, as we are all well aware. That raises an interesting issue. If the proposed section simply states in full what is encompassed by the ECHR, section 1 becomes virtually a dead letter.

Section 1 is all about hatred. Most expressions of hatred that I have heard, in 40-odd years of watching football matches in Scotland, have taken the form of

“expressions of antipathy, dislike, ridicule, insult or abuse”.

That is what one hears. However, if that is now a statable ECHR defence, does it not undermine the validity of section 1 in the first place? If not, why does the freedom of expression provision not extend to cover section 1, as Patrick Harvie suggests? That raises some fundamental issues about the offences that we are in the process of creating.

Roseanna Cunningham: For the offence of offensive behaviour at football to be committed, it is not enough that a person express hatred of a person based on their membership of a religious group; the behaviour must be such that it is, or would be, likely to incite public disorder. Our view is that it is perfectly legitimate to seek to prevent the expression of hateful views in the context of a football match where there is a risk of public disorder.

If committee members care to look at the European convention on human rights, they will see that that is precisely the extent to which the freedom of expression right is limited—the public disorder issue is precisely the qualification used in the European convention. Freedom of expression, as always in our society, carries with it a qualification about public disorder, which is clearly stated in the European convention.

Patrick Harvie: David McLetchie is right when he says that amendments 11 and 11A address some of the seriously contested areas of the bill. I do not think that anyone would deny that many of the things mentioned in the Government’s amendment 11 would be offensive to many people—for example, subsection (1)(b) of the proposed new section refers to

“antipathy, dislike, ridicule, insult or abuse”—

but the question is whether we wish to criminalise those things. In relation to condition B in section 5, the Government does not wish to criminalise them.

Despite the discussion on the matter, I am still unclear why it is not possible to use the defence proposed in amendment 11 in relation to the offence created in section 1. It is unclear where the limits of the offences lie and how much offence is to be allowed in cultural expressions and activities. Those are some of the most serious problems with the bill. There is a lack of clarity about what is and is not acceptable. I accept that it is unlikely that I will convince the committee on amendment 11A, but I will press it.

The Convener: The question is, that amendment 11A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

McLetchie, David (Lothian) (Con)
Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 11A disagreed to.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 11 agreed to.

Section 6—Section 5: interpretation
Amendment 36 not moved.

The Convener: I remind members that amendment 12 pre-empts amendment 37.

Amendment 12 moved—[Roseanna Cunningham]—and agreed to.

Section 7 agreed to.

After section 6
Amendment 13 moved—[Roseanna Cunningham]—and agreed to.

After section 7

The Convener: Amendment 14, in the name of the minister, is grouped with amendments 14A and 14B.

Roseanna Cunningham: Amendment 14 seeks to meet the Government’s commitment, made in response to the committee’s report, to provide a review clause. Although we support the introduction of a review provision, we must ensure that any report is carried out after allowing a sufficient amount of time for the act’s impact to be judged. We believe that such a report can only be worth while following two full football seasons.

Amendments 14A and 14B seek to make it a statutory requirement that any review of the legislation’s operation sets out the objectives intended to be achieved by the legislation, the extent to which those objectives have been achieved and whether and to what extent those objectives remain appropriate. I feel that those amendments do no more than state the obvious with regard to what a review of the legislation’s operation would involve. As a result, I do not think that they are necessary. I am happy to give a commitment that a review of the legislation’s operation will consider the extent to which it has been effective in addressing football-related disorder and will not simply be a statistical bulletin detailing the number of people arrested and convicted. I urge the committee to reject amendments 14A and 14B.

I move amendment 14.

David McLetchie: As the minister has indicated, amendments 14A and 14B seek to amend her amendment 14, and she has correctly identified that their purpose is to ensure that the reports envisaged in the principal section proposed in amendment 14 are more wide-ranging in scope than is apparent from the amendment’s strict construction.

Such reports must be more than statistical tabulations of charges, prosecutions and convictions in relation to the offences that the bill creates. I firmly believe that operation of the legislation must be reviewed in the much wider context of standards of behaviour at football matches and in related environments. We must examine the extent to which the legislation is being used successfully instead of existing crimes and offences being used to prosecute behaviour, how the legislation is tackling the policing of offensive internet communications, and the
Government’s overall programme for tackling sectarianism in Scotland, of which the bill is just one aspect.

Although I accept that another construction is not intended by either the minister or the Government, and I welcome the minister’s assurances in that respect, I think that if the bill contained a wider requirement it would be improved for the benefit of both the present Government and Parliament and future Governments and Parliaments, which will be looking at the legislation for many years to come.

I move amendment 14A.

The Convener: Minister, do you wish to wind up?

Roseanna Cunningham: I have nothing to further to say.

The Convener: The question is, that amendment 14A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
McLetchie, David (Lothian) (Con)

Against
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 1, Against 5, Abstentions 3.

Amendment 14A disagreed to.

Amendment 14B not moved.

The Convener: The question is, that amendment 14 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 14 agreed to.

Section 8—Commencement

The Convener: Amendment 15, in the name of the minister, is in a group on its own.

Roseanna Cunningham: Amendment 15 seeks to replace section 8. When the bill was first introduced, the intention was that the powers would be available to the police ahead of the 2011-12 football season. In view of the tight timescale for achieving that, provision was made in section 8 for it to come into force immediately on royal assent. As the bill is no longer being treated as emergency legislation, the Government considers that the provisions should follow the normal procedure for criminal offences and be brought into force by ministerial order.

I move amendment 15.

The Convener: The question is, that amendment 15 be agreed to. Are members agreed?

Members: No.

The Convener: There will be a division.

For
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
McLetchie, David (Lothian) (Con)
Yousaf, Humza (Glasgow) (SNP)

Abstentions
Kelly, James (Rutherglen) (Lab)
McInnes, Alison (North East Scotland) (LD)
Pearson, Graeme (South Scotland) (Lab)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 15 agreed to.

Section 8, as amended, agreed to.

Section 9 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. Thank you, everyone. We got through that with just a few little slip-ups—including some of my own, for a change. I thank Patrick Harvie for his contribution.

I suspend for a few minutes to let the minister leave.

12:15

Meeting suspended.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill
[AS AMENDED AT STAGE 2]

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Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Offensive behaviour at regulated football matches

1 Offensive behaviour at regulated football matches

5 (1) A person commits an offence if, in relation to a regulated football match—

(a) the person engages in behaviour of a kind described in subsection (2), and

(b) the behaviour—

(i) is likely to incite public disorder, or

(ii) would be likely to incite public disorder.

(2) The behaviour is—

(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,

(ii) a social or cultural group with a perceived religious affiliation,

(iii) a group defined by reference to a thing mentioned in subsection (4),

(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 any of sub-paragraphs (i) to (iii) of paragraph (a),

(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,

(d) behaviour that is threatening, or

(e) other behaviour that a reasonable person would be likely to consider offensive.

(3) For the purposes of subsection (2)(a) and (b) it is irrelevant whether the hatred is also based (to any extent) on any other factor.

(4) The things referred to in subsection (2)(a)(iii) are—
(a) colour,
(b) race,
(c) nationality (including citizenship),
(d) ethnic or national origins,
(e) sexual orientation,
(f) transgender identity,
(g) disability.

(5) For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—

(a) measures are in place to prevent public disorder, or
(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.

(6) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

2 Regulated football match: definition and meaning of behaviour “in relation to” match

(1) In section 1 and this section, “regulated football match”—

(a) has the same meaning as it has for the purposes of Chapter 1 (football banning orders) of Part 2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (see section 55(2) of that Act), but

(b) does not include a regulated football match outside Scotland unless the match involves—

(i) a national team appointed to represent Scotland, or
(ii) a team representing a club that is a member of a football association or league based in Scotland.

(2) For the purposes of section 1(1), a person’s behaviour is in relation to a regulated football match if—

(a) it occurs—

(i) in the ground where the regulated football match is being held on the day on which it is being held,
(ii) while the person is entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or
(iii) on a journey to or from the regulated football match,

(ab) it is directed towards, or is engaged in together with, another person who is—

(i) in the ground where the regulated football match is being held on the day on which it is being held,
(ii) entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or
(iii) on a journey to or from the regulated football match.

(3) The references in subsection (2)(aa) and (ab) to a regulated football match include a reference to any place (other than domestic premises) at which such a match is televised; and, in the case of such a place, the references in subsection (2)(aa) and (ab) to the ground where the regulated football match is being held are to be taken to be references to that place.

(4) For the purpose of subsection (2)(aa) and (ab)—

(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and
(b) a person’s journey includes breaks (including overnight breaks).

3 Fixed penalties

In Part 1 of the table in section 128 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (fixed penalty offences), after the entry relating to section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, insert—

<table>
<thead>
<tr>
<th>“Section 1(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011 (asp 00)”</th>
<th>Offensive behaviour at regulated football matches</th>
</tr>
</thead>
</table>

4 Sections 1 and 2: interpretation

(1) Section 1(1) applies to—

(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and
(b) behaviour consisting of—

(i) a single act, or
(ii) a course of conduct.

(2) In section 1(2)—

(a) membership, in relation to a group, includes association with members of that group,
(b) “presumed” means presumed by the person expressing hatred or, as the case may be, doing the stirring up,
(c) “religious group” has the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7).

(3) In section 1(4)—

(a) “disability” means physical or mental impairment of any kind,
(b) “transgender identity” means any of the following—

(i) transvestism,
(ii) transsexualism,
(iii) intersexuality,
(iv) having, by virtue of the Gender Recognition Act 2004 (c.7), changed gender,
(v) any other gender identity that is not standard male or female gender identity.

(4) In section 2(3), “televised” means shown (on a screen or by projection onto any surface) whether by means of the broadcast transmission of pictures or otherwise.

4A Power to modify sections 1 and 4

(1) The Scottish Ministers may by order—

(a) modify section 1 so as to—
   (i) add or remove a description of behaviour to or from those for the time being listed in subsection (2) of that section,
   (ii) vary the description of a behaviour for the time being listed in that subsection,
   (iii) add or remove a thing to or from those for the time being listed in subsection (4) of that section,
   (iv) vary the description of a thing for the time being listed in that subsection,

(b) modify section 4 so as to—
   (i) add or remove a definition to or from those for the time being mentioned in subsection (2) or (3) of that section,
   (ii) vary a definition for the time being mentioned in either of those subsections.

(2) An order under subsection (1)—

(a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,
(b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,
(c) is subject to the affirmative procedure.

Threatening communications

5 Threatening communications

(1) A person commits an offence if—

   (a) the person communicates material to another person, and
   (b) either Condition A or Condition B is satisfied.

(2) Condition A is that—

   (a) the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons of a particular description,
(b) the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm, and
(c) the person communicating the material—
   (i) intends by doing so to cause fear or alarm, or
   (ii) is reckless as to whether the communication of the material would cause fear or alarm.

(3) For the purposes of Condition A, where the material consists of or includes an image (whether still or moving), the image is taken to imply a threat or incitement such as is mentioned in paragraph (a) of subsection (2) if—
   (a) the image depicts or implies the carrying out of a seriously violent act (whether actual or fictitious) against a person or against persons of a particular description (whether the person or persons depicted are living or dead or actual or fictitious), and
   (b) 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.

(4) Subsection (3) does not affect the generality of subsection (2)(a).

(5) Condition B is that—
   (a) the material is threatening, and
   (b) the person communicating it intends by doing so to stir up hatred on religious grounds.

(6) It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable.

(7) A person guilty of an offence under subsection (1) is liable—
   (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
   (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

5A Protection of freedom of expression

(1) For the avoidance of doubt, nothing in section 5(5) prohibits or restricts—
   (a) discussion or criticism of religions or the beliefs or practices of adherents of religions,
   (b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,
   (c) proselytising, or
   (d) urging of adherents of religions to cease practising their religions.

(2) In subsection (1), “religions” includes—
   (a) religions generally,
   (b) particular religions,
   (c) other belief systems.
**Section 5: interpretation**

(1) Subsections (2) to (5) define expressions used in section 5.

(2) “Communicates” means communicates by any means (other than by means of unrecorded speech); and related expressions are to be construed accordingly.

(3) “Material” means anything that is capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form.

(4) “Hatred on religious grounds” means hatred against—

   (a) a group of persons based on their membership (or presumed membership) of—

      (i) a religious group (within the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7)),

      (ii) a social or cultural group with a perceived religious affiliation, or

   (b) an individual based on the individual’s membership (or presumed membership) of a group mentioned in either of sub-paragraphs (i) and (ii) of paragraph (a).

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

(6) In subsection (4)—

   (a) “membership”, in relation to a group, includes association with members of that group, and

   (b) “presumed” means presumed by the person making the communication.

**6A Power to modify sections 5(5)(b) and 6**

(1) The Scottish Ministers may by order—

   (a) modify section 5(5)(b) so as to—

      (i) add or remove a ground of hatred to or from those for the time being mentioned in that section,

      (ii) vary a ground of hatred for the time being mentioned in that section,

   (b) modify section 6 so as to—

      (i) add or remove a definition to or from those for the time being mentioned in that section in consequence of a modification made under paragraph (a),

      (ii) vary a definition that relates to a ground of hatred for the time being mentioned in section 5(5)(b).

(2) An order under subsection (1) may—

   (a) specify grounds of hatred by reference to hatred against groups of persons, or individuals, of specified descriptions,

   (b) specify such descriptions by reference to specified personal characteristics,

   (c) in relation to any ground added by the order, modify this Act so as to make such provision for the same or similar purposes as that in section 5A as the Scottish Ministers consider necessary or appropriate,

   (d) remove or vary any provision made under paragraph (c).

(3) An order under subsection (1)—
(a) may make such consequential, transitional, transitory or saving provision as the
Scottish Ministers consider appropriate,
(b) may, for the purpose of making consequential provision under paragraph (a),
modify this Act,
(c) is subject to the affirmative procedure.

General

Sections 1(1) and 5(1): offences outside Scotland

(1) As well as applying to anything done in Scotland, sections 1(1) and 5(1) also apply to
anything done outside Scotland by—

(a) a British citizen, a British Overseas Territories citizen, a British National
(Overseas) or a British Overseas citizen,
(b) a person who under the British Nationality Act 1981 (c.61) is a British subject,
(c) a British protected person within the meaning of that Act, or
(d) a person who is habitually resident in Scotland.

(2) Section 5(1) also applies to a communication made by any person from outside Scotland
if the person intends the material communicated to be read, looked at, watched or
listened to primarily in Scotland.

(3) Where an offence under section 1(1) or 5(1) is committed outside Scotland, the person
committing the offence may be prosecuted, tried and punished for the offence—

(a) in any sheriff court district in which the person is apprehended or in custody, or
(b) in such sheriff court district as the Lord Advocate may direct,
as if the offence had been committed in that district (and the offence is, for all purposes
incidental to or consequential on the trial and punishment, deemed to have been
committed in that district).

Report on operation of offences

(1) The Scottish Ministers must lay before the Scottish Parliament—

(a) a report on the operation of the offence in section 1(1) during the review period,
and
(b) a report on the operation of the offence in section 5(1) during the review period.

(2) A report under subsection (1) must be so laid no later than 12 months after the end of the
review period.

(3) In subsections (1) and (2), “the review period” means the period—

(a) beginning on the relevant day, and
(b) ending 2 years after the 1 August next occurring after the relevant day.

(4) In subsection (3), “the relevant day” means—

(a) in relation to a report under subsection (1)(a), the day on which section 1 comes
into force,
(b) in relation to a report under subsection (1)(b), the day on which section 5 comes
into force.
8 Commencement

(1) This section and section 9 come into force on the day of Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

9 Short title

The short title of this Act is the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Introduced by: Kenny MacAskill
On: 16 June 2011
Supported by: Roseanna Cunningham
Bill type: Executive Bill
OFFENSIVE BEHAVIOUR AT FOOTBALL AND
THREATENING COMMUNICATIONS (SCOTLAND)
BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised
Explanatory Notes are published to accompany the Offensive Behaviour at Football and
Threatening Communications (Scotland) Bill (introduced in the Scottish Parliament on 16 June
2011) as amended at Stage 2. Text has been added or deleted as necessary to reflect
amendments made to the Bill at Stage 2 and these changes are indicated by sidelaying in the right
margin.
REVISED EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL — AN OVERVIEW

4. The Bill provides for two new criminal offences. The offence of ‘Offensive behaviour at regulated football matches’ criminalises offensive or threatening behaviour likely to incite public disorder at certain football matches. The offence of ‘Threatening communications’ provides for a criminal offence concerning the sending of communications which contain threats of serious violence or which contain threats intended to incite religious hatred.

COMMENTARY ON SECTIONS

Section 1 – Offensive behaviour at regulated football matches

5. This section creates a statutory offence of engaging in offensive behaviour which is likely to incite public disorder at a regulated football match.

6. Subsection (1) provides that a person who engages in behaviour at 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.

7. 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 – this would include, but is not limited to, sectarian songs or chants.

8. 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).

9. 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.

10. 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 put in place to prevent public disorder, such as 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.

11. Subsection (6) specifies that the maximum penalty is 5 years imprisonment and a fine not exceeding the statutory maximum.

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

12. 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”.

13. 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) 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”.

14. Subsection (2) 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. 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 being 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 being 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 Anti-social Behaviour etc. (Scotland) Act 2004 to add the offence of Offensive behaviour at regulated football matches at section 1 to 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 Anti-social 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 4A: Power to modify sections 1 and 4

23. Section 4A 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 groups whom it is an offence to incite or express hatred of in section 1(4); and to add a definition to, or remove or vary a definition contained in, section 4(2) or (3). Subsection (2) provides that any order made under subsection (1) may make such consequential, transitional, transitory or saving provisions as are considered appropriate.

Section 5: 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.

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 religious hatred.

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 or 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 is 5 years imprisonment and a fine not exceeding the statutory maximum.

Section 5A: 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 5(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 6: Section 5: interpretation

35. This section defines terms used in section 5.

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, on the internet through websites, email, blogs, podcasts etc, by printed media, et cetera.
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 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 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 relation to 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 religion).

Section 6A: Power to modify sections 5(5)(b) and 6

41. This section allows for sections 5(5)(b) and 6 to be amended by order made by the Scottish Ministers. Subsection (1) provides a power to amend section 5(5)(b) to add a 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 6 so as to add, remove or vary a definition that relates to a ground of hatred mentioned in section 5(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, it may modify the Act so as to make provision for similar purposes as that in Section 5A (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 7: Sections 1(1) and 5(1): offences outside Scotland

44. This section makes provision regarding the circumstances in which the offences at sections 1(1) and 5(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 offences apply to anything done outside Scotland by a person to whom this subsection applies (e.g. a British citizen or a person who is habitually resident in Scotland). As such, a British citizen commits this offence irrespective of where in the world they make the threatening communication from.
46. Subsection (2) provides that the offence at section 5(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 (whether or not they fall within subsection (1)). 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, 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 as the Lord Advocate may direct, as if the offence had been committed there.

Section 7A: 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 5 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.

Section 8: Commencement

49. This section provides for section 8 itself and section 9 to come into force on Royal Assent. The other provisions shall come into force on such a date as Ministers appoint by order.
OFFENSIVE BEHAVIOUR AT FOOTBALL AND
THreatening Communications (Scotland)
BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.10.7 of the Parliament’s Standing Orders, in relation to the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions inserted into the Bill at Stage 2 and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill provides for two new criminal offences. The offence of ‘Offensive behaviour at regulated football matches’ criminalises offensive or threatening behaviour likely to incite public disorder at certain football matches. The offence of ‘Threatening communications’ provides for a criminal offence concerning the sending of communications which contain threats of serious violence or which contain threats intended to incite religious hatred.

Rationale for subordinate legislation

3. The Bill contains two main delegated powers provisions, added by amendment at Stage 2, which are explained in more detail below. In deciding whether the provision should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has carefully considered the importance of each matter against the need to—

- strike the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation;
- make proper use of valuable Parliamentary time; and
- respond to the recommendations contained in the Justice Committee’s report that consideration should be given to widening the offensive behaviour at football offence to cover hatred based on a person’s age or gender, and that, following consultation, consideration should be given to whether the offence concerning threats intended to stir up religious hatred should be widened to cover hatred on other grounds.
SUBORDINATE LEGISLATIVE POWERS - DETAIL

Delegated powers

Section 4A– Power to modify sections 1 and 4

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative procedure

Provision

4. Section 1(2) of the Bill lists behaviour which constitutes the offence of ‘offensive behaviour at regulated football matches’ where it occurs in relation to a regulated football match and is or would be likely to incite public disorder. Section 1(4) provides a list of groups of persons in relation to whom it is an offence under section 1(2)(a)-(c) to express hatred of or stir up hatred against, in addition to those mentioned in s 1(2)(a)(i) and (ii). These are colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. Section 4 defines various terms used in sections 1 and 2.

5. Section 4A(1)(a) provides the Scottish Ministers with a power to modify section 1(2) so as to add, remove or vary a description of a behaviour for the time being listed in that subsection and to modify section 1(4) so as to add or remove a thing listed for the time being at section 1(4) or vary the description of a thing listed at section 1(4). Section 4A(1)(b) provides a power to modify section 4 so as to add or remove a definition from subsection (2) or (3) of that section, or vary a definition for the time being mentioned in either of those subsections.

6. The power could be used to add ‘gender’ or ‘age’ to the list of groups in section 1(4). If it is considered appropriate or necessary to do so, the power at section 4A(1)(b) could then be used to amend section 4 to provide definitions of ‘gender’ and ‘age’.

Reason for taking this power

7. In their Stage 2 Report, the Justice Committee stated “the Committee is supportive of the Scottish Government’s decision not to restrict the section 1 offence to expressions of sectarian hatred only. We invite the Government to consider whether it would be appropriate to include expressions of hatred on the basis of age and gender within the scope of the offence.” The Government’s response to the Committee of 1 November set out the Government’s position that it “notes the Committee’s support for the inclusion of categories beyond sectarian hate in relation to the section 1 offence and the invitation to consider the inclusion of age and gender. The Government also notes the very detailed and thoughtful consideration by the Equal Opportunities and Justice Committees on the same issue in the context of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Given the complex arguments presented in the course of the consideration of the 2009 Act, the Government will bring forward an amendment to allow for the extension of the offence to cover additional characteristics including age and gender at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.”
8. The Government considers that the appropriate means of enabling ‘age’ and ‘gender’ to be added to the list of groups in s 1(4) at a later time if, following consultation, it is considered appropriate to do so is to provide a power to amend sections 1(2), 1(4) and 4 to enable Ministers to amend by order the list of prohibited behaviours and protected groups, and to make consequential changes to the definitions contained at section 4. This would avoid the need for Parliament to consider entirely new primary legislation whose sole purpose was to add a new group to the list at section 1(4) and make any necessary consequential changes. We do not envisage that the adding of age or gender to the list at section 1(4), if following consultation, it was considered appropriate, would raise any issues which could not adequately be considered by the Parliament under the affirmative procedure. The power is drawn in such a way as to be wider than only allowing the addition, modification or deletion of groups listed at section 1(4). It would also enable appropriate modifications to be made to the list of behaviours specified at section 1(2) in the event that new forms of offensive behaviour at football emerge that it would be useful to specify as ‘behaviour’ under section 1(2), rather than relying on the general provision at section 1(2)(e) concerning behaviour which a reasonable person would be likely to find offensive. The power also enables adjustments to be made to the definitions of ‘groups’ at section 4 in the event that it is necessary to reflect changes in thinking on equality issues.

9. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. These powers have been taken to ensure that appropriate provision can be made to ensure that any order which modifies sections 1 or 4 does not affect any prosecution for something done before the modification, for example in the event that any existing behaviour was removed from section 1 and replaced with another broader behaviour which encompassed the behaviour which was removed.

Choice of procedure

10. This power can be used to widen (or narrow) the kinds of behaviour covered by the offensive behaviour at football offence and therefore we consider the appropriate level of parliamentary scrutiny should be the affirmative procedure.

Section 6A – Power to modify sections 5(5)(b) and 6

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: affirmative procedure

 Provision

11. Section 5(5) of the Bill provides that it is an offence for a person to communicate material to another person if that material is threatening and the person communicating it intends by doing so to stir up hatred on religious grounds. Section 6 defines various terms used in section 5.

12. Section 6A(1)(a) provides the Scottish Ministers with a power to modify section 5(5)(b) of the Bill so as to add or remove a ground of hatred to or from those for the time being listed in that section, or to vary a ground of hatred for the time being mentioned in that section. Section 6A(1)(b) provides a power to modify section 6 so as to add, remove or vary a definition to or from those for the time being mentioned in that section in consequence of a change made using
the power at section 6A(1)(a). Section 6A(2) provides that an order under section 6A(1) may specify grounds of hatred by reference to hatred against groups of persons or individuals of specified descriptions and that it may specify such descriptions by reference to specified personal characteristics. Section 6A(2)(c) provides that, in relation to any ground added by the order, the order may modify the Act so as to make such provision for the same or similar purposes as that in section 5A (Protection of freedom of expression) as the Scottish Ministers consider necessary or appropriate.

13. The power would enable, for example, an amendment to be made to section 5(5)(b) to add threats intended to incite hatred on the grounds of sexual orientation or disability to that section. The power has been drafted so as to enable consequential amendments to be made to section 6 concerning definitions of terms used in any amendment to section 5(5)(b) and to enable any provision considered necessary to ensure protection of freedom of expression in consequence of the changes to the extent of section 5(5)(b) to be made. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. Such powers may be required to ensure that any modification of sections 5 or 6 does not affect any prosecution for something done before the modification.

Reason for taking this power

14. In their Stage 2 report, the Justice Committee noted that there were differing views on whether section 5 should be widened to cover other categories of people and acknowledged that “this is an issue that would require more consideration.” Some who gave evidence to the Justice Committee considered there to be a strong case for extending section 5(5)(b) to cover threats intended to stir up hatred of persons on the grounds of their sexual orientation, disability or transgender status. The Committee therefore recommended “that the Scottish Government consult on widening section 5 at an appropriate point should the Bill be passed.”.

15. In its response to the Committee Report of 3 November, the Government stated: “The Government notes the concerns about the lack of consultation on the implications of widening section 5 and the Committee’s conclusion that such consultation should be undertaken after the Bill is enacted. The Government will therefore bring forward an amendment to allow for the extension of the offence to cover additional characteristics at a later date, which will enable the issues to be examined following consultation and full consideration of evidence.”.

16. The Government considered that the appropriate means of meeting the commitment given to the Justice Committee was to amend the Bill to provide an order-making power to amend section 5(5)(b) to enable additional grounds of hatred to be added to the scope of this offence. It was considered that this was preferable to requiring entirely new primary legislation to be brought before Parliament to make changes to the list of groups covered by the offence concerning threats intended to incite hatred as many of the issues concerning the framing of an offence of threats intended to stir up hatred are the same, irrespective of the grounds on which hatred is being stirred up and we do not consider it an effective use of Parliamentary time to require entirely new primary legislation to add new “grounds” of hatred to this offence.

17. In considering the scope of the amendment, we considered it important to ensure that appropriate provision concerning protection for freedom of expression could be made when making any amendment to add additional groups to be covered by the offence concerning threats intended to
incite hatred. Part 3A of the Public Order Act 1986, as amended by the Schedule 16 to the Criminal Justice and Immigration Act 2008 provides for an offence concerning threats intended to stir up hatred on grounds of sexual orientation. That Act makes specific provision concerning protection of freedom of expression in relation to stirring up hatred on grounds of sexual orientation, stating, for the avoidance of doubt that urging people to refrain from or modify sexual conduct or practices shall not of itself be taken to be threatening or intended to stir up hatred. Similar provision could be made under section 6A(2)(c) were the power to be used to specify sexual orientation as a ground of hatred.

Choice of procedure

18. This power can be used to widen Condition B of the threatening communications offence so as to criminalise threats made with the intention of stirring up hatred of other groups of people (e.g. by reason of their race, sexuality or disability). Therefore we consider the appropriate level of parliamentary scrutiny to be the affirmative procedure.

Section 8 - Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: The Order must be laid before Parliament under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

Section 8 of the Bill provides that with the exception of sections 8 and 9, which come into force immediately on Royal Assent, the Scottish Ministers may by order bring the provisions of the Bill into force.

Reason for taking this power

Section 8 of the Bill as introduced had made provision for the offence provisions to come into force immediately on Royal Assent, as it had been introduced as emergency legislation with the intent that it would come into force ahead of the 2011/12 football season. However, as it is no longer being treated as emergency legislation, we now consider it more appropriate that the Act should come into force by order.

Choice of procedure

As is now usual for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).
Subordinate Legislation Committee

18th Report, 2011 (Session 4)

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as amended at Stage 2

Published by the Scottish Parliament on 6 December 2011
Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Chic Brodie
Nigel Don (Convener)
James Dornan (Deputy Convener)
Kezia Dugdale
Mike MacKenzie
John Scott
Drew Smith

Committee Clerking Team:

Clerk to the Committee
Irene Fleming

Assistant Clerk
Euan Donald

Support Manager
Lori Gray
The Committee reports to the Parliament as follows—

1. At its meetings on 29 November and 6 December 2011, the Subordinate Legislation Committee considered the delegated powers provisions in the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as amended at Stage 2. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. As introduced, the Bill contained no delegated powers. As such, the Committee did not consider the Bill at introduction. At stage 2 amendments were agreed to which would enable sections 1, 4, 5(5)(b) and 6 of the Bill to be modified by way of order. An amendment was also agreed to which makes provision for a commencement power at section 8(2).

3. The Scottish Government provided the Parliament with a supplementary delegated powers memorandum on these new provisions in the Bill ("the supplementary DPM"). The Committee took evidence from the Scottish Government on the powers in section 4A, power to modify sections 1 and 4, and section 6A, power to modify sections 5(5)(b) and 6. The Committee’s consideration of these powers is set out below.

4. The Committee was content with the power at section 8(2).

Delegated powers

Section 4A - Power to modify section 1 (offence relating to offensive behaviour at regulated football matches) and section 4 (interpretation of sections 1 and 2), and to make consequential, transitional, transitory or saving provision

Power conferred on: the Scottish Ministers

Power exercisable by: order
Parliamentary procedure: the affirmative procedure

5. Section 1 makes it an offence to behave in an offensive and disorderly manner in relation to a regulated football match. The term “regulated football match” is defined in the Bill. Behaviour is defined very broadly in the Bill to include things said or communicated as well as things done.

6. Section 1(2) of the Bill describes what will be treated as offensive. Section 1(2)(a)-(c) read with 1(4) relate to expressions or stirring up hatred against a variety of groups. These include hatred based on colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability. Threatening behaviour and other behaviour which a reasonable person would be likely to consider offensive is also caught. In any case the behaviour must be likely to incite or be public disorder. Section 4 defines various terms used in sections 1 and 2.

7. The power in section 4A to modify the criminal offence set out in section 1 comprises three elements. Firstly, it enables the Scottish Ministers to modify section 1. It can do so in regard to a number of matters. In particular it can do so to add, remove or vary a description of behaviour to or from those presently listed in subsection (2). The power also enables similar amendment to be made to the list of things relevant to behaviour which expresses hatred of a group as presently set out in subsection (4), ie colour, race, sexual orientation, etc.

8. Secondly, it enables the Scottish Ministers to modify section 4. They can do so to add, remove or vary a definition mentioned in subsections (2) or (3). These cover such matters as what “membership”, in relation to a group, includes. It also enables amendment to be made to the definitions of such terms as “religious group” and “disability”.

9. Thirdly, an order modifying sections 1 or 4 can also make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate. Where making consequential provision such an order can in addition modify the new Act itself.

10. In short this power is capable of altering the scope of offensive behaviour caught by the section 1 offence in a wide variety of ways. It does not affect the need for public disorder or threatened public disorder before the offence is committed.

11. Any order under section 4A is subject to the affirmative procedure.

12. The supplementary DPM notes that three factors were taken into account when determining to deal with this by means of subordinate legislation.

13. Firstly, it was considered that subordinate legislation struck the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in the light of experience, without the need for primary legislation.
14. Secondly, it ensured that proper use was made of valuable Parliamentary time.

15. And thirdly, it responded to the recommendations contained in the Justice Committee’s report that consideration should be given to widening the offensive behaviour at football offence to cover hatred based on a person’s age or gender, and that, following consultation, consideration should be given to whether the offence concerning threats intended to stir up religious hatred should be widened to cover hatred on other grounds.

16. In oral evidence, the Scottish Government confirmed that it considered the power at section 4A was the appropriate way to respond to the Justice Committee’s recommendation with regard to widening the offensive behaviour at football offence to cover hatred based on a person’s age or gender. This approach, the Scottish Government indicated, would enable there to be consultation on the widening of the offence as recommended by the Justice Committee.

17. In the supplementary DPM the Scottish Government contend that leaving this provision to subordinate legislation—

“…would avoid the need for Parliament to consider entirely new primary legislation whose sole purpose was to add a new group to the list at section 1(4) and make any necessary consequential changes. We do not envisage that the adding of age or gender to the list at section 1(4), if following consultation, it was considered appropriate, would raise any issues which could not adequately be considered by the Parliament under the affirmative procedure.”

18. In oral evidence, the Committee raised questions about the wide nature of these powers. Scottish Government officials contended that this was not a wide power as offences under section 1 only applied in the context of regulated football matches and as such any changes to the offence could also only relate to such matches.

19. The Committee also questioned whether the use of order making powers was a rushed response to the Justice Committee’s recommendations, given that it did not specifically recommend the use of order making powers, and whether it would have been preferable to either have halted the progress of the Bill to consult on these recommendations or to make provision for further primary legislation in this regard following consultation. Scottish Government officials, however, asserted that this was not a rushed response. On the contrary, the officials intimated that this approach was a considered one which allowed for proper consultation on widening the terms of the offence. Moreover the matters to which the Justice Committee’s recommendations related still pertained to offensive behaviour at regulated football matches and as such, the officials asserted that this was the appropriate place to make provision for them.

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20. A majority of the members of the Committee found the reasoning provided for using order making powers in this instance to be justifiable. The Committee considers that the use of order making powers in this instance is appropriate.

21. However, a minority of members of the Committee considered that it would have been preferable to either have halted the progress of the Bill to consult on the Justice Committee’s recommendations or to make provision for further primary legislation in this regard following consultation.

22. As previously noted, orders under section 4A will be subject to the affirmative procedure and as such subject to approval by the Parliament.

23. In oral evidence, the Committee asked the Scottish Government, given the significance of the modifications to the Bill orders under section 4A could make, whether it considered affirmative procedure would provide for sufficient scrutiny of these orders. In particular, the Committee enquired whether any consideration had been given to applying a super-affirmative procedure to orders under section 4A, so as to allow for a period of consultation prior to laying the order.

24. In evidence, Scottish Government officials noted that although no provision was made for a super-affirmative procedure on the face of the Bill, the Minister for Community Safety had made a commitment in oral evidence to the Justice Committee to consult on orders under this section.2

25. It was further explained by the Scottish Government officials in evidence that the requirement for a super-affirmative procedure under this section was not considered appropriate as some orders would be of a technical nature and in these instances consultation would result in an unnecessary delay. Where, however, consultation was considered appropriate, as committed to by the Minister, there would be a period of consultation before an order was laid, but it was acknowledged that this would not be binding.

26. The Committee recognises that the order making powers at section 4A are significant and that in some cases orders under this power should be subject to consultation. The Committee welcomes the Minister for Community Safety’s commitment to consult in these instances. At the same time, the Committee understands that some orders under this section will be of a technical nature and consultation externally in the form which a super-affirmative procedure would entail in these instances would be unnecessary.

27. With that in mind, the Committee considers the affirmative procedure is the appropriate power to be applied in this instance, ensuring that orders under section 4A must be approved by the Parliament in order to have effect. Imposing a universal requirement for consultation on all orders under this section on the face of the Bill would in the view of the Committee be unnecessary and the Committee notes that the Minister for Community Safety will ensure that consultation will be undertaken where it is appropriate.

28. During the course of its scrutiny of the Bill the Justice Committee considered matters in relation to the European Convention on Human Rights (ECHR) and invited the Scottish Government “to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights.”.3

29. The Committee questioned whether an order making power subject to the affirmative procedure would necessarily enable satisfactory consideration be given to ECHR issues. Key definitions and key elements of behaviour which, if engaged in, may result in an offence being committed could be changed and the time to consider orders in terms of compliance with ECHR would necessarily be less.

30. Scottish Government officials advised the Committee that in order for any Bill to receive a certificate of competence it must be compliant with ECHR and that this Bill had been given such a certificate. Furthermore, they noted that any order would need to comply with ECHR requirements.

31. The Committee notes that any order laid under this Bill would be considered by it in the usual manner and would require to comply with ECHR requirements.

32. The Bill makes provision for the creation of two new criminal offences at sections 1 and 5. Sections 4A and 6A enable the Scottish Ministers to alter the terms of these offences. Given the potential significance of these order making powers, the Committee invited the Scottish Government officials to provide comparable examples within recent legislation of a power to make significant alterations, with respect to criminal offences, by way of subordinate legislation.

33. Amongst other examples, the Scottish Government officials drew the Committee’s attention to section 43(8) of the Sexual Offences (Scotland) Act 2009 which allows Ministers, by order, to amend section 43 to add, delete or amend a condition which, if satisfied, would mean that a person was in a position of trust and could commit the offence of sexual abuse of trust in section 42 of that Act.

34. Attention was also drawn to section 8 of the Emergency Workers (Scotland) Act 2005 which gives Ministers the power, by Order, to amend sections 1(3), 2(3) and 5(3) of that Act to add to the list of emergency workers whom it is an offence to assault, obstruct or hinder in various situations.

35. The Committee notes that sections 4A and 6A give the Scottish Ministers the power to change the two core provisions in this Bill and therefore these examples are perhaps not strictly analogous as they alter aspects of the offences in the Bill rather than the key provisions and do so at an advanced stage in the Bill process.

36. However, they do provide examples of orders being used to amend criminal offences and as such the Committee notes that while use of order making powers in this regard might be rare and perhaps even rarer where order making powers are used to amend criminal offences at the core of the

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Bill's purpose at such an advanced stage in the process, they are not unprecedented.

37. In the course of oral evidence, Scottish Government officials were asked whether the order-making power at section 4A of the Bill, which provides a power to amend sections 1(2), 1(4) and 4 of the Bill could be used to make an order to add a list of 'proscribed songs' to the Bill. Officials were unable to provide a response at the meeting, but committed to providing a response in writing.

38. In its response, attached as an annex to this report, the Scottish Government acknowledged the power could be used to provide a list of proscribed songs, subject to the limits of describing a “behaviour” that could to a reasonable person appear offensive.

39. It further noted, that in framing the power it was not the Scottish Government’s intention to either allow or preclude such a use.

40. The Scottish Government indicated, however, that it did not consider creating a list of proscribed songs to be an effective means of dealing with offensive and disorderly behaviour at football matches. To that end, the response notes that the Scottish Government does not consider this to be an appropriate use of the power.

41. The Committee notes the response from the Scottish Government.

Section 6A – Power to modify sections 5(5)(b) (person communicating threatening material intending by doing so to stir up hatred on religious grounds) and 6 (interpretation of section 5 provisions relating to threatening communications)

Power conferred on: the Scottish Ministers

Power exercisable by: order

Parliamentary procedure: the affirmative procedure

42. Section 5 of the Bill sets out the other criminal offence contained within the Bill, relating to threatening communications. Under section 5(1), an offence is committed if a person communicates material to another person, and either Condition A or Condition B (as set out elsewhere in section 5) is satisfied. Condition A describes material which would represent a threatening communication. Condition B is set out at section 5(5). Section 5(5)(a) provides that the material must be threatening and, in addition, section 5(5)(b) requires that the person communicating it intends by doing so to stir up hatred on religious grounds.

43. Section 6 defines expressions which are used in section 5. These include definitions of “communicates”, “material”, and “hatred on religious grounds”.

44. Section 6A(1)(a) provides the Scottish Ministers with a power to modify section 5(5)(b) of the Bill so as to add or remove a ground of hatred to or from those for the time being listed in that section, or to vary a ground of hatred for the time being mentioned in that section. Section 6A(1)(b) provides a power to modify section 6 so as to add, remove or vary a definition to or from those for the time
being mentioned in that section in consequence of a change made using the power at section 6A(1)(a). Section 6A(2) provides that an order under section 6A(1) may specify grounds of hatred by reference to hatred against groups of persons or individuals of specified descriptions and that it may specify such descriptions by reference to specified personal characteristics. Section 6A(2)(c) provides that, in relation to any ground added by the order, the order may modify the Act so as to make such provision for the same or similar purposes as that in section 5A (Protection of freedom of expression) as the Scottish Ministers consider necessary or appropriate.

45. The supplementary DPM notes that the power would enable, for example, an amendment to be made to section 5(5)(b) to add threats intended to incite hatred on the grounds of sexual orientation or disability to that section. The supplementary DPM further states that the power has been drafted so as to enable consequential amendments to be made to section 6 concerning definitions of terms used in any amendment to section 5(5)(b) and to enable any provision considered necessary to ensure protection of freedom of expression in consequence of the changes to the extent of section 5(5)(b) to be made. The order making power allows for such consequential, transitional, transitory or saving provisions as Scottish Ministers consider appropriate. Such powers may be required to ensure that any modification of sections 5 or 6 does not affect any prosecution for something done before the modification.

46. The supplementary DPM notes that the same tests in terms of the appropriateness of using order making powers as applied to section 4A, and as set out at paragraphs 12 and 13 of this report, were applied in relation to the decision to make use of order making powers in this regard.

47. The supplementary DPM notes that the adoption of the power, as with its provision in relation to section 4A, was considered a proportionate response to a recommendation by the Justice Committee.

48. In its Stage 2 report, the Justice Committee noted that there were differing views on whether section 5 should be widened to cover other categories of people and acknowledged that “this is an issue that would require more consideration.” Some who gave evidence to the Justice Committee considered there to be a strong case for extending section 5(5)(b) to cover threats intended to stir up hatred of persons on the grounds of their sexual orientation, disability or transgender status. The Committee therefore recommended “that the Scottish Government consult on widening section 5 at an appropriate point should the Bill be passed.”

49. In its response to the Justice Committee’s report, the Scottish Government committed to bringing forward an amendment which would allow for the terms of section 5 to be widened subject to consultation. The supplementary DPM notes that the Government considered that the appropriate means of meeting the commitment given to the Justice Committee was to amend the Bill to provide an order-making power to amend section 5(5)(b) to enable additional grounds of hatred to be added to the scope of this offence. It was considered that this was preferable to requiring entirely new primary legislation to be brought before the

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Scottish Parliament to make changes to the list of groups covered by the offence concerning threats intended to incite hatred as many of the issues concerning the framing of an offence of threats intended to stir up hatred are the same, irrespective of the grounds on which hatred is being stirred up and the Scottish Government did not consider it an effective use of Parliamentary time to require entirely new primary legislation to add new “grounds” of hatred to this offence.

50. In oral evidence to the Justice Committee the Minister for Community Safety noted that the case for widening the scope of section 5(5)(b) had yet to be made, but that this amendment would allow for it to be so on the basis of consultation.

51. In the context of questioning on the powers under section 4A, Members highlighted the same points about the powers under section 6A, questioning the appropriateness of using order making powers in this context, enquiring about the width of these powers and querying whether the approach has been rushed.

52. The responses from the Scottish Government on section 6A echoed those given on section 4A.

53. A majority of Members were again content with the responses given and the justifications made for using order making powers. The Committee considers that the use of order making powers in section 6A is appropriate.

54. The Committee enquired whether the procedural requirements on the exercise of this power were sufficient to enable effective scrutiny.

55. Exercise of the power under section 6A is subject to the affirmative procedure. Subordinate legislation brought forward under section 6A would in consequence be subject to full scrutiny by the Parliament, and would require to be approved by it before being brought into force.

56. However, as with the power in section 4A, the Committee considered whether the affirmative procedure would be likely to afford adequate time to investigate the effect of changes which might be made by subordinate legislation to the nature of the offence.

57. The supplementary DPM notes that the affirmative procedure was adopted in this case as—

“This power can be used to widen Condition B of the threatening communications offence so as to criminalise threats made with the intention of stirring up hatred of other groups of people (e.g. by reason of their race, sexuality or disability).”

58. The Committee is content that the affirmative procedure will impose sufficient control on the exercise of the power at section 6A.
ANNEX

Correspondence from the Scottish Government dated 1 December 2011

We undertook to write to the Committee following the session of 29 November taking evidence from officials concerning the order-making powers contained in the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. The Committee have asked whether the order-making power at section 4A of the Bill, which provides a power to amend sections 1(2), 1(4) and 4 of the Bill could be used to make an order to add a list of ‘proscribed songs’ to the Bill.

The Government’s view is that, for the reasons outlined at paragraph 51 of the Policy Memorandum, the creation of lists of proscribed songs is not an effective means of dealing with offensive and disorderly behaviour at football matches. In short, the problems with constructing a proscribed list which is definitive, the difficulty in keeping such a list up to date to account for any new songs and chants and the potential for “loopholes” being created, possibly by even the most minor adjustment to existing songs and chants, means that the creation of such a list in legislation would not only be cumbersome but would be ineffective.

Accordingly, it was not the Government’s intention, in framing the power at section 4A, specifically to allow or preclude such a use. The power allows new descriptions of behaviour to be added or existing behaviours listed there to be modified. Proscribing specific songs could only be done within those constraints. The Government’s view is that would not be an appropriate use of the power.

I hope that this information is helpful to the Committee in its consideration of the order-making powers contained in the Bill.
SUBORDINATE LEGISLATION COMMITTEE

EXTRACT FROM THE MINUTES

13th Meeting, 2011 (Session 4)

Tuesday 29 November 2011

Present:

Chic Brodie
James Dornan (Deputy Convener)
Mike Mackenzie
Drew Smith

Nigel Don (Convener)
Kezia Dugdale
John Scott

1. **Decisions on taking business in private**: The Committee agreed to take items 5 and 7 in private.

5. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private)**: The Committee agreed its approach to its consideration of the delegated powers provisions in this Bill after Stage 2.

6. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill**: The Committee took evidence on the Bill after Stage 2 from—


7. **Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (in private)**: The Committee considered the evidence heard earlier in the meeting and agreed to consider a draft report at its next meeting.
On resuming—

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: After Stage 2

The Convener: I welcome Gery McLaughlin, the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill team leader; Patrick Down, policy adviser for the bill team; and Heather Wortley, from the Scottish Government’s legal directorate. Thank you for coming and for waiting around—it is greatly appreciated. You will know what we are here to discuss, so we will go straight to questions, which will be led by John Scott.

John Scott (Ayr) (Con): Given 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—will you outline the Scottish Government’s reasons for making provisions in the bill to enable the Scottish ministers to modify sections 1 and 4 by order?

Patrick Down (Scottish Government): If the convener agrees, it might be easiest if I answer the question in relation to the order-making powers in sections 4A and 6A, because the reasons are largely the same.

The Convener: That is perfectly reasonable. If there is a general answer that refers to both powers, by all means do so.

Patrick Down: The powers were introduced in response to recommendations in the Justice Committee’s stage 2 report on the bill. The committee invited us to consider adding age and gender to the list of characteristics that are covered by the section 1 offence. In our response, we noted the committee’s support for the inclusion of categories beyond sectarian hatred and religious and racial hatred in relation to the section 1 offence and the invitation to consider the inclusion of age and gender.

The Convener: That is perfectly reasonable. If there is a general answer that refers to both powers, by all means do so.

Patrick Down: The powers were introduced in response to recommendations in the Justice Committee’s stage 2 report on the bill. The committee invited us to consider adding age and gender to the list of characteristics that are covered by the section 1 offence. In our response, we noted the committee’s support for the inclusion of categories beyond sectarian hatred and religious and racial hatred in relation to the section 1 offence and the invitation to consider the inclusion of age and gender.

We also noted that, in the previous session of Parliament, the Equal Opportunities Committee and the Justice Committee considered age and gender in relation to the Offences (Aggravation by Prejudice) (Scotland) Bill and, after hearing evidence from Barnardo’s, Help the Aged and Scottish Women’s Aid, among others, came to the conclusion that it was not appropriate to include age and gender in the list of characteristics in that bill in relation to which an offence could be aggravated. There are significant issues on which we need to consult further. We felt that, rather than add age and gender to the bill now, we would take an order-making power to enable us to take time to consult on whether those characteristics should be added.

As members know, there is another order-making power, in section 6A, which enables us to add new grounds of hatred. The Justice Committee recognised that there are different views on whether to widen the section 5 offence to cover other categories of hatred and acknowledged that the issue requires more consideration. The Justice Committee therefore invited the Government to consult on widening the section 5 offence at an appropriate time, should the bill be passed. In response, we noted the concern about the lack of consultation on the implications of widening section 5 to cover other categories of hatred, which is why we did not support Patrick Harvie’s stage 2 amendments that would have done so. We lodged an amendment to allow for the extension of the offence to cover additional categories of hatred at a later date, to enable the issues to be considered following full consultation.

John Scott: So the matter was essentially dealt with in this way in response to the concerns of the Justice Committee and others.

Patrick Down: Yes.

John Scott: Thank you.

The Convener: I will pursue that a little. Does the Government accept that it is really quite a wide power and that the justification is more narrowly drawn than the power that is being taken?

Patrick Down: The power to modify section 1 is about modifying the circumstances in which an offence relating to offensive behaviour at a regulated football match can be committed. It is not that wide, in that it can be used only to add new kinds of behaviour that, when they occur at a regulated football match and are likely to incite public disorder, could constitute a criminal offence. The power does not enable us, for instance, to lay an order that would extend the offence beyond football.

There is an argument that section 1(2)(e) covers offensive behaviour at football matches generally, so what we would be looking to do with any order-making power is to bring additional clarity. It may be that behaviour that expresses hatred on the basis of gender or age would already be considered offensive behaviour to a reasonable person, but laying an order would perhaps bring additional clarity that it was definitely covered by the offence. The power is perhaps not as wide as it first appears to be.
John Scott: Is it not unusual to take powers with such tariffs at such a late stage? I do not think that you have necessarily answered that. Why was the need for the power not foreseen, given the level of discussion and debate that there has been around the bill?

Patrick Down: I am afraid that I cannot comment on whether order-making powers of this kind have been added to bills at stage 2 in the past. I simply do not know. The power was added at this stage very much in response to recommendations that the Justice Committee made in its stage 2 report.

John Scott: Our view is that it is unusual, and that is why we are a bit concerned about it. Anyway, thank you for your answer in the meantime.

Drew Smith (Glasgow) (Lab): One concern that was raised at the Justice Committee was about how behaviour will be defined or what it might be taken to mean. The minister has ruled out the possibility of a proscribed list of songs. Can you confirm that the provisions in relation to subordinate legislation will rule out a list of proscribed songs being produced in future?

Patrick Down: For the reasons that we outlined during the stage 1 debate, it is unlikely that ministers would want to provide a list of proscribed songs. I will ask Heather Wortley to comment from a legal perspective on whether the power is drawn in such a way as to prevent that from being done.

Heather Wortley (Scottish Government): I am afraid that I have never considered the question of a proscribed list being put into a Scottish statutory instrument. That might be something that we can consider and come back to you on.

The Convener: That would be helpful, especially if it is a question that you have not considered before.

James Dornan (Glasgow Cathcart) (SNP): Drew Smith touched on my question briefly. Section 4A gives the Scottish ministers the power to change one of the bill's core provisions by way of subordinate legislation. Among other things, it gives ministers the power to redefine what constitutes an offence under section 1. What factors did the Scottish Government take into account when it determined that that would be an appropriate use of order-making powers?

Patrick Down: The factors are largely those that we set out in the delegated powers memorandum, which were: striking the right balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly in the light of experience and without the need for fresh primary legislation; making proper use of valuable parliamentary time; and responding to the recommendations in the Justice Committee's report on the possible extension of the offences at sections 1 and 5, which we felt that it was not appropriate to do immediately by amending the bill at stage 2 because of the complex issues that were raised about extending the offences in that way.

James Dornan: Okay.

15:00

Chic Brodie (South Scotland) (SNP): When the Justice Committee was scrutinising the bill, it considered matters concerning the European convention on human rights and invited the Scottish Government to reflect on concerns raised. The catch-all test for offensive behaviour is set out in section 1(2)(e), which, as you will know better than I do, refers to

"other behaviour that a reasonable person would be likely to consider offensive".

It was felt that that might be too expansive and that it might raise concerns in respect of adherence to freedom of speech and other rules or guidance under the European convention on human rights. What consideration was given to whether the power at section 4A, which enables changes to be made to the offences in section 1, raises ECHR compliance issues, particularly in relation to freedom of speech?

Patrick Down: Any bill that is introduced into the Scottish Parliament has to be compliant with the European convention on human rights. The Presiding Officer had signed off the bill as being compliant and we are satisfied that it is compliant. Any order that we made would also have to be compliant with the European convention on human rights.

Chic Brodie: The question was about section 1(2)(e), which talks about

"other behaviour that a reasonable person would be likely to consider offensive".

Is that too wide and too expansive, given what the Government was trying to do—having the powers while still meeting the requirements of the ECHR?

Patrick Down: We are of the view that section 1(2)(e) is compliant with the European convention on human rights. The order-making power does not change that.

Chic Brodie: I am surprised.

Kezia Dugdale (Lothian) (Lab): I think that part of my question was answered at the beginning, but perhaps I can pursue it a bit further.

The bill creates two new criminal offences and gives the ministers the power to amend the terms
of those offences. It alarms me that that could be done by secondary or subordinate legislation. Does it not alarm you? You said earlier that you did not find it unusual. I understand that Patrick Down is a policy officer and that Heather Wortley is a lawyer. Is it unusual?

**Patrick Down:** If it would be helpful, I will give some examples of secondary legislation that can be used to vary criminal offences.

Section 43(8) of the Sexual Offences (Scotland) Act 2009 provides ministers with an order-making power to amend section 43 of the act by adding, deleting or amending a condition that, if satisfied, would constitute a position of trust. A person in a position of trust could commit the offence of sexual abuse of trust, which has a maximum penalty of five years imprisonment.

Another example is that section 141 of the Criminal Justice Act 1988 confers a power on the secretary of state to prescribe by order weapons that are offensive weapons and which it is an offence to manufacture, sell and so on. That power was transferred to the Scottish ministers on devolution and was used to make the Criminal Justice Act 1988 (Offensive Weapons) (Scotland) Order 2005, which added two new categories of weapon—the stealth knife and the straight, side-handled or friction-lock truncheon—to the list of weapons that are specified as offensive weapons under that section.

Other examples include a power at section 2 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005; one at section 8 of the Emergency Workers (Scotland) Act 2005, which enables ministers to amend by order the list of emergency workers whom it is an offence to assault, obstruct or hinder in various situations; and one at section 123(6) of the Licensing (Scotland) Act 2005, which allows ministers by order to include or exclude premises from the definition of excluded premises at section 123(2) of that act, which has the effect that the sale of alcohol in those premises would constitute a criminal offence.

**Kezia Dugdale:** Are you now arguing that it is common to use the power in that way?

**Patrick Down:** I do not know whether it is common, but it is certainly not entirely novel, as those five examples show.

**Kezia Dugdale:** It is not novel.

**Mike MacKenzie (Highlands and Islands) (SNP):** The exercise of the power under section 4A is subject to the affirmative procedure. Are you concerned that that might not allow an adequate opportunity for full consultation? Given the significance of the provisions that could be amended by section 4A, have you given any consideration to the use of the super-affirmative procedure, to allow for fuller scrutiny and consultation?

**Patrick Down:** Use of the super-affirmative procedure would place a requirement on the Government to consult before laying an order. The minister has made it clear that, as a matter of policy, the Government would consult before making any significant changes, for example, to section 1, to add new protected categories, or to section 5, to add new categories of person against whom it would be an offence to make threats that incited or stirred up hatred.

However, it is possible, at least hypothetically, that the order-making power could be used to make very minor technical changes, for example to the drafting of the definitions in section 4. One example that springs to mind is that, if at some future time there was a Council of Europe convention on equalities issues that required us to amend the language that we use to describe the equality groups that are listed in section 4, that might require us to make consequential amendments to section 4 that would have no real impact on how the offence worked in practice. We think that it would be disproportionate to require a full consultation before those technical drafting changes could be made. We take the view that, in practice, we would consult before we made any significant changes to either of the offences in the bill, but there are hypothetical circumstances in which we might want to make very minor technical drafting changes that would not require consultation.

**Mike MacKenzie:** Thank you very much. I am pleased that you have put on record a commitment to consult in the event that significant extensions to the power are proposed.

**The Convener:** Several members want to follow up on that. I will start with Kezia Dugdale.

**Kezia Dugdale:** In your answers to my question and to Mike MacKenzie’s, you used the word “significant”. To me, that is a highly subjective term. Do you have a definition of what you mean by it? For example, you talked about adding types of weapon to the offensive weapons legislation. It strikes me that that would be fairly insignificant and that adding to that legislation items that were clearly dangerous would not cause a great deal of alarm to the wider public. What does “significant” mean in the eyes of the law?

**Patrick Down:** The examples that the Justice Committee gave of the addition to section 1 of age and gender and additions to section 5 covering, for example, sexuality or disability are changes that would have a real impact on what would be criminal, as opposed to drafting changes that might have no practical impact. If we changed the
definition of sexual orientation, it would not change the fact that homophobic chanting at football was a criminal offence. If, on the other hand, we added threats that were intended to incite hatred on grounds of sexual orientation to section 5 of the bill—I suppose that it would be an act by the time that we laid the order—I think that that would change what was criminal and would therefore be significant.

Kezia Dugdale: That is helpful, but if we are talking about what would be criminal, surely that requires greater scrutiny than the subordinate legislation process entails.

Patrick Down: Such an order would, of course, be an affirmative order, so it would have to go to a vote of the full Parliament; it could not simply be sneaked through.

Kezia Dugdale: But it would not have to be debated.

Patrick Down: I am happy to be corrected on this, but my understanding is that affirmative orders are, or certainly can be, debated in the Parliament.

Drew Smith: Given that we are talking about the potential to change the nature of a criminal offence by order, what would be the timescale in the event that that was the course of action that the minister decided that he or she wanted to take? How long would it take for the order to come into effect, so that someone could commit a criminal offence under the new law? How easy would it be to communicate to those who attend football grounds in Scotland that something that was not illegal the previous week was illegal that week?

Patrick Down: If we take the example of the football offence, there is an argument that, because of the general criminalisation of behaviour

“offensive to a reasonable person”,

the change to what would be criminal would not be significant. I foresee, however, that any consultation would follow the usual Scottish Government approach, involving a 12-week consultation period before any order was made. That order would then have to sit in the Parliament for, I think, 28 days before being voted on. It is 40 days, I am sorry. If such an order were brought forward, we would make efforts to communicate the fact that the behaviour that we were amending the act to cover was in our view criminal. There would be a commencement date in the order, so the point at which it would come into effect would be clear to anyone reading it.

John Scott: Just for clarification, if all are agreed that age and gender measures should be introduced now, is it correct that they cannot be included in the bill because you need more time to consult on that? Is that why those measures will have to be brought in by subordinate legislation?

Patrick Down: Yes.

Gery McLaughlin (Scottish Government): Sorry, I might have misunderstood what you said about everyone being agreed on age and gender. The position is that the committee took evidence from some people who were very much in favour of including such measures, as were some committee members, but not all. As Patrick Down said, a contrary conclusion was reached during the debates on the Offences (Aggravation by Prejudice) (Scotland) Bill.

The Government’s view is that, because the issues are complex, they would require consultation and could not be added to the bill at this stage. We have provided for the order-making power because it will give us the opportunity to consult and, as we have heard, the minister is committed to consulting before laying any order—we and the Justice Committee consider that to be essential. Certainly, the Justice Committee was strongly of the view that consultation was required in the case of the threatening communications offence. The committee would probably have taken that into account for the first offence as well, once it had seen our response on that, although it was not clear from the committee’s report whether that was their view.

John Scott: Does that not imply that the whole thing is even now being rushed? If this should be in the bill, even after consultation—

Gery McLaughlin: No, I would disagree—

John Scott: Well, presumably you are proposing to introduce the new offence into the bill through subordinate legislation, which will have the same effect.

Gery McLaughlin: I disagree with the contention that this is being rushed. The bill’s provisions, as they stand, address the issues relating to offensive behaviour at football, which the Government has identified as essential to address, as set out in the policy memorandum for the bill. Other groups gave evidence to the committee and came forward with other issues. They thought that the first offence, relating to football, could have been more clearly expressed and that the measures relating to the second offence could have been significantly widened. Those were not the initial targets of the bill, however, and the Government’s view is that they are not essential in addressing the bill’s policy objectives.

The Government said that it would be responsive to amendments, however, and in a spirit of openness and co-operation with the
recommendations of the Justice Committee, said that it would take powers to react to those recommendations at a later stage, following appropriate consultation. It would be rushed if we were to include them now, but it might be entirely appropriate to introduce them later, following consultation, depending on the results of the consultation. The regulatory power—the order-making power—allows the Government to do that, subject to the agreement of the Parliament under the affirmative procedure.

John Scott: I did not really take in what you said about affirmative and super-affirmative procedures on this issue. In reality, what would be the difference between the two? Given the tariff attached to these offences—which I believe is five years—why did you prefer the affirmative procedure to the super-affirmative procedure?

15:15

Gery McLaughlin: I refer you to Patrick Down’s comment about the minister’s commitment to consult on the issues before introducing an order, which would be debated by and subject to a vote in the Parliament before any changes were made in the law. That is equivalent to the super-affirmative procedure, minus a requirement in the bill that a consultation be undertaken. As Patrick has pointed out, that would permit more minor technical changes to be made in response, for example, to Council of Europe conventions, without having a full consultation, which might well be disproportionate for more minor issues. With regard to the age and gender issue that we have been discussing in relation to the first offence and the move to widen the provisions of the second offence for other equalities groups, the procedure is very similar to the super-affirmative procedure but without the specific requirement set out in legislation.

The Convener: Are you saying that the difference between the super-affirmative and affirmative procedures is the need to consult and that what subsequently happens in the Parliament is the same?

Gery McLaughlin: I am not an expert on the matter, but I think that there are different views on what super-affirmative procedure is. I am looking at Heather Wortley when I say this, but I do not think that it is a precise term. The idea is that it goes beyond the affirmative procedure, which, as you will be aware, requires that the Government introduces an order, that there is a consultation period of 40 working days—or perhaps it is just 40 days—after it is laid and that there is a debate in and a vote by the Parliament before it is passed into law. Obviously, the vote will have to be positive. Super-affirmative procedure goes beyond that in some way, usually with a specific requirement to consult in the bill. It might have other features but, as I said, I am not an expert on it.

The Convener: So the affirmative procedure means something specific in legislation, whereas super-affirmative does not necessarily mean anything specific, but goes beyond affirmative procedure and will be tailored to circumstances at the time.

Gery McLaughlin: To the best of my knowledge, the affirmative and negative procedures are similar to Westminster tradition, while the super-affirmative procedure is more specific to the Scottish Parliament. It is a more novel idea in that respect.

Chic Brodie: Are we saying that there is a procedure that is just an idea and has not been agreed across the board to ensure that we all have the same understanding of it?

The Convener: Perhaps I can answer that for you. Negative and affirmative instruments are laid—

Chic Brodie: I understand that.

The Convener: However, super-affirmative procedure is an idea. It goes beyond affirmative, but at this stage has not been prescribed in either statute or standing orders.

I suspect that one or two of the committee’s remaining questions have already been answered but I think that Mike MacKenzie has a particular query.

Mike MacKenzie: What is the Scottish Government’s reasoning behind making provision in the bill to enable the Scottish ministers to modify sections 5(5)(b) and 6 in a way similar to that for section 4A?

Patrick Down: We have taken the power to modify section 5(5)(b) in order to be able to add new grounds of hatred to the offence. At the moment, it would be an offence to make a threat intended to incite religious hatred. The power would enable us to include, for example, threats intended to incite hatred on grounds of disability, sexual orientation or gender as constituting the offence of threatening communications.

The power to amend section 6 is, to a degree, consequential on that in that it enables us to add definitions of any term that we introduce in section 5(5)(b). We have also taken a power to add provision equivalent to the section added at stage 2 to protect freedom of expression. I do not know how familiar you are with the bill’s contents, but it contains a provision essentially intended to ensure for the avoidance of doubt that the provision on threats intended to incite religious hatred does not interfere with legitimate criticism or discussion of
religious matters. Likewise, we thought that if we took the power to extend the offence we might need to make similar provision protecting, for example, the right to discuss or criticise matters relating to people’s sexual practices.

Mike MacKenzie: And are the reasons for not putting that in the bill similar to those that we have been discussing?

Patrick Down: Yes. Indeed, the Justice Committee was firmer on this matter and very much of the view that changes should not be introduced until there had been further consultation. The only way to do that was to take this order-making power to enable changes to be made later, following consultation.

James Dornan: As far as varying and defining the bill’s hatred elements are concerned, what factors did the Government take into account when determining whether this was an appropriate use of order-making powers?

Patrick Down: I apologise for repeating myself—

James Dornan: I guess that you will be at this stage.

Patrick Down: The policy memorandum sets out the various factors, including the need to strike the right balance between recognising the issue’s importance and providing the flexibility to respond to changing circumstances quickly and without the need for fresh primary legislation; the need to make proper use of valuable parliamentary time; and the need to respond to concerns raised during the Justice Committee’s consideration of the offence about whether there was a case for extending the provisions to other categories of hatred.

Chic Brodie: Coming back to the process—and leaving the super-affirmative procedure to one side for a moment—I note that orders under section 6A will, as you have pointed out, be subject to affirmative procedure. Given the significance of those orders, are you content that there will be sufficient scrutiny of the kind of significant changes to the bill that you have just mentioned?

Patrick Down: Yes, not least because of the minister’s commitment to having a full public consultation ahead of any such changes being made.

The Convener: On behalf of the committee I thank the witnesses for coming along and answering our questions. I remind Ms Wortley of our hope that she might be able to answer our question about songs.

Heather Wortley: We will provide a response in writing.

The Convener: If you could let us have that as soon as is reasonably possible, that would be helpful.

15:23

Meeting continued in private until 15:42.
Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 9  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

David McLetchie

1 In section 1, page 1, leave out line 22 and insert—

<( ) expressing support for an organisation listed in Schedule 2 to the Terrorism Act 2000 (c.11), or

( ) glorifying or celebrating events involving the loss of life or serious injury.>

David McLetchie

2 In section 1, page 2, line 17, at end insert—

<( ) It may not be libelled in an indictment or specified in a complaint that an offence under subsection (1) is—

(a) racially aggravated under section 96 of the Crime and Disorder Act 1998 (c.37),

(b) aggravated by religious prejudice under section 74 of the Criminal Justice (Scotland) Act 2003 (asp 7), or

(c) aggravated by prejudice relating to disability, sexual orientation or transgender identity under the Offences (Aggravation by Prejudice) (Scotland) Act 2009 (asp 8).>

Section 4A

Roseanna Cunningham

3 In section 4A, page 4, line 18, at end insert—

<( ) disapply paragraph (b) of subsection (5) of that section in relation to a description of behaviour for the time being listed in subsection (2) of that section.>

Patrick Harvie

8 In section 4A, page 4, line 29, at end insert—

<( ) Before making an order under subsection (1), the Scottish Ministers must—
(a) consult such persons as they consider appropriate, and
(b) lay a report on any such consultation before the Scottish Parliament.>

Section 6A

Patrick Harvie

9 In section 6A, page 7, line 5, at end insert—
<(  ) Before making an order under subsection (1), the Scottish Ministers must—
(a) consult such persons as they consider appropriate, and
(b) lay a report on any such consultation before the Scottish Parliament.>

Section 7

Roseanna Cunningham

4 In section 7, page 7, line 8 leave out <, sections 1(1) and 5(1) also apply> and insert <by any person, section 1(1) also applies>

Roseanna Cunningham

5 In section 7, page 7, leave out lines 10 to 13

Roseanna Cunningham

6 In section 7, page 7, line 15, at beginning insert <As well as applying to anything done in Scotland by any person,>

Roseanna Cunningham

7 In section 7, page 7, line 15, leave out <any> and insert <a>

Section 7A

Patrick Harvie

10 In section 7A, page 7, line 29, at end insert—
<(  ) Before preparing a report under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 3 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Section 1 offence: supporting terrorism and glorifying events
1

Group 2: Statutory aggravations not to be applied to section 1 offence
2

Group 3: Section 1 offence: power to disapply 1(5)(b)
3

Debate to end no later than 40 minutes after proceedings begin

Group 4: Powers to modify offences: requirement to consult
8, 9

Group 5: Offences outside Scotland
4, 5, 6, 7

Group 6: Report on operation of offences: requirement to consult
10

Debate to end no later than 1 hour and 10 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 1, No. 39 Session 4

Meeting of the Parliament

Wednesday 14 December 2011

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S4M-01571—That the Parliament agrees that, during Stage 3 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 40 minutes
Groups 4 to 6: 1 hour 10 minutes.

The motion was agreed to.

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 4, 5, 6, 7 and 10

Amendment 3 was agreed to (by division: For 64, Against 17, Abstentions 36)

The following amendments were disagreed to (by division)—

1  (For 15, Against 103, Abstentions 0)
2  (For 14, Against 101, Abstentions 0)
8  (For 53, Against 63, Abstentions 0)
9  (For 53, Against 64, Abstentions 0)

Offensive Behaviour at Football and Threatening Communications (Scotland) Bill - Stage 3: Roseanna Cunningham (Minister for Community Safety and Legal Affairs) moved S4M-01524—That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 64, Against 57, Abstentions 0).
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill: Stage 3

14:19

The Presiding Officer (Tricia Marwick): The next item of business is stage 3 proceedings on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. In dealing with the amendments, members should have the bill as amended at stage 2, that is SP bill 1A; the marshalled list, that is SP bill 1A-ML; and the groupings, which I have agreed to. The division bell will sound and proceedings will be suspended for five minutes for the first division of the afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate. Members should now refer to the marshalled list of amendments.

Section 1—Offensive behaviour at regulated football matches

The Presiding Officer: Amendment 1, in the name of David McLetchie, is in a group on its own.

David McLetchie (Lothian) (Con): I am delighted to kick off the debate.

Amendment 1 is an amendment that I first lodged at stage 2 but withdrew on the strength of an undertaking from the minister to consider its adoption. It was fairly considered by her and discussed by Parliament, but the minister concluded that she could not accept it. Accordingly, I have brought it back to Parliament for wider debate and discussion.

One of the bill's weaknesses is its failure to define sectarian behaviour, although its primary motivation is to address sectarian behaviour in the context of football matches. As I have said repeatedly, sectarian behaviour in Scotland cannot be viewed solely in the context of religious hatred directed against Roman Catholics. It also manifests itself in loyalties and affiliations arising from the history of Ireland, where religious divisions between Catholics and Protestants certainly play a major part but where there are also strong and secular republican and loyalist traditions. Regrettably, their conflicting desires to gain independence or defend an existing constitutional relationship with Britain have been conducted not just on a political level, but through the violence and activities of paramilitary and terrorist groups on both sides.

I welcome the fact that that broader perspective on what constitutes sectarian behaviour is shared by the Scottish Government and reflected in the guidelines to prosecutors that have been published by the Lord Advocate. In the context of the section 1(2)(e) offence of "behaviour that a reasonable person would be likely to consider offensive", the Lord Advocate's guidelines indicate that that would encompass "Songs/lyrics in support of terrorist organisations" and "Songs/lyrics which glorifies or celebrates events involving the loss of life or serious injury."

The intention behind amendment 1 is to incorporate a specific provision in the bill to refer to such conduct, which would sit alongside the religious hatred provisions in sections 1(2)(a), 1(2)(b) and 1(2)(c). At the same time, my amendment would remove from the bill the catch-all section 1(2)(e) offence that was the subject of much adverse comment in the evidence received by the Justice Committee, which is recorded in the committee's report to the Parliament. My amendment defines terrorism by reference to the organisations that are on the proscribed list compiled by Her Majesty's Government under the Terrorism Act 2006, which covers the Irish Republican Army and its various derivatives and splinter organisations, as well as loyalist paramilitary groups.

The problem with the statutory aggravation enacted by this Parliament in section 74 of the Criminal Justice (Scotland) Act 2003 was that it was one sided. It focused solely upon religious hatred rather than wider forms of sectarian behaviour and as such was rightly resented as an unbalanced piece of legislation. We risk making exactly the same mistake in this bill. It is not good enough to throw a catch-all provision into the bill and to leave to guidelines the definition of behaviour that will or will not be prosecuted. If one was going to take that approach, logically all unacceptable behaviour could be covered by generalised catch-all offences, leaving the specification of what is offensive to a reasonable person, including religious and other hatreds, to the Lord Advocate's guidelines to prosecutors. We do not have that. Instead, we have a half-and-half approach to the problem that is likely to satisfy no one and which, I am sorry to say, is born out of an unwillingness to grasp firmly the sectarian nettle. The Parliament can and should do better than that.

I move amendment 1.

James Kelly (Rutherglen) (Lab): I rise to oppose amendment 1, although I think that David McLetchie lodged it to try to address one of the central flaws of the bill, which is its lack of
definition. I genuinely believe that the Scottish National Party Government has got itself into great difficulty over that.

In the aftermath of the election, there was agreement across the Parliament on the need to tackle sectarianism, but the SNP focused on it as a football matter and rushed in the bill, which was poorly defined. That dogged the debate throughout the summer months and into the autumn. When issues about what would be an offence under the bill have been raised with SNP ministers and the Lord Advocate, the answer that has consistently been given has been that that will be down to the police and the prosecutors. That is simply not good enough. We should not expect the police and the prosecutors to fill in for the gaps in the bill.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): As we have heard, amendment 1 would narrow the scope of the offensive behaviour offence by removing the reference to “other behaviour that a reasonable person would be likely to consider offensive” and replacing it with a more limited reference to support for terrorism and glorification of loss of life. The Government does not support the amendment, but I nevertheless thank Mr McLetchie for his careful consideration of the bill and the constructive approach that he has adopted in lodging the amendment.

Two distinct but related issues are involved, the first of which is the removal of the general so-called catch-all provision in section 1(2)(e). I do not believe that the offence will be effective if it cannot accommodate itself to a range of existing and, crucially, future behaviours. Whenever a list of specific behaviours is captured in law, we risk freezing the law at that point and limiting its applicability. I understand that there are concerns about the catch-all nature of section 1(2)(e), but it is necessary to achieve our stated aims. I am also fully assured that the offence will be enforced proportionately and fairly. I would be extremely concerned that, were section 1(2)(e) to be deleted, the offence would not be flexible enough to capture the continually evolving variety of offensive behaviour that we are aiming to eliminate from Scottish football.

Secondly, the explicit reference to support for proscribed organisations is problematic. I have discussed that issue with Mr McLetchie and understand, and to a large extent sympathise with, his intentions in lodging an amendment to highlight such an important issue. We are in full agreement that the bill should criminalise support for terrorist organisations in the context of football. I am therefore happy to give members an assurance that the bill already criminalises support for terrorism in connection with regulated football matches where there is a risk of public disorder. That is made very clear in the Lord Advocate’s guidelines on the bill.

As a result of Mr McLetchie’s engagement with us on the issue, we have looked into the issue of placing a reference to terrorism in the bill. I have discussed the matter with the Lord Advocate and carefully considered it. As I have said, I understand the concerns behind the amendment and am sympathetic to the reasoning for lodging it, but all offensive behaviour that is likely to incite public disorder is already covered by the bill, including support for terrorist organisations and the glorifying of tragedies. That behaviour is already covered by section 1(2)(e), which the amendment would remove. The Lord Advocate’s guidelines make it very clear that that is exactly the sort of offensive behaviour that would be covered. The Government’s view is that the Lord Advocate’s guidelines are the most appropriate way to deal with the matter, and therefore we do not support amendment 1.

David McLetchie: I thank James Kelly and the minister for their contributions in this short debate. I was pleased that James Kelly identified that the purpose of amendment 1 was to correct one of the central flaws of the bill, which is a lack of definition and precision in the way that the offences are framed. I am therefore slightly surprised that, when I lodge an amendment that incorporates such definition and precision into the offence, the Labour Party elects to vote against it. I suspect that there are other reasons at play, but so be it. I welcome even the qualified welcome that was given.

The minister said that amendment 1 would narrow the scope of the offence. Yes, it would, and I make no apologies for that because, as James Kelly fairly pointed out, one of the principal criticisms of the bill is that the new offences that it creates are too general in scope, particularly in relation to section 1(2)(e). On that issue, the minister and I, and the members of her party and those of mine, fundamentally disagree. I respect her views and I appreciate the fact that she respects ours. Nonetheless, I wish to press the amendment to a vote.

The Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: We are not agreed, so I suspend the meeting for five minutes.
On resuming—

The Presiding Officer: Order. I ask members please to resume their seats and check that they have their cards in their consoles; otherwise, they will not be allowed to vote.

We move to the division on amendment 1.

**For**
- Brown, Gavin (Lothian) (Con)
- Carlaw, Jackson (West Scotland) (Con)
- Davidson, Ruth (Glasgow) (Con)
- Fergusson, Alex (Galloway and West Dumfries) (Con)
- Fraser, Murdo (Mid Scotland and Fife) (Con)
- Goldie, Annabel (West Scotland) (Con)
- Johnstone, Alex (North East Scotland) (Con)
- Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
- McGirr, Jamie (Highlands and Islands) (Con)
- McLetchey, David (Lothian) (Con)
- Milne, Nanette (North East Scotland) (Con)
- Mitchell, Margaret (Central Scotland) (Con)
- Scanlon, Mary (Highlands and Islands) (Con)
- Scott, John (Ayr) (Con)
- Smith, Liz (Mid Scotland and Fife) (Con)

**Against**
- Adam, Brian (Aberdeen Donside) (SNP)
- Adam, George (Paisley) (SNP)
- Adamson, Clare (Central Scotland) (SNP)
- Alian, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
- Baille, Jackie (Dumbarton) (Lab)
- Baker, Claire (Mid Scotland and Fife) (Lab)
- Baker, Richard (North East Scotland) (Lab)
- Beamish, Claudia (South Scotland) (Lab)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- Biagi, Marco (Edinburgh Central) (SNP)
- Bibby, Neil (West Scotland) (Lab)
- Boyack, Sarah (Lothian) (Lab)
- Brodie, Chic (South Scotland) (SNP)
- Brown, Keith (Clackmannanshire and Dunblane) (SNP)
- Burgess, Margaret (Cunninghame South) (SNP)
- Campbell, Aileen (Clydesdale) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
- Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
- Constance, Angela (Almond Valley) (SNP)
- Crawford, Bruce (Stirling) (SNP)
- Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
- Dey, Graeme (Angus South) (SNP)
- Don, Nigel (Angus North and Mearns) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Dornan, James (Glasgow Cathcart) (SNP)
- Dugdale, Kezia (Lothian) (Lab)
- Edie, Jim (Edinburgh Southern) (SNP)
- Ewing, Annabelle (Mid Scotland and Fife) (SNP)
- Ewing, Fergus (Inverness and Nairn) (SNP)
- Fabiani, Linda (East Kilbride) (SNP)
- Fee, Mary (West Scotland) (Lab)
- Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
- Findlay, Neil (Lothian) (Lab)
- Finnie, John (Highlands and Islands) (SNP)
- FitzPatrick, Joe (Dundee City West) (SNP)
- Gibson, Kenneth (Cunninghame North) (SNP)
- Gibson, Rob (Caithness, Sutherland and Ross) (SNP)

The Presiding Officer: The result of the division is: For 15, Against 103, Abstentions 0.
Amendment 1 disagreed to.

The Presiding Officer: We now move to group 2. Amendment 2, in the name of David McLetchie, is the only amendment in the group.

David McLetchie: Amendment 2 is the same as an amendment that I withdrew at stage 2 on the basis of the minister’s undertaking to give the matter fuller consideration. Again, she has done that in good faith, and I commend her for that. Again, however, my proposal has not been adopted or endorsed by the Government, so I am bringing it to the chamber for further debate today.

Amendment 2 is derived from the Lord Advocate’s guidelines to prosecutors, to which I referred in the debate on the previous group. The guidelines stipulate that it is not appropriate to add an aggravation on the grounds of religious and other hatreds and prejudices in the prosecution of the new offences that are created under sections 1 and 5. I believe that that guideline should be in the bill.

The Government’s position is that new laws are required in order that free-standing offences relating to offensive behaviour at football matches may be defined and prosecuted separately and distinctly from other common law and statutory offences that are of general application. If that is the Government’s position, there is no need to charge a person with a statutory aggravation, which would be directed towards exactly the same behaviour. It would be particularly absurd to add a statutory aggravation under section 74 of the Criminal Justice (Scotland) Act 2003, which, as I have said before, is an unsatisfactory piece of legislation, and a product of this Parliament’s last, inadequate effort to tackle sectarianism.

I move amendment 2.

James Kelly: I rise to oppose the amendment in the name of David McLetchie. I fundamentally disagree with the premise of the amendment that racial and religious aggravations should not be included.

It is important that we have appropriate statistics when we try to assess the problem of sectarianism and religious aggravation in Scotland. In the context of the bill—if it is to go forward—it is important that we are able to assess what the breaches of the peace cover. That should not be vague or unspecific.

On the analysis of statistics, it is a matter of regret that the Government has lost a substantial body of data dating back a number of years. That needs to be examined closely. I have taken the matter up with the Cabinet Secretary for Justice, who says that it is a matter of the information technology policy that the data is deleted after two years. It has been pointed out to me that the IT systems might indeed hold the data, so I will take that up further with the cabinet secretary.

I oppose amendment 2. I believe that it is appropriate to have full data available if we are to be able to assess the impact of the problem and monitor the effect of any legislation going forward.

Roseanna Cunningham: I really have to deal with the point that James Kelly made first, to knock that nonsense on its head. The fact is that summary cases are dealt with in exactly the way that they have been dealt with since 2001, when the destruction policy was put in place by the member’s own Government. If he is now going to say that that was wrong, I am astonished—

James Kelly: Why was it in your manifesto?

The Presiding Officer: Order, Mr Kelly.

Roseanna Cunningham: Mr Kelly must know that somewhere in the region of 270,000 cases are reported every year, which makes absolutely clear why the physical destruction policy was put in place in 2001. It is a bit rich for him to come to the chamber now and moan about something that he put in place.

Amendment 2, in the name of David McLetchie, is intended to ensure that individuals charged with offensive behaviour motivated by hatred cannot also have a statutory aggravation relating to behaviour motivated by prejudice added to their charge. I sympathise with the intention of the amendment, but it goes beyond what is needed to ensure that an additional aggravation cannot be added to those behaviours that express hatred, because it applies to all the types of behaviour listed in section 1.

As paragraphs (a) to (c) of section 1(2) on the offensive behaviour offence cover expression of hatred directed towards individuals based on their membership or perceived membership of groups including those that are defined by religion, colour, race, nationality, ethnic or national origins, sexual orientation, transgender identity and disability, the Government agrees that it would not be appropriate to add an additional aggravation to charges under those paragraphs.

However, amendment 2 would also preclude aggravations being added to charges under paragraphs (d) and (e) of section 1(2), which cover behaviour that is threatening or otherwise likely to be offensive to a reasonable person, including support for terrorism. It may be appropriate to add a statutory aggravation to charges under those paragraphs, and that is one of the reasons why the Government will not support the amendment. That was the basis of the conversations that we had with Mr McLetchie. I thank him once again for engaging in that discussion with us.
The other reason why the Government will not support the amendment is that the issue is, as Mr McLetchie recognises, already covered in the Lord Advocate’s guidelines on the bill. The guidelines state:

“It is not appropriate to add aggravations in terms of prejudice relating to race, religion, sexual orientation, transgender identity or disability to this offence.”

I think that that is very clear and leaves no doubt that additional aggravations should not be added to charges relating to hatred under the offensive behaviour at football offence. The Government will not support the amendment.

14:45

David McLetchie: I again thank the minister and Mr Kelly for their contributions to our debate this afternoon.

I find Mr Kelly’s logic a little difficult to follow. The principal offence in the bill is behaviour that expresses or stirs up hatred against people who are members of a religious group or a social or cultural group with a perceived religious affiliation—and so on. The statutory aggravations are that an offence is aggravated by hatred, dislike or a stirring up of hatred of people in the same categories. How can we have an aggravation of something that is already an offence, in almost identical terms? That makes absolutely no sense at all.

That is exactly why the instructions are as they are in the Lord Advocate’s guidelines. I seek only to bring that approach into the bill so that it is not just a matter for the guidelines. The minister—fairly, from her perspective—says that the Government wants the aggravations to apply to the more generalised offences in paragraphs (d) and (e) of section 1(2). That is where we fundamentally differ, because I do not think that the bill should have generalised offences in those paragraphs. It should be specifically focused on the behaviour that was intended to address: behaviour largely perceived to be of a sectarian nature.

As before, there is a fundamental division of opinion between us. I will press my amendment to a vote.

The Presiding Officer: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Lothian) (Con)
Milestone, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Alian, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Colley, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Fay, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Gray, lain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)

No.

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Lothian) (Con)
Milestone, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

For

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Lothian) (Con)
Milestone, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)
MALIK, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsdale) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Park, John (Mid Scotland and Fife) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (C eyebrows and Chryston) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Presiding Officer: The result of the division is: For 14, Against 101, Abstentions 0.

Amendment 2 disagreed to.

Section 4A—Power to modify sections 1 and 4

The Presiding Officer: We move to group 3. Amendment 3, in the name of the minister, is the only amendment in the group.

Roseanna Cunningham: Amendment 3 is a technical amendment intended to clarify the application of the order-making powers in section 4A. Those powers were added at stage 2.

Section 4A allows the Scottish ministers to make an order, subject to affirmative procedure, to modify the behaviours that trigger, and the groups protected by, the offensive behaviour offence. The Government has given a clear commitment that we will consult on any substantive changes to be made using the powers.

The amendment is intended to make it clear that where necessary—for example, to ensure compliance with the ECHR, which is required of us in this Parliament—section 1(5)(b) can be disapplied as regards a type of behaviour listed in section 1(2). The effect of such a disapplication would be that persons must be present in sufficient numbers for public disorder to be likely to be incited as a result of a kind of behaviour.

I move amendment 3.

David McLetchie: I rise to oppose the amendment in the minister's name. In an extraordinary way, it demonstrates exactly what is wrong with the bill. In essence, with this amendment and the powers in section 4A, which was added to the bill at stage 2, the Government wants an opportunity by way of statutory instrument to amend on the hoof the new criminal offences that it is creating in the bill.

We have an absurd situation in that the bill says that behaviour is an offence even if "persons likely to be incited to public disorder are not present or are not present in sufficient numbers".

In other words, it does not matter—someone can be guilty of an offence even if they are not present. However, the Government is so concerned that that provision might be struck down on the ground of its failure to comply with the ECHR that it now wants the power to remove the provision by statutory instrument. Would it not be a better idea to get it right in the first place? We would not then have a problem.

In conclusion, we had an interesting brief on the bill from the organisation known as Liberty. It comments:

"Allowing for the modification of criminal conduct by way of Ministerial order is a breathtaking expansion of power. Use of the statutory instruction 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."

I could not say it better myself; in fact, I haven't. I oppose amendment 3.

Roseanna Cunningham: When David McLetchie comments about getting it right the first time, I wonder what he thinks stage 2 and stage 3 of our bill procedures are about. This is hardly the first Government to lodge the odd amendment during the progress of a bill. I seem to remember it happening frequently between 1999 and 2007.

Taking an order-making power is hardly an unusual procedure either. It is fairly standard and we have made it clear that the order-making powers that we seek to take under the bill will be invoked only with the fullest consultation, which means coming back to the chamber for a vote. I
do not understand why Mr McLetchie finds that to be so objectionable.

The Presiding Officer: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Eilean (Na h-Eileanan Siar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alleen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linthgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Alcine (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McGrigor, Jamie (Highlands and Islands) (Con)
McLetchie, David (Lothian) (Con)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Liz (Mid Scotland and Fife) (Con)

Abstentions

Ballie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Findlay, Neil (Lothian) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stewart, David (Highlands and Islands) (Lab)

The Presiding Officer: The result of the division is: For 64, Against 17, Abstentions 36.

Amendment 3 agreed to.
The Presiding Officer: We move to group 4. Amendment 8, in the name of Patrick Harvie, is grouped with amendment 9.

Patrick Harvie (Glasgow) (Green): I have made it fairly clear all along that I am no great fan of the bill. Although I thought that the flaws in the bill were probably too deep to be rectified by amendments, I lodged a number of amendments at stage 2 because I took the view that, if the Government was determined to push the bill all the way, the least that we could do was try to shave off a few of the rough edges and resolve a few of the more significant problems. Unfortunately, I was not successful at persuading the Government that some of my worthy stage 2 amendments should be agreed to, so I have come back with a few smaller ones at stage 3. I again make it clear that I believe that the flaws in the bill run very deep and that, even if the Government accepts all my amendments, I am not sure that that will make me vote to pass the bill.

The bill has been portrayed as being a football bill or a sectarianism bill but, in reality, it is nothing of the kind. Although part of it applies only to football and part of it applies only to religion, it is a much wider hate crime bill, which will sit alongside the other pieces of hate crime legislation that have been passed.

Members will be aware that, in the last session of Parliament, I worked with the Government on such legislation in the form of the Offences (Aggravation by Prejudice) (Scotland) Bill, which, in the end, received the support of all the Opposition parties. We considered whether to include in that bill the offence of incitement to hatred. Along with some of the organisations that lobbied for the bill, I and other politicians considered whether incitement to hatred was an issue that we wanted to get into.

The UK Government and the Westminster Parliament have implemented incitement to hatred legislation, but the Scottish Parliament has never done so. Until about a week before the introduction of the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, I thought that there was still a pretty clear consensus that we did not feel that it was right to pursue incitement to hatred in legislation without a great deal more careful consideration, but that is what the bill does.

The bill creates the offence of incitement to hatred, albeit only in highly specific circumstances. It was unclear why, if the Government supported the introduction of incitement to hatred legislation, it had defined those circumstances in the way in which it had. Therefore, at stage 2, I lodged amendments that would have extended the grounds of incitement to hatred to cover all the other grounds that are mentioned in relation to other aspects of the bill. I put those amendments forward for debate, but I did not press them to a vote, because I had concerns that we were creating rushed legislation and that we were stepping over a line that we had previously agreed, on a cross-party basis, not to step over.

Following those stage 2 considerations, it was clearer to me than ever that we would be making a serious mistake. Therefore, the amendments in group 4—amendments 8 and 9—say to ministers that, if they intend to use the power that they wish to have to extend the scope of the incitement to hatred offence or the other offence, in addition to asking the Parliament's permission, they will need to begin a public debate on the proposal. The consequences of getting wrong hate speech legislation are far graver than the consequences of getting wrong legislation on other hate crimes. With statutory aggravation, we are talking only about treating existing offences differently because of motivation but, with hate speech legislation, we would be in much more danger of stepping over the line on free speech. The free speech defence that the Government has included does not apply to the whole bill or to both the offences that are proposed.

With amendments 8 and 9, I argue that the Government should have to consult publicly and begin a public debate with a view to ensuring that if, in future, it decides that it wishes to come back with an order to extend the scope of the offences, we do not make more mistakes than we have to.

I move amendment 8.

James Kelly: I support Patrick Harvie's amendments, for which he has made a cogent case. It is clear that, if the bill goes through, the proposed order-making power will give the Government a substantial remit to extend the provisions beyond those that are in the bill. Patrick Harvie is absolutely correct to say that, if that step is to be taken, there should be appropriate consultation, not only within the Parliament, but with interested parties outside it, in order to ensure that a consensus can be built for the changes that are proposed. I am afraid that the Government has failed to build such a consensus on the bill.

David McLetchie: As Patrick Harvie said, he lodged a significant number of amendments at stage 2, some of which raised fundamental issues to do with the relationship between, on the one hand, civil liberties and freedom of speech and, on the other, hate crimes. It would have been well worth having a wider debate on those issues at stage 3 in the context of what the bill aspires to do. It is a deficiency in our processes that we cannot accommodate such debate in the final stage of parliamentary consideration of legislation. That might be an issue for the future.
I support amendments 8 and 9 and I urge the minister to accept them, because it is important that there is wider public consultation on any proposed changes to the legislation, as Patrick Harvie and James Kelly said.

15:00

**Alison McInnes (North East Scotland) (LD):** I welcome Patrick Harvie’s on-going efforts to improve this mess of a bill, although I fear that it is a hopeless cause.

Given the unprecedented powers that sections 4A and 6A will introduce, amendments 8 and 9 are vital if we are to ensure that at least some sense of democratic process remains in our law making. The Government’s amendments to the bill at stage 2, which will enable the Government to alter the definition of a criminal offence by ministerial order, were hard to believe. As we heard, Liberty described the approach as a “breathtaking expansion of power”.

Despite the minister’s assurances to the contrary, the affirmative procedure is simply not meant to be used for such a purpose. Criminal offences should only ever be redefined through the formal bill process, which demands full pre-legislative scrutiny—the bill was sadly lacking in that, due to the Government’s gung-ho mentality.

Bill scrutiny involves three distinct stages, two parliamentary debates, a committee report and the opportunity to lodge amendments, whereas the affirmative order procedure involves no formal consultation and allows for no more than 90 minutes of debate in committee and only the briefest discussion in the chamber. That is no way to make criminal law.

Amendments 8 and 9 would, at the very least, require the Government to carry out some form of consultation before using its new powers. That is no substitute for genuine democracy, but it seems to be the best that we can hope for under the Scottish National Party Government.

**Roseanna Cunningham:** The problem with amendments 8 and 9 is that they would apply no matter how minor or technical the change. The Subordinate Legislation Committee considered in great detail the order-making powers as set out in the delegated powers memorandum for the bill, and it concluded in its report that the Government’s reasoning for the use of order-making powers was “justifiable” and “appropriate”.

The committee said:

“...will be of a technical nature and consultation ... in these instances would be unnecessary.”

It concluded:

“Imposing a universal requirement for consultation on all orders under this section on the face of the Bill would in the view of the Committee be unnecessary”.

and noted that I have assured the Justice Committee that “consultation will be undertaken where it is appropriate” on the substantive issues that were discussed.

I am happy to repeat that assurance. I confirm that the Government does not support amendments 8 and 9, for the reasons that I laid out.

**Patrick Harvie:** Here is a thought. The Parliament could pass a single piece of legislation, which would give ministers the power to come back with an order to change more or less any aspect of criminal law. It would save us all an awful lot of time and bother. I am sure that most ministers would be happy to have the power to say, “Actually, these changes are very minor and technical; let us not bother with full legislation but instead pass it all through the affirmative procedure.”

I hope that all members understand that is not a serious proposal. I hope that we all understand that that is not how we do things in a democratic Parliament. If the Government wants to change the law it should do so on a formal basis, rather than take upon itself the power to do so through the affirmative procedure.

Like David McLetchie, I am sorry that we are not having a wider debate about more fundamental aspects of the bill. We will perhaps have to confine our comments in that regard to the debate on the motion that the bill be passed, which will happen before decision time.

I will press amendment 8 to a vote on the basis that the Parliament should take responsibility for the operation of the legislation and any changes to it, and ensure that ministers do not come to regard the order-making power as a default position. There is a great danger that ministers will come to regard it as something that they can insert in every piece of legislation. I believe that we should hold them to a higher standard.

The Deputy Presiding Officer (Elaine Smith): The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Etrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
Mcinnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McManus, Siobhan (Central Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
McTaggart, Anne (Glasgow) (Lab)
Mline, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Andy (Dumfries) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

Against
Adam, Brian (Aberdeen Donside) (SNP)
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 53, Against 63, Abstentions 0.

Amendment 8 disagreed to.

Section 6A—Power to modify sections 5(5)(b) and 6

Amendment 9 moved—[Patrick Harvie].

The Deputy Presiding Officer: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)  
Bibby, Neil (West Scotland) (Lab)  
Boyack, Sarah (Lothian) (Lab)  
Brown, Gavin (Lothian) (Con)  
Carlaw, Jackson (West Scotland) (Con)  
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)  
Davidson, Ruth (Glasgow) (Con)  
Dugdale, Kezia (Lothian) (Lab)  
Fee, Mary (West Scotland) (Lab)  
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)  
Fergusonsson, Alex (Galloway and West Dumfries) (Con)  
Findlay, Neil (Lothian) (Lab)  
Fraser, Murdo (Mid Scotland and Fife) (Con)  
Goldie, Annabel (West Scotland) (Con)  
Gray, Iain (East Lothian) (Lab)  
Griffin, Mark (Central Scotland) (Lab)  
Harvie, Patrick (Glasgow) (Green)  
Henry, Hugh (Renfrewshire South) (Lab)  
Hume, Jim (South Scotland) (LD)  
Johnstone, Alex (North East Scotland) (Con)  
Johnstone, Alison (Lothian) (Green)  
Kelly, James (Rutherglen) (Lab)  
Lamont, Johann (Glasgow Pollock) (Lab)  
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)  
Macdonald, Lewis (North East Scotland) (Lab)  
Malik, Hanzala (Glasgow) (Lab)  
Martin, Paul (Glasgow Provan) (Lab)  
McArthur, Liam (Orkney Islands) (LD)  
McCulloch, Margaret (Central Scotland) (Lab)  
McDougall, Margaret (West Scotland) (Lab)  
McGrigor, Jamie (Highlands and Islands) (Con)  
Mclnnnes, Alison (North East Scotland) (LD)  
McLetchie, David (Lothian) (Con)  
McMahon, Michael (Uddingston and Bellshill) (Lab)  
McMahon, Siobhan (Central Scotland) (Lab)  
McNeil, Duncan (Greenock and Inverclyde) (Lab)  
McTaggart, Anne (Glasgow) (Lab)  
Milne, Nanette (North East Scotland) (Con)  
Mitchell, Margaret (Central Scotland) (Con)  
Murray, Elaine (Dumfriesshire) (Lab)  
Park, John (Mid Scotland and Fife) (Lab)  
Pearson, Graeme (South Scotland) (Lab)  
Pentland, John (Motherwell and Wishaw) (Lab)  
Rennie, Willie (Mid Scotland and Fife) (LD)  
Scalan, Mary (Highlands and Islands) (Con)  
Scott, John (Ayr) (Con)  
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)  
Smith, Drew (Glasgow) (Lab)  
Smith, Liz (Mid Scotland and Fife) (Con)  
Stewart, David (Highlands and Islands) (Lab)  

**Against**

Adam, Brian (Aberdeen Donside) (SNP)  
Adam, George (Paisley) (SNP)  
Adamson, Clare (Central Scotland) (SNP)  
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)  
Beattie, Colin (Midlothian South and Tweeddale and Lauderdale) (SNP)  
Biagi, Marco (Edinburgh Central) (SNP)  
Brodie, Chic (South Scotland) (SNP)  
Brown, Keith (Clackmannanshire and Dunblane) (SNP)  
Burgess, Margaret (Cunninghame South) (SNP)  
Campbell, Aileen (Clydesdale) (SNP)  
Campbell, Roderick (North East Fife) (SNP)  
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)  
Constance, Angela (Almond Valley) (SNP)  
Crawford, Bruce (Stirling) (SNP)  
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)  
Dey, Graeme (Angus South) (SNP)  
Don, Nigel (Angus North and Mearns) (SNP)  
Dorris, Bob (Glasgow) (SNP)  
Dorman, James (Glasgow Cathcart) (SNP)  

Eadie, Jim (Edinburgh Southern) (SNP)  
Ewing, Annabelle (Mid Scotland and Fife) (SNP)  
Ewing, Fergus (Inverness and Nairn) (SNP)  
Fabiani, Linda (East Kilbride) (SNP)  
Finnie, John (Highlands and Islands) (SNP)  
FitzPatrick, Joe (Dundee City West) (SNP)  
Gibson, Kenneth (Cunninghame North) (SNP)  
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)  
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)  
Heburn, Jamie (Cumbernauld and Kilsyth) (SNP)  
Hyslop, Fiona (Linlithgow) (SNP)  
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)  
Keir, Colin (Edinburgh Western) (SNP)  
Kidd, Bill (Glasgow Anniesland) (SNP)  
Lyle, Richard (Central Scotland) (SNP)  
MacAskill, Kenny (Edinburgh Eastern) (SNP)  
MacDonald, Angus (Falkirk East) (SNP)  
MacDonald, Gordon (Edinburgh Pentlands) (SNP)  
Mackay, Derek (Renfrewshire North and West) (SNP)  
Mackenzie, Mike (Highlands and Islands) (SNP)  
Mason, John (Glasgow Shettleston) (SNP)  
Matheson, Michael (Falkirk West) (SNP)  
McAlpine, Joan (South Scotland) (SNP)  
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)  
McLeod, Aileen (South Scotland) (SNP)  
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)  
McMillan, Stuart (West Scotland) (SNP)  
Neil, Alex (Airdrie and Shotts) (SNP)  
Paterson, Gill (Clydebank and Milngavie) (SNP)  
Robertson, Dennis (Aberdeenshire West) (SNP)  
Robison, Shona (Dundee City East) (SNP)  
Russell, Michael (Argyll and Bute) (SNP)  
Salmond, Alex (Aberdeenshire East) (SNP)  
Stevenson, Stewart (Barrheadshire and Buchan Coast) (SNP)  
Sturgeon, Nicola (Glasgow Southside) (SNP)  
Swinney, John (Perthshire North) (SNP)  
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)  
Torrance, David (Kirkcaldy) (SNP)  
Urquhart, Jean (Highlands and Islands) (SNP)  
Walker, Bill (Dunfermline) (SNP)  
Watson, Maureen (Aberdeen South and North Kincardine) (SNP)  
Wheelhouse, Paul (South Scotland) (SNP)  
White, Sandra (Glasgow Kelvin) (SNP)  
Wilson, John (Central Scotland) (SNP)  
Yousaf, Humza (Glasgow) (SNP)  

The **Deputy Presiding Officer**: The result of the division is: For 53, Against 64, Abstentions 0.  

**Amendment 9 disagreed to.**  

**Section 7—Sections 1(1) and 5(1): offences outside Scotland**  

The **Deputy Presiding Officer**: We move to group 5. Amendment 4, in the name of the minister, is grouped with amendments 5 to 7.  

Roseanna Cunningham: Amendments 4 to 6 relate to the extraterritorial extent of the offences in the bill, and amendment 7 is a minor drafting amendment.  

The extraterritorial scope of the offensive behaviour at football offence extends to matches that are played outside Scotland that involve a Scottish club or the national team. The bill currently covers all British citizens. That was
intended to ensure that the offence in relation to matches that are played outside Scotland covered supporters of Scottish teams who are based in England, Wales and Northern Ireland as well as those who are based in Scotland. It would have ensured that any British citizen who participated in sectarian or otherwise offensive behaviour during a match that involved a Scottish football club or the national team that was played outside Scotland was covered by the offence.

We have discussed the issue with the United Kingdom Government, which has argued that the extra-territorial application of the offensive behaviour offence should be restricted to individuals who are normally resident in Scotland, as other British citizens who take part in behaviours that will be criminalised under the bill would be punished under laws elsewhere in the UK.

Amendment 4’s proposals will still mean that individuals normally resident in Scotland travelling to matches involving Scottish teams elsewhere in the world will be covered by the offence. That means that those travelling from their homes in Glasgow, Edinburgh or Dundee to watch their teams play in London, Munich or Napoli can be punished under the offensive behaviour offence.

The UK Government has given us assurances that laws elsewhere in the UK can deal with similar behaviour by other British citizens. I have sought its assurance that it will take all reasonable steps to ensure that conduct that our bill will criminalise if carried out in Scotland or abroad by those habitually resident in Scotland will be routinely prosecuted if the conduct is by persons not habitually resident in Scotland and relates to a match involving a Scottish team that is played elsewhere in the UK.

Therefore, in the light of the UK Government’s objections to the extent of the offence and, crucially, its assurances that such behaviour will be dealt with elsewhere in the UK for relevant supporters, we have agreed to introduce the amendments in question to restrict the extra-territorial extent of the offence to individuals habitually resident in Scotland. The Crown Office and Procurator Fiscal Service will also take forward discussions with the Crown Prosecution Service on a protocol between the two organisations in relation to the prosecution of offensive behaviour that takes place elsewhere in the UK at a regulated football match involving a Scottish team.

Football clubs also have a part to play in addressing fan behaviour, including that at matches abroad. The joint action group has led to the implementation of a new information-sharing protocol between the police and clubs that will allow the police to pass details of offending fans to clubs for appropriate action to be taken, regardless of whether it relates to matches at home or abroad. I am therefore confident that clubs will take action against any fans behaving in an unacceptable manner when following their team, which includes fans travelling from outside Scotland to any match involving their club.

The bill’s provisions, action by clubs and liaison with the UK authorities will therefore ensure that anyone following their club or the national team who behaves in a sectarian or offensive manner that risks inciting public disorder will be subject to the full force of the law and possibly other sanctions, no matter whether the game takes place in Glasgow, Manchester or Milan.

Amendments 4, 5, 6 and 7 also provide that the threatening communications offence applies to any threatening communication made outside Scotland by any person where that communication is intended to be seen or heard in Scotland.

I move amendment 4.

Alison McInnes: I find it interesting but perhaps not surprising that at this late stage the Government has suddenly discovered that part of its bill lies outwith the powers of the Scottish Parliament. Had the Government listened to the many concerns that the Opposition parties raised in its submission of its concerns about the legislative competence of this part of the bill. Amendments 4, 5, 6 and 7 will remove an error in the drafting of the bill that it has taken the Government six months to recognise. I dread to think how many more we might discover in the next months.

Roseanna Cunningham: Alison McInnes must accept that for a considerable amount of time we have been in discussion with the UK Government on that drafting point; it is not something that anybody has suddenly discovered. I stand by amendment 4.

Amendment 4 agreed to.

Amendments 5 to 7 moved—[Roseanna Cunningham]—and agreed to.

Section 7A—Report on operation of offences

The Deputy Presiding Officer: We move to group 6. Amendment 10, in the name of Patrick Harvie, is the only amendment in the group.

15:15

Patrick Harvie: As I said before, I am sorry that I have not been successful in persuading the
Government to accept any of my more substantial amendments, either at stage 2 or today. I am left with one very minor amendment, and I hope that there will be some willingness to consider it.

Section 7A of the bill as amended at stage 2 requires the Government to produce a report on the operation of the new offences and to lay that before the Parliament. I had hoped, in the debate on the motion that the bill be passed, to be able to try to persuade the Parliament that we should do more than simply review the operation of those new offences and that we should set a timescale for the Government to consolidate hate-crime legislation, given the frankly slightly messy situation that already exists and which we are making worse today.

However, if there is not to be such an opportunity—I will still argue for it, even though my amendment has not been selected for the debate—I will make the case that the report that the Government is to lay before the Parliament can be properly informed only if the Government consults publicly on the drawing-up of that report. Many people have direct, first-hand experience of these offences and we should listen to them when we are reviewing the operation of the legislation. I hope that, when the report is laid before the Parliament, we have the opportunity to debate in the chamber substantive amendments to a motion and vote on how the Government should respond to the experiences that are expressed during the review.

I move amendment 10.

**James Kelly**: I rise to support Patrick Harvie’s amendment. I underline our sympathy with and support for the case that he outlined in relation to the consolidation of hate-crime law. He makes some fair points in that regard.

Although he describes amendment 10 as more minor than others that he wished to debate, it deals with the important matter of the report coming back to the Parliament and the data in the report. As I said earlier, it is important to be able to monitor the effectiveness of legislation through reports and data.

It was disappointing that the minister failed to take my intervention earlier. I wanted to point out the fact that the Scottish National Party made a manifesto pledge regarding the full publication of data relating to religious offences. It is regrettable that the minister sought to criticise me but was not prepared to take that intervention.

Patrick Harvie’s amendment is logical. It makes a great deal of sense and would help the Parliament to form a view not only on the effectiveness of the legislation but on the wider issues affecting Scottish society.

**Roseanna Cunningham**: As Patrick Harvie will be aware, the Government lodged an amendment at stage 2 to respond to the Justice Committee’s recommendation that we should report to the Parliament on the operation of this legislation after an appropriate period.

The Government has already made it clear that we will give full consideration to the issues that are involved in preparing our report on the bill and that it will not simply be a statistical report. I regard it as essential that we consult a wide range of partners to assist in the preparation of our report. Consultation with appropriate persons is therefore already our intention.

Nevertheless, I thank Mr Harvie for the constructive way in which he has engaged in the process. I confirm that the Government appreciates the intention behind his amendment and that it will, therefore, support it.

**Patrick Harvie**: I could pretend that I am picking my chin up off the floor, but I am grateful to the minister for not only accepting the amendment but intimating to me earlier that I could expect this decision. I welcome the fact that one amendment from Opposition parties will be accepted.

In closing, I ask the minister and the Cabinet Secretary for Parliament and Government Strategy to look at how the Parliament will have an opportunity to consider the report when it is laid. We need a full debate on the report so that Opposition members can lodge amendments to a substantive motion and to ensure that the Parliament is able to decide how we should respond to the contents of the report.

**Amendment 10 agreed to.**

**The Deputy Presiding Officer**: That ends the consideration of amendments.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

The Deputy Presiding Officer (Elaine Smith):
The next item of business is a debate on motion S4M-01524, in the name of Roseanna Cunningham, on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill.

15:20

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): I am glad finally to be able to open this stage 3 debate and to set out the decisive actions that the Government has taken to address the problem of sectarian and other offensive behaviour at football. This is an historical issue that has been too long ignored in Scotland. In the previous football season the issue reached a crisis point, with death threats posted on the internet and bullets and bombs sent though the post in connection with football. We need to remember the events that took place earlier this year, because it was a fairly astonishing escalation of activity in Scotland that I would guess pretty much every member in the chamber absolutely abhorred.

I do not for one minute accept that sectarianism is confined only to football, and I will say more about the wider agenda in the debate. However, it is abundantly clear that such behaviour manifests itself in the context of football more visibly than elsewhere. Given that that is the case, it was manifestly clear that action was essential.

Working with the Lord Advocate, the police and football authorities, we took the decisive action that was demanded by the crisis we faced earlier this year. Following requests from the police to the First Minister, we established the joint action group to ensure, first of all, that football’s own house was in order. There were 41 actions agreed in July, which included the establishment of a new national football policing unit backed by an investment of £1.8 million.

We are already seeing the benefits of that constructive partnership approach, which involves football clubs, authorities, fans and the police. I note the continued demand that football should put its own house in order. Of course we accept that, and that is exactly what we have already delivered through the joint action group.

On 6 December, along with the Cabinet Secretary for Justice and the Minister for the Commonwealth Games and Sport, I attended a joint action group meeting at Hampden. The Scottish Premier League, backed by the Scottish Football League and the Scottish Football Association, has agreed proposals to toughen its approach to tackling unacceptable supporter conduct, demanding higher standards of clubs and introducing a new independent sanctioning regime.

We are seeing new focused action from the police, and we will see tougher standards for football clubs applied by the football authorities, but what of the Government? The critical role for Government in this partnership is to ensure that the law is fit for purpose. As part of its work, the joint action group was asked whether the current laws are adequate to ensure that the unacceptable behaviour that we are seeing is stopped. A fundamental change was not required, but the expert advice was clear: the laws could be improved in relation to tackling sectarian and other offensive behaviour at football matches and in relation to communications, in particular on the internet. That simple point seems to have been lost in what I think is a fog of denial and sometimes apparently wilful misunderstanding.

James Kelly (Rutherglen) (Lab): The minister has stated the views of the joint action group. Was it also the view of the football clubs that legislation was required?

Roseanna Cunningham: Football clubs know perfectly well that they have to get their house in order. I repeat that the advice from the experts was clear: a change in the law would assist police and prosecutors in stamping out this most visible form of sectarianism. In the face of that expert advice, the Government’s responsibility to act was clear.

We have always fully accepted that this was about evolution not revolution in the law—about sharpening the tools available, not creating entirely new tools. Indeed, that is where there has been further confusion on the part of the critics of these measures. It is very difficult to reconcile the view that these new measures add nothing to the existing law and are thus unnecessary with the idea—often expressed in almost the same breath—that they are unworkable and illiberal.

The Lord Advocate made it clear that breach of the peace was being narrowed under challenge from the courts. Last year, in the Criminal Justice and Licensing (Scotland) Act 2010, we introduced the section 38 “Threatening or abusive behaviour” offence to deal with the narrowing in relation to domestic incidents. There was no great outcry then—indeed that gathered broad support. What we are doing through the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill is much the same, although in this case we are responding to the narrowing of breach of the peace as it relates to football. The narrowing that we are talking about includes
setting a very high bar for deciding when there is probably fear or alarm in the noisy and boisterous context of football and, even more seriously, judgments, for instance that those hurling racist abuse did not commit an aggravated offence because the abuse was fleeting and lost in the cauldron of noise.

We have carefully considered the legal issues and designed bespoke offences that deal with the limitations, while being fully mindful of our obligations under the European convention on human rights. No longer need police and prosecutors depend on the “fear or alarm” test in the context of football matches; the test now is the more relevant public order test.

Those claiming that the law adds nothing fail to mention the application of the new laws outside Scotland. Football is international, but breach of the peace, or section 38, is not. Similarly, Scotland currently has no incitement to religious hatred law to tackle the growing problem of sectarian and other religious threats on the internet and elsewhere. The new laws provide that. To be clear, those are clear and specific improvements elsewhere. The new laws provide that. To be more relevant public order test.

The measures in the bill relating to football go beyond sectarianism. We make no apology for that. It cannot be credible in taking action to stamp out overtly sectarian behaviour not to seek to stamp out wider offensive behaviour, which is all too often associated with, or a response to, sectarianism.

Patrick Harvie (Glasgow) (Green): Does not the minister make a good case for taking a wee bit longer and consulting a wee bit more widely before drafting legislation and introducing it to the Parliament so hurriedly? That would have been better and we would then have been able to take a clear view on whether the incitement to hatred offence—or the much wider expression of hatred offence—has wider application or not.

Roseanna Cunningham: We extended the timetable for the bill from the original plan to what we have now. For this bill, there was appropriate consultation.

There has been much comment that offensiveness is part and parcel of football—that it is just a fact of life. I simply disagree. When offensive behaviour risks provoking public disorder, that cannot be tolerated, and certainly not in the powder keg atmosphere of high-risk football matches—at which up to 300 police officers and 500 stewards are required to keep the peace.

Of course, much of the noisy, even rowdy, behaviour at football is its lifeblood. Often, it is a celebration of identity and culture, but let us not pretend otherwise than that much of what we see at football celebrates nothing more than hate and division and is done to antagonise and provoke old wounds. That is unacceptable; that must stop.

We have heard a great deal about this Government’s apparent failure to listen on this issue, but listen we have, time and time again, to the demands of the overwhelming majority of Scots—the 91 per cent who want tougher action. They are decent, law-abiding people who have simply had enough of what they hear on the terraces and read on the internet.

We also listened in June, when this Parliament requested more time to consider the legislation. We accepted then that the context for the legislation was not yet clear, and that pause has meant that the context for the legislative action that we are taking is now much clearer. That clarity has been provided by the crucial work of the joint action group to put football’s own house in order and the wider, deeper strategy to tackle sectarianism, now supported by an unprecedented £9 million investment over the spending review period. So we are not where we were in June, when the bill was supported by a sizeable majority of this Parliament. There can now be no doubt that legislating to tackle the issues in football and on the internet—where this hatred is often most visible and therefore most damaging—is not the limit of our aspirations, nor the extent of our ambition.

In context, the bill seeks to introduce proportionate and effective measures that are designed to tackle a limited set of specific issues. It is the first necessary step on a longer journey. We have benefited from the constructive contribution of a number of members and have seen the bill amended to respond to issues raised by the Justice Committee and others to make it even more fit for purpose. Even if not all amendments are accepted, they provoke thought and reflection on the part of Government, and many of our amendments were lodged in response to those who engaged in thoughtful and constructive dialogue. I look forward to participating in the debate this afternoon.

I move,

That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be passed.

15:31

James Kelly (Rutherglen) (Lab): I oppose the bill at stage 3. Let me say at the outset that I very much regret that the Parliament will divide on such an important issue. This Parliament has taken a united stand on many issues, including domestic abuse, and has sent out a strong signal to Scotland. We all agree that we want to eradicate
the evil of sectarianism—a blight on Scottish society—and we should not divide on such an issue. The reason why we are is not only that the Government has not made the case, but that the legislation is flawed, and the Government has not been able to build a consensus on it in Parliament or outside.

The minister tells us that she thanks members for lodging amendments; however, only at the very last minute did we actually see an amendment accepted—one, from Patrick Harvie. It was like throwing a crumb to the Opposition benches.

The decision not to agree to the bill at this stage is both a principled and an evidence-based one. It has been useful to have more evidence since our last debate in the Parliament. Statistics on prosecutions for religious aggravation have been published, showing 693 prosecutions in 2010-11. Do not forget that the vast bulk of those will have come before 3 March and the old firm game at which all the controversy started. That shows that legislation is effective and was being used. In addition, 99 of those prosecutions related to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which was only enacted in October last year. Surely it would have made more sense to let another part of the legislative toolbox settle in and to take more time. Then, as Mr Harvie pointed out, if there was a case for introducing legislation, we could have done so on the basis of evidence. The Government's process has been flawed.

We welcomed the decision by the First Minister back in June to pause, reflect and extend the timetable but, in reality, the Government paused but did not do anything more. Where was the consultation over the summer? Where were the discussions with community groups and the education sector? They did not take place. Instead, the Government was closeted in St Andrew's House with civil servants and became too focused on football. We still do not have a clear strategy for tackling sectarianism. As a result, the Government has not been able to build a proper consensus. The issues that were raised at stage 1 remain. We need only look at the submission from the Law Society of Scotland, which says that the existing legislation is adequate and asks about section 38 of the Criminal Justice and Licensing Act 2010. Many such issues, which it raised at stage 1, have still not been answered at stage 3.

No wonder the Government has failed to build support for the bill. The fact that Margo MacDonald, David McLetchie, Hugh Harvey—if only, eh?—Hugh Henry and Patrick Harvie have raised concerns shows the breadth of opposition in Parliament.

The First Minister (Alex Salmond): I wonder whether James Kelly recognises this recent quote:

"I applaud the legislation because this is besmirching the reputation of Scotland."

It goes on:

"Now if something happens it's worldwide, it's on Twitter, it's on YouTube, it's everywhere. It's about Scotland and I care passionately about how the country is viewed ... it's important that the government get this done and dusted and get on with it."

It was from Henry McLeish, former First Minister.

James Kelly: It is good to see that because the Lord Advocate is not available to look after the minister today, the First Minister has had to come in and take care of her.

Members: Oh no.

The Deputy Presiding Officer: Order.

James Kelly: We all know that the process has not been handled competently by the minister. At each stage, she has had to be looked after so that she always has someone at her side to tell her what to say. That is why the Lord Advocate was at the Justice Committee. What was he doing getting himself involved in the political process?

On the way forward on this issue—

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): Will the member take an intervention?

James Kelly: No, I will not take an intervention.

The First Minister: Will the member take an intervention?

James Kelly: No. I will not. The First Minister has had his say.

Members: Oh!

James Kelly: We need a proper, thought-out strategy on sectarianism—[Interruption.]

The Deputy Presiding Officer: Order. The member is not taking interventions.

James Kelly: We need a strategy that is informed by real people in real communities, not by civil servants in St Andrew’s House.

The issue needs to be taken forward within the education sector, and the churches used, to build consensus in communities. That is what Labour’s action plan does.

The action plan also deals specifically with the issue of offensive behaviour at football matches. Sectarian singing must be rooted out, which is why Scottish Labour supports points deductions for clubs that are unable to clean up their act in their stadiums.
Kenny Farquharson in Scotland on Sunday said that, if passed, the legislation would be the worst piece of legislation ever passed by the Scottish Parliament. The Scottish National Party Government will use its majority to railroad the legislation through. It is a defining moment for the Parliament—the first piece of legislation in the fourth session that the Parliament has considered at stage 3—but this is bad law and it is bad practice for the SNP to break up the consensus on such an important issue. We need to work together. We need consensus. We want to eradicate sectarianism from Scottish society and we ask the Government to work properly with Opposition parties to do that.

At stage 1, Scottish Conservative members voted against the principles of the bill because we did not believe that the Government had made a strong enough case for introducing new laws to tackle offensive behaviour associated with football matches or threatening communications. We did not do so because we somehow tolerate such behaviour or deem it acceptable in present-day Scotland. To suggest that we do so is an offensive distortion of our position, and a distortion of the position of everyone else who has studied the bill and assessed the evidence that has been presented. It would help the debate considerably if all members approached it with respect for the positions that others have adopted in good faith on both sides of the argument.

We have sought to engage in dialogue with the Government following the stage 1 debate, and, as we have heard, we lodged amendments for consideration at stages 2 and 3. Those amendments were rejected, so we must now consider whether the bill as it stands should be amended. I have come to the conclusion that it should not be because, as I said earlier, it runs away from the problem of squarely addressing and defining sectarian behaviour in present-day Scotland, which is supposedly the conduct to which it is directed and which was the motivation behind its introduction. It introduces vague, catch-all offences that have been strongly criticised as an affront to civil liberties, and it wants to modify and introduce new criminal offences by statutory instrument without proper scrutiny in the Parliament.

I have no doubt that, following the commencement of the act, there will be a major push to prosecute alleged offenders under its provisions and I have no doubt that, within a year or so, the First Minister and others will hail it as a glorious triumph as figures are unveiled for convictions secured under it. However, that is not the real test, of course. We will have to ask how many convictions would have been secured for the same behaviour if it were prosecuted under our existing laws; indeed, one might ask how many more convictions might have been secured. Moreover, we will have to ask how many people have been successfully prosecuted under the new laws who could not have been prosecuted under our present laws and what will happen when prosecutions under section 1, to which the statutory freedom of expression exemption does not apply, nonetheless hit the ECHR buffers. We got some flavour of that from discussion of an amendment. The answer is that the Scottish Government will try to patch things up using the powers conferred by section 4A.

The Government likes to tell us that the police want the bill. No doubt they do, but asking a policeman whether he wants more powers is like asking a policeman whether he wants a pay rise. It is not the job of the Parliament to confer police powers on demand; instead, in a free society, our job is to balance laws to maintain public order against rights of free speech and association. We are also told that the Lord Advocate thinks that the bill is necessary. Let us be honest: the Lord Advocate is not just a prosecutor, he is a member of the Scottish Government. To use those immortal words: he would say that, wouldn’t he? That claim must be balanced against the weight of informed legal opinion, which is against the proposals as is well documented in the Justice Committee’s report.

In the past, I have warned against the something-must-be-done syndrome that permeates the Parliament. The Government has fallen into the trap of grandstanding for effect. In some respects, I have sympathy for it, given the situation that it faced earlier this year and the public outcry about the latest manifestations of an age-old Scottish problem. In a football context, that problem should, of course, have been long since resolved by the football authorities, which have done us absolutely no favours in this regard. The criticism of the SPL in the Justice Committee’s report is withering and demonstrates that the football authorities—the SPL and the SFA—really need to get their act together. It is ironic that, this very week, the Union of European Football Associations has taken action and has fined Celtic Football Club—as it has fined Rangers Football Club in the past—for the offensive behaviour of its fans at football matches played in UEFA competitions.

John Mason (Glasgow Shettleston) (SNP): Does not what the member has just said prove the need for the legislation? Obviously, the football authorities have felt, rightly or wrongly, that they could not control the issue because it has been so
big. Surely that is why the Parliament needs to get involved.

David Mcletchie: It does not prove that, because the laws are big enough to deal with the issue. What has actually been proven is that our football authorities are somewhat weak-willed and weak-kneed in comparison with UEFA, which has set an example that our football authorities should follow.

The clubs concerned will point to the steps that they have taken to challenge sectarian behaviour in its widest sense, and I applaud their efforts, as we all do. They will also protest, as they have already done, that they are being penalised for conduct over which they have no control. That might be a good enough excuse for the SPL, but it is not good enough for UEFA and nor should it be. It might be guilt by association, but that is just tough. The offenders are the customers of our football clubs and the venues for such behaviour are their football grounds. The issue needs to be tackled by our football authorities, and they should get on with it. If that means fines, points deductions or closed-door games, so be it—it is long overdue. The time for playing pass the parcel is over.

The Deputy Presiding Officer: We move to the open debate. I ask for speeches of four minutes, although there is a bit of leeway for interventions.

15:45

Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP): Notwithstanding the somewhat bumpy ride that the bill has had, I am glad that it has been given full consideration at all stages in committee and the Parliament and has now come to stage 3. I am glad that the emergency legislation process was abandoned because, as I made clear at the time, that was not the proper approach.

James Kelly mentioned the Lord Advocate coming to give evidence to the Justice Committee. I remind him that witnesses who give evidence to the committee are there with the committee’s agreement, so he must have agreed to the Lord Advocate’s coming. Nothing was sprung on Mr Kelly. I remind him that, at stage 2, although the Government lodged several amendments, Labour did not lodge a single one.

James Kelly: Will the member take an intervention?

Christine Grahame: No—I have only four minutes.

I commend Patrick Harvie and David Mcletchie for participating in the dialogue, notwithstanding their views on the bill. They did not simply take a stand right from the start.

James Kelly rose—

Christine Grahame: I remind members that this is a bill of two halves. Let us have less hysteria and hype and more matter-of-fact statements. The word “sectarian” is not mentioned in the bill; instead, it talks about “offensive behaviour”, which could relate to all manner of things, including colour, race, nationality and sexual orientation.

Hugh Henry (Renfrewshire South) (Lab): Will Christine Grahame give way?

Christine Grahame: In fairness, I will let James Kelly in, because he wanted to clarify an issue and I did not take his intervention.

James Kelly: I point out to Christine Grahame that the Labour Party supported the bill at stage 1, so we did not take that stance from the start. On amendments, she might want to reflect on the fact that the first time that a non-Government amendment was accepted was right at the end of the process.

Christine Grahame: I take it from that that you accept that the Labour Party lodged no amendments at stage 2, which is my point. Labour did not even argue the case by lodging amendments.

The bill is not simply about offensive behaviour—it must be behaviour that expresses hatred and is threatening to people, or behaviour that a reasonable person would consider offensive. We had a lot of debate about the term “reasonable person”, but the reasonable person test is well established in Scots law. Members have asked for specifics, but in law we must always look at the facts and circumstances of any incident. I might use a word that is not offensive because of the manner in which I deliver it, but in other circumstances it could be offensive and an incitement to hatred. That is a perfectly practical way of looking at the situation.

Johann Lamont (Glasgow Pollok) (Lab): The problem is that when somebody says something offensive at a football match or when watching football on television in the pub, that will be an offence, but it will not be an offence to say the same thing in a community. What message does that give to people?

Christine Grahame: There must be an incitement to public disorder and the reasonable person test must be met. There are many cases in law that deal with that. As we heard in evidence, breach of the peace is not a satisfactory way of dealing with the issue, because the behaviour always has to be in public.

We had a big debate about including people who are travelling to and from football matches. At the beginning of the process, I was not sure that I supported that provision but, as the evidence
came in, we found that most of the problems take place not in stadiums, which are well policed and where there are stewards, but outside stadiums and on the way to a match. Some people have no intention of going to a match and simply use the colours that they wear as a means of causing public disturbance. That was the evidence from the police. They said that they find it hard to deal with the issue. We must always remember that the police, the prosecution service and the vast majority of the public support the measures.

I have taken some interventions, so I hope that I will get an extra minute, because I want to refer briefly to the threatening communications offence, which we keep missing out. It is important that the term “material” means more than just material on the internet—it includes paper, parcels, blogs, images and anything like that. The test is higher than that for the other offence, because there must be an incitement

“to carry out a seriously violent act”.

The Government did not have to put a freedom of expression test in the bill, but it did do so. People should take comfort from that that satire and genuine debate—even strident debate—will not be suppressed, because they do not seek to incite a seriously violent act.

Patrick Harvie has put forward a good argument for a review. At stage 2, proposals were introduced for such a review to be carried out at least two years hence, as well as for a report to Parliament and a consultation. That is important, because these are uncharted waters.

At the end of the day, I support David McLetchie’s view that the great disappointment is that only now are the SPL and the SFA getting together to discuss an independent sanctions regime. If only such a regime had been in place beforehand. No one is better placed to police football matches than the clubs, the SFA and the SPL themselves. Perhaps this legislation will not need to be used if those organisations get on and do the job themselves.

The Deputy Presiding Officer: Just before I call Graeme Pearson, I remind members that they have four minutes for their speeches but that if they take interventions, I can be generous in giving them time back.

15:51

Graeme Pearson (South Scotland) (Lab): First, I associate myself with the comments of David McLetchie about the responsibility of the clubs. I remind Christine Grahame that we raised the matter at an earlier stage of the bill, and that we on the Labour benches are focusing strongly on it.

The SNP Government is to be congratulated on the support that has been mustered in relation to the bill. To unite Rangers and Celtic supporters, the Law Society of Scotland, the churches, the Scottish Human Rights Commission, academics, commentators and Liberty—to name but a few—in opposition against it is impressive, and they oppose it with good reason.

Two thousand years ago, the Roman senator, Cicero, said:

“The strictest law often causes the most serious wrong.”

We should take heed of that message. The minister has had ample opportunity to provide the Justice Committee and Parliament with evidence to back up her call for new laws. Where are the statistics on sectarianism that have been asked for each year by the Roman Catholic Church? They are missing when they could have assisted us. Where was the evidence of the significant numbers of cases whose prosecutions failed due to problems with current laws? Where was the commitment to football banning orders in the five years during which fewer than 120 such orders were issued? In the past six months, however, the authorities have delivered 50 such bans. The evidence was not there.

Instead we were given the opinions of three police officers, who said that they needed new powers, and of the Lord Advocate, who appeared to suggest in the press that Parliament should not even debate the bill, and that we should merely pass the matter to him to deal with.

Cicero also commented that

“the arrogance of officialdom should be tempered and controlled”.

We have been given no facts and figures relating to failed cases, and no demonstration of what would change as a result of the new laws. We have been given opinions, not evidence. In most democratic societies, laws are enacted not as a result of the demands of the police or prosecutors, but because communities identify the need for solutions.

So what is this new crime, and how will we recognise it? Therein lies a difficulty. The Minister has been unable to clarify the unchallenged circumstances with which this law is designed to deal. Indeed, when excerpts of football chants and songs were played for her on BBC radio, she rejected, with some haste, the invitation to “name that crime”, and insisted that a police officer would be best placed to decide on that question. Last night on television, Humza Yousaf also failed the test of clarifying the situation.

Humza Yousaf (Glasgow) (SNP): Will the member give way?
Graeme Pearson: I am sorry; I will not.

In the past four years, the average number of arrests at old firm games has been 11. That is still too many, but are we really creating new draconian legislation to deal with an acknowledged small minority among the 50,000 fans at a match?

We are told that interpretations surrounding sections of the bill are to be resolved by guidelines that will not form part of the bill. The problem with unwritten law is that we do not know where to go to erase it.

In evidence to the Justice Committee last week on a possible bill of rights, Lord McCluskey said:

"Definition is fundamental to administering the law. Judges ought to be able to read the law like a railway timetable, not as a kind of general declaration of intent".—[Official Report, Justice Committee, 6 December 2011; c 592.]

The Deputy Presiding Officer: I am afraid that the member will have to conclude now.

Graeme Pearson: Will the law be accessible? Is it foreseeable to the man or woman in the street? The sectarianism legislation needs to be accessible and foreseeable, but how can it be if the minister describes it as a "catch-all" in some of his conclusions?

The Deputy Presiding Officer: I am afraid that you will have to come to a conclusion now, Mr Pearson.

Graeme Pearson: Will the Government take the opportunity to talk up Scotland and accept Labour's fleshed-out plans in the interests of decent supporters everywhere?

The Deputy Presiding Officer: I reiterate that speeches should be four minutes, but if members take interventions I can give extra time for them.

15:56

Alison McInnes (North East Scotland) (LD): I, too, oppose the bill and will vote against it at decision time. I thank everybody who responded to the Justice Committee's truncated call for evidence. I, for one, found the detailed guidance and informed opinions that they were able to submit at such short notice to be absolutely invaluable. I can only offer my sympathies to the vast majority of them, whom the Government has chosen simply to ignore.

At stage 1, I asked the minister 24 questions about the practicalities of enforcing the legislation, the evidence base behind its introduction, statistics on prosecutions under existing laws and issues potentially arising from the new offences. Those questions were just the ones that I had time to ask. Yesterday, I looked back over them and reflected on what I have heard from the minister, her officials and the Lord Advocate since June. By my count—I am being rather generous—I have had an answer to four of them.

Throughout the progress of the bill, Opposition members have had to endure constant insinuations from the SNP that, by raising concerns over the potential implications of the bill, we are scared to tackle the problem, that we condone sectarian behaviour or that we are opposing the bill for opposition's sake. I say to all SNP members who have expressed one of those opinions that by doing so they demean Parliament and insult every person in this country who has doubts about whether the bill is in Scotland's best interests.

Christine Grahame: Will the member take an intervention?

Alison McInnes: I will not, at the moment.

I have made it clear from the outset that I, and the Liberal Democrat party, stand with every member in this chamber to say that sectarian behaviour, in whatever form, is unacceptable. It has to stop and we will gladly work constructively with anybody, any group and any political party to find a long-term solution to it.

Had the Government come to this chamber in June and said that it wanted to engage with all parties here, I would have been on board. If it had said that it wanted to work with clubs to identify problem areas better, to work with religious groups to promote tolerance and to work with local authorities and schools to educate our young people better, I would have been on board. Instead it introduced a bill that is so rushed, so badly drafted and so ill-conceived that it seriously risks doing more damage than good. I cannot support that.

If the minister is unable to answer more than one in every six questions that she is asked about the bill, how can she possibly claim that the Government has made the case for two new criminal offences to be created?

If expert groups such as Liberty and the Law Society, football clubs such as Rangers and Celtic, supporters groups from clubs across the country and religious groups of all faiths do not think that the bill is a solution to the problem, what exactly does the minister believe we are achieving here today?

In his announcement after stage 1, the First Minister said:

"On this issue above all, I want consensus; I want consensus across the chamber and across our partner organisations."—[Official Report, 23 June 2011; c 1020.]
At stage 1, five members—my colleagues on the Liberal Democrat seats and I—voted against the bill. At stage 2, 53 members could not support the bill. The more we have studied the detail of the bill, the more of us have come to realise that it simply is not workable.

The First Minister was right to seek consensus, but it will prove to be a hollow gesture if the bill is passed today, because although consensus has been found, it is consensus that the bill is not what we need. The First Minister now has a choice. He can step back from the brink again; he can withdraw the bill and ask us all in Parliament to work together on a lasting solution to sectarianism and offensive behaviour in Scotland. No-one here would criticise him for that. We would applaud him and we would get on and work with him.

Alternatively, he can use his majority to force this unwise, unwarranted and unworkable bill on to our statute books. In this Parliament, in which there is an SNP majority, we cannot stop him. We cannot make him listen to expert opinion or reasoned opposition, but if he does not do that, the people of Scotland can hold him alone accountable for his actions.

16:00

Patrick Harvie (Glasgow) (Green): I missed all the fun with the bad weather last week. I was not around because I was at a conference on hate crime, funnily enough, at which I learned a lot about the wide range of approaches that are being taken in European Union member states and various parts of the United States. Those approaches work in different contexts, of course. In the US, for example, there is strong constitutional protection of free speech. In many European countries, on the other hand, there is a record of laws on hate speech or controlling speech—for example, laws on Holocaust denial.

Different countries take different approaches in the light of their different historical and cultural contexts and the different kinds of hate crime that they consider important. However, legislating on incitement to hatred is not a universal approach. It is not always the wrong approach—there is a case for it, as well as a case against it—but part of my problem with the bill is that Parliament has always tilted towards the argument against legislating on incitement to hatred, although it has never run away from the argument for it.

If we wish to change that, we should try to do it on a cross-party basis and we must ensure that we do it in a careful and considered away that takes account of all the possible consequences before we start the journey. However, the bill came out of the blue. It will result in legislation on incitement to hatred in specifically defined contexts. In Christine Grahame’s speech, there was a suggestion that it will not apply in other circumstances—in ordinary communities—and, at one point, I heard a heckle from the SNP benches: “Well, maybe it should.” Yes. Maybe it should, but maybe it should not. Let us not take the first step on a road that will lead us not where, without having properly considered all the consequences.

There is a case for legislation on incitement to hatred. The UK Government and Westminster Parliament have introduced it not only on religious grounds but, for example, on the ground of sexual orientation, but this Parliament has not done that. In fact, the bill goes way beyond the legislation on incitement to hatred in other places: it criminalises the expression of hatred, not only the inciting of hatred in others, so it goes way beyond what even some of the most gung-ho jurisdictions in the EU are doing on incitement to hatred. At various points at stages 2 and 3, I have tried to lodge amendments that might have toned down those measures or changed the context of them.

I have tried to examine why we talk about “hatred” in the bill when we talk about “malice” and “ill will” in other legislation. I also tried to think about how we define the circumstances—for example, whether the measures on a place where a regulated football match is being shown would apply if somebody was simply playing a clip of a match on their mobile phone. I tried to examine the fear and alarm test by asking whether a serious charge with a serious penalty requires a serious and credible threat or just the suggestion of one. I also attempted to widen the free-speech defence.

I am afraid that the successful amendment—an obligation to consult and report on the operation of the offences—is no substitute for those other changes, so the bill will still be bad legislation. No doubt it will be passed, but the Parliament should still assert itself after it has been passed.

I regret that we are not debating my amendment that would have called for consolidation of hate crime law on a set timescale. Consolidation will be required, so I call on the minister to make a commitment on that and for Parliament to join me in calling for that consolidation work to happen.

There may be a worthy intention behind the bill, but it is the wrong approach. We are making mistakes that we will need to come back to correct in good time.

16:04

John Finnie (Highlands and Islands) (SNP): The bill has been informed by the Lord Advocate—the senior law officer in Scotland—and police officers. I do not think that they have powers
on demand, as has been suggested. Nor have we
had only three police officers asking for those
powers: the representatives of every police
officer—all three staff associations and the British
Transport Police—commend the bill.

The bill’s title is important. That might seem to
be a self-evident statement. The bill seeks to
tackle offensive behaviour at football and
threatening communications. It is not about
righting society’s wrongs. The bill seeks to deal
specifically with events that are connected with
football.

Neil Findlay (Lothian) (Lab): Does John Finnie
accept that the bill’s title is loaded with value
judgments about what one group of people deems
to be offensive to another group of people?

John Finnie: No, I do not accept that. The
standard judgment that applies to police officers
and prosecutors will still apply.

I am always hearing people trying to decide how
relevant the bill will be to them when they are
attending football matches, so I have tried to
envisage what the match-day experience might be
for someone at a football match after the
legislation is passed. Someone might well come
from a community in which, in addition to on-going
work on the pernicious issue of sectarianism,
£9 million has been invested to deal with schools,
community centres and the workplace. In many
respects, there is not likely to be any noticeable
difference on match day. However, travel to and
from matches will be subject to the legislation,
which is entirely in line with the criteria that were
set out in the football banning orders that were put
in place by the previous Labour-Lib Dem
Administration.

The joint action group, which has done
commendable work across the different sectors
that are involved in dealing with football, is
bringing about more rigorous checks for alcohol on
buses. Alcohol plays a significant part in disorder.
It is unfortunate that James Kelly is not in the
chamber, but there has been clarification on the
issue of the casual bigot who intervenes but is not
going to the football match. Such people will be
captured by the legislation, which will be rigorously
enforced by the British Transport Police, who
strongly welcome it.

In public houses, the licensee will be reminded
of their obligations under the licensing legislation
and the new legislation, which will make public
houses more pleasant places for anyone to be a
customer.

Johann Lamont: Will the member take an
intervention?

John Finnie: I do not have time.

The public house will become a more pleasant
place to walk past, and it will certainly be a more
pleasant place in which to work. Public houses are
workplaces.

In grounds, there will not be a discernible
difference to policing. The police will be there
and a fan will know that the officers will have been
trained and that they will be vigilant and able to
deal with offensive behaviour.

There has been some dubiety about the
behaviour that the bill will cover. I will read out the
following because it might well help:

“Songs/lyrics which promote or celebrate violence
against another person’s religion, culture or heritage

Songs/lyrics which are hateful towards another person’s
religion and religious leaders, race, ethnicity, colour,
sexuality, heritage or culture”

will not be tolerated. I can only see that as being a
positive step towards enhancement of the football
experience.

The police will require to police these matters
sensitively, not least because there are potentially
significant public safety issues. Prosecutors and
the police will require to deal with juveniles
sensitively. We know that they have a wide range
of powers and, for the most serious offences,
there are custodial sentences.

We have heard about the difficulties that are
associated with breach of the peace, and the
legislation will certainly fill that gap. A lot could be
said about that, but I fear that the Presiding Officer
is about to tell me to sit down.

The Deputy Presiding Officer (John Scott):
You can carry on for a little while, if you want to.

John Finnie: The suggestion that
representations about the issue have not been
listened to is incorrect. Freedom of expression,
reporting back and the issues that have been
alluded to by Patrick Harvie’s amendments are all
very important and it is important that we learn
from our experiences. Christine Grahame was
right when she said that the focus on offensive
behaviour at football rather than on threatening
communications has meant the loss of an
important element, which is about the shocking
posts on Facebook and Twitter. They will now be
picked up by the legislation. That can only be a
positive thing.

The Deputy Presiding Officer: Thank you. I
remind members that we have a little time in hand,
so we encourage interventions.

16:09

Humza Yousaf (Glasgow) (SNP): I appreciate
having the chance to speak in what is an
incredibly important debate.
The debate has been passionate, which is understandable, but it is a real shame that it has been so heated throughout, and so full of hyperbole, and that recriminations have been thrown back and forth by all sides.

During the de facto stage 1 debate, John Lamont spoke of his experiences as a child at school and what he felt was hateful behaviour between two factions. When he did so, he was loudly shouted down and heckled by members from all parties, some of whom went red in the face, pointed their fingers and shook their fists. Regardless of whether we agree with John Lamont—I do not—our inability to have a mature and reasoned debate on sectarianism is a collective failure on the part of all of us. How can we expect people outside Parliament to tackle the problem that is fuelled by offensive behaviour if we ourselves are incapable of doing so?

In the past few weeks, I have met representatives of Rangers supporters associations and representatives of Celtic supporters associations, and it is clear that they have a number of concerns, most of which relate to how the police may enforce the bill’s provisions. Like them, I am keen that, as the act is implemented, those concerns are not borne out through the use of heavy-handed police tactics or invasive and unnecessary video recording in innocent supporters’ faces. If there are such incidents, I will happily hold the police to account, but I do not believe that the police want to use such tactics.

Recently, the new football co-ordination unit for Scotland—FoCUS—met Hearts Football Club and supporters of the club before last weekend’s match against Celtic to discuss appropriate behaviour and chanting. A couple of days before the match, Hearts posted a statement on its website, in which it urged fans to get right behind the team, but only to use “appropriate chanting” —no specific phrases were outlined. The result was that everyone talked about a dramatic match and what happened on the field rather than what happened on the terraces.

I have trouble with the claim that there is no clarity, because a Rangers fan will know exactly the type of song he or she should not sing. When I met the Rangers Supporters Trust recently, I was told that there are specific phrases that it wants out of Ibrox. We all know what they are.

On the other side of town, in the past few weeks Neil Lennon, Peter Lawwell and Celtic Football Club have come down hard on pro-IRA chanting. It is clear that they do not want such songs to be sung near Parkhead. There is no confusion or ambiguity about that.

When Opposition members tell me that the term “offensive” is too vague but then use it in their 11-point plan in the context of the banning of “offensive merchandise”, that defeats their argument.

Patrick Harvie: Humza Yousaf makes the case that those things should be unacceptable and that there is an argument that a new offence should be created to deal with such songs and chants. Will he explain to me why that offence should not apply to the same group of lads when they are on a night out and to behaviour that is nothing to do with football, and which is not committed on the way to football? Why should not it apply in the wider community? Why does he think that incitement to hatred legislation in the context of football is the right way to do proceed?

Humza Yousaf: It is because the purpose of the bill is to target a specific problem. Anyone who looks at last season’s incidents, whether they involved parcel bombs, bullets in the post or attacks on high-profile managers, will realise that they related to a specific problem. That is not to say that there is a hierarchy. The bill is part of a wider strategy, which I hope to come on to.

Neil Findlay: Will the member give way?

Humza Yousaf: I am short of time, and I want to make some final remarks.

The atmosphere, the rivalry and the banter are essential parts of the game and none of us wants them to be lost. More than 95 per cent of football fans will continue to sing the songs that they sing and will continue to chant as they have been doing without fear of arrest or prosecution.

I do not doubt any member’s willingness to tackle sectarianism. We may not have agreed on whether this cog is a vital part of the overall machinery that is needed to tackle the issue, but I hope that, as we move forward, we will not allow that to stand in the way of our coming together to develop a wider strategy on a centuries-old scourge that has no place in the modern Scotland that we all aspire to build.

16:14

Siobhan McMahon (Central Scotland) (Lab): I will address the two primary flaws in the bill. First, it is ill defined, especially in its failure to outline what constitutes sectarian or offensive behaviour. Secondly, it is too narrow in scope and content and advances no strategy for combating sectarianism in a broader societal context.

The antisectarian charity, Nil by Mouth, defines sectarianism as

“Narrow-minded beliefs that lead to prejudice, discrimination, malice and ill-will towards members, or presumed members, of a religious denomination.”
The bill contains no alternative definition. It is general where it should be specific and it is turgid where it should be compact. According to the policy memorandum, the bill’s aim is “to tackle sectarianism by preventing offensive and threatening behaviour related to football matches ... particularly where it incites religious hatred.”

However, nowhere in a forest of disparate words and phrases does the bill mention Catholics or Protestants or refer to sectarianism.

Evasiveness is a theme of the bill, especially in relation to what constitutes offensive behaviour.

Humza Yousaf: Will the member give way on that point?

Siobhan McMahon: No.

One requires only the most cursory knowledge of Scottish football to appreciate that some songs, chants and slogans are brazenly aggressive and discriminatory and others are not. A refusal to engage with that reality and adopt a more detailed and constructive approach has rendered the bill confused and ineffective. According to the BBC’s world service, “A Nation Once Again” has been voted the world’s most popular song. “Give Ireland back to the Irish” was written by Sir Paul McCartney, and “Sunday, Bloody Sunday” by John Lennon. “The Soldier’s Song” is the national anthem of Ireland. All those songs are commonly sung on the terraces. Are they to be banned?

The bill’s barometer of offensive behaviour is “behaviour that a reasonable person would be likely to consider offensive.”

At the weekend, Scottish Police Federation chairman Les Gray said that if we have to tell people what is offensive and what is not we are in big trouble. That is the same man who said: “I’ve been in homes with King Billy on the wall and on the other side with the Pope on the wall, and both sides are just as bad.”

If such an enlightened attitude is typical of a reasonable person, I agree that we are in big trouble.

In practice, the task of negotiating the minefield of deciding who is reasonable and what is abusive will fall to the police. I am a proud Celtic supporter and I have followed my team far and wide, in stadiums throughout the country. I have heard and seen things that I found offensive. I have heard rival fans sing that I am in the wrong country, that the famine is over so why don’t I go home, and that I only sing in the chapel. I have seen potatoes thrown at Celtic fans, as bananas were once thrown at black footballers. I have heard Irish nationals—yes, Irish nationals—such as Aiden McGeady and James McCarthy, being booed and taunted in football grounds up and down the country.

However, when I have pointed out the culprits to police officers, I have been ignored or told that the perpetrators will be dealt with later. Not once has my complaint been acted on. I do not understand the logic of handing the police additional powers when they are failing to use the powers that are at their disposal.

Moreover, the police will never eradicate sectarianism, because they are dealing only with the symptoms, not the causes. Until we recognise that sectarianism is a societal problem, which requires a sophisticated response, we will never make progress. In stark contrast to a rushed and ill-conceived bill, Scottish Labour’s 11-point action plan incorporates three key elements: examination, education and communication. It features a raft of innovative proposals, including a proposal for a comprehensive review of how educators can promote religious and cultural tolerance.

Education is the most effective way of confronting bigoted attitudes. It should begin in schools but it should not end there. Colleges, universities and employers throughout the public and private sectors should be required to conduct regular seminars and workshops that promote tolerance and understanding within and between faiths and cultures.

The only way we can rid ourselves of sectarianism is to broadcast the message loud and clear: in 21st century Scotland sectarianism—like racism, anti-Semitism and homophobia—is utterly unacceptable. I urge members to consider the points that I have made. I ask them to vote with their consciences and to vote against the bill.

16:18

Colin Keir (Edinburgh Western) (SNP): Throughout the debate, speakers from all parties have said how much they want to end the blight of offensive behaviour and particularly sectarianism at football matches. Problems that are not associated with football can and should be targeted in other ways. Football is rightly being dealt with in the bill, because it provides the context for the most visible examples of offensive behaviour, not just at stadiums but as people go to and from matches. The offensive behaviour is seen on television.

Of course there must be a wider societal approach, as Siobhan McMahon said.

The catalyst for the bill was the infamous game of shame between Celtic and Rangers last season, but offensive behaviour has been commonplace in football grounds throughout
Scotland for decades, so it is particularly disappointing that the Opposition parties appear not to be willing to support the bill, especially given that there was a great deal of agreement on various issues during the bill’s committee stages.

I say to David McLetchie that I would like to think that the test will be not how the number of prosecutions rises but how it falls because of the bill.

As others have pointed out, the police, the Lord Advocate and others see the bill as an important step in strengthening the law, particularly as breach of the peace appears not to be as effective as it used to be. The provisions in the bill, taken with football banning orders, will mean that the toolkit that is available to the police and prosecution authorities is substantially enhanced. I welcome the freedom of expression provision, as well as John Finnie’s comments.

James Kelly: Will the member take an intervention?

Colin Keir: I ask the member to let me make some progress.

I have to ask, as others have done today, how much thought was put into the 11-point plan that the Labour Party has proposed. Just about all the suggestions in what Graeme Pearson called a fleshed-out plan, including education and work with community groups, have already been started over a period of time. I do not believe that Labour has put in enough research, because its plan looks like it was written on the back of a cigarette packet on a Friday night.

Michael McMahon (Uddingston and Bellshill) (Lab): What about the bill?

Colin Keir: I think that my comment is appropriate.

Even Jack McConnell knows that he did not do anything like enough. In 2009, he stated that, if he had one regret, it was that he failed to introduce a bill to tackle sectarianism.

As the Minister for Community Safety and Legal Affairs said, the Government has committed £9 million over three years for community and grassroots projects to combat sectarianism.

I welcome the joint action group’s proposals on the actions to be taken if fans of clubs are found to be behaving in an offensive manner. As I said in the debate on the Justice Committee’s report at stage 2 and in committee, I would prefer the Scottish Football Association to take over from the Scottish Premier League full responsibility for points deduction, as the SFA is the national association, but I know that the Parliament cannot legislate for that as it would breach FIFA’s laws on Government interference. I therefore encourage the SFA and the SPL to ensure that action on any disciplinary matters that relate to the behaviour of supporters is open and transparent, particularly given the recent decisions against Celtic as well as those in the past against Rangers. I fear that UEFA and/or FIFA will start to take a more serious set of actions against our clubs if the SFA and the SPL do not act on offensive behaviour.

The bill takes on the problems that are faced at football grounds today. Tomorrow can be dealt with through community initiatives and work with youngsters and faith groups; such work is already being done and it will be enhanced in the coming years. The bill is certainly not an attack on anyone apart from the mindless people who shame our national game and our country. Perhaps the Opposition parties will reflect on what the option of doing nothing would mean.

I support the motion.

16:23

Roderick Campbell (North East Fife) (SNP): No one could say that ridding Scotland of offensive behaviour at football or in society in general is easy, and the bill cannot be anything other than a step along the way. However, it is not the bill that was introduced in May. We have a freedom of expression provision in relation to the second offence, a general review provision, and an amendment to the provisions in relation to a regulated football match. Those are small but significant amendments.

What I am still struggling with is the fact that some members chose not to participate in discussions to amend the bill, particularly given that, as was reported in June, members of the Opposition thought at that time that legislation should be in place as quickly as possible. I understand that they might not agree that this bill should be in place, but they did think that there should be legislation. When the Labour Party announced on Sunday that none of its proposals required new legislation, I found it troubling. We have a problem that is worthy of legislation in June but not one that is worthy of legislation in December.

No one has said that the problem can be solved with legislation alone, and no one has said that sectarianism is a problem at football games alone. However, legislation is a key instrument in a broad approach to the eradication of offensive behaviour of a religious, racial or homophobic nature at football matches.

The Lord Advocate spoke in evidence about gaps in existing legislation. By their actions, some Opposition members clearly seek to deny that there are such gaps. I have always accepted that the bill overlaps with existing legislation. However,
as I said in June and at the stage 2 debate on 3 November, and as academics such as Dr Kay Goodall and the Lord Advocate have said, there is a transformational effect from legislation. The Lord Advocate said:

“Legislation can be transformational ... it can change society’s behaviour and its attitude towards behaviour, and that should never be overlooked.”—[Official Report, Justice Committee, 20 September 2011; c 309.]

As well as providing a primary mechanism, which is to punish those guilty of an offence, law has a secondary function in changing public attitudes to behaviour. Naming the offence will have a transformational effect on people’s behaviour and offensive behaviour at football will become a named crime. It will be something that people will be keen to avoid that will be rather different from a conviction for breach of the peace which, as others have said, is being used in any event far less often because of its known difficulties.

There is much to commend in Labour’s 11-point plan, but will it transform behaviour on its own? If, as a football pundit said to me, football has had 100 years to clean up its act and failed to do so, will what Labour proposes change the attitude of the clubs? Few would argue against the proposal for points docking in appropriate circumstances, but that is not a matter for the Scottish Government. As I understand it, FIFA rules would prevent any Government intervention. Let us be clear that if behaviour changes, as we all hope that it will, there will be few or no prosecutions, and we will all be happy.

James Kelly: Will the member take an intervention?

Roderick Campbell: I want to press on to finish the points that I can in the short time that I have.

I am not clear what the Labour Party’s position is on the second offence. I could guess that it says that section 38 of the 2010 act is sufficient, but we should not forget that that section does not include any reference to incitement to religious hatred. In that respect, I take on board some of what Patrick Harvie said. In contrast to section 38 of the 2010 act, the bill removes the need to prove that the person making the threat intended to carry it out and the need to prove that the behaviour actually caused fear and alarm.

As others have said, the 11-point plan refers to much that is under way. The Scottish Government has always said that it will continue to take an inclusive approach to its programme to tackle sectarianism. As I understand it, the Government has committed itself to spending £9 million on the issue over the next three years.

I very much hope that the Labour Party will recognise that its plans and the bill are not mutually exclusive. Legislation must go hand in hand with non-legislative action in education and dialogue. In my view, not to support the bill when the opportunity presents itself while at the same time condemning sectarian songs sends out entirely the wrong message. We need new legislation, but we also need a wider approach—on that, at least, I hope that we can all agree.

16:27

Mary Fee (West Scotland) (Lab): When the First Minister addressed members in the chamber in June, he announced that the bill consultation would be extended to allow the First Minister and his Government to achieve “consensus across the chamber and across our partner organisations.”—[Official Report, 23 June 2011; c 1020.]

Six months later, it is clear to all, except to Alex Salmond and the SNP, that they have failed to achieve a consensus with Opposition parties and organisations that are involved in tackling sectarianism.

Nobody doubts the importance of tackling the disgrace that is sectarianism and bigotry and eradicating it from our communities, workplaces, schools and football stadiums, but the bill fails to address the problems and the attitudes of bigots at football matches, in pubs and at home.

The First Minister has accused Scottish Labour of being negative and oppositionist regarding the bill. I wonder whether his views are the same towards groups and organisations such as the Law Society of Scotland, which questioned “whether these proposed measures do in fact bring clarity and strengthen the law.”

The Scottish Human Rights Commission said:

“the Bill is drafted too broadly, lacking legal precision as to the scope of the new offences”.

Nil by Mouth commented that it would like to see “less grandstanding” and more understanding. The Church of Scotland and Faith in Community Scotland said:

“The Bill will do nothing do reduce sectarianism unless it is part of wider work.”

I ask the First Minister and the Minister for Community Safety and Legal Affairs whether those groups are being negative and oppositionist, too, when they say that they would like to see wider work to tackle sectarianism.

John Mason: The member seems to be suggesting that wider work is not going on but, in the schools in my area, incredibly good work is going on. Does the member agree that wider work is going on and that we should be debating an addition to that rather than downgrading it?
Mary Fee: I am not in any way downgrading any outside work or wider work that is going on. This is a huge problem, and we need a wide variety of solutions to tackle it.

Scottish Labour has published our action plan to tackle the ills of bigotry through education, working with young people, teachers, employers, faith groups, football clubs and supporters groups. We agree that we need to tackle sectarianism, and our action plan shows how we can make the changes that are needed. However, sectarianism is not restricted to football matches or the pub. It is in schools, workplaces and homes.

The Scottish Government has been forward in its promotion of early intervention, and here we have a clear area that needs attention, not the reactionary bill that we have as a result of the bigotry and lack of understanding of the minority in football grounds.

I am glad to see that football banning orders, which were introduced by the previous Scottish Labour Administration, have been used more and more each year. Before that, we enabled the courts and police to add a religious prejudice aggravation to offences. Those measures are already in place and should be used further. However, by adding the bill, we risk doing more harm than good by confusing the public. The Government cannot even define sectarianism in the bill and gives no indication of what songs are offensive.

Humza Yousaf: Will the member give way?

Mary Fee: I do not have time.

The minister who is responsible for the bill, Roseanna Cunningham, told the Justice Committee that fans who cross themselves or who sing the Scottish national anthem, “Flower of Scotland”, or the British national anthem, “God Save the Queen”, could be arrested if they were behaving in a threatening or offensive manner. There is no clarity about what is offensive. It is simply down to people’s judgment at the time.

The bill has been steamrollered through by the SNP. Given the Government’s majority, the bill will likely be enacted. However, the SNP has failed to convince the general public, supporters groups, Opposition parties and external bodies that would like to work further with the Government to tackle the problem at its root, and I cannot support such a flawed and discredited bill. I hope that SNP members will ignore their whip sheet, see sense and vote with their conscience.

16:32

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): I am the last speaker in my group and we are fast approaching time added on for stoppages in the debate, but there is still an opportunity for some members to score a late winner and grab victory from the jaws of defeat.

The Scottish Government has played a blinder, even agreeing to a replay at the request of its opponents, in the interests of sportsmanship. The Opposition has been thrown hastily together with last-minute changes and comprises a variety of players from different teams, all with different tactics and no clear idea of how to influence the outcome of the game. However, in the world of politics and the Scottish Parliament, there is still hope, even in the few minutes that remain, that we can unite and score a victory against bigotry at Scottish football matches.

We should remember that the vast majority of supporters of all our clubs will not be affected in the slightest by the bill. They are the majority who behave and act responsibly, support their team and are great ambassadors for their clubs.

Michael McMahon: We keep talking about bigotry, and all the references that are made in this debate appear to focus on Celtic and Rangers. However, after the bill is passed, will Kilmarnock fans stop singing about being up to the knees in their blood?

Willie Coffey: I hope that every football fan in Scotland and, indeed, throughout the world desists from singing songs that poke fun at or criticise their opponents and fans of any other clubs.

The bill is aimed at the small minority who disgrace their clubs, embarrass their fellow supporters and bring shame on Scotland through their behaviour, regardless of the public disorder that could occur. It has been suggested that the bill will criminalise fans for having a sing-song and that it diminishes freedom of speech. However, it does neither of those things.

The Lord Advocate explains that the current offence of breach of the peace is not sufficient to deal with the problems that we have and that proving that sectarian chanting causes alarm to a reasonable person is not as straightforward as some people suggest that it is. The bill attaches an offence to conduct and behaviour that could lead to public disorder, as the Lord Advocate, the Association of Chief Police Officers in Scotland and many others have asked for. Who can support a view that behaviour that is likely to lead to public disorder should not be an offence in Scotland? That is what the bill does, and it should be supported by all decent fans and organisations.

Throughout the debate, we have heard that the bill does not do this or that, that it should be not only about football, that sectarianism is far wider than football, and that we must educate and work with everybody for a common solution, and so on. There is merit in that, and I know that some great
work is being done, with more to follow. I was pleased to hear in the minister’s statement that the Scottish Government has allocated an extra £9 million for community and education grass-roots work.

The bill is not going to be enough to eradicate sectarianism in Scotland; nobody said that it was. However, this problem is one rotten egg in the sectarian basket that is being cracked tonight; hopefully, the stench will diminish with time. It is more than a pity that some members prefer to oppose the measure unless the whole basket of rotten eggs is cracked in a one—something that those members failed abysmally to do for years when they were in government.

We must support the bill tonight as a Parliament. It is a good measure that clarifies the breach of the peace law for our police officers and sends out a clear message to the bigots who stalk our football grounds masquerading as supporters that Scotland will no longer tolerate their behaviour. The bill should be the beginning of a process of engagement that reaches out to all decent supporters and organisations that say that enough is enough. We must work together and gather in all the good ideas that have been offered over the past few months. Education, mutual respect and co-operation should—and always will—triumph over the forces of bigotry which, if left alone and unchallenged, fester and corrupt us all.

The world is watching us closely to see whether Scotland’s Parliament is ready to make a stand against the bigots. We might not be able to do that in football, but in the Parliament we can all grab a victory before the referee blows the whistle on another towsy encounter at Holyrood.

16:37

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): I thank my former colleagues on the Justice Committee for their work in scrutinising the bill. Together with the clerks, they did a good job in considering how the bill could be improved.

When the Scottish Government first announced that it would delay the bill’s passage, that was welcomed by all sides as an opportunity to make serious changes to the poorly written and vague first draft that came before the Parliament. It is highly regrettable, therefore, that we have reached stage 3 and yet the bill has shown remarkably little improvement. The SNP will probably use its majority to push through this lacklustre response to what is a blight on Scotland’s culture.

No one doubts that sectarianism is an evil that must be removed from our society in Scotland, and any right-minded person would want to achieve that. However, I would argue that the way to tackle such unacceptable behaviour is not through vague and potentially harmful acts of Parliament but through better enforcement of existing laws.

Those are not just my thoughts. Aidan O’Neill QC described this as the worst drafted bill that he had ever seen, and concerns have been raised by the Law Society of Scotland, the Church of Scotland and others, which are all worried about the potential harm that the bill could cause. They agree that bad law is worse than no law.

There are a number of reasons for that, which my colleague David McLetchie identified. The Scottish Government has failed clearly to define the behaviour that it is trying to criminalise. The SNP has been unable to identify the problem at the heart of the issue, and its members cannot seem to agree on whether it is tackling a religious or a political issue. As such, the Government has produced a catch-all measure that could result in those with innocent intentions being punished by the law.

There is no clear definition of what constitutes an offence, and many are rightly concerned about what might be caught and become criminal behaviour. Churches throughout Scotland are worried that Christian teachings might be in jeopardy because of the vague definitions in the bill. Other organisations have raised similar concerns. Indeed, when I asked the minister in committee whether the singing of the national anthem would constitute an offence, she was unable to answer me, stating that it would depend on the other circumstances.

I know that the minister will direct members to the guidelines that support the bill, but that is not the point. The legislation itself must be certain and clear, and it is simply wrong of the Scottish Government to rely on guidelines to deal with the inadequacies in the bill’s drafting.

Many are concerned that the bill will impinge greatly on the ability to associate, speak freely and voice opinions with anyone or on any matter. That will inevitably mean that the people who are criminalised are not the individuals who are peddling these unacceptable views but innocent Scots throughout the country who will be seen as committing an offence, despite having honest intentions.

Although there is an agreement that we must tackle this serious issue, that does not condone the something-must-be-done mentality that the SNP Government has adopted. Existing measures are in place that, if used more effectively, could start to deal with the problem.

The Justice Committee report called on both the SFA and the SPL to take more action on the issue
and it is vital that they now start to do so. Closer working between the two groups in charge of Scottish football could produce a co-ordinated effort to take action against fans who are guilty of sectarianism. As the committee noted in its report, it is highly regrettable that that has not already been achieved and more pressure should and must be put on them to ensure that the issue is dealt with as a matter of urgency.

The Scottish Conservatives will rightly consider any initiative that aims to reduce sectarian behaviour in our society but, having looked at the bill, we think that it has been found wanting. David McLetchie has tried to improve the bill with amendments, but they have been rejected and our concerns remain. We have tried to be reasonable but have been rebuffed by the Scottish Government, which is determined to force through this shoddy bill.

I therefore urge every MSP to think carefully before voting to approve the bill. If it is to become law, there are real concerns and a real danger that it could end up causing more harm than it does good.

16:41

Johann Lamont (Glasgow Pollok) (Lab): I regret very much the position that we are now in, whereby the Opposition will vote against the bill and it will be voted through by the Government.

Willie Coffey, in one of his many puns, talked about opposition being cobbled together. The minister should reflect on the fact that, on an issue that everyone is concerned about, the Opposition parties have come together to express their concern about the bill. It is not good enough to say that that is about wilful opposition. The minister should recognise the significance and the scale of the opposition to the bill, in the Parliament and elsewhere, if she wants to address the issue.

I would love to have the luxury of the SNP’s majority. However, the Government must recognise not only the power of that majority, which I am sure that it will use from time to time to implement its programme, but the responsibility of majority to recognise that in certain circumstances it is not good enough for the Government to use its votes to get its way.

When the First Minister stepped back in June and said that he wanted to build a consensus, we celebrated and welcomed that. However, we got not a pause to reflect but a period of paralysis. Nothing happened and the bill came back in the same form. We promised that we would not exult when the First Minister stepped back and we welcomed his move. However, I am disappointed that we still have the same bill with little amendment and that the minister has not acknowledged that the concerns that have been expressed are serious.

Members across the chamber recognise the preciousness of unity on the issue, because we recognise that disunity gives heart to the most bigoted in our communities. We wanted unity on the issue so much, yet we feel that we cannot come together, unified, on the bill.

Annabelle Ewing (Mid Scotland and Fife) (SNP): The member referred to the fact that the bill was in substantially “the same form” and that few amendments were incorporated. Does she therefore regret that her party lodged no amendments at stage 2?

Johann Lamont: It is not worthy of the seriousness of the debate to try to allay people’s concerns by saying that we did not lodge amendments.

We made exceptionally clear our willingness to work with the Government. We did not start from the position of opposing this bill, of all bills. I did not want to be in the position that I am now in of opposing the bill, but the fact is that we have reached the view—across the Opposition—that the bill has the potential to make the situation worse rather than better. It is offensive to condition people into believing that, if someone disagrees with the bill, they condone sectarian behaviour.

I welcomed Humza Yousaf’s comments about the need for maturity, but I regret the minister’s suggestion that those of us who do not support the bill are in denial about the scale of the problem. It is precisely because we understand the scale of the problem that we will not stand by and allow the bill to go through without raising concerns about it.

We have a strategy and a record in government on this question. When we developed a strategy, we consulted on it; in that way, legislative weaknesses can be reflected in the legislative programme. This Government has done things the other way round. It is simply not good enough to have assertion rather than evidence. It is a very simple factual matter that of all the convictions for religiously aggravated offences, only a third of the offences took place at or around football grounds. That is my concern. This is a huge issue in our communities and the bill does not address that question at all.

The minister says that people did not engage in careful consideration, and that there was no thoughtful and constructive engagement. We did that, but we simply came to the conclusion that the approach of the legislation would make things worse. We are entitled to say that and we reflect the concerns of people beyond the Parliament. The Government has a majority, but the Parliament takes very seriously the need to listen to the voices outside the Parliament. There are
many voices who agree with us, and the Government cannot wish those voices away.

If time had been taken in this debate, and if we had reflected seriously on how best to tackle the problem, perhaps we would have dealt with Patrick Harvie’s questions about whether it would have been better to use the legislation about hate crime. I am personally in favour of legislation, on occasion, symbolically signifying what people disagree with. I am also in favour of naming crimes, which is why I supported legislation on stalking. However, such things take time.

People in our communities want to engage with the process. It is simply not good enough to say that, of course, legislation will make it better, and that legislation is necessary for the transformation of attitudes. If people are not won over to that position—people who feel that they have been discriminated against, who feel threatened by the legislation, who are unsure whether, when they go into a football ground, or indeed a pub, they will be committing an offence—it is reasonable for this legislature to address those concerns rather than to deny their existence.

One of our colleagues said that at least a pub would be a better place to work in as a result of the bill—but only on match day and only if the television is on. If behaviour is unacceptable to someone who is working in that pub, it should be unacceptable, offensive behaviour, full stop. The parliamentary process allows us to tease out the issues that are difficult to address. It is simply not good enough to close down the debate and to say that people are not interested, that they are not reflecting any real concerns and that they are simply being oppositionist for opposition’s sake.

The tone of the back-bench speeches was far more constructive than that from the ministers on the front bench. I welcome that. We do not pretend that our action plan is the last word. We want to engage in a debate and a discussion on how these matters can be taken forward. We offer our action plan as a genuine, serious way of making these matters can be taken forward. We offer our support to the minister. I welcome that. We do not pretend that our action plan is the last word. We want to engage in a debate and a discussion on how these points can be addressed through the parliamentary process.

While the Government is set on pushing through the legislation, we remain troubled, but we remain united in our concern about sectarianism. Our offer to the minister is genuine. We will vote against the bill but we will continue to engage as actively as we can, with the minister and with committees, on how to tackle the broader scourge of sectarianism and offensive behaviour, which goes far beyond football grounds and far beyond match day. It is very much to our regret that we will vote against the bill, but we continue to be determined to work with people across the Parliament to tackle this grave problem in our communities.

The Presiding Officer (Tricia Marwick): I call on Roseanna Cunningham to wind up the debate. Ms Cunningham, you have until 4.59.

16:49

Roseanna Cunningham: Thank you, Presiding Officer.

In closing the debate, I thank all those who contributed to the development of the bill, right back to June and, indeed, before then. In particular, I thank all those whom I have met or who have written to me to discuss the bill. I also thank the Justice Committee, the many witnesses and experts who gave their time to engage in the parliamentary process and the Scottish Government officials who have worked tirelessly on the bill over the past six months.

Despite this afternoon’s debate, I am confident that we are beginning to see long-needed change in attitudes and behaviours in Scottish football. As I have said many times, football is not the only manifestation of sectarianism but those behaviours at football are often the most visible sign of division in our society.

Once the legislation is in place, we can get down to the difficult and long-term work of tackling sectarianism. I want to begin the process of healing the divide and then celebrating this nation’s differences and diversity. Whatever division there is in Parliament over the bill, I hope that once 5 o’clock has been and gone we can rise above that and set our sights on the real, longer-term prize.

There were a number of thoughtful contributions to the debate, including some that did not support the bill. Other contributions were somewhat less edifying. I cannot go through every one of the contributions because, despite the generous apportionment of time, I fear that I would run out of it.

However, I must take up some of the comments from James Kelly and, by inference, Johann Lamont. James Kelly made much of what was obviously a rather hastily cobbled together announcement at the weekend by the Labour Party on its proposals on sectarianism. I looked at the 11 proposals quite carefully and what struck me as interesting was that every one of them reflected commitments that this Government has already made. There was nothing new there. I am happy to speak to James Kelly and others in his party about the detail of that, if they wish to hear it.

I turn to Patrick Harvie’s comments on the importance of tackling hate crimes more generally. I have some sympathy for what he said. The
Government has no plans to undertake a wide-ranging consolidation exercise on hate crime, because of the enormous resource-intensive nature of any consolidation exercise—it is not in our plans, and certainly not on the timescale that Patrick Harvie would have wanted—but I can give an undertaking that the Government will explore the possibility of research to evaluate the effectiveness of existing hate crime laws. I will engage with Patrick Harvie as we move forward on that.

Patrick Harvie: I am grateful to the minister for those words and would appreciate a timescale being imposed on the design and delivery of that research. In particular, will she explain why an offence such as a broad version of incitement to hatred should apply specifically to football matches but not to an English Defence League rally or a group of drunken thugs outside a gay club at 2 o’clock on a Sunday morning? Why is it that that offence is being introduced only in that one specific circumstance but would be wrong in other circumstances?

Roseanna Cunningham: I respectfully say to Patrick Harvie that, when he gets a concession, it is generally a good idea to welcome the concession without immediately demanding chapter and verse on every detailed aspect that might arise. I have committed to engaging with Patrick Harvie on that and I will do so. I will speak about some of the other contributions more generally. Sadly, many of them repeated the same stock phrases that have time and again been refuted. We heard the repeated assertion that sectarianism is not confined to football, as if the Government had ever claimed that it was. However, football is the ugliest and most visible manifestation of sectarianism and the bill was designed specifically to deal with that.

Johann Lamont: I indicated to the minister that only one third of convictions for religious aggravation relate to offences in or around football stadiums, which means that two thirds of such offences must happen in our communities. The problem must go far beyond football.

Roseanna Cunningham: Did I not just say that? I sometimes wonder whether selective deafness comes over people when they listen to SNP members. I respectfully point out to Johann Lamont that that particular group of offences does not cover travel to and from football matches, for example, which are encompassed by the bill.

Another frequently made point is that somehow the bill represents all that we are doing. On the contrary, we have a wide-ranging set of measures already in hand, as I have said, including the commitment of an unprecedented £9 million to the problem over the next three years. That is more money than the Labour Government put in.

It is also said that there is united opposition to the bill. There has certainly been quite a degree of discussion and debate, but it is simply not true to say that there is unanimous opposition to it. We listened to the churches’ request for a freedom of expression provision, and they acknowledged and welcomed the amendment that we lodged at stage 2. That was one of a number of amendments that the Government lodged as a result of the committee’s report. Indeed, a number of members know perfectly well that there is continued support from, for example, Bishop Devine, who speaks for the Catholic church on the issue. The Scottish Human Rights Commission certainly raised specific issues with us that related to a specific provision in the bill, but it has been broadly supportive of the bill, and has said so on a number of occasions. If we add the churches and the SHRC to the police and the prosecutors, we have an interesting group of people who support the bill, and given the decisions that have been made over the past couple of days, we could probably pray in aid UEFA, if it knew about the bill.

On 23 November, Chief Rabbi Jonathan Sacks visited the Parliament. I was struck by something that he said: “Great nations are honest nations and it takes confidence to say that you have faults”. Those are wise words, which I commend to members. Scotland is, of course, a great nation with many more virtues than faults—members would expect me to say that—but some of the faults that we have run very deep, and that can make honesty all the more difficult. Therefore, let us be honest here today. Sectarianism has created faultlines in Scottish society over many years, decades and, arguably, centuries. Some of those faultlines may have healed over, but occasionally the faultlines shift and make clear the depth of the problem that remains. That often takes people by surprise, and it can shake our confidence as a nation.

Comprehensive and long-term action is required to tackle sectarianism, of course. Deep-set attitudes and behaviours need to be changed through education and engagement. It is important to reiterate that the Government has already announced that it will develop a community-based approach to tackle sectarianism that is focused on meeting the specific needs of communities. In our manifesto, we gave our promise that we are in this for the long run, and we have backed that promise with the unprecedented levels of investment to which I have referred.

I have made it clear that I do not believe that sectarianism in Scotland reduces to what we see
at football matches. Those who are genuinely disadvantaged and discriminated against may never have set foot inside a football stadium, and phrases such as “90-minute bigot” are an affront to their plight. However, football grips this nation, so what we see at football matches sends a disproportionately powerful signal through not just Scottish society, but throughout the world. It is therefore clear that we cannot address the wider problem of sectarianism without taking action to stamp out its very visible manifestation at football matches.

I commend the bill to Parliament and the people of Scotland.
Decision Time

17:01

The Presiding Officer (Tricia Marwick): There are two questions to be put as a result of today’s business. The first question is, that motion S4M-01524, in the name of Roseanna Cunningham, on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen Donside) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Ewing, Annebelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Finnie, John (Highlands and Islands) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
Mackenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Aileen (South Scotland) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmont, Alex (Aberdeenshire East) (SNP)
Steven, Stewart (Banffshire and Buchan Coast) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (SNP)
Walker, Bill (Dunfermline) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (SNP)
Yousaf, Humza (Glasgow) (SNP)

Against

Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baker, Richard (North East Scotland) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Helen (Cowdenbeath) (Lab)
Fee, Mary (West Scotland) (Lab)
Ferguson, Patricia (Glasgow Maryhill and Springburn) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macdonald, Lewis (North East Scotland) (Lab)
MacDonald, Margo (Lothian) (ind)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McCulloch, Margaret (Central Scotland) (Lab)
McDougall, Margaret (West Scotland) (Lab)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McLetchie, David (Lothian) (Con)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greencock and Inverclyde) (Lab)
McTaggart, Anne (Glascow) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Park, John (Mid Scotland and Fife) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)

The Presiding Officer: The result of the division is: For 64, Against 57, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill be passed.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill
[AS PASSED]

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Offensive Behaviour at Football and Threatening Communications (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Offensive behaviour at regulated football matches

1 Offensive behaviour at regulated football matches

5 (1) A person commits an offence if, in relation to a regulated football match—

(a) the person engages in behaviour of a kind described in subsection (2), and

(b) the behaviour—

(i) is likely to incite public disorder, or

(ii) would be likely to incite public disorder.

10 (2) The behaviour is—

(a) expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of—

(i) a religious group,

(ii) a social or cultural group with a perceived religious affiliation,

(iii) a group defined by reference to a thing mentioned in subsection (4),

(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 any of sub-paragraphs (i) to (iii) of paragraph (a),

(c) behaviour that is motivated (wholly or partly) by hatred of a group mentioned in any of those sub-paragraphs,

(d) behaviour that is threatening, or

(e) other behaviour that a reasonable person would be likely to consider offensive.

15 (3) For the purposes of subsection (2)(a) and (b) it is irrelevant whether the hatred is also based (to any extent) on any other factor.

20 (4) The things referred to in subsection (2)(a)(iii) are—
(a) colour,
(b) race,
(c) nationality (including citizenship),
(d) ethnic or national origins,
(e) sexual orientation,
(f) transgender identity,
(g) disability.

(5) For the purposes of subsection (1)(b)(ii), behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that—
(a) measures are in place to prevent public disorder, or
(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.

(6) A person guilty of an offence under subsection (1) is liable—
(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

2 Regulated football match: definition and meaning of behaviour “in relation to” match

(1) In section 1 and this section, “regulated football match”—
(a) has the same meaning as it has for the purposes of Chapter 1 (football banning orders) of Part 2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) (see section 55(2) of that Act), but
(b) does not include a regulated football match outside Scotland unless the match involves—
(i) a national team appointed to represent Scotland, or
(ii) a team representing a club that is a member of a football association or league based in Scotland.

(2) For the purposes of section 1(1), a person’s behaviour is in relation to a regulated football match if—
(aa) it occurs—
(i) in the ground where the regulated football match is being held on the day on which it is being held,
(ii) while the person is entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or
(iii) on a journey to or from the regulated football match, or
(ab) it is directed towards, or is engaged in together with, another person who is—
(i) in the ground where the regulated football match is being held on the day on which it is being held,
(ii) entering or leaving (or trying to enter or leave) the ground where the regulated football match is being held, or
(iii) on a journey to or from the regulated football match.

(3) The references in subsection (2)(aa) and (ab) to a regulated football match include a reference to any place (other than domestic premises) at which such a match is televised; and, in the case of such a place, the references in subsection (2)(aa) and (ab) to the ground where the regulated football match is being held are to be taken to be references to that place.

(4) For the purpose of subsection (2)(aa) and (ab)—
(a) a person may be regarded as having been on a journey to or from a regulated football match whether or not the person attended or intended to attend the match, and
(b) a person’s journey includes breaks (including overnight breaks).

3 Fixed penalties

In Part 1 of the table in section 128 of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (fixed penalty offences), after the entry relating to section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, insert—

<table>
<thead>
<tr>
<th>“Section 1(1) of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011 (asp 00)”</th>
<th>Offensive behaviour at regulated football matches</th>
</tr>
</thead>
</table>

4 Sections 1 and 2: interpretation

(1) Section 1(1) applies to—
(a) behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and
(b) behaviour consisting of—
   (i) a single act, or
   (ii) a course of conduct.

(2) In section 1(2)—
(a) membership, in relation to a group, includes association with members of that group,
(b) “presumed” means presumed by the person expressing hatred or, as the case may be, doing the stirring up,
(c) “religious group” has the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7).

(3) In section 1(4)—
(a) “disability” means physical or mental impairment of any kind,
(b) “transgender identity” means any of the following—
   (i) transvestism,
(ii) transsexualism,
(iii) intersexuality,
(iv) having, by virtue of the Gender Recognition Act 2004 (c.7), changed
gender,
(v) any other gender identity that is not standard male or female gender
identity.

(4) In section 2(3), “televised” means shown (on a screen or by projection onto any surface)
whether by means of the broadcast transmission of pictures or otherwise.

4A Power to modify sections 1 and 4

(1) The Scottish Ministers may by order—
(a) modify section 1 so as to—
(i) add or remove a description of behaviour to or from those for the time
being listed in subsection (2) of that section,
(ii) vary the description of a behaviour for the time being listed in that
subsection,
(iii) add or remove a thing to or from those for the time being listed in
subsection (4) of that section,
(iv) vary the description of a thing for the time being listed in that subsection,
(v) disapply paragraph (b) of subsection (5) of that section in relation to a
description of behaviour for the time being listed in subsection (2) of that
section,
(b) modify section 4 so as to—
(i) add or remove a definition to or from those for the time being mentioned in
subsection (2) or (3) of that section,
(ii) vary a definition for the time being mentioned in either of those
subsections.

(2) An order under subsection (1)—
(a) may make such consequential, transitional, transitory or saving provision as the
Scottish Ministers consider appropriate,
(b) may, for the purpose of making consequential provision under paragraph (a),
modify this Act,
(c) is subject to the affirmative procedure.

Threatening communications

5 Threatening communications

(1) A person commits an offence if—
(a) the person communicates material to another person, and
(b) either Condition A or Condition B is satisfied.

(2) Condition A is that—
(a) the material consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act against a person or against persons of a particular description,

(b) the material or the communication of it would be likely to cause a reasonable person to suffer fear or alarm, and

(c) the person communicating the material—

(i) intends by doing so to cause fear or alarm, or

(ii) is reckless as to whether the communication of the material would cause fear or alarm.

(3) For the purposes of Condition A, where the material consists of or includes an image (whether still or moving), the image is taken to imply a threat or incitement such as is mentioned in paragraph (a) of subsection (2) if—

(a) the image depicts or implies the carrying out of a seriously violent act (whether actual or fictitious) against a person or against persons of a particular description (whether the person or persons depicted are living or dead or actual or fictitious), and

(b) 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.

(4) Subsection (3) does not affect the generality of subsection (2)(a).

(5) Condition B is that—

(a) the material is threatening, and

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

(6) It is a defence for a person charged with an offence under subsection (1) to show that the communication of the material was, in the particular circumstances, reasonable.

(7) A person guilty of an offence under subsection (1) is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

5A Protection of freedom of expression

(1) For the avoidance of doubt, nothing in section 5(5) prohibits or restricts—

(a) discussion or criticism of religions or the beliefs or practices of adherents of religions,

(b) expressions of antipathy, dislike, ridicule, insult or abuse towards those matters,

(c) proselytising, or

(d) urging of adherents of religions to cease practising their religions.

(2) In subsection (1), “religions” includes—

(a) religions generally,
(b) particular religions,
(c) other belief systems.

6 Section 5: interpretation

(1) Subsections (2) to (5) define expressions used in section 5.

(2) “Communicates” means communicates by any means (other than by means of unrecorded speech); and related expressions are to be construed accordingly.

(3) “Material” means anything that is capable of being read, looked at, watched or listened to, either directly or after conversion from data stored in another form.

(4) “Hatred on religious grounds” means hatred against—
   (a) a group of persons based on their membership (or presumed membership) of—
      (i) a religious group (within the meaning given by section 74(7) of the Criminal Justice (Scotland) Act 2003 (asp 7)),
      (ii) a social or cultural group with a perceived religious affiliation, or
   (b) an individual based on the individual’s membership (or presumed membership) of a group mentioned in either of sub-paragraphs (i) and (ii) of paragraph (a).

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

(6) In subsection (4)—
   (a) “membership”, in relation to a group, includes association with members of that group, and
   (b) “presumed” means presumed by the person making the communication.

6A Power to modify sections 5(5)(b) and 6

(1) The Scottish Ministers may by order—
   (a) modify section 5(5)(b) so as to—
      (i) add or remove a ground of hatred to or from those for the time being mentioned in that section,
      (ii) vary a ground of hatred for the time being mentioned in that section,
   (b) modify section 6 so as to—
      (i) add or remove a definition to or from those for the time being mentioned in that section in consequence of a modification made under paragraph (a),
      (ii) vary a definition that relates to a ground of hatred for the time being mentioned in section 5(5)(b).

(2) An order under subsection (1) may—
   (a) specify grounds of hatred by reference to hatred against groups of persons, or individuals, of specified descriptions,
   (b) specify such descriptions by reference to specified personal characteristics,
(c) in relation to any ground added by the order, modify this Act so as to make such provision for the same or similar purposes as that in section 5A as the Scottish Ministers consider necessary or appropriate,

(d) remove or vary any provision made under paragraph (c).

(3) An order under subsection (1)—

(a) may make such consequential, transitional, transitory or saving provision as the Scottish Ministers consider appropriate,

(b) may, for the purpose of making consequential provision under paragraph (a), modify this Act,

(c) is subject to the affirmative procedure.

General

7 Sections 1(1) and 5(1): offences outside Scotland

(1) As well as applying to anything done in Scotland by any person, section 1(1) also applies to anything done outside Scotland by a person who is habitually resident in Scotland.

(2) As well as applying to anything done in Scotland by any person, section 5(1) also applies to a communication made by a person from outside Scotland if the person intends the material communicated to be read, looked at, watched or listened to primarily in Scotland.

(3) Where an offence under section 1(1) or 5(1) is committed outside Scotland, the person committing the offence may be prosecuted, tried and punished for the offence—

(a) in any sheriff court district in which the person is apprehended or in custody, or

(b) in such sheriff court district as the Lord Advocate may direct,

as if the offence had been committed in that district (and the offence is, for all purposes incidental to or consequential on the trial and punishment, deemed to have been committed in that district).

7A Report on operation of offences

(1) The Scottish Ministers must lay before the Scottish Parliament—

(a) a report on the operation of the offence in section 1(1) during the review period, and

(b) a report on the operation of the offence in section 5(1) during the review period.

(1A) Before preparing a report under subsection (1), the Scottish Ministers must consult such persons as they consider appropriate.

(2) A report under subsection (1) must be so laid no later than 12 months after the end of the review period.

(3) In subsections (1) and (2), “the review period” means the period—

(a) beginning on the relevant day, and

(b) ending 2 years after the 1 August next occurring after the relevant day.

(4) In subsection (3), “the relevant day” means—
(a) in relation to a report under subsection (1)(a), the day on which section 1 comes into force,
(b) in relation to a report under subsection (1)(b), the day on which section 5 comes into force.

8 Commencement

(1) This section and section 9 come into force on the day of Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

9 Short title

The short title of this Act is the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2011.
Offensive Behaviour at Football and Threatening Communications (Scotland) Bill  
[AS PASSED]

An Act of the Scottish Parliament to create offences concerning offensive behaviour in relation to certain football matches, and concerning the communication of certain threatening material.

Introduced by: Kenny MacAskill  
On: 16 June 2011  
Supported by: Roseanna Cunningham  
Bill type: Executive Bill