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 its 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

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