

Justice Committee

1st Report, 2011 (Session 4)

Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

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The Scottish Parliament
Pàrlamaid na h-Alba

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
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Graeme Pearson
Humza Yousaf

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The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

1st Report, 2011 (Session 4)

Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2

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 majority¹ 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

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) Bill³ 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 memorandum⁴ accompanying the Bill and rehearsed further in the briefing⁵ 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>

⁵ Scottish Parliament Information Centre. (2011) *Offensive Behaviour at Football and Threatening Communications (Scotland) Bill*. SPICe Briefing 11/48. Available at:

<http://www.scottish.parliament.uk/business/research/briefings-11/SB11-48.pdf> [Accessed October 2011].

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.”⁸ 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.⁹

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.¹⁰ 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 people¹¹ 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.¹² (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

⁸ See also eg Harps Community Project. Written submission. Grand Orange Lodge of Scotland. Written submission.

⁹ Policy Memorandum, paragraph 26

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.¹³) 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.¹⁴

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."¹⁵

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.¹⁶

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.¹⁷ 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."¹⁸

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.

¹³ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 243.

¹⁴ 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

¹⁵ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 16.

¹⁶ 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

¹⁷ Eg Celtic Supporters Trust. Written submission. Children in Scotland. Written submission.

¹⁸ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 257.

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."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."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."²¹

44. These sentiments were echoed in comments by Les Gray of the Scottish Police Federation that the police would want to "hammer"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".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.)

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>

²⁰ Explanatory Notes, Paragraph 52.

²¹ Explanatory Notes, Paragraph 51

²² Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 50.

²³ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 38.

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 announced²⁴ 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

²⁴ Scottish Parliament. *Official Report*, 23 June 2011, Col 1020.

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.

²⁵ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 23; Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 305.

²⁶ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 305.

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.²⁸ 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

²⁸ Law Society of Scotland. Written submission. Scottish Human Rights Commission. Written submission. Celtic Football Club. Written submission

(b) persons likely to be incited to public disorder are not present or are not present in sufficient numbers.”

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 memorandum²⁹ 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.³⁰ Some Members questioned further how this would work in practice and this is discussed below.

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 behaviour³¹ (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.”

²⁹ Policy Memorandum. Paragraphs 9 and 28.

³⁰ As noted earlier, a journey to or from a match is defined to include stops, including overnight stops.

³¹ Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), section 38. Available at: http://www.legislation.gov.uk/asp/2010/13/pdfs/asp_20100013_en.pdf [Accessed October 2011]

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.”³²

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”,³³ that football is Scotland’s national game with a high media profile,³⁴ 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.”³⁵ 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”³⁶ 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.

³⁵ Policy Memorandum. Paragraph 12.

³⁶ Scottish Parliament Justice Committee. *Official Report*, 6 September 2011, Col 159.

were usually very safe places, particularly viewed in an international context,³⁷ and were much more family-friendly than in previous generations.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.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.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.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.⁴² Darryl Broadfoot of the SFA referred to the “game of shame” epithet attached to the match as “a hysterical tabloid headline”,⁴³ whilst the Rangers Supporters Assembly described media reactions to the match as “nothing short of a moral panic ... designed solely to sell newspapers.”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.⁴⁵

³⁷ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 157-158 and 164.

³⁸ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 172.

³⁹ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 168, 169, 170 and 178.

⁴⁰ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 162 and 171

⁴¹ Scottish Parliament Justice Committee. *Official Report, 22 June 2011*, Col 115.

⁴² Eg Kevin Rooney. Written submission.

⁴³ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 225.

⁴⁴ Rangers Supporters Assembly. Written submission.

⁴⁵ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 199-200.

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.”⁴⁶

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”.⁴⁷ On the role of the media, he sought to turn the tables, arguing that “the most profound prejudice and hatred”⁴⁸ 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.”⁴⁹

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

⁴⁶ Brian Taylor. Written submission.

⁴⁷ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 190.

⁴⁸ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 201.

⁴⁹ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 184. See also Kevin Rooney. Written submission.

criminal but, in the main, I focus on the football—I am there to watch a game of football.”⁵⁰

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 1.⁵¹

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”⁵² 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.”⁵³

98. He pointed to UEFA’s⁵⁴ 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.⁵⁵

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.”⁵⁶ 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.”⁵⁷

⁵⁰ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 174.

⁵¹ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 160-161.

⁵² Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 182.

⁵³ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 182.

⁵⁴ UEFA is European professional football’s governing body, with responsibility amongst other things for running the main European competitions.

⁵⁵ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 196.

⁵⁶ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 182.

⁵⁷ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 189.

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.”⁵⁸

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.”⁵⁹ She also pointed to the significant police resources that were needed to maintain order.⁶⁰ 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.”⁶¹

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”.⁶² 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.”⁶³

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.”⁶⁴

⁵⁸ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 207.

⁵⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 297.

⁶⁰ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 298.

⁶¹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 297.

⁶² Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 188.

⁶³ Professor Graham Walker. Written submission.

⁶⁴ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 185.

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.”⁶⁵

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.”⁶⁶ It should be added that the witness went on to say that his remarks had been “slightly intemperate”.⁶⁷ 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.⁶⁸ (However, the Committee is not clear from the evidence we received as to whether this panel has to date been convened.⁶⁹) They also clarified that the SFA had fairly wide-ranging disciplinary powers for unacceptable behaviour in football grounds, ranging from

⁶⁵ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 187. Also (eg) Kevin Rooney. Written submission.

⁶⁶ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 169.

⁶⁷ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 173

⁶⁸ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 218.

⁶⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 321

warnings to annulments and replays or points docking.⁷⁰ 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.⁷¹ 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.⁷²

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.⁷³

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 replied⁷⁴ 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—

⁷⁰ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Cols 218, 227.

⁷¹ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 221.

⁷² Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 218.

⁷³ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 224.

⁷⁴ Scottish Premier League. Letter to the Convener, 20 September 2011.

“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

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

⁷⁶ Scottish Parliament Justice Committee. *Official Report*, 22 June 2011, Col 100.

⁷⁷ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 229

“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.⁷⁸ 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.”⁷⁹

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”,⁸⁰ 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.”⁸¹

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.”⁸²

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

⁷⁸ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 232

⁷⁹ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 39.

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.”⁸³

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”.⁸⁴

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.⁸⁵ 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 report⁸⁶ 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.⁸⁷

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.”⁸⁸ 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

⁸³ Coalition for Racial Equality and Rights. Written submission.

⁸⁴ Human Rights Consortium Scotland. Written submission.

⁸⁵ Eg Celtic Football Club. Written submission. Rangers Football Club. Written submission. William Queen. Written submission.

⁸⁶ <http://www.scotland.gov.uk/Publications/2011/07/22120711/0> .

⁸⁷ 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.

⁸⁸ <http://www.copfs.gov.uk/News/Releases/2011/09/Solicitor-General-introduces-New-Football-Liaison-Prosecutors>

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.”⁸⁹

132. Les Gray of the Scottish Police Federation expressed similar views.⁹⁰

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.”⁹¹

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

⁸⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 309.

⁹⁰ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 48.

⁹¹ Scottish Parliament Justice Committee. *Official Report, 22 June 2011*, Col 82

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 (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.”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 (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”⁹³ 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.

⁹² Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 308.

⁹³ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 311.

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

⁹⁶ Eg Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 41; Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 231; Association of Chief Police Officers in Scotland. Written submission.

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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ These include, for instance, Stonewall Scotland, which referred to a 2009 report¹⁰² 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"¹⁰³ of age and gender.¹⁰⁴

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

⁹⁸ Eg Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 267. See also Policy Memorandum. Paragraphs 51-52.

⁹⁹ Available at

<http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/DraftLordAdvocateguidelines.pdf>

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.

¹⁰¹ Eg Equality Network. Written submission. Scottish Youth Parliament. Written submission. YouthLink Scotland. Written submission. Dr John Kelly. Written submission. Scottish Council of Jewish Communities. Written submission.

¹⁰² Stonewall Scotland. Written submission. The report referred to (available at http://www.stonewall.org.uk/documents/leagues_behind.pdf [accessed September 2009]) appears to be based on a survey of attitudes in England.

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.¹⁰⁵ 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?”¹⁰⁶

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”.¹⁰⁷ “Offensiveness”, by contrast, could not be easily defined; it was “in the eye of the beholder.”¹⁰⁸ 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”.¹⁰⁹ 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.”¹¹⁰

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.¹¹¹ The Committee

¹⁰⁵ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 159. Tony McKelvie. Supplementary written submission; Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 244. Roman Catholic Church. Supplementary written evidence.

¹⁰⁶ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 250.

¹⁰⁷ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 243.

¹⁰⁸ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 238.

¹⁰⁹ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 243.

¹¹⁰ Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 242.

¹¹¹ Eg Scottish Catholic Observer. Written submission. Paul Cochrane. Written submission. Harps Community Project. Written submission.

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

¹¹² Eg John McKnight. Written submission. Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Cols 175 and 183. Rangers Supporters Assembly. Written submission

¹¹³ Eg Dr John Kelly. Written submission. Mark McCabe. Written submission.

¹¹⁴ Dr Kay Goodall. Written submission.

¹¹⁵ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 278-279.

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,

¹¹⁶ Scottish Parliament Justice Committee. Official Report, 20 September 2011, Cols 280-281.

¹¹⁷ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 280-281.

¹¹⁸ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 303.

¹¹⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 302-303.

¹²⁰ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 302.

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.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.”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.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.¹²⁴ Along with Shelagh McCall of the Scottish Human Rights Commission,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.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

¹²¹ Eg Law Society of Scotland. Written evidence. YouthLink Scotland. Written submission. Deirdre O’Reilly. Written submission.

¹²² The Christian Institute. Written submission.

¹²³ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 64.

¹²⁴ Dr Kay Goodall. Written submission.

¹²⁵ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 280-281

¹²⁶ Scottish Parliament Justice Committee. *Official Report, 22 June 2011*, Col 120.

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

¹²⁷ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 236.

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.”¹²⁹

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.”¹³⁰

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.”¹³¹

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.”¹³²

¹²⁹ Scottish Beer and Pub Association. Written submission.

¹³⁰ Scottish Beer and Pub Association. Written submission.

¹³¹ Law Society of Scotland. Written submission.

¹³² Scottish Parliament Justice Committee. *Official Report, 21 June 2011, Col 28.*

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.¹³³ 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."¹³⁴

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."¹³⁵

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.

¹³³ Policy Memorandum. Paragraph 22.

¹³⁴ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 230.

¹³⁵ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 233.

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

¹³⁸ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 279.

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.¹³⁹

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.

¹³⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 316.

THE SECTION 5 OFFENCE: THREATENING COMMUNICATIONS

Explanation 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.¹⁴⁰

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.¹⁴¹

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.”¹⁴²

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

¹⁴³ Scottish Parliament Justice Committee. *Official Report*, 22 June 2011, Col 100.

¹⁴⁴ Eg James P Connolly. Written submission.

¹⁴⁵ Dr Sarah Christie and Dr David McArdle. Written submission.

¹⁴⁶ Eg <http://news.scotsman.com/religiousissuesinscotland/Fan-facing-prison-over-antiCatholic.6843834.jp>; <http://news.stv.tv/scotland/west-central/269393-man-facing-jail-for-jibes-about-celtic-boss-neil-lennons-red-hair-on-facebook/>

¹⁴⁷ Information available via the clerk or the Scottish Courts Administration

¹⁴⁸ Scottish Parliament Justice Committee. *Official Report*, 20 September 2011, Col 293.

whole issue. The Bill was “a step in the right direction”.¹⁴⁹ On the other hand, he was concerned that section 5 was an insufficiently sophisticated “knee-jerk reaction”¹⁵⁰ 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.”¹⁵¹

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.”¹⁵²

Other views

213. A number of stakeholders from the voluntary or youth sectors broadly welcomed the intentions behind this element in the Bill.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ 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”.¹⁵⁶

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—

¹⁴⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 293.

¹⁵⁰ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 291.

¹⁵¹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 295.

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..

¹⁵⁵ Eg Scottish Parliament Justice Committee. *Official Report, 13 September 2011*, Col 239; Professor Graham Walker. Written submission; Supporters Direct Scotland. Written submission.

¹⁵⁶ Scottish Parliament Justice Committee. *Official Report, 6 September 2011*, Col 199.

“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.

¹⁵⁸ Eg Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 286-287.

¹⁵⁹ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Cols 53-54.

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 majority¹⁶⁰ 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 minority¹⁶¹ 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 Institute¹⁶² 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.

¹⁶⁴ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 265.

¹⁶⁵ Scottish Parliament Justice Committee. *Official Report*, 20 September 2011, Col 280.

¹⁶⁶ Scottish Parliament Justice Committee. *Official Report*, 13 September 2011, Col 239.

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.”¹⁶⁷

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.”¹⁶⁸ 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 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.

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).”¹⁶⁹

233. Some witnesses have queried why the Bill has not gone further.¹⁷⁰ 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

¹⁶⁷ Policy Memorandum. Paragraph 41

¹⁶⁸ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 304.

¹⁶⁹ Policy Memorandum. Paragraph 40.

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.

¹⁷² Scottish Parliament Justice Committee. *Official Report*, 22 June 2011, Col 120

¹⁷³ Scottish Parliament Justice Committee. *Official Report*, 20 September 2011, Col 304.

“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.”¹⁷⁴

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.”¹⁷⁵

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.¹⁷⁶ 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.

¹⁷⁵ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Cols 279-250.

¹⁷⁶ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 304.

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—

¹⁷⁷ An example of the latter is provided by the Scottish Council of Jewish Communities (Written submission)

¹⁷⁸ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 287.

¹⁷⁹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 294.

¹⁸⁰ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 290.

¹⁸¹ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 285.

¹⁸² Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 294.

“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.”¹⁸³

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.¹⁸⁴

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.”¹⁸⁵

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”.¹⁸⁶

253. There were others who had some doubts about whether the extraterritorial aspects of section 5 could be made to work.¹⁸⁷ The Law Society suggested that

¹⁸³ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 52.

¹⁸⁴ Scottish Parliament Justice Committee. *Official Report, 21 June 2011*, Col 54.

¹⁸⁵ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 288.

¹⁸⁶ Scottish Parliament Justice Committee. *Official Report, 20 September 2011*, Col 290.

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 McCreadie, 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 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.

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 \(222KB pdf\)](#)
[Action for Children Scotland \(supplementary submission\) \(137KB pdf\)](#)
[Amnesty International \(86KB pdf\)](#)
[Anderson, Robert \(59KB pdf\)](#)
[Association of Chief Police Officers in Scotland Football Sub Group \(134KB pdf\)](#)
[Association of Directors of Social Work \(66KB pdf\)](#)
[Ballingry Celtic Supporters Club \(60KB pdf\)](#)
[Brennan, Martin \(66KB pdf\)](#)
[Buchanan, Professor William \(120KB pdf\)](#)
[Campbell, James \(47KB pdf\)](#)
[CARE for Scotland \(88KB pdf\)](#)
[Catholic Church \(24KB pdf\)](#)
[Catholic Church \(supplementary submission\) \(199KB pdf\)](#)
[Celtic Football Club \(74KB pdf\)](#)
[Celtic Supporters Association \(65KB pdf\)](#)
[Celtic Supporters Trust \(169KB pdf\)](#)
[ChildLine in Scotland \(130KB pdf\)](#)
[Children in Scotland \(289KB pdf\)](#)
[Christian Institute \(514KB pdf\)](#)
[Christie, Dr Sarah and McArdle, Dr David \(22KB pdf\)](#)
[Church and Society Council of the Church of Scotland and Faith in Community Scotland \(87KB pdf\)](#)
[Coalition for Racial Equality and Rights \(69KB pdf\)](#)
[Cochrane, Paul \(19KB pdf\)](#)
[Connelly, John \(84KB pdf\)](#)
[Connolly, James P. \(78KB pdf\)](#)
[Council of Ethnic Minority Voluntary Sector Organisations Scotland \(116KB pdf\)](#)
[Easdale, John \(6KB pdf\)](#)
[Equality and Human Rights Commission Scotland \(132KB pdf\)](#)
[Equality and Human Rights Commission Scotland \(supplementary submission\) \(86 KB pdf\)](#)
[Equality Network \(26KB pdf\)](#)
[Evangelical Alliance Scotland \(66KB pdf\)](#)
[Furey, Daniel and Elizabeth \(5KB pdf\)](#)
[Gallagher, Professor Tom \(14KB pdf\)](#)
[Goodall, Dr Kay \(197KB pdf\)](#)
[Graham Walker, Professor Graham \(162KB pdf\)](#)
[Grand Orange Lodge Scotland \(140KB pdf\)](#)

[Hadfield, M. \(19KB pdf\)](#)
[Halliday, Margaret \(6KB pdf\)](#)
[Hannah, Dr John \(8KB pdf\)](#)
[Harps Community Project \(169KB pdf\)](#)
[Human Rights Consortium Scotland \(50KB pdf\)](#)
[Inclusion Scotland \(128KB pdf\)](#)
[Internet Services Providers' Association \(203KB pdf\)](#)
[Jackson, Gordon \(10KB pdf\)](#)
[Keith, Dr Graham \(62KB pdf\)](#)
[Kelly, Dr John \(19KB pdf\)](#)
[Law Society of Scotland \(17KB pdf\)](#)
[Leonard, Alan \(8KB pdf\)](#)
[McAree, John \(8KB pdf\)](#)
[McCabe, Mark \(15KB pdf\)](#)
[McKay, Bob \(60KB pdf\)](#)
[McKelvie, Tony \(11KB pdf\)](#)
[McKelvie, Tony \(supplementary submission\) \(72KB pdf\)](#)
[McKnight, John \(117KB pdf\)](#)
[Minogue, Tom \(14KB pdf\)](#)
[Muslim Council of Scotland \(98KB pdf\)](#)
[National Secular Society \(114KB pdf\)](#)
[Nil by Mouth \(122KB pdf\)](#)
[O'Reilly, Deirdre \(118KB pdf\)](#)
[Playbusters \(99KB pdf\)](#)
[Queen, William \(8KB pdf\)](#)
[Ramsay, Margaret \(7KB pdf\)](#)
[Rangers Football Club \(74KB pdf\)](#)
[Rangers Supporters Assembly \(131KB pdf\)](#)
[Rooney, Kevin \(120KB pdf\)](#)
[Sacro \(63KB pdf\)](#)
[Scottish Beer and Pub Association \(182KB pdf\)](#)
[Scottish Catholic Observer \(75KB pdf\)](#)
[Scottish Community Justice Authorities \(115KB pdf\)](#)
[Scottish Council of Jewish Communities \(23KB pdf\)](#)
[Scottish Episcopal Church \(59KB pdf\)](#)
[Scottish Football Association \(59KB pdf\)](#)
[Scottish Human Rights Commission \(149KB pdf\)](#)
[Scottish Justices Association \(64KB pdf\)](#)
[Scottish Police Federation \(68KB pdf\)](#)
[Scottish Youth Parliament \(185KB pdf\)](#)
[Society of Scotland \(supplementary submission\) \(16KB pdf\)](#)

[Stonewall Scotland \(238KB pdf\)](#)

[Supporters Direct Scotland \(56KB pdf\)](#)

[Taylor, Brian \(82KB pdf\)](#)

[Victim Support Scotland \(65KB pdf\)](#)

[Waiton, Dr Stuart \(97KB pdf\)](#)

[YouthLink Scotland \(92KB pdf\)](#)

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 \(157KB pdf\)](#)

Written submissions are also published (in the order received) on the Committee's webpage at:

<http://www.scottish.parliament.uk/s4/committees/justice/inquiries/OBFTCBill/OBFTCBill.htm>

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