

Justice Committee

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

Written submission from Fans Against Criminalisation

1. Do you agree with the proposal in the Bill to repeal the 2012 Act? What are your reasons for coming to this view?

We are fully supportive of the proposal to repeal Sections 1-5 of the Act. Our reasons are set out below. We have provided sub-headings to aid clarity.

The OBA is and was unnecessary

When the 2012 Act was being introduced the only argument made in support of it was that the existing legislation did not give the police sufficient powers to deal with genuine problems within stadia. This has to be addressed on two levels. One relates to the issue of **whether or not there is a problem of criminality of any significance within football stadia**. The second relates to the nature of the powers which the existing legislation gives to the police and **whether the 2012 Act gave them additional/better specified powers**. We shall address the first here and the second in relation to Question 3.

In the meantime, we note here that the Law Society of Scotland's submission to the Justice Committee in 2011 and again in 2017, directly contradicts the police argument saying in 2011:

"..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."

This has proved to be a very accurate prediction of the 'confusion' which was indeed caused and they have confirmed that they continue to hold that view. Numerous sheriffs have indicated, both in court and in responses to the Evaluation Report commissioned by the Scottish Government, that the legislation was confusing and flawed.

<http://www.bbc.co.uk/news/uk-scotland-tayside-central-22972013> Sheriff criticises confusing anti-bigotry law

http://www.heraldscotland.com/news/14493071.Rangers_fans_cleared_as_sheriff_criticises_flawed_sectarianism_law/

<https://www.thecourier.co.uk/news/local/dundee/76436/dundee-sheriff-criticises-anti-sectarian-legislation/>

Criminality was previously declining in football stadia

It is our contention, supported by all relevant official statistics, that the degree of criminality within football stadia has been on a long-term declining trend since the early 80's and was, in the period leading up to the Act, almost non-existent in the context of the number of individual attendances at SPFL (or its predecessor bodies) matches. Football in 2011, when this Act was first proposed, was a very different experience from that of the period prior to 1980.

The public discourse leading up to the introduction of the Act and the language used by the Government, the Police and media commentators laid special emphasis on the issue of

sectarianism. Prior to 2012 the relevant legislation would have been Section 74 of the Criminal Justice (Scotland) Act 2003. This allows for religious, racial and other ‘aggravations’ of Breach of the Peace, Assault and other charges. The proportion of charges involving a religious aggravation which took place at a football ground in the two years leading up to the introduction of the 2012 Act were 12.9% and 7.6% respectively. This compares with the first year of the 2003 Act in which 15% of all charges related to incidents at football stadia. This constitutes, on any view, a downward trend in incidents at football grounds from a small base in terms of where most of these religiously aggravated incidents take place ie in places unconnected with football.

There is no evidence of any significant problem with disorder in Scottish football grounds in absolute terms or, as it happens, in comparison with other similarly-sized public events eg concerts. In terms of behaviour which could constitute hate crime either in terms of religion or other factors, clearly the overwhelming majority of this behaviour takes place in places other than football stadia. On that basis we are clear that there was never any genuine, substantive basis for new legislation which affected only football fans.

The Act is Poorly drafted

The difficulty with this Act was that the Scottish Government¹, in the words of the Appeal Court judges, Lady Paton, and Lords Brodie and Philip in the case of *PF Dingwall v Cairns*² ‘**created a criminal offence with an extremely long reach**’. In attempting to create this offence the drafters described both the nature of what would be a criminal offence, and in what circumstances, so widely as to cover almost any behaviour as long as it could be described as being ‘in the context of a regulated football match’. In the words of Paton, Brodie and Philip:

‘..it is to be noted that behaviour may be in relation to a regulated football match not only if it occurs in the ground where the match is being held on the day in which it is being held (irrespective of the time of day) or while the person is entering or leaving the ground but also if the person is on a journey to or from such a match. Moreover, in terms of section 2(4) of the Act 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 even intended to attend the match.’

The notion that **the law can regard you as being on a ‘journey to or from a regulated football match’ that you had no intention to attend** is one that most citizens would struggle to comprehend. This has led to individuals being charged in circumstances some considerable hours before or after a match in venues unrelated to any football match and where no evidence has been led that they have actually been at a football match. Indeed, **prosecution can take place in relation to events which are alleged to have occurred at any public place as long as a match took place at some point that day or any contiguous day and which the accused did not watch (live or on television) or was even interested in**. If this legislation was intended to deal with disorder or other problematic behaviour in football stadia then the very widely drawn boundaries around it make it virtually useless in this regard.

¹ We deliberately say Scottish Government here rather than Scottish Parliament because the 2012 Act was passed using only the governing party’s votes. All other opposition MSPs voted against the Act.

² <https://www.scotcourts.gov.uk/search-judgments/judgment?id=113686a6-8980-69d2-b500-ff0000d74aa7>

The 2012 Act embodies the concept of the *reasonable* person as do many other pieces of legislation. However, in this case of this Act, the term has been defined by the same trio of Law Lords as something which genuinely reasonable people would find shocking:

Thus, the Act distinguishes between, on the one hand, "a reasonable person" and, on the other, a person "likely to be incited to public disorder". It may be that a person likely to be incited to public disorder is of a more volatile temperament than a reasonable person or, to use the language of the sheriff, an uninitiated member of the public. The person likely to be incited to public disorder may have particular interests and particular knowledge. He may have particular views about the two songs in question or those who sing them.

So, in other words the leading case in this regard makes it clear that if person A 'in the context of a regulated football match' behaves in a way that incites person B who is a 'volatile' person who already holds 'particular' views about person A, to public disorder then person A (not person B) is guilty of an offence. We cannot accept that this is what the Government intended or, if it is, we say that this is a totally unacceptable way to frame a law in a modern democracy.

An additional layer of paralogism is added when they go on to say:

As section 1(5)(b) provides that such persons need not be present for the purposes of determining whether specific behaviour would be likely to incite public disorder, it cannot be relevant to the question as to whether there has been a contravention of section 1(1)(b) that particular persons in a football ground could not actually hear the words being sung. **In other words the actual context within which the behaviour occurs is not determinative** (*our emphasis*). Where behaviour falls within any of the categories specified in section 1(2) it is sufficient for conviction that persons likely to be incited to public disorder would be likely to be incited to public disorder by the particular behaviour, whether or not they were present in sufficient numbers and whether or not they were subject to measures put in place to prevent public disorder. As it does not matter whether persons likely to be incited to public disorder are there in sufficient numbers or are there at all it cannot matter whether or not the persons who are present (whether likely to be incited to public disorder or otherwise) actually became aware of the relevant behaviour.

So not only is context not everything, in this legislation is it not anything. Moreover, **a crime of offensiveness is committed even if someone (such as person B above) was present but could not hear it; or if they were not present and even if they did not discover later that the comment had been made** We do not believe that the non-footballing public are aware of the 'long reach' of this legislation and would have serious concerns, as we do, if they did. This has resulted, as we show later, in there being a **very large numbers of cases in which there are no actual, identifiable victims**.

The Act is Illiberal

However, much this Act was, and is, presented in public discourse as being an 'anti-sectarian' initiative, it is clear both from the way it is written and from the way it is enforced and prosecuted that it is nothing of the sort. Not only does the word 'sectarian' not appear anywhere in the wording of the 2012 Act (and thereby cleverly avoids defining what that means) but **the scope of what it covers has been left to the Police Service of Scotland** (who we have already identified as being non-neutral with respect to this legislation) and to the Crown Office Procurator Fiscal Service. The wide-ranging definition of offensiveness in the 2012 Act – as described above - has allowed for an intrusion of the law into the behaviour, beliefs and identity

of large numbers of people simply because they are football fans as opposed to being fans of other sports or none.

On that basis, the behaviours which have been alleged by the police and prosecuted by the Fiscals as ‘offensive’ range from

- singing ‘f**k yer ‘well’ in relation to Motherwell FC
- singing a song about the H-Block Hunger Strikers which reached No 33 in the Official Top 40 charts and, as such, was played on BBC Radio 1
- wearing a t-shirt referring to oneself as an ‘unrepentant Fenian b*****d’
- gesticulating in an unspecified way to opposition supporters
- arguing with stewards
- arguing with police officers
- holding a banner which showed Neil Lennon in a pose made famous by Vladimir Ilyich Ulyanov aka Lenin at Finlandia Station in 1917
- singing a song which recounts a conversation between a father and son as they remember the 1916 Rising in Dublin – an event which has been celebrated by a number of Scottish politicians and other dignitaries in this centenary year
- using a flare in a stadium
- holding a banner with a line from the 90’s pop song 99 Red Balloons
- as well as other charges of assault, racism, and religious bigotry (75-80% of charges most years) all of which could have been covered by other legislation but the COPFS instructed the Police Service of Scotland to use the 2012 Act.

In an Appeal Court judgement³ delivered in March 2015, the Lord Justice Clerk, and Lords Bracadale and Boyd of Duncansby made clear their interpretation of the intention of the Act in the following terms:

The main, but not exclusive, focus is on the behaviour of certain Celtic and Rangers fans with their long-standing attachment to opposing factions involved in the politics of Ireland, and Ulster in particular. The continuing relevance of such issues to sport is a source of some bafflement to many, even if their cultural origins are easily traced.

Here, one of the two leading cases in this area makes clear that what is being targeted is not what the public would normally perceive to be hate crime but the expression of political views in relation to the history of relations between Britain and Ireland. However much many people in Scotland might not like these particular views, they are undoubtedly perfectly legitimately held in a democratic society. Moreover, one should be allowed to express these views in a non-threatening and peaceful way as one pleases if Scotland is to call itself a modern democracy.

If the intention of the Act was to stop football fans having/expressing views on Ireland and the history of its relations with Britain, then this is, in and of itself, illiberal. However, as could have been predicted, the use of the Act was extended to cover any behaviour, action, word, song, banner or t-shirt that the Police Service of Scotland do not like and in no case that we are aware of, did the COPFS demur from prosecuting once such charges were brought.

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=e84dd2a6-8980-69d2-b500-ff0000d74aa7>

The second evidentiary bar in relation to this Act ie that it might incite public disorder, should have ameliorated the impact of the Act on freedom of expression. However, the fact that the grounds for conviction did not require anyone to have actually ever known that a football fan had exercised their freedom of expression meant that no such protection was available. To the best of our knowledge, no witness in an Offensive Behaviour case has ever testified that they were offended or that disorder might have ensued, other than police officers who rely on their 'knowledge' of such matters as opposed to any other more detailed expertise. In the most recent year for which there are statistics the 'victim' in Offensive Behaviour are the 'community' (according to the Police) 71% of cases and the 'police' in 16% of cases. So in 87% of cases there is no identifiable victim.

The subjective concept of offensiveness should never have been used as the basis for a criminal charge. It leaves football fans completely at the mercy of individual police officers and what they find offensive or thought the 'community' would find offensive. The COPFS compounded this by proceeding with every single Offensive Behaviour charge that was brought to them even when there was very little chance of a conviction. **We assert that no actual person should have the legal right not to be offended but also that people should not be subjected to criminal proceedings for offending a hypothetical person. The scope for the individual bias of officers and fiscals is so great as to present a genuine danger to civil liberties.**

The Act targets and criminalises largely young men with no previous contact with the criminal justice system

The most recent set of statistics for 2016-17 show that 70% of those charged under the Act are under 30 and 31% are under 20. This has consistently been the case throughout the existence of the Act. The Evaluation⁴ of the Act commissioned by the Scottish Government in 2015 also highlighted the fact that young people in particular were being targeted. The Scottish Government announced in 2015 that, in response to this concern, they had instigated and funded, to the tune of £67000, a 'Diversion from Prosecution'⁵ scheme which would seek to ensure that young people would not be saddled with a criminal record for relatively minor offences. This is a clear recognition that the Act was criminalising young people who had no business being near a police station or a court. **A Freedom of Information request submitted by us to the COPFS has, however, revealed that the option of diversion has been offered to only 2 people up to 27 September 2016.**

Since June 2015 2 referrals have been made to the scheme for sectarian offences under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 directly by the Crown Office and Procurator Fiscal Service (COPFS).

There are no published statistics on the previous convictions of those charged under the 2012 Act, but our own work with those charged and from our dealings with a number of solicitors who have dealt extensively with these cases, we are aware that **they are overwhelmingly people of previous good character with no prior contact with the law.**

To create an Act which criminalises young, mainly working-class, men who would not otherwise be criminalised is entirely at odds with the Governments' own policy positions in a number of significant respects. On this basis alone, we support the repeal of the 2012 Act.

⁴ <http://www.gov.scot/Resource/0047/00479022.pdf>

⁵ <http://www.sacro.org.uk/thinking/news/tackling-sectarianism-across-scotland>

The Act has created unnecessary and preventable tensions between the Police Service of Scotland and football fans

As football fans ourselves and in talking to other football fans, we can say that the harmless pastime of attending a football match has become somewhat of an ordeal since the 2012 Act was introduced. Football fans experience near constant filming throughout matches, we are followed, searched, monitored and generally treated as though we are a threat to society. Elderly people and children are treated as though they are potentially dangerous criminals and the whole atmosphere of football has become one of antagonism – not between opposing fans groups – but between fans and the police. In the week in which this is being written almost every newspaper is carrying statements from senior police officers issuing threats to football fans attending the League Cup Semi-Final at Hampden. One would almost think they were trying to provoke trouble rather than police citizens going about their lawful business.

As an organisation offering support to fans caught up in the Act we have witnessed a complete breakdown in trust between the police and the fan groups. Long-standing supporters' organisations now refuse to enter into discussions with the police because of the resentment which has been created by their behaviour. In the past, it was quite normal to meet with the police from time to time to discuss any issues but this now does not happen to anywhere near the same extent. Given that the Act has targeted the young we have an even greater level of distrust in the 15-25 age group. This is a very dangerous situation when you have young people who feel a very profound sense of injustice about how they are treated by those charged with keeping us safe.

The practice of police officers engaging in 'dawn raids' – a fact conceded by the Police Service of Scotland in evidence to the Petitions Committee of the Scottish Parliament in 2016 – has further exacerbated the feeling of grievance and mistrust among young football fans and the police. This is particularly the case in circumstances which have occurred recently when solicitors have offered to bring people who are wanted for questioning to a police station and had that request refused in favour of turning up at 5.30am at someone's door⁶. The petty vindictiveness of arresting people on a Friday (often several weeks after the alleged offence) in order to hold them for three nights instead of one in a police cell is not lost on football fans – even those not actually subjected to this treatment.

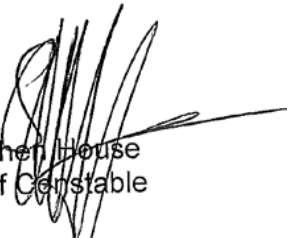
This kind of policing has been evident from the very early days of the Act. A notable example is the actions of the then Strathclyde Police in 2013 in the Gallowgate⁷ in Glasgow when a peaceful demonstration of Celtic fans (numbering about 100-150) was attacked by a force of hundreds of police officers drafted in from various force areas using dogs, helicopters and horses. A Section 12 Notice under the Public Order Act was read out by the senior officer that day (ACC Ruaridh Nicolson) and used to restrict the movement of people who were trying to go about their business including attending a match at Celtic Park. 13 people were arrested for public order offences and Stephen House, in response to numerous letters from MSPs concerned about the scale of that operation, assured them in the following terms:

⁶ <http://fansagainstcriminalisation.com/here-is-how-the-police-service-of-scotland-keep-us-safe/>

⁷ For a detailed report of this incident see 'Citizens' Report into the Policing of Football Fans: Kettling on the Gallowgate, 16th March 2013' which can be accessed here: <http://fansagainstcriminalisation.com/citizens-report-into-the-policing-of-football-fans/>

It is my belief that when the outstanding criminal proceedings are concluded video footage available will allow both you and your constituents a more complete picture of the events that day and show that the actions of my officers were necessary, justified and proportionate. In the meantime I trust this is helpful.

Yours sincerely



Stephen House
Chief Constable

Despite his assurances and despite the amount of filming from the street and the sky no such video footage has been shown and, more importantly, of the 13 people arrested that day, who allegedly carried out these crimes in full view of hundreds of police officers, **precisely none were convicted of any public order offence or any violence** or indeed anything that would have in any way justified the assault on them. Indeed, two police officers were subsequently investigated for perjury as a result of the evidence they offered in court against one young man⁸ in the Gallowgate and another for a later incident. For these reasons, many young Celtic fans do not trust the police. However, there are many other incidents, almost on a weekly basis, involving fans of other clubs which have stoked the fires of resentment and which are part of what seems to be a war on football fans which this Act has heralded.

Most recently (7/8/17) we have the comments of Assistant Chief Constable Bernard Higgins, who astonishingly took to the national press⁹ to demand that a particular group of football fans cease any political expression, insisting that they 'leave the politics at the turnstiles'. Whilst UEFA policy may prohibit political expression within the context of a football match within their control, Scottish law does not. Mr Higgins, therefore, is not simply fulfilling his role as Assistant Chief Constable by advocating that fans abide by the law, but he in fact goes well beyond that, relying on his own personal views and tastes to attempt to restrict the political expression of citizens of a modern European democracy in 2017. At best, this is unwise but at its worst it is a grotesque abuse of his position. One simply cannot imagine Mr Higgins urging any other group of society to refrain from indulging in political expression and it is a matter of grave concern that he has chosen to publicly censure supporters in this manner.

When you take all of this together with the appalling treatment of children in terms of 'consensual' stop and searches the fears and resentments of (young) fans seem more than

⁸ <http://fansagainstcriminalisation.com/the-last-man-standing-from-the-gallowgate-goes-to-trial/>

http://www.heraldscotland.com/news/13789612.New_football_law_perjury_probe_as_police_accused_of_lying_in_court/

⁹http://www.heraldscotland.com/news/homenews/15457165.Celtic___s_Green_Brigade_warned_to_keeep_their_politics_away_from_the_pitch/

justified. It is clear that the effort to repair those relationships will take a very long time but that process will not even begin until the 2012 Act is abolished.

The Act has led to a blurring of lines between politicians, prosecutors and police which is dangerous to democracy

In monitoring the use of the 2012 Act we have become aware of numerous instances of what appear to be unusual interactions between the politicians, the police and the COPFS.

These include:

- The behaviour of the then Lord Advocate, Frank Mulholland, in assuming the role of the largely silent (on this matter) Justice Secretary of the time, Kenny MacAskill. Mulholland gave numerous press interviews and justifications of the legislation in what we are advised is a departure from the normal role of the Government's senior law officer. This included telling Bernard Ponsonby in an STV news bulletin that in certain circumstances 'an Irish Republican identity could be illegal'¹⁰.
- The behaviour of the COPFS in appealing, or threatening to appeal a number of verdicts and sentences in Offensive Behaviour cases when they normally only do this for very serious cases like murder and rape and usually only at the rate of one or less a year. We have been told, although we have no proof, that in at least one of these cases it was at the request of a prominent Scottish Government Minister.
- The fact that the COPFS have taken the decision to prosecute Offensive Behaviour cases to the absolute limit in respect of always proceeding with charges in all circumstances; demanding special bail conditions in all football cases but not in the case of violence or drug offences which appear in the same court on the same day; forcing fiscal deputes to refer every decision upwards as opposed to making day to day decisions by themselves and assigning three fiscals to cover the whole of Scotland for football cases alone in an act designed to elevate the prominence of the 2012 Act.
- The discussions between COPFS and the PSoS regarding which 'songs' they would prosecute; police officers then giving evidence that they 'learnt' the songs online and then the COPFS instructing the police to use the 2012 Act in every case.
- The behaviour of police officers in giving evidence which Sheriffs have criticised and which have led to allegations and investigations of perjury (see Footnote 7).

The extent of these and other incidences of apparent collusion has blurred the lines between politicians who make laws, police officers who enforce them and fiscals who prosecute breaches of them. There appears to be a much greater degree of co-operation to make this particular Act look more effective and successful than should be the case in our legal system. On this basis, we support a repeal of the Act and hope for a return to the proper and clear distinction between the various elements of our governance, police and justice system.

¹⁰ http://www.celtictrust.net/index.php?func=d_home_article&id=425

2. Did you support the original legislation?

No, we were formed to oppose the introduction of the Act and have consistently opposed it ever since.

3. Do you consider that other existing provisions of criminal law are sufficient to prosecute offensive behaviour related to football which leads to public disorder? If so, could you specify the criminal law provisions? Or does repeal of section 1 risk creating a gap in the criminal law?

Police powers pre and post 2012

The argument made in 2011 by the Scottish Police Federation (accompanied by a plea for more resources); the Association of Scottish Police Superintendents, ACPOS and the Assistant Chief Constable of Strathclyde, Campbell Corrigan was that it was very difficult to obtain a conviction for Breach of the Peace since that charge required there to be evidence that the behaviour had caused ‘fear and alarm’ and that this was hard to prove in the setting of a football match. Leaving aside the obvious conclusion that if no one was caused ‘fear and alarm’ then there was no cause for concern, **the reality is that in attempting to extend criminal status to the subjective concept of ‘offensiveness’ the legislation actually made it more difficult for Sheriffs to convict.** We shall return to this when discussing the poor quality of the drafting of the 2012 Act but here we shall simply point to the conviction rates of the Act and that of other comparable legislation some of which could have and would have been used prior to 2012 ie the common law offence of Breach of the Peace and Assault etc.

We also note at this point that there are a number of other pieces of legislation which could be used for behaviour which is more problematic, such as:

- Section 74 of the Criminal Justice (Scotland) Act 2003 introduced statutory aggravations for offences motivated by religious prejudice and requires courts to take any aggravating factors into account when passing sentence.
- Part 2, Chapter 1 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 allows for football banning orders of varying lengths to be applied to offences of violence, disorder and stirring up hatred towards a range of protected characteristics.
- Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 introduces a new offence of threatening or abusive behaviour, punishable on conviction on indictment to up to five years in prison, or on summary conviction to up to 12 months and/or a fine. The offence has been in force since October 2010.

In Table 1 below, we examine a group of offences treated as comparable for the purposes of the publication of the statistics. We show the period of the 2012 Act for which there is data¹¹. We can see the numbers of charges where the offence is proven. **The total numbers for the Offensive Behaviour Act are very small indeed relative to the other kinds of charges.**

¹¹ The most recent data 2015-16 now combines the statistics for all these offences into one group and we cannot now separate them out in a similar way to previous years.

Table 1

	2011-12	2012-13	2013-14	2014-15
	12,757	11,649	11,218	11,758
Common assault	10,685	9,748	9,511	10,077
Common assault of an emergency worker	2,072	1,901	1,707	1,681
	12,544	12,961	13,731	15,580
Breach of the peace	5,491	2,852	1,768	1,601
Threatening or abusive behaviour	6,999	9,915	11,661	13,499
Offence of stalking	52	125	210	401
Offensive behaviour at football (Section 1 of Offensive behaviour Act)	2	67	86	76
Threatening communications (Section 6 of Offensive behaviour Act)	-	2	6	3

More importantly, however, if we look at Table 2 we can see that the conviction rate for most of charges are in the mid-70s to high-90s. The conviction rates published for the Offensive Behaviour Act for the full six years of operation (ie years to 2016-17 except 2011-12) range from the mid 50s to the low 80s. For the most current year 2016-17 the figure for concluded cases is 74% but the statistician responsible for this publication helpfully points out that:

Charges that conclude quickly may not be representative of all charges. They may have concluded quickly because they were the most straightforward cases or those where there was an early guilty plea. It is therefore possible that final conviction rates will be different from those quoted here. ¹²

The statistician goes on to say that the convictions rates published in Criminal Proceedings in Scotland

..covers 2015-16. This shows that there were 131 people convicted where their main charge was under section 1 of the OBFTC Act in 2015-16. When compared against the number of cases where proceedings have concluded, this represents a conviction rate of 76 per cent. This is lower than the conviction rate in 2014-15 (84%), but higher than in 2013-14 (56%). However, it is important to note that the conviction rate can naturally vary from year to year. Comparable conviction rates for people proceeded under Breach of the Peace and Common Assault charges in 2015-16 are 84% and 74% respectively.

These comments confirm the points we make above and also a point we have made elsewhere ie that conviction rates, as published by the Scottish Government, are not true conviction rates.

¹² <https://beta.gov.scot/publications/charges-reported-under-offensive-behaviour-football-threatening-communications-scotland-act/pages/4/>

The published rates show the number of convictions as a proportion of the number of concluded cases. They do not show the true conviction rate ie the number of convictions as a proportion of the number of charges in a given reporting period.

We have had email correspondence with the COPFS statistician responsible for the data that is used as the basis for the annual Scottish Government research paper “Charges reported under the Offensive Behaviour and Threatening Communications (Scotland) Act 2012”. She confirms that the figures for convictions provided in this publication are not re-published once all charges are concluded. She confirms that official statistics on conviction rates are as published by the Scottish Government in the Criminal Proceedings statistical bulletin each year.

This matters more because not all types of charges proceed through the system at the same rate. The Scottish Government’s own evidence shows that Offensive Behaviour charges are dealt with relatively slowly. In addition, because those cases which have a guilty plea are likely to be concluded within one reporting period, the published statistics are likely to overestimate the true conviction rate.

A better estimate of the true conviction rate for the Act is to take all the convictions over the whole period of the Act and show them as a proportion of the total number of charges for the same period. The conviction figure cannot cover cases not concluded for the most recent years (2015-17)¹³. **The total number of charges over the period is 1394 and the total number of convictions up to May 2017 was 507. This amounts to a conviction rate of just over 36%. This is an extremely low figure for any crime.**

Table 2

	2011-12	2012-13	2013-14	2014-15
Common assault	76%	75%	74%	72%
Common assault of an emergency worker	92%	91%	92%	95%
	86%	86%	84%	84%
Breach of the peace	85%	83%	85%	82%
Threatening or abusive behaviour	87%	87%	85%	85%
Offence of stalking	78%	75%	79%	77%

¹³ Bear in mind that cases have taken as long as 23 months to conclude so span a number of reporting years.

- 4. Do you have a view on the focus of section 1 of the 2012 Act, which criminalises behaviour surrounding watching, attending or travelling to or from football matches, which may not be criminalised in other settings?**

See answer to Question 1 paragraph

- 5. Do you consider that other existing provisions of criminal law are sufficient to prosecute threats made with the intent of causing a person or persons fear or alarm or inciting religious hatred? If so, could you specify the criminal law provisions? Or does repeal of section 6 risk creating a gap in the criminal law?**

In the first four years of the Act there were 46 charges under this Section of the Act resulting in 12 convictions. Since 2013-14¹⁴ there has been 28 charges with only 9 relating to football. This is an incredibly small number of charges and convictions and there appears to be no genuine need for this legislation given that there was already legislation which could deal with this kind of offence eg the Communications Act 2003 which appears to be the preferred option for police and prosecutors.

- 6. Do you have a view on the proposed transitional arrangements in the Bill: that there should be no further convictions for section 1 and 6 offences from the date on which the repeal of those offences takes effect; and that the police will cease issuing fixed penalty notices at least from the point at which the Bill is passed?**

We believe that it is only just that if the 2012 Act is repealed, all charges made under this legislation should be dropped and that no further charges should be brought against individuals using it. If Parliament, on behalf of the Scottish people, determines that this law is not fit for purpose then it would be unjust and unnecessary for fans to face further hardship as a result of it. We also believe that all fans convicted under the law, who could not have been convicted under any other legislation, should at the very least have the opportunity to appeal these convictions and perhaps a transitional arrangement could allow for such a process to take place

- 7. To what extent do you consider that the 2012 Act has assisted in tackling sectarianism?**

Since the Act does not actually mention the word sectarianism and since it is designed specifically for football which is not the location of most religiously-aggravated charges (both before and after the introduction of the OB Act) then it was never likely to address the complicated issue of sectarian behaviour. Not surprisingly therefore, it hasn't.

¹⁴ <https://beta.gov.scot/publications/charges-reported-under-offensive-behaviour-football-threatening-communications-scotland-act/pages/4/>

Indeed, we would suggest that actions/words/songs etc were re-defined to classify them as 'sectarian' or 'hate crime' in order to fit with the public discourse around the Act and to justify its retention. This has the effect of diverting the attention of policy makers away from the very serious increases in particular kinds of genuine hate crime which impacts on real people as opposed to hypothetical victims.