As the Minister responsible for the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the Act), I am responding to the Justice Committee’s call for written evidence on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill.

As we all know, the vast majority of football supporters are well behaved and simply want to enjoy watching our national game with family and friends in a positive and good-natured atmosphere. However, sadly, a minority of fans continue to behave inappropriately, ignoring the impact they have on others. We all want to preserve and enable free speech, even comments made in bad taste, but behaving however you please with no regard for others undermines the concepts of equality, fairness and justice.

Sadly, we continue to hear and see offensive singing, banners and chants on the terraces as a minority of football fans behave as if they are exempt from the standards of behaviour that are expected and considered acceptable across Scottish society.

Legislation sets the standard for what is acceptable in our society and what is not. We therefore need to ensure that we have appropriate legislation in place so that those who indulge in threatening and abusive behaviour at football can be dealt with appropriately.

The Act continues to be an important tool in tackling all forms of offensive behaviours, including sectarianism and expressing support for terrorist organisations. Repealing the Act removes protection from the vast majority of fans who wish to enjoy football in a safe and inclusive environment. Repeal sends the message that the rights of the majority of fans are less important than the minority who wish to engage in abusive and offensive behaviour.

Repeal of section 6 of the Act, which is not linked to football, would remove the specific offence in Scots law criminalising threats made with the intent of inciting religious hatred. Unlike elsewhere in the UK, prior to the introduction of the Act, this specific offence did not exist. This was an obvious gap and it was clear that legislation was required to address it. Repeal of section 6 will remove protection from religious communities in Scotland and would be a backward step. We have a duty to ensure that protection is maintained.

If opponents to the Act believe the Act is flawed then we need to look at how it can be improved rather than repealing it with no alternative. This government has always been open to discussing people’s concerns about the Act and has been willing to work with others to ensure the legislation is working effectively – and we continue to do so.

In recognition of the fact that police and prosecutors need the appropriate powers to tackle hate crime, Parliament’s concerns in relation to the Act, and the need to provide a responsible and practical way forward, I commissioned the independent Review of Hate Crime Legislation in Scotland. Lord Bracadale is leading the review and will consider whether existing hate crime law is the most effective approach for the justice system to deal
with criminal conduct motivated by hatred, malice, ill-will or prejudice. I understand that he has invited party leaders and relevant spokespeople to meet with him to discuss the work of the review and I hope that these offers will be accepted.

The review includes the hate crime elements of the Act, as it is a key piece of hate crime legislation in Scotland, but of course is not limited to the Act. The review is about all hate crime legislation and covers all areas of Scottish life – not just sectarianism or football. Lord Bracadale’s consultation paper, which will be published at the end of the month, will seek feedback from across society on issues with the current legal framework. The review will be informed by the evidence gathered.

It is important to remember that the Act was not created without consultation. Prior to the introduction of the Act, there were a number of official level meetings organised to discuss it with civic Scotland and other interested parties. These included Her Majesty’s Inspectorate of Education (HMIE); COSLA; Association of Chief Police Officers Scotland (ACPOS); Licensing bodies; Church of Scotland; Archdiocese of Glasgow; Catholic Church in Scotland; Muslim Council of Scotland; Action of Churches Together in Scotland; Scottish Council of Jewish Communities; and a general stakeholder event attended by the former Minister for Community Safety and Legal Affairs.

There was support for the introduction of the Act from academics; legal experts; and football authorities/clubs. More recently, Victim Support Scotland has stated they are “opposed to the repeal of the 2012 Act unless there is a viable alternative to support victims of threatening communication and religious prejudice.”

The annexes attached to this letter set out the Scottish Government’s position and continued support for the Act and respond to many of the assertions and criticism that have been made about the Act:

**Annex A** – provides responses to the Committee’s specific questions

**Annex B** – provides background information on the Act and explores why the Act was introduced, what it does and why it continues to be needed.

**Annex C** – provides responses to the specific criticisms in the Bill’s accompanying documents.

**Annex D** – provides responses to a number of criticisms that have been made against the Act by those that oppose it.

The Act strengthens the law and allows for a more effective response by police and prosecutors. Our vision is for a Scotland where everyone lives free from abuse and I believe that the Act has a role to play in achieving this.

**Annabelle Ewing**

Scottish Government
25 August 2017
1. Do you agree with the proposal in the Bill to repeal the 2012 Act? What are your reasons for coming to this view?

No, the Scottish Government does not agree with the proposal in the Bill to repeal the 2012 Act.

There is a problem with abusive and offensive behaviour at Scottish football. The failure of football authorities and clubs to effectively tackle this issue provides a permissive environment in and around football where individuals feel able to behave in ways they could not elsewhere in society. It may only be a minority of fans who behave in these ways, but that minority is significant enough for it to tarnish the reputation of Scottish football and spoil the game for those who simply want to enjoy supporting their team.

Racist, religious and homophobic slurs and bigotry are excused as “banter”, as “passion” and as being caught up in the heat of the moment. This is not acceptable. Football is not the only sport which elicits passion and friendly rivalry from fans and other spectators, yet it is extremely rare to see abusive and offensive behaviour displayed in relation to other sports. The football house needs to be put into order if we don’t want our national game to become our national disgrace.

Introducing specific pieces of legislation to respond to specific problems is not unusual and is certainly not unique to this Act. For example, Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010 specifically targets involvement in serious organised crime. The legislation is used to identify the seriousness of the context in cases falling within it, however other legislation such as conspiracy could often be used. In addition, whilst it remains competent for a prosecutor in Scotland to bring a charge of Breach of the Peace, crimes of disorderly conduct are now commonly prosecuted under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. There is therefore strong precedent for the way in which the Act was developed and the fact that section 1 had a specific focus on issues relating to football.

The distinctiveness of football culture, and problems that arise as a result, means that the Act is not the first or only piece of legislation introduced to tackle a problem solely in relation to football. For example, legislation on the sale of alcohol exists which applies solely in relation to football. Controls over the carriage and consumption of alcohol, first introduced in 1980, are set out in Part II of the Criminal Law (Consolidation) (Scotland) Act 1995. Section 18 of the 1995 Act empowers the Scottish Ministers to designate sporting events and grounds that are subject to alcohol controls. The current designations state that all FIFA, UEFA and Scottish football matches played at the grounds of clubs in the Scottish Premier Football League, Lowland League and Highland League will be subject to alcohol controls. The controls do not apply to a non-designated event at a designated football ground – e.g. concerts or other sports.

Football is the largest spectator sport in Scotland and the flagship for how Scottish sport is perceived around the globe. We pride ourselves for being an open, friendly and welcoming nation, but this is not the image reflected in the aggressive, offensive and abusive behaviour that is still far too common at, and in relation to, football matches.
Becoming the Scotland that we want to be – a Scotland where everyone, regardless of background can live and raise their family in peace and contribute to, and benefit from, the wellbeing of the whole of our society – can only be achieved through action. The fact that offensive and abusive behaviour remains such a significant problem in football, following years of failure by the football authorities and clubs to take sufficient action, is testament to the fact that this problem will not simply go away by ignoring it or excusing it and it is unrealistic and naïve to think it will.

The Act, or a viable alternative, is necessary. Repealing the Act in full would send the message that offensive and threatening behaviour in relation to football, including the celebration of terrorism, is decriminalised and acceptable. This would have a negative impact on communities targeted by the abuse and make it less appealing to families to attend football matches in Scotland. Repealing section 6 removes the protection against threats intended to stir up religious hatred which would put Scotland behind the rest of the UK.

We have always said that we would be happy to discuss how the legislation could be improved and we remain open to such discussions. However, no one can rationally look at the offensive and abusive behaviour that is a regular feature at Scottish football and conclude that there is no problem to be addressed. If we are serious about tackling such behaviour, then we need strong legislation which sets the standard of what is and is not acceptable. If the critics of the Act believe that the legislation does not effectively tackle such behaviour, then they should provide constructive suggestions on how the perceived problems with the Act could be addressed.

The Act remains one element of our work to tackle hate crime and repeal would send a message beyond football that abusive behaviour is acceptable in Scotland. The question we must ask is 'do we want to live in a country where offensive and abusive behaviour and threats of violence are considered an acceptable, day-to-day part of living in modern Scotland?' If the answer is no, as it should be, then our efforts should be focussed on making sure the Act works effectively, rather than repealing with no viable alternative to appease a vocal minority.

2. Did you support the original legislation?

Yes. Our laws help to set the standard for what is acceptable in society and what is not. A central reason for developing new laws is to reflect the changing standards in society and to ensure safeguards are in place to protect vulnerable people. The Act recognises the particular problems that arise at, and in relation to, Scottish football, and makes it clear that offensive and abusive behaviour to the detriment of anyone will not be tolerated.

The suggestion that academics, law makers, football clubs and fans did not support the legislation when it was introduced is incorrect: in reality, there was a significant amount support for the legislation and its intentions:

**Academics**

- **Dr Kay Goodall**: “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”. Justice Committee Written Evidence, 26 August 2011

- **Professor John Kelly, Lecturer on sport and expert on football and sectarianism at University of Edinburgh** said: “I’m very heartened I have to say. I was a little bit worried with the rushed nature of the bill, but having read the bill briefly this morning I’m very, very heartened I have to say. I think it’s important that the bill doesn’t mention the word “sectarian” or “sectarianism” once, certainly to my reading, and I think that’s important because it recognises for the first time, I think, in Scottish law, it recognises that this issue isn’t about people having a sectarian identity per se this is about hatred of someone else’s identity, so I’m very heartened by that.” **BBC News, 17 June 2011**

**Legal expert**

- **The late Paul McBride QC** said: “I think this is the most important legislation to be passed in Scotland in the past 30 years, because it deals with a problem we absolutely have to solve. The government is correct in bringing it in as quickly as possible, there’s no reason for delay. As legislation goes, it’s simple as pie - you don’t even need to be legally qualified to understand it. I think this bill sends out a powerful, symbolic message from the Scottish Government. It is the Scottish Government’s first bill in Holyrood in this parliament, and it says very clearly that this behaviour will not be tolerated in any way whatsoever. That will hopefully mean the escalation from violence to sending parcel bombs, etc., will be nipped in the bud much earlier.” **Scotsman, 18 June 2011**

**Football clubs**

- **Peter Lawwell, Chief Executive**: “Celtic Football Club welcomes the introduction of this legislation. The issues it seeks to address are problems for society as a whole and not just football. The type of behaviour intended to be covered by this legislation has no place anywhere in Scottish society.” **Celtic Football Club statement on 17 June 2011**

- **Rangers Football Club statement**: “We are encouraged to see the Scottish Government recognises in this bill that offensive behaviour or singing by fans are issues that affect many clubs and look forward to seeing legislation enforced more evenly and consistently than it has been in the past. We have repeatedly made our position abundantly clear - there is no place in football for sectarian, racist or offensive behaviour and support legislation to deal with these matters as effectively as possible.” **17 June 2011**

**Fans**

- **Martin Riddell, Association of Tartan Army Clubs**: “The Association of Tartan Army Clubs by and large supports the bill on the basis that something must be done, because our national game is being tarnished” **Justice Committee Evidence Session, 6 September 2011**

Whilst some of these individuals and organisations may not fully support how the legislation has been operating since it was introduced, it is clear that there was support for specific legislation to tackle the issue of offensive behaviour at football and therefore
reviewing and, if required, amending the legislation would be a more sensible way forward than repeal.

The criticism that the Act was simply a knee jerk reaction to a specific ‘Old Firm’ match is false and misleading. The Act is a consequence of decades of ignoring and excusing this type of offensive behaviour at football. It will be recalled that the 2010-11 football season saw unacceptable behaviour in Scottish football reach an intolerable level, with sectarian and offensive behaviour, misconduct from players and managers, threat, threats, and live ammunition and bombs sent to prominent figures directly and indirectly associated with football.

While this assertion that the Act was simply a knee jerk reaction to this particular ‘Old Firm’ match is not correct, it is certainly true to say that most people associate football-related sectarianism and other forms of abusive behaviour with Rangers FC and Celtic FC. For most of the time the Act has been in operation, these teams have not played in the same division and have rarely met in competition. When they did meet, significantly larger policing operations were required to maintain order in comparison to most other football matches.

Since Rangers were promoted to the Scottish Premiership for the 2016-17 season, the two teams have met on six occasions in league and cup fixtures. These fixtures saw reports of effigies being hung within a stadium; a young boy being hit by a glass bottle and having to go to hospital for treatment; large scale offensive singing and offensive banners; and racist gestures by supporters. It therefore seems very odd that as we move into a phase of increasingly regular ‘Old Firm’ matches, parliament is to consider a Bill for the Act to be repealed. Repealing a law at the point that it is most likely to be needed defies logic.

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?

The Act strengthens existing law by removing the requirement for the Crown to prove that the accused's behaviour would cause fear and alarm to a reasonable person, as per breach of the peace and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and instead focuses on whether the behaviour would be likely to incite public disorder. It is wider than section 38 in that it covers offensive, as well as threatening or abusive, behaviour.

The offence also has extra-territorial application, which makes it possible for a prosecution to be brought in relation to behaviour which takes place at matches played by Scottish teams elsewhere in the UK and abroad (this covers all Scottish teams including local clubs and the national team).

The COPFS confirmed in its submission to James Kelly’s consultation on the repeal of the Act that there is some behaviour which may be prosecuted under section 1 which would not be capable, or would not be securely capable, of being prosecuted under any other provision, such as the extra-territorial effect of the legislation. The previous Lord Advocate, in his evidence to the Justice Committee, referred to the benefit of not having to “shoe horn” cases into the existing law.
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?

Section 1 of the Act focusses on football and a key aim of the Act was to challenge the identified problem of abusive football-related behaviour. There is no doubt that there is a particular problem with such behaviour at, and related to, football and it is right that we should take action to address it.

There are contexts where strongly held religious, political or cultural views are acceptable and quite appropriate. The unacceptable cost to individuals, communities and, ultimately, society means that we cannot afford to allow football to be a permissive environment for abusive, offensive or threatening behaviour. We believe that the vast majority of football fans are well-behaved with little need for interference from the law. However, there is a small, often determined, minority for whom provoking, antagonising, threatening and offending behaviour is seen as part and parcel of what it means to support a football team. Whatever their motivation, the Act demonstrates that such a view is mistaken and will not be accepted.

When the independent Advisory Group on Tackling Sectarianism in Scotland (‘the Advisory Group’) was gathering evidence they reported that “Almost everyone who addressed the question of sectarianism in Scotland mentioned issues associated with football.” (Advisory Group report, December 2013, paragraph 6.65), and that, along with Loyalist and Irish Republican marches and parades, football was seen as being one of the most visible contributors to and manifestations of sectarianism in Scotland.

In their reports, the Advisory Group highlighted that football matches provided a “permissive environment” which allowed those attending to behave in ways they would not in any other environment. Such an environment does not spring up overnight and does not occur where those with influence, such as football clubs and authorities, have taken effective action to tackle the social problems that manifest themselves at football matches.

There is no evidence that other sports are affected in the same way by such high levels of antisocial behaviour and it is therefore difficult to justify extending the Act to cover all sports. To do so would not be based on evidence but would be to appease the vocal minority which has persistently criticised the Act and the purposes behind it.

Loyalist and Irish republican parades are also perceived by the public to be a visible manifestation of sectarianism. However, an analysis of police data from key local areas was carried out by the University of Stirling as part of their work looking at the Community Impact of Public Processions and did not demonstrate any notable spikes in antisocial or criminal behaviour attributable to the processions. Such findings support the decision to focus the scope of the Act on football where a particular problem could be demonstrated. However, as we have been from the outset, we remain open to changes to the legislation based on evidence and will give consideration to any new evidence that is presented to us.

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?
Section 6 brings Scotland into line with the rest of the UK by specifically addressing threats intended to stir up religious hatred. There is no other legislation which specifically covers this. As recognised by the Bill’s Financial Memorandum, the evaluation of section 6 found that police respondents who had experience of using section 6 powers were satisfied that the incidents of offending communication they dealt with were not just abusive, and so capable of being prosecuted under existing legislation, but fitted the definition under section 6 (i.e. consisting of material that contained a threat of serious violence that was designed to have had, or was likely to have caused, fear or alarm to a reasonable person).

Section 6 does not in any way affect a person’s right to criticise or comment upon religious/non-religious belief matters, even in harsh terms. However, the legislation makes it an offence to make threats of serious violence or death or with the intent of stirring up hatred against a religious/non-religious belief group which would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm.

We are all responsible for our words and actions. When these are no longer reasonable and threaten others they are no longer justifiable and the individual concerned must be accountable to the consequences.

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 think it is correct – should Parliament pass the Bill in its current form – that there should be no further convictions for offences under sections 1 and 6 of the 2012 Act from the date on which repeal of those offences takes effect. We consider that there may well be an issue in relation to the legislative competence of sections 2(3) and 3(2) of the Bill, standing Article 7 ECHR.

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

It is incorrect to continually present section 1 as only tackling sectarianism. Section 1 covers hateful behaviour – stirring up hatred against others based upon their religious affiliation, race, colour, nationality, ethnic origin, sexual orientation, transgender identity or disability; threatening behaviour – engaging in fighting or challenging other supporters to fight; and otherwise offensive behaviour – expressing support for terrorist organisations, celebrating individuals involved in terrorist activity and celebrating, glorifying or mocking incidents involving the loss of life or serious injury. The key principle behind the Act was to set out in legislation the levels of behaviour that were considered unacceptable and to make it clear that such behaviour could be tackled through the application of legislation whenever necessary.

It is also wrong to continually present the Act as the only action that the Scottish Government is taking to tackle sectarianism; indeed, legislation has been just one of the many strands of the Scottish Government’s work to tackle sectarianism over the past six years. Our approach has focussed on three main elements:
• Independent advice on the development of the agenda through the Advisory Group on Tackling Sectarianism in Scotland.
• Gathering evidence through both quantitative and qualitative approaches.
• Grassroots community-based work to tackle the identified sectarian problems within individual communities through tailored approaches responding to the specific circumstances in each community. This also included a strong focus on the development and delivery of educational tools.

The Act was additional to this work and did not impact on the delivery of any of our educational or community-based initiatives. This work continues and includes a Scotland-wide roll out of the first ever national education resource on tackling sectarianism for primary and secondary schools, embedding this work in our schools through teacher training.
Background to the Act

1. The Act is a consequence of decades of failure to take effective action to tackle abusive behaviour at, and related to, football in Scotland. Those of us who remember the 1970s and 1980s will remember high levels of antisocial behaviour, including high levels of violence, associated with football which we simply would not accept now. Improvements to stadium infrastructures, including safer stadiums and better facilities and more effective policing and stewarding have helped to ensure that we do not see a return to those days. But, significant as those changes were, they failed to tackle the underlying problems, allowing some to feel they still have free rein to say whatever they wish and behave however they wish within the context of football. Football has consistently failed to get its house in order and move with the times and we cannot allow our national sport to continue to be tarnished by exhibitions of offensive prejudice.

2. The Scottish Government maintains a strong focus on community-based work and education to prevent bigotry, prejudice and discrimination taking hold in the first place and this has included work to tackle racism, homophobia, gender inequality, religious intolerance and sectarianism. But we also need to ensure that we have robust legislation in place to tackle bigotry, prejudice and discrimination when it does occur. Legislation sets the standards for what is and is not acceptable in society and our legislative framework needs to evolve to ensure it reflects as well as drives the attitudes of the society we live in. Abuse, prejudice and bigotry are simply not acceptable in any part of 21st century Scotland and that includes football.

3. The 2010-11 football season saw an unacceptable level of football-related antisocial behaviour requiring a robust response. It is not correct to suggest that the so-called “shame game” - a Scottish Cup replay between Celtic FC and Rangers FC on 2 March 2011 featuring a number of incidents involving players on and off the pitch and 35 arrests for a variety of sectarian and racial breach of the peace offences - was the specific driver for the introduction of the Act.

4. Rather, this was the highest profile incident in a series of incidents during the 2010-11 football season which included misconduct, threats and, most significantly, the sending of parcel bombs to the then Celtic FC manager Neil Lennon and two high-profile supporters of the club, the late Paul McBride QC and the then Labour MSP Trish Godman. In a separate incident, live ammunition was sent in the post to Neil Lennon and the then Celtic FC players Paddy McCourt and Niall McGinn.

5. In their reports, the Advisory Group highlighted that football matches provide a “permissive environment” allowing some of those attending to behave in ways they may not in other contexts. Such an environment does not spring up overnight and does not occur where those with influence, such as football clubs and authorities, have taken effective action to tackle the social problems that manifest themselves at football matches.

6. Although the Act is not simply about either sectarianism or football, it is important to note that when the Advisory Group was gathering evidence they reported that “Almost everyone who addressed the question of sectarianism in Scotland mentioned issues associated with football.” (Advisory Group report, December 2013, para 6.65). Football,
along with Loyalist and Irish Republican marches and parades, continues to be widely perceived as a major contributor to, and visible manifestation of, sectarianism in Scotland.

What the Act does

7. The Act was never about replacing existing law. Rather, it was about giving better and sharper tools to police and prosecutors to more effectively respond to abusive behaviour at, and related to, football.

8. The Act is made up of two parts and it is important to consider them separately:

**Section 1 (Offensive Behaviour at Football)**

8.1 Section 1 of the Act covers hateful, threatening and otherwise offensive behaviour at regulated football matches that is likely to cause public disorder:

- “Hateful” behaviour is behaviour which stirs up hatred against others based upon their religious affiliation; race; colour; nationality; ethnic origin; sexual orientation; transgender identity or disability.

- “Threatening” behaviour covers behaviours such as engaging in fighting or challenging other supporters to fight.

- “Other offensive behaviours” are clearly defined in the Lord Advocate’s guidelines as behaviours which express support for terrorist organisations; celebrate individuals involved in terrorist activity; celebrate, glorify or mock incidents involving the loss of life or serious injury.

8.2 It is important to note that this section of the Act is not restricted to sectarianism as is too commonly believed.

8.3 Section 1 strengthened existing law by removing the requirement for the Crown to prove that the accused’s behaviour would cause fear and alarm to a reasonable person, as is the case with breach of the peace and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and instead focuses on whether the behaviour would be likely to incite public disorder. It is wider than section 38 in that it covers offensive, as well as threatening or abusive, behaviour.

8.4 The offence also has extra-territorial application, which makes it possible for a prosecution to be brought in relation to behaviour which takes place at matches played by Scottish teams elsewhere in the UK and abroad (this covers all Scottish teams including local clubs and the national team). The recent Champions League qualifying match between Linfield FC v Celtic FC in Belfast on 14 July 2017 is an example of where the Act’s extra-territorial powers could be of application. The match was marred by a number of incidents which saw UEFA issue charges to both clubs for rule infringements. If trouble is caused by Scottish fans, or foreign fans that later come to Scotland, they can be charged under the provisions of the Act. This would be lost if the Act was repealed.

8.5 The Crown Office and Procurator Fiscal Service (COPFS) confirmed in its submission to James Kelly’s consultation on the repeal of the Act that there is some behaviour which may be prosecuted under section 1 which would not be capable, or would not be securely capable, of being prosecuted under any other provision such as
Breach of the Peace, or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. It is also beneficial that the Act allows identification of crimes related to football and to take account of this in sentencing decisions. In addition, the extra-territorial effect of the legislation means that those intent on causing trouble cannot simply travel abroad and get away with behaviour that would not be acceptable in Scotland. In his evidence to the Justice Committee, the previous Lord Advocate referred to section 1 bringing the benefit of not having to “shoe horn” cases into the existing law.

8.6 Furthermore, the independent evaluation of the operation of section 1 of the Act carried out by the University of Stirling found that police officers described the Act as providing a previously lacking simplicity and clarity – particularly around sectarian behaviour and offensiveness. It suggested that some offensive words or gestures which were associated with celebrating or supporting terrorism or terrorist organisations, but which were difficult to prosecute under either breach of the peace or section 38, now clearly fell within the ambit of the new legislation.

Section 6 (Threatening Communications)

8.7 Section 6 criminalises any communication with at least one other person which threatens a person with serious violence or death, or incites others to kill or commit a seriously violent act against a person, or which implies such a threat and threats intended to stir up religious hatred. The offence is committed where that communication would cause a reasonable person to suffer fear or alarm and the accused either intended to cause such fear and alarm, or was reckless as to whether the communication of the material would cause such fear and alarm. The offence applies to text, images, video and sound, communicated by any means (for example, by post, the internet, leaflets).

8.8 It is important to note that section 6 is not linked to football and is not limited to sectarianism.

8.9 Repeal of this section would be deeply problematic as, unlike elsewhere in the UK, prior to the introduction of the Act there was no specific offence in Scots law criminalising threats made with the intent of inciting religious hatred. This was an obvious gap and it was clear that legislation was required to address it. Repeal of section 6 in its entirety will clearly remove protection from religious communities in Scotland and, in the current world climate, where demonisation of people based on their religious belief is still widespread, removal of this protection is a backward step.

Why the Act continues to be needed

9. Recently published findings from 2016-17 confirm that offensive behaviour continues to be a problem in Scottish football. There were 377 charges under section 1 of the Act in 2016-17, a 32% increase. While it is the case that the increase can be explained by 140 charges with one particular fixture (the 2016 Scottish Cup Final), these latest figures demonstrate that this kind of behaviour is still very much present in Scottish football.

10. The point made by the Advisory Group about football providing a ‘permissive environment’ for unacceptable behaviour (highlighted at paragraph 6 above), was also recognised in a nationally representative survey to investigate public attitudes to sectarianism. That survey found that football was the most commonly mentioned factor that
people believe contributes to sectarianism in Scotland (88% mentioned it, while 55% thought it was the main factor).

11. The supporters survey conducted as part of the evaluation of Section 1 in 2014 (2,185 respondents) sheds some light on the prevalence of certain potentially offensive behaviours and showed that around a third of both home (28%) and away (35%) supporters reported hearing negative references to a person’s religious background, as well as skin colour (8% of home supporters) and sexuality (19%).

12. The Act sends out a strong signal and helps tackle the problematic and unacceptable elements of football culture. Recent evidence based on a supporters survey (conducted as part of the evaluation of section 1 in 2014) showed that there was consensus around certain kinds of behaviour at football which the Act is designed to tackle: 85% agreed that it is offensive to sing songs or make remarks about people’s religious background or beliefs, while 90% agreed with this in relation to celebrating the loss of life and 82% in relation to support for terrorist organisations.

13. In addition, a nationally representative YouGov poll commissioned by the Scottish Government (June 2015) found that a clear majority of respondents (82%) agreed sectarian singing or chanting at football matches is offensive and that a similar proportion (83%) supported laws to tackle offensive behaviour at and around football matches. 80% of those surveyed also directly supported the Act.

14. The Act is designed to tackle hateful, threatening and otherwise offensive behaviour at regulated football matches, not only in relation to sectarianism but also in relation to behaviour which stirs up hatred against others based on religion, race, colour, nationality, ethnicity, sexuality, transgender identity or disability. It also allows police to tackle threatening behaviour, such as fighting or challenging others to fight, as well as ‘other offensive behaviours’ including support for terrorist organisations or celebrating individuals involved in terrorism as well as celebrating, glorifying or mocking incidents which involve loss of life or serious injury.

15. It sends a clear message that these kinds of offensive and threatening behaviours cannot be tolerated in a modern Scotland which values and promotes diversity and inclusion.

Opposition to the Act

16. The two basic arguments against the Act are that:

   (a) It is fundamentally unfair in its targeting of football fans.

   (b) There are existing laws in place which cover everything that the Act covers.

17. We should consider the implications of these two arguments:

   (a) It is fundamentally unfair in its targeting of football fans.

17.1 Section 1 of the Act recognises that there is a specific problem with behaviour at, and related to, football matches: the arguments supporting this have been set out above. Those who oppose the Act argue that the Act is unfair in singling out football fans and question why the Act does not apply to, for example, rugby, golf or cricket. The answer is simple; the offensive behaviours displayed by football fans at, and related to, football matches are not replicated in any other sport.
17.2 There is therefore no obvious need for section 1 to be extended to other sports, or indeed wider events. However, as we have been from the outset, we remain open to changes to the legislation based on evidence and will give consideration to any new evidence that is presented to us.

17.3 In arguing for the repeal of the Act, those who oppose it fail to address, or even acknowledge, that extending or amending section 1 could also provide a competent response to the concerns that they themselves are raising.

17.4 It is also worth noting the following comments from ‘An evaluation of section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012’ published in June 2015:

(1.21) Section 1 is not unique. Some of its language appears in other statutes, and much of what it deals with is familiar to criminal lawyers. Sport spectatorship (especially football) has for many years attracted specific regulation by the criminal law throughout the UK and many parts of Europe. Both Scotland and England/Wales for example have specific laws to cover drinking in and around stadia, and England/Wales has specific legislation on football ticket touting, pitch invasions and racist chanting at football.

(1.22) Much of the behaviour of football supporters is governed by the ‘public order’ family of offences (such as the common law offences of breach of the peace or mobbing and rioting) to which section 1 belongs. Whether something is a risk to public order depends on the circumstances of where it happens, so that behaviour which might be disruptive but lawful in everyday life can become unlawful in a mass football setting. Furthermore, one of the aims of these offences is to prevent disorder before it happens. The offences therefore catch supporters who are attempting to do things which could cause a disturbance, not just those who already have.

(b) There are existing laws in place which cover everything that the Act covers.

17.5 As we have explained in paragraphs 8.3 to 8.9, the Act does provide additional powers so the statement that other existing laws can be used is incorrect.

17.6 However, if it is argued that the Act is not needed because existing legislation is already in place to deal with the type of behaviour the Act seeks to address, then the logical conclusion is that repealing the Act will make no difference whatsoever to the number of charges being made or the types of people being charged, as those currently charged under the Act would simply be charged under a different piece of legislation, such as Breach of the Peace, for exactly the same behaviour. However, because we know that the Act provides powers beyond the scope of other existing legislation, then the consequence of repealing the Act means that there will be no available powers to deal with this type of problem behaviour.
1. The documents supporting the Bill contain specific criticisms of the Act. The Scottish Government does not agree with these criticisms and this annex sets out our responses to these.

Policy Memorandum

2. The Policy Memorandum (PM) argues that the legislation is flawed on several levels, including its alleged illiberal nature, its alleged failure to tackle sectarianism, and the suggestion that other legislation already exists to address the issues the Act is intended to cover. The PM argues that repeal will reduce police and court costs; build relationships between police and football supporters; and build community cohesion. We do not believe these claims are correct.

Illiberal nature of the Act

3. The PM states that section 1(2)(e) of the Act, which criminalises “other behaviour that a reasonable person would be likely to consider offensive” (where it is or would be likely to incite public disorder) is confusing and unclear. It argues that the terms of this section do not differentiate between the specific behaviour it is targeted at (i.e. offensive behaviour at football) and a wider category of behaviour that people should be free to engage in. In other words, it is arguing that individuals do have the right to be offensive, as what may be considered to be offensive to some would not be considered offensive to others, and therefore “offensiveness” is a vague concept that cannot be adequately defined to allow clear prosecutions to take place.

4. In this respect, the Act has been interpreted as illiberal and liable to be unfair and arbitrary in its application due to claims it does not allow the public to understand what is and what is not allowed.

5. We do not agree with this assessment and therefore we do not believe the Act is illiberal. Police officers make judgments in relation to the application of many pieces of legislation, particularly in relation to antisocial behaviour, and on a daily basis police officers assess situations and make judgements on the behaviours of individuals and groups. The need to do this is certainly not unique to the Act.

6. Police officers are trained to use their judgement and guidance is issued to help achieve uniformity of application of the law across Scotland. It is inevitable that there will be some very clear cut cases, while others, such as those cases involving the use of language, require an officer to make a judgement. When making these judgements, consideration has to be given to the intent of the behaviour – i.e. whether it was intended to provoke the victim – and how the target of the behaviour views the behaviour – i.e. do they believe they were targeted with hate speech?

7. To repeal the Act because police officers have to do what they have to do on a daily basis in relation to numerous other pieces of legislation is not logical and demonstrates a simplistic understanding of the law. Ultimately, it is legal precedent established through prosecutions that define the extent to which any piece of legislation can be applied, as well as its limitations.
The Act also states that the reasonable person test needs to be applied. Although not defined in the Act, the “reasonable person” is a standard frequently used in law to denote a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining criminal negligence or liability. The standard holds that each person owes a duty to behave as a reasonable person would under the same or similar circumstances. While the specific circumstances of each case will vary, the reasonable person standard does not.

The Lord Advocate’s guidelines, issued to support the implementation of the Act and subsequently updated, give very clear examples of what is to be considered offensive—chanting about support for terrorist organisations; singing sectarian songs; and singing songs that celebrate disasters and the loss of life.

There is evidence which shows that the general public agree that these things are offensive. The independent evaluation of the Act (University of Stirling, 2015) found that people thought it was offensive to sing songs or to make remarks about people’s religious background or beliefs (85% agreeing), or which celebrate the loss of life (90% agreeing), or which support terrorist organisations (82% agreeing), or making political gestures at football matches (60% agreeing). Therefore we do not believe that the Act is illiberal. Rather, we believe that it deals with a specific problem with behaviour related to football which does not manifest itself elsewhere to the same degree in society.

Failure to tackle sectarianism

It is important to be clear that the Act is about more than tackling sectarianism. Section 1 (Offensive Behaviour at Football) of the Act covers hateful, threatening and otherwise offensive behaviour at, or in relation to, regulated football matches. Hateful behaviour stirs up hatred against others based upon their religious affiliation; race; colour; nationality; ethnic origin; sexual orientation; transgender identity or disability. Section 6 (Threatening Communications) of the Act covers threats intended to stir up religious hatred.

The annual analysis of charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act show that in every year apart from 2012-13, the majority of charges have been for Threatening Behaviour i.e. where the accused threatened another/other person/people; the behaviour involved the accused acting in a disorderly or aggressive manner, making threats or challenging others to fight, or where they engaged in fighting. This demonstrates that the Act has been used to challenge a range of behaviours and is not purely focused on tackling sectarianism.

Other legislation already exists

As already discussed in Annex A, the Act is not about replacing existing law but about giving even better and sharper tools to police and prosecutors to allow for a more effective response. It also recognises the problematic elements of football culture specifically, which are perpetuated by a minority of football supporters, and allows these to be tackled directly.

Repeal will reduce police and court costs

It is argued that the Act is not needed because there is existing legislation in place. In this scenario, offenders would still be charged and processed through Court meaning that the pressures and costs identified would not change. The Scottish Government view is that
the Act provides new and additional powers, so repeal will remove some protections and reduce the powers of the courts. This could potentially reduce police and court costs, but only as a consequence of exposing the public to greater level of risk.

Repeal will build relationships between police and football supporters

15. The PM suggests that Mr Kelly considered amendment of the Act as an alternative to repeal, but felt only repeal would address the main criticisms that have been made of the Act. It goes on to say that Mr Kelly is of the view that the Act has become so discredited in the eyes of many football fans that nothing short of wholesale repeal would have a chance of restoring their confidence and re-setting relations with the police. The PM additionally argues that some supporters feel that the policing of football matches is disproportionate (e.g. the use of containment, also called “kettling”), and invasive of privacy (e.g. the routine filming of fans). Tensions around the introduction of the Act and the extent to which certain sections of fans felt ‘over-policed’ were highlighted in the evaluation report (2015) as having placed a degree of strain on police, club and fan relationships.

16. The Act makes no provision for policing and this is entirely a matter for Police Scotland. It is very important to separate the policing of the Act from the Act itself. If the policing of the Act is found to be at fault, then that needs to be dealt with appropriately by Police Scotland. However, it does not mean that the Act itself is bad legislation.

17. If the Act is repealed, it is unlikely that the policing of football matches will change. Police Scotland has been clear that the use of body-worn cameras is an effective method of collecting evidence and carrying out post-match investigation. This is a convenient way of gathering evidence and there is no reason to believe that the repeal of the Act will have any impact on this operational policing matter whatsoever.

18. Given that the basis of the claimed difficult relationships between the police and football fans appears to be essentially about policing tactics, and it seems unlikely that those tactics will change, it is difficult to see how repeal of the Act will therefore make any difference to those claimed relationships. Indeed, if relationships are a major concern, then the route to resolving this issue is through direct engagement between football fans and the police. However, we are aware that many of those who oppose the Act have been extremely reluctant to engage with the police under any circumstances. This is unlikely to change if the Act is repealed.

Repeal will build community cohesion

19. The PM says that “while the 2012 Act may have been well intentioned, the Act’s implementation has arguably resulted in a number of negative equalities impacts. By repealing the Act, it is hoped that the impact on some of the affected groups could be alleviated”. The PM goes on to argue that section 1 of the Act specifically targets a group (football fans) made up predominantly of men (young men in particular) and therefore the Act may unfairly target a specific group who choose to attend a football match, while “ignoring equivalent behaviour in other settings”. In relation to section 6 it argues that the offence refers specifically to the incitement of religious hatred only and that this is flawed as it does not provide parity for all of the protected groups.

20. Calls to repeal the Act ignore the potential detrimental impact of repeal on community cohesion and the range of equalities groups who are currently protected by the legislation. Responding to the Repeal Bill consultation, both the Equality Network and Stonewall Scotland expressed concerns about repealing the Act. They both felt that repeal could send
the message to the public that expressions of prejudice and hatred at football matches were condoned and decriminalised.

21. The Scottish Government has always maintained that the vast majority of football supporters are well-behaved and simply wish to support their team. It is a minority of supporters who cause problems and ruin the enjoyment of the match for other spectators. The Act is clear – don’t indulge in behaviour that is likely to incite public disorder and which is threatening or expresses hatred towards others based on religious beliefs, race, colour, nationality, sexual orientation, transgender identity or disability or which is otherwise offensive when attending, or travelling to or from, a regulated football match.

22. The Act therefore targets anyone who indulges in offensive and threatening behaviour and is not aimed at any particular group or section of society. We therefore do not agree that the Act unfairly targets young men or one section of society. We understand the importance of engaging with young people and are committed to working with young people through grassroots community and education projects.

23. In relation to the criticism of section 6, repealing the Act would be deeply problematic. Section 6 brings Scotland into line with the rest of the UK, where threats intended to stir up religious hatred have been criminalised since 2006, and provides increased protection on issues like serious on-line abuse which is a growing concern in all of Scotland’s minority communities.

24. The Equality Network and Stonewall Scotland have both expressed concerns that section 6 does not provide parity for all protected groups but have argued that, rather than repealing the Act, reviewing and amending it would be a better option.

25. When the Act was passing through Parliament as a Bill, the Justice Committee recognised the differing views on whether to widen section 6 to cover other categories of protection and acknowledged that this was an issue that would require further consideration. The Committee invited the Scottish Government to consult on widening section 6 and we have been and remain open to considering amendments.

Financial Memorandum

26. The Financial Memorandum (FM) aims to estimate the costs that have been incurred as a result of the implementation of the 2012 Act, and assesses what the financial implications might be of repealing the Act.

27. The FM outlines estimated costs that fall on the Scottish Administration (Crown Office and Procurator Fiscal Service, Scottish Courts and Tribunal Service, Scottish Prison Service), local authorities (Criminal Justice Social Work) or other bodies (specifically Scottish Legal Aid Board and Police Scotland) and attempts to argue that savings could be made were the Act not in force.

28. However, the FM appears to contradict the PM, which argues that the Act was not needed because other existing legislation is already in place to deal with the type of behaviour the Act seeks to address. As previously highlighted, it could be argued that if other existing legislation is in place, then the same people would be charged under different legislation and therefore the pressures and costs to the various bodies identified in the FM would not change.
Clarity in prosecuting

29. A key aim of the Act was to provide clarity to allow football-related offences to be prosecuted more easily, and to ensure that they are recorded as football-related. The Act does this and it could therefore be argued that repeal of the Act will put police and prosecutors back to a position where they need to spend time working through different pieces of legislation to identify the most appropriate to allow them to prosecute rather than using the Act. As such, this could actually impact negatively on resources, and it may also make it more difficult to secure convictions. Having a specific offence related to football is also beneficial as it allows for the easy identification of crimes related to football and allows for better monitoring of the scale of problem behaviour relating to football.

Extra territoriality

30. The Act allows for extra-territoriality which makes it possible for a prosecution to be brought in relation to behaviour which takes place at matches played by Scottish teams in the rest of the UK and abroad. Offences such as breach of the peace and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 do not have extraterritorial effect and we believe that it is important for Police Scotland and Scottish Courts to have such power to ensure that those who behave in violent and abusive ways are appropriately prosecuted and receive a fitting penalty.

31. Repeal of the Act as proposed would mean that this power is lost. While some money could be saved by not being able to pursue such prosecutions and obtain convictions, the ability to prosecute on an extra-territorial basis is an important tool which has been made available to Police Scotland to allow them to take action to challenge the offensive behaviour of anyone following their club regardless of where they are in the world.

32. This power helps to ensure that those who wish to indulge in abusive and bigoted behaviour cannot sidestep the law by travelling to football matches played by Scottish clubs or the national team elsewhere in the UK and abroad. Scottish football fans largely have a good reputation when travelling abroad, and the extra-territorial element of the Act will help to ensure this is maintained by allowing Police Scotland to deal with disruptive individuals whose behaviour would tarnish that reputation.

Section 6 (Threatening Communications)

33. Section 6 of the Act brings Scotland into line with the rest of the UK by specifically addressing threats intended to stir up religious hatred. There is no other legislation which covers this specific offence. Therefore repealing the whole Act means that charges cannot be prosecuted under section 6 and a financial saving could be made by this. However, while it can be argued that there could be a saving made by repealing this section, we believe that this would be at the expense of protection for Scotland’s communities.

34. Ensuring that Scotland’s minority communities have, at a minimum, the same rights and protection in law as their counterparts in the rest of the UK is essential. We value the diversity that makes up modern Scotland and we want to see all of our communities thrive. On-line abuse is an increasingly prevalent issue for those communities we engage with. Indeed, there is evidence from England and Wales that after each terror incident there is a new spike in on-line hate abuse and going forward it is clear that tackling such abuse will be a major challenge for politicians, police and prosecutors.
35. Repealing section 6 will both remove protection from communities and send entirely the wrong signal about how much we value these communities. Indeed, it is our view that there is a stronger argument to be made for extending the coverage of section 6 so that it covers a wider range of protected characteristics, rather than simply being limited to religion.

Policing costs

36. The FM also raises the issue of policing of football matches and acknowledges that it is unlikely that repeal of the Act will make a significant difference to the cost of policing high-profile fixtures since those fixtures will still have to be policed in much the same way post-repeal.

37. The FM calculates an estimated £2.5 million per annum is spent policing ‘Old Firm’ matches which would equate to expenditure of around £12.5 million since the Act came into force in 2012. This calculation is inaccurate as it fails to recognise that there has been no consistent fixture between Celtic and Rangers due to Rangers’ liquidation in 2012 and their subsequent placing in the lower leagues, not re-entering the Premiership until August 2016. This would not be a saving if the Act was repealed, as the FM itself acknowledges that these matches would be policed at the same level regardless.

38. It is worth noting that the cost of ‘Old Firm’ fixtures (or other football matches) does not stop with the policing of the match itself. These fixtures can have a significant impact on public resources and society as a whole. As well as large scale policing operations at and around the stadium, police have to deal with pre-match misconduct and continue to deal with the fallout from matches into the evening and following day. This can lead to the need for an increased presence of officers in the city/town centre, on public transport and across the country as fans arrive back from the match. Other emergency services are also impacted with Accident and Emergency departments putting on extra staff to deal with increased numbers of admissions.

39. There are two points which are worth considering here. The first is that the best way to reduce policing costs in relation to football is to tackle the offensive, abusive and violent behaviour that means matches require a high level of policing. Repealing the Act without a viable alternative will do nothing whatsoever to discourage the problematic behaviour that leads to a need for a high level of policing at particular football matches.

40. Indeed, it is more likely that repeal will lead to those who enjoy recreational abuse feeling emboldened by what will be perceived as the police and prosecutors being stripped of powers. It therefore could be argued that rather than reducing, or even maintaining police costs, the antisocial behaviour of fans emboldened by the repeal of the Act could in fact lead to a need for additional officers at and around certain football matches and in the city or town centre before and after the match.

41. The second is the cost to wider society of such behaviour. Abusive and offensive behaviour, whether it is aimed at individuals or communities more generally, undermines community cohesion. It builds walls and barriers between people and turns them into something that is fundamentally different from ourselves. It is the basis of “othering”, the process of casting a group or individual aside to establish our own identity through opposition to and, frequently, vilification of this other.

42. The “othering” can be based on race, religion, gender, sexual orientation and so forth, but the end result will always negatively impact on the health and wellbeing of the individual or community targeted as well as society as a whole. We want to live in a society where
people are free to celebrate their culture and identity, but when that identity is based on opposition, dislike and even hatred of others, we have a problem. The cost of this to society is incalculable in money terms. Legislation like the Act is important in making it clear that demonising and vilifying others is not acceptable.

43. Finally, the FM raises the issue of the budget for FoCUS (Football Coordination Unit for Scotland) within Police Scotland. The FM says that it is impossible to say with any certainty whether, and if so how, repeal of the Act would affect the expenditure on FoCUS (an FOI confirmed the annual budget to be £769,690, mainly staffing costs of 15 officers). The FM acknowledges that it would be an operational decision for Police Scotland whether to disband FoCUS, or reduce its budget, in response to repeal and confirms that the operational actions of FoCUS which relate to the Act, but which are not specifically provided for in the Act itself (such as filming football fans at, and on the way to, football grounds), may continue after the Act is repealed.

44. FoCUS was not established as a direct result or consequence of the introduction of the Act. FoCUS was established as one of the measures contained in the Joint Action Group (JAG) report, published on 11 July 2011. It was supported by the Scottish FA, Scottish Premier League, Scottish Football League, Celtic Football Club and Rangers Football Club. The JAG report stated that ‘A National Football Policing Unit is established, enabling the Scottish Police service to deliver a consistent approach when policing football in Scotland, coordinating football intelligence, enforcing football related legislation and supporting post-match investigations’.

45. FoCUS officers continue to play an important intelligence role in relation to matches which helps to ensure that problematic behaviour can be dealt with swiftly and effectively. We do not believe that there is any desire to disband FoCUS and acknowledge that, even if it were to be disbanded, the costs involved are mainly for staffing and officers would be assigned to other duties meaning that there is no significant cost saving to be made. As the Act makes no provision for policing any decisions regarding staffing would an operational matter for Police Scotland.
OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (REPEAL) (SCOTLAND) BILL – ADDITIONAL POINTS

1. There have been a number of criticisms of the Act which appear to have been repeated on numerous occasions through both the media and social media. This annex seeks to provide accurate information in response to these.

The Act has a low conviction rate

2. It has been argued by opponents of the Act that it has a low conviction rate. As it takes a degree of time for charges to pass through the court system, it is too early to robustly look at conviction rates for 2016-17. However, provisional figures provided in the Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2016-17 report show that of the 377 charges for which court proceedings had commenced, 196 had concluded, resulting in 145 convictions (74%). Comparable data presented in last year’s publication for 2015-16 showed that there were 86 concluded charges and there were 73 convictions (85%).

3. The latest and most robust information on conviction rates come from the most recent ‘Criminal Proceedings in Scotland’ publication which 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%. 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 vary from year-to-year.

4. Comparable conviction rates for people proceeded under Breach of the Peace and Assault charges in 2015-16 are 84% and 74% respectively.

The Act breaches Human Rights

5. The PM argues that the Act is incompatible with the European Convention on Human Rights (ECHR). It suggests the section 1 offence has been viewed as restricting Article 10 rights to freedom of expression and creating legal uncertainty through the vagueness and subjectivity of key concepts it employs, such as behaviour that a reasonable person would be likely to consider offensive. In addition, it argues that concern remains about the implications of section 6 for ECHR under Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression).

6. The Act is compatible with the ECHR; it was passed by Parliament and was not referred to the Supreme Court by the Law Officers. Further, it has been judicially considered in the context of challenges under the ECHR; those challenges did not succeed.

7. In March 2015 the Court of Appeal considered the case of two individuals found guilty of singing ‘Roll of Honour’ at a regulated football match in October 2013. The Court of Appeal refused leave to appeal over the lack of evidence to conclude there was a likelihood that the song being sung could incite public disorder but granted leave to appeal over the question of whether there was a conflict with Article Seven of the European Convention on Human Rights – that the Act does not make it clear that singing the ‘Roll of Honour’ song would contravene the Act and that there is nothing in the content that expresses words of hatred. The High Court considered the case and refused the appeal.
The Scottish Government failed in its duty to evaluate the Act

8. Opponents of the Act have accused the Scottish Government of failure to deliver post-legislative scrutiny of the Act as required by section 11 of the legislation. Section 11 of the Act required the Scottish Government to review the operation of section 1 and section 6 over a period of at least two years and to report to Parliament within a further 12 months (by 1 August 2015).

9. The Act does not specify the scope or scale of the evaluation, only that ‘Scottish Ministers must consult such persons as they consider appropriate’. On 12 June 2015, the Scottish Government published an independent evaluation of section 1 carried out by the University of Stirling in conjunction with ScotCen Social Research. A wide range of stakeholders were consulted by both evaluation teams during the course of their duties in carrying out these reviews. Researchers at The University of Stirling conducted two online supporters’ surveys in 2013 and 2014 (the first was live between August and September 2013 and the second between July and August 2014), seeking respondents’ views about their match day experience since the legislation came into force. The first survey was completed by supporters of all 42 SPFL clubs. A total of 1,945 completed surveys were received with Celtic supporters returning most responses (310) followed by Hearts (299) and Rangers (180). A second online fan survey was carried out at the end of 2013/14 season and, again, was completed by supporters of all 42 SPFL clubs. A total of 2,185 survey responses were received with Celtic supporters again returning most responses (423), followed by Rangers (249) and Hearts (232).

10. A separate evaluation of section 6 was carried out by the Scottish Government's Justice Analytical Services team.

11. Both of these evaluations were used as the basis for an overarching report published by Paul Wheelhouse MSP, former Minister for Community Safety & Legal Affairs.

12. The reports laid in parliament fully addressed the Scottish Government’s statutory obligation and at the time and ever since, no-one in the Scottish Parliament has implied otherwise.

Analysis of data

13. The Scottish Government has monitored the Act since its inception and each year has provided a detailed analysis of all charges, including information about the nature of the charges, the accused and victims of incidents reported under the Act. This data also contributed to the statutory review of the Act.

14. More detailed information about the charges and the analysis of them can be found in the yearly publications. However, the most recent findings illustrate the problem still felt in terms of offensive behaviour associated with football. In 2016-17 there were 377 charges under section 1 of the Act reported by the police to the Crown Office and Procurator Fiscal Service (COPFS). This is a 32% increase in charges between 2015-16 and 2016-17. It is important to note that this increase can be attributed to the high number of charges (140) associated with the Rangers v Hibernian Scottish Cup Final fixture held at Hampden stadium on 21st of May 2016.

15. This analysis should not be interpreted as a direct measure of changes in offensive behaviour at and around football matches. It is based on data on charges made under
section 1 of the Act by Police Scotland and the ability to pursue charges is dependent on policing decisions around the deployment of officers and policing strategies. Trend data over a number of years shows that changes from year to year are often driven by a small number of specific events and therefore caution should be applied about drawing conclusions from comparing data across different years.

16. The data on section 1 of the Act, shows that the Act is tackling a wide range of behaviour, and far beyond incidents that might be described as ‘sectarian’. The legislation covers hateful, threatening and otherwise offensive behaviour at regulated football matches and the most common category of offence in 2016-17 was threatening behaviour (79%), followed by hateful behaviour (17%) and otherwise offensive (10%). The proportions have changed since last year with a higher proportion of threatening behaviour in 2016-17. This can be partly explained by the Scottish Cup Final where 45% of the charges in 2016-17 related to threatening behaviour occurred.

17. In terms of the method of abuse only 12% of the charges relate to offensive singing (last year it was 25%). Safety is the main priority at a football match and addressing threatening behaviour is key to ensuring that events remains safe for all of those attending.

18. In 2016-17, as with all previous years, almost all of those accused were male. Of the 377 charges, 373 (99%) involved a male accused. Just under a third (31%) of the charges involved an accused aged 20 or under, 39% of charges involved an accused aged 21-30 and 30% were 31 or older. While some argue that the Act unfairly targets young people, Police Scotland have provided assurance that they do not target any age group specifically and that where criminality is detected, regardless of race, colour creed, age sex or team affiliation, it is dealt with appropriately and fairly. The Scottish Government has provided support to SACRO to deliver a diversionary prosecution scheme aimed at first time and less serious offenders, and continues to work with stakeholders to improve community engagement and education.

19. While some argue that the Act has been used to target supporters of certain football clubs, the evidence shows that the Act has been used across a wide range of fixtures involving a variety of clubs, rather than suggesting an undue focus on any particular club. Most recent figures show that the accused were noted to be affiliated with 20 football teams. The accused had an affiliation with Rangers in 110 charges (29% of the total, with 60 of these charges associated with the Scottish Cup Final), Hibernian in 101 (27% of the total, with 75 of these charges associated with the Scottish Cup Final), Celtic in 60 (16% of the total) and Hearts in 17 (5% of the total).

Key points from Evaluation of section 1

20. A multi-method research study was conducted by academics and led by Stirling University to evaluate the implementation and impact of new powers introduced in section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. This comprised:
   - online surveys of supporters of Scottish football clubs in 2013 and 2014;
   - interviews and focus groups with those involved in the implementation and enforcement of the legislation including Sheriffs, Procurators Fiscal, Police Officers and Club Security Officials;
   - meetings and focus groups with football fans and representatives of supporters groups;
   - analysis of secondary data sources, including data from the Crown Office, the Scottish Government and Police Scotland; and
• a degree of observational research and informal interviewing in and around stadia on match days.

21. The research aimed to provide evidence on the Act’s impact on disorder and offensive behaviour at football matches. The key objectives for the research were as follows:
   • To assess the implementation of the legislation and to identify any barriers that may be impeding its effectiveness;
   • To evaluate whether the atmosphere and behaviour at and around football matches has improved since the introduction of the Act;
   • Relatedly, to assess whether the Act has also resulted in a reduction in offending at and around football matches; and finally,
   • To examine supporters’ perception of the legislation, in terms of their understanding of its content and acceptance of its objectives.

Key Findings

22. The evaluation found that the primary value of the act for police stakeholders was that it gave them added purpose, and added clarity, particularly when dealing with sectarian behaviour associated with football. Greater clarity in dealing with demonstrations of support for terrorist organisations was found to be particularly valuable.

23. Policing and stewarding was considered inconsistent at different stadia, with inexperienced police officers and stewards failing to act on offensive behaviours or enforcing legislation in a manner which could be perceived as adversarial.

24. There were some concerns raised by fans and police officers that the Act had led to a strain on police, club and fan relationships at certain clubs due to certain sections of fans feeling over-policed.

25. Further concerns were raised by some police officers that the focus of resources was on in-stadia disorder and offensive behaviour (such as those associated with enthusiastic singing and displays of potentially offensive behaviour) at the expense of resources available to monitor more violent risk groups.

26. Fan and some stakeholder respondents expressed concern at the extent to which the Act was perceived as being targeted at younger fans. There were concerns that criminalising is disproportionate.

27. Sheriff views were divided, ranging from strongly supportive to critical. Supportive comments were focussed on the aims of the Act and the ability to tackle what was considered to be a serious problem. Others were concerned about human rights implications and clarity.

28. Fan perceptions of certain behaviours in relation to previous seasons provides an indication of long-term changes. Survey findings showed that 40% of home supporters felt negative references to religious background was less common in the 2013/14 season than in previous seasons, while only 3% thought it was more common. 56% of supporters felt the level of negative references to religious background was the same as in previous seasons. Qualitative research found similar views among fans and stakeholders, with fans of Celtic and Rangers describing a marked decline in certain types of offensive behaviour at home games.
29. These perceptions were backed up by official data on football-related offending, indicating a marked decline in football-related charges, including hate crime charges, between the first and second full years after the Act’s introduction, with a 24% reduction in S.1 charges overall between 2012-13 and 2013-14. However, the report highlighted the difficulty in determining whether some, or any of these reductions are attributable to the Act or the wider societal context which has seen declines in violence and disorder more generally over a number of years.

30. The Stirling research team made 8 recommendations, the majority of which were aimed at football clubs and Police Scotland. These included: emphasising the message that the Act was about all hate crime - rather than just sectarianism; improving relationships between fans, clubs and football authorities; improving policing and stewarding; and using diversionary methods instead of formal criminal sanctions in certain situations.

**Supporter survey limitations**

31. The views of Supporters Direct Scotland (SDS) members (and non-members who were forwarded the link to the survey) may be considered a reasonable proxy for those of Scottish football supporters in general, although the characteristics of SDS subscribers are likely to be distinctive in a number of important respects. Those signed up to SDS will necessarily have access to the internet and are likely to have a reasonable degree of ICT literacy.

32. Despite these caveats, the sampling strategy used has resulted in survey responses being received from supporters of all 42 SPFL clubs and an almost even split of season ticket holders and non-season ticket holders, in both surveys. As such, and while acknowledging its limitations, it provides a workable basis for hypothesising about the views and experiences of Scottish football fans in general.

**Public support**

33. Mr Kelly’s consultation on the repeal Bill attracted 3,261 responses (33 from organisations and 3,228 from individuals). A majority of respondents were either fully or partially supportive of repeal of section 1 (73%) and section 6 (69%). It has been suggested that these figures show that a majority of people oppose the Act and support its repeal. However, a number of professional opinion polls conducted since 2011 have shown significant support for the Act by the wider Scottish public:

- 91% of Scots agree that stronger action needs to be taken to tackle sectarianism and offensive behaviour associated with football in Scotland. (TNS-BMRB, 4 Sept 2011).

- 85% of Scots agree that sectarianism should be a criminal offence. (TNS-BMRB, 4 Sept 2011).

- 60% of Scots support the Act (Panelbase, May 2015: 14% against and 26% don’t know; 1,013 people surveyed). 59% of those surveyed who identified themselves as Rangers fans supported the law, while support among Celtic fans was higher at 64%.

- The online supporter’s surveys conducted as part of the independent evaluation of the Act found that people thought it was offensive to sing songs or to make remarks about people's religious background or beliefs (85% agreeing), or which
celebrate the loss of life (90% agreeing), or which support terrorist organisations (82% agreeing), or making political gestures at football matches (60% agreeing) (Stirling University, June 2015).

- Scottish Government commissioned YouGov poll shows 76% of those interested in football and 84% of those not interested in football support the Act (June 2015).