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

Graham Ross

The aim of this Member's Bill is to repeal, in its entirety, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. The Bill has been introduced by James Kelly MSP.

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Executive Summary

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act") received Royal Assent on 19 January 2012 and came into force on 1 March 2012. The 2012 Act provides for two new criminal offences: one which criminalises offensive and threatening behaviour at, or in connection with football matches; and an offence which criminalises threatening communications which contain threats of serious violence or threats intended to incite religious hatred.

The 2012 legislation has been the subject of much debate both as it progressed through the Parliament and since the 2012 Act came into force. Some view the legislation as a necessary tool in combatting unacceptable and offensive behaviour at, or in connection with football matches; behaviour which can veer into racism, sectarianism and homophobia; others see the legislation as "illiberal", on the grounds that it targets only football fans; and as unnecessary, as there is other legislation which can be used to deal with such behaviour.

This briefing provides information on the background to, and the provisions within, the 2012 Act and examines the policy underlying the Member's Bill which is seeking to repeal the 2012 Act.

Background to the 2012 Act

In 2011, a number of incidents during football matches (primarily involving Celtic FC and Rangers FC), and in the wider public domain, led to the Scottish Government organising a summit in March 2011 to discuss the impact of sectarianism on Scottish football and on wider society.

The intention of the summit was to assess and make proposals on certain aspects of the game in order to protect football's reputation in Scotland and beyond. The summit was attended by Scottish Ministers and representatives of the former Strathclyde Police force, Celtic FC, Rangers FC, the Scottish Football Association, the Scottish Football League and the Scottish Premier League.

At that time, the issue of sectarianism and associated behaviour at football matches had been to the fore of the debate. In addition to behaviour during football matches, a number of other serious incidents led to calls for an examination of, and responses to, sectarian attitudes which pervade some sections of Scottish society.

For example, in 2011, the former Celtic FC manager, Neil Lennon, former MSP Trish Godman and the late Paul McBride QC were the intended recipients of what were described by the police as 'viable parcel bombs'. The devices were found at various locations in the west of Scotland. Also in January 2011, bullets addressed to Mr Lennon which had been sent from an address in Northern Ireland, were intercepted at a mail sorting office in Glasgow. Bullets were also sent to two Celtic players who had represented Northern Ireland at international level. The police also arrested individuals who had allegedly posted sectarian comments on the internet directed at Mr Lennon and El-Hadji-Diouf, a Senegalese footballer who had been on loan at Rangers FC.

During a game between Celtic and Rangers on 2 March 2011, the respective managers, Neil Lennon and Ally McCoist were involved in a heated touchline confrontation which was also cited as a reason to examine behaviour at football matches in Scotland.

Following the summit in March 2011, the Scottish Government issued a joint statement:

“ Football is Scotland's national game and at its best combines pride and passion with a sense of responsibility, respect and discipline. There is absolutely no place in football for those who let the passion become violence, and the pride become bigotry, and we commit to doing all in our power to maintain the good reputation of Scottish football. No football club is directly responsible for the violence, disorder and bigotry seen on our streets and in our homes, and we condemn such acts entirely. However, we accept that as professionals and role models, those who play and coach the game do have a particular duty to ensure that their behaviour on and off the pitch sets a high standard.”

“ We accept that those involved in football can positively influence the behaviour and attitudes of the wider community, and so do have a role in addressing the problems that affect such communities, whether that be violence or bigotry or alcohol misuse. We therefore commit to work together to ensure that however we can contribute to addressing these issues, we will. In particular, we agree on a renewed focus on tackling alcohol misuse. ¹ ”

Following the summit, a Joint Action Group (JAG) was established to develop proposals and identify ways to deliver on the commitments agreed at the summit. The [report of the JAG](#), published on 11 July, sets out those proposals including one to introduce an Offensive Behaviour at Football and Threatening Communications (Scotland) Bill with the intention that the Bill would be passed by the Parliament before the end of 2011.

The Original Bill

The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill ("the Offensive Behaviour Bill") was introduced in the Scottish Parliament on 16 June 2011. The Scottish Government initially indicated that it would like to see the Offensive Behaviour Bill passed and in force in time for the start of the 2011-12 Scottish football season which was due to start in July 2011. In order to achieve this, it was intended that the Offensive Behaviour Bill would be subject to emergency legislation procedure (see the section on 'Procedural History' below). At that time, concerns were raised about the Government's intention to progress the Bill without a full consultation and the opportunity for the Parliament's Justice Committee to take evidence from stakeholders. Bill McVicar, then Convener of the Law Society of Scotland's Criminal Law Committee said:

“ We understand the importance of tackling sectarianism. This is a very serious issue and one that needs both attention and action from our political leaders. However, it is because of the importance of this issue that the Scottish Government needs to allow adequate time to ensure the legislation can be properly scrutinised. It is particularly vital for sufficient time to be allowed at stage 1, the evidence gathering stage, for proper public consultation. Without this consultation there is the risk that the legislation could be passed which either does not meet its objective or is inconsistent with existing law, making it unworkable. It could also result in legislation that is open to successful challenge. ² ”

The then Moderator of the General Assembly of the Church of Scotland, the Right Reverend David Arnott, met with the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP, to discuss the Bill and stated:

“ We appreciated the opportunity to meet with the Minister on this very important issue but we remain nervous about this haste in which the bill is being rushed through Parliament, apparently in time for the start of the football season. Whilst we are not against the ideas in this bill, we remain unconvinced of the wisdom of this approach. The speed at which it is being rushed through means it appears to lack scrutiny and clarity. The government is rightly asking for support from across civic Scotland, but is not giving civic Scotland much time to make sure they are happy with the content. ³ ”

In the Policy Memorandum to the Offensive Behaviour Bill, the Scottish Government stated that the measures in the Bill needed to be in place before the start of the 2011-12 football season to, amongst other things, begin to repair the damage done to the reputation of Scottish football and Scotland more generally by recent events and that this had curtailed the opportunity to engage in a standard consultation on the provisions in the Bill. The Government also pointed out that its plans to introduce the legislation had been discussed with a range of partners including the Association of Chief Police Officers in Scotland, COSLA, the Scottish Courts Service, the Crown Office and Procurator Fiscal Service and representatives of the Scottish Football Association and the Scottish Premier League.

Procedural History

As pointed out above, the Scottish Government initially intended to fast-track the Offensive Behaviour Bill through Parliament so that it could become law in time for the new football season in late July 2011. To do this, the Government proposed that it should be treated as

an emergency bill, although it also proposed a gap between stage 1 (to be taken on 23 June 2011) and stages 2 and 3 (to be taken on 29 June 2011). Under the Parliament's standing orders, the ordinary procedure for emergency bills is that Parliament takes all three stages on the same day.

The Justice Committee took evidence on the Offensive Behaviour Bill from five panels of witnesses at two meetings on [21 June](#) and [22 June 2011](#). The Committee did so in the knowledge that it would not have time to produce a report on the Bill in time for the stage 1 debate (as would normally be the case). The Committee's intention was to take as much as evidence as possible in the limited time available so as to help inform the stage 1 debate and any debate on amendments to the Bill. The Committee also issued a call for written evidence on the Bill (necessarily with a very short deadline for responses) which was targeted at key stakeholders. In response, the Committee received [82 written submissions](#).

On 23 June 2011, the Parliament debated a motion to treat the Bill as an emergency bill. This was agreed to after a division. The Parliament then agreed by division to consider the Bill according to the timetable set out above. Following this, the Parliament debated the Bill at stage 1.

Shortly after the stage 1 debate, and just before the Parliament was to vote on whether to agree the general principles of the Bill at stage 1, the then First Minister Alex Salmond MSP, announced that, if the Parliament agreed to the general principles, he would propose an extended timetable for consideration of the Bill at stages 2 and 3. He indicated that this would, whilst allowing more scrutiny, enable the Bill to be passed by the end of the year. He said that he hoped that providing more time for evidence-taking on the Bill would increase the likelihood of the Parliament and wider Scottish society achieving consensus on the issues raised.

Following the First Minister's comments, the Parliament went on to approve the general principles of the Bill at stage 1 (by a majority of 103 to 5, with 15 abstentions). On 29 June, the Parliament agreed, without division, a motion not to take the remainder of the Bill as an emergency bill; that the Justice Committee be the lead committee on the Bill; and that stage 2 be completed by 11 November. Stage 2 was duly completed on 22 November 2011 and the Bill was passed at Stage 3 on 14 December 2011 with a division of 64 for (all SNP Members), 57 against (all other Members) and no abstentions.

The 2012 Act

The 2012 Act makes provision for two new criminal offences, one involving "offensive behaviour at regulated football matches" (the Section 1 offence) and one involving "threatening communications" (the Section 6 offence).

The Section 1 offence

The Section 1 offence includes a number of separate elements. One is that the offending behaviour is "in relation to a regulated football match" and such behaviour does not have to take place in the ground where a match is being held and on the day it is being held. Also covered is behaviour while the person is entering or leaving the ground or on a journey to or from the match. The same is true in relation to non-domestic premises where a match is being televised - so a person can commit the offence in for example, a pub where the match is being televised.

The second element of the offence is that it involves behaviour that is or would be "likely to incite public disorder". Thirdly, the behaviour must be at least one of the following:

- behaviour "expressing hatred of, or stirring up hatred against", a group of persons based on their religious affiliation or a group defined by reference to their colour, race, nationality, ethnic or religious origins, sexual orientation, transgender identity or disability - or against any individual member of such a group;
- behaviour motivated by hatred of such a group;
- behaviour that is threatening; or
- other behaviour that a reasonable person would be likely to consider offensive.

Subject to these requirements, the behaviour may be "behaviour of any kind including, in particular, things said or otherwise communicated as well as things done", and may be behaviour consisting of a single act, as well as behaviour that amounts to "a course of conduct".

The Section 6 offence

The Section 6 offence consists of communicating material to another person if one of two conditions (A or B) is satisfied - although it is a defence to show that communication of the material was reasonable in the circumstances.

Condition A is that the material "consists of, contains or implies a threat, or an incitement, to carry out a seriously violent act" against a person or persons; that the material or communication of it "would be likely to cause a reasonable person to suffer fear or alarm"; and that the person communicating the material intends to cause fear or alarm or is reckless as to whether that is the outcome.

Condition B is that the material is threatening and is communicated with the intention of stirring up hatred on religious grounds. Condition B requires intent (to stir up hatred on religious grounds), in contrast to condition A where recklessness as to whether the communication concerned would cause fear or alarm can be sufficient for that condition to be met.

Further provision makes clear that the "material" means anything capable of being read, looked at, watched or listened to (for example, photographs and audio or video recordings as well as text); and that material can be communicated by any means other than unrecorded speech.

Views on the original legislation

The Scottish Government's original proposal to legislate in this area, and the 2012 Act itself, led to very polarised views on whether the legislation was a necessary and proportionate response to the incidents which had preceded it. The legislation was viewed by some to be a necessary response to what was perceived to be a particular problem within football, while others felt that there were already laws in place which could deal with the behaviour that the legislation was seeking to address. Those opposed to the legislation also felt that it was illiberal in that it only applied in the context of football.

Those views have, more or less, remained constant over time. For example, the responses to the consultation on James Kelly's Member's Bill and the responses to the Justice Committee's call for evidence on Mr Kelly's Bill, were very similar to views on the original legislation. To that end, the following paragraphs very briefly outline some of the views expressed on the original legislation while views gathered in response to Mr Kelly's consultation and the Justice Committee's call for evidence are discussed in more detail later in this briefing.

The Section 1 offence and existing laws

The Policy Memorandum to the original Bill pointed out that, although there were a number of legal provisions which could be applied to disorderly and offensive behaviour at football matches, there was concern that a substantial proportion of such behaviour would not explicitly be caught by the current law.

For example, such behaviour could, in certain circumstances, be prosecuted under the common law offence of breach of the peace, or by using the offence of threatening and abusive behaviour at Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 ("the 2010 Act"). Where there is a racist element to the behaviour, prosecution using the offences at Part III of the Public Order Act 1986 (incitement of racial hatred) may also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and Section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, may also be relevant.

However, the Policy Memorandum to the original Bill suggested that a substantial proportion of offensive behaviour related to football which may lead to public disorder was not explicitly caught by the current law and that such behaviour may not satisfy the criteria for causing fear or alarm which is required to prove breach of the peace, or the offence of threatening and abusive behaviour at Section 38 of the 2010 Act.

With regard to the Section 1 offence, the Law Society of Scotland's criminal justice committee commented:

“ The Committee is of the view that the offence, under Section 1 does not improve on common law breach of the peace or Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010ⁱ. 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. ⁴ ”

ⁱ Section 38 of the 2010 Act provides that a person commits an offence if they behave in a threatening or abusive manner; the behaviour would be likely to cause a reasonable person to suffer fear or alarm; and intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

Giving evidence to the Justice Committee, the then Lord Advocate Frank Mulholland QC stated:

“...the definition of breach of the peace requires the conduct to be 'severe enough to cause alarm to ordinary people and threaten serious disturbance to the community' and 'genuinely alarming and disturbing, in its context, to any reasonable person'. Under that definition of breach of the peace, there have been cases in which a sheriff has ruled that supporters shouting racist abuse at a black player, or another supporter grunting in an ape-like fashion and shouting racist abuse at a black player, did not amount to breach of the peace. The view was taken that 'the conduct was over very quickly', that it was not 'flagrant', that it took place 'in the midst of the cauldron of sound which emanates from any large sports crowd' and that it could not 'be interpreted as conduct which would be alarming or seriously disturbing to any reasonable person in the particular circumstances of the football match'. In cases involving conduct at football matches, defences have been run that no fear and alarm is caused by offensive chanting and singing and at the end of the match it was clear that no public disorder resulted.⁵”

Whether the Section 1 offence is illiberal

Some stakeholders expressed concern that the Section 1 offence in the original legislation was illiberal in nature, focussing as it does on those attending football matches.

In its written submission to the Justice Committee on the original Bill, Celtic Football Club argued that the Bill could discriminate against football supporters by criminalising behaviour in a football environment which, in other circumstances, might not be considered unlawful.⁶

The Section 1 offence as enacted makes specific provision to criminalise conduct in relation to football matches rather than any other sport, activity, or event. The question is whether this is justifiable.

In the Policy Memorandum to the original Bill, the Scottish Government explained that the bill “has been limited to what the Government and partners agree is immediately necessary”, that football is Scotland’s national game with a high media profile, and that “there is something very specific and increasingly unacceptable about attitudes and behaviours expressed at football matches whether that is “sectarian”, racist or homophobic.”

Football as theatre

Another point put to the Justice Committee on the original Bill was that the question of whether football fans could be offensive or hateful completely missed the point. A football match, the argument went, should not be confused with real life outside the stadium; it was a rowdy and rough-edged species of theatre, and that was its unique appeal.

In his written evidence to the Justice Committee at that time, Dr Stuart Waiton developed this point further and argued that “the Football Bill consciously distinguishes football fan activity from the words and behaviour of artists, comedians and other performers. That football rowdiness is arguably part of a ‘performance’ specific to games is ignored. This aspect of the Bill appears to be wholly discriminatory against football fans who would no longer be treated equally under the law”.⁷

Giving evidence to the Justice Committee, Dr Waiton, said that he doubted the existence of sectarianism as a meaningful social phenomenon, outside of the “pantomime” of football. He went on to argue that people who found “poison” at football matches needed “a reality check”. On the role of the media, he sought to turn the tables, arguing that “the most profound prejudice and hatred” came not from the fans towards each other, but from the media (and politicians) towards the fans. He condemned the Bill as a “snobs law”.⁸

The Section 6 offence

There were some parallels between the debate on the Section 1 offence and the offence of threatening communications. In particular, the same question was asked as to whether the offence was fundamentally necessary.

The Scottish Government’s Policy Memorandum on the original Bill listed three statutory offences that might be used against threatening behaviour: the offence of “threatening and abusive behaviour” at Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the offences at Part III of the Public Order Act 1986 (incitement of racial hatred).

Section 74 of the Criminal Justice (Scotland) Act 2003 and Section 96 of the Crime and Disorder Act 1986, which provide for statutory aggravations on grounds of religious or racial hatred, may also be relevant; plus two common law offences (uttering threats and breach of the peace).

The Policy Memorandum went on to say that, while these laws were in place, they were not always easily applied to this behaviour. For example, the requirement for a “public element” can make a charge of breach of the peace difficult to bring in some cases. It can also be difficult to establish that someone actually intended to carry out a threat or incite someone else to commit a crime in relation to the common law offences of uttering threats and incitement. While the offence of “threatening and abusive behaviour” does not require a public element, it does require that the behaviour must be of a threatening and abusive *manner* and could not necessarily be used to prosecute threats made with the intent of inciting religious hatred. Finally, in relation to electronic communications, case law has left some doubt about whether the offence of improper use of a public electronic communications network at Section 127 of the Communications Act 2003 can be used to prosecute people who create offensive websites or “groups” on social networks, as opposed to sending threatening emails or other communications.⁹

In written evidence to the Justice Committee at that time, some legal experts doubted the Scottish Government’s analysis stating that as with the Section 1 offence, Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening and abusive behaviour) already provided an appropriate remedy, with an identical sentencing power to that proposed in the original bill .

In their written evidence, Dr Sarah Christie and Dr David McArdle stated that the Section 38 provisions on threatening or abusive behaviour could also be read to encompass the offence proposed in Section 6 of the Bill.

Section 38 provides that it is an offence for a person to behave in a threatening or abusive manner where that behaviour would be likely to cause a reasonable person to suffer fear or alarm and he or she either intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.

'Behaviour' in this context covers behaviour of any kind including, either as a single incident or a course of conduct, spoken threats, or threats communicated in other ways, and threats evinced through physical acts. If the individual were to have communicated material containing or implying a threat of serious violence, or material which is threatening and intends to stir up religious hatred, that would amount to behaving in a threatening, and no doubt in many cases, abusive manner which would be likely to cause fear or alarm to a reasonable person and so would be caught by that section. The Policy Memorandum queries whether Section 38 could cover all instances of behaviour intended to incite religious hatred but, given the nature of material designed to inflame religious 'hatred', the academics argued that it would be hard to envisage a communication which was not sufficiently abusive to cause fear or alarm to a reasonable person.¹⁰

Use of the 2012 Act

The following paragraphs provide statistical information on the use of both Section 1 and Section 6 of the 2012 Act since its inception.

The Scottish Government statistical bulletin [Criminal Proceedings in Scotland, 2015-16](#) provides information on people proceeded against and convicted under the 2012 Act between 2011-12 and 2015-16. The bulletin was published in January 2016.

	2011-12	2012-13	2013-14	2014-15	2015-16
Section 1					
convictions	2	67	86	76	131
proceedings	2	91	154	90	173
Section 6					
convictions	-	2	6	3	1
proceedings	-	2	7	6	2

The Table shows that there were 132 people convicted for offences under the 2012 Act in 2015-16. When compared with the number of people proceeded against, this represents a conviction rate of 75 per cent.

The bulletin points out that these statistics are not directly comparable with the COPFS reports on [Hate Crime in Scotland](#) or the Scottish Government publication [Charges reported under the Offensive Behaviour at Football and Threatening Communications \(Scotland\) Act 2012 in 2015-16](#). Both of those outputs use COPFS figures which measure individual charges at the case marking stage while statistics in the criminal proceedings bulletin are representative of closed cases that have reached a final verdict in court.

The "Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2015-16" was published in June 2017 and provides an overview and further analysis of charges reported by the police to the COPFS in 2016-17. The report provides information about the locations, dates of charges, the nature of the offensive behaviour, the age and gender of the accused, and the nature of the victims.

Section 1

The document states that, in 2016-17, there were 377 charges under Section 1 reported by the police to COPFS. This represents an increase of 32% on the 286 charges reported in 2015-16 and is the highest number of 'offensive behaviour at football' charges since the

2012 Act was introduced. The document states that the increase is explained by the 140 charges associated with the Hibernian versus Rangers Scottish cup final fixture at Hampden stadium on 21 May 2016.

The document points out that data has been gathered over a sufficient number of years to discern that changes from year to year are often driven by a small number of specific events, and therefore caution is advised when seeking to draw conclusions when comparing data across different years.

In 2016-17, as with all previous years, the accused in Section 1 cases were mostly males. Of the 377 charges reported, 373 involved a male accused. Thirty-one per cent 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.

The accused were noted to be affiliated to 20 football teams - a decrease from the previous year when affiliation to 33 teams was noted. Accused persons had an affiliation to Rangers in 100 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).

The most common category of offence in 2016-17 was threatening behaviour (79%), followed by hateful behaviour (17%) and 'otherwise offensive' (10%).

For the period 2016-17, there were 66 charges for hateful behaviour. Breaking down the hateful behaviour category further, 58 charges related to religious hatred. Catholicism and Protestantism were the main religions targeted within the religious hatred category. Catholicism was the main target, with hateful behaviour reported towards this religion in 44 charges - 75% of the total of religious hatred charges.

The majority of the charges reported occurred at a football stadium (69%). This represents an increase of 85% from the period 2015-16 (142 charges) to 2016-17 (262 charges). This increase can be explained by 137 of the 140 charges associated with the Scottish cup final between Hibernian and Rangers at Hampden.

After charges occurring at football stadiums, the next most common locations where people were charged under Section 1 were on a main street (19%), followed by public transport (8%).

Section 6

The report points out that, in 2016-17, there were 6 Section 6 charges reported to the COPFS. This compares to 7 charges in 2015-16, 4 charges in 2014-15 and 11 charges in 2013-14. One of the 6 charges in 2016-17 was related to football, which is the same number as in 2015-16 and 2014-15. There were 6 charges related to football in 2013-14. Social media was the medium used to send a threatening communication in 4 of the Section 6 charges in 2016-17.

The report states, that of the 6 charges reported, court proceedings had been commenced in all 6. At the time of publication, 3 cases were ongoing, 2 had resulted in convictions and were given monetary penalties and the other resulted in a harassment order.

Proposal for a Member's Bill

On 27 July 2016, James Kelly MSP lodged a proposal for a Member's Bill which seeks to repeal the 2012 Act in its entirety. Mr Kelly also published a [consultation](#) on his bill which closed on 23 October 2016. Mr Kelly proposed the repeal to the 2012 Act on the basis that the legislation was flawed on several levels including its illiberal nature, its failure to tackle sectarianism, and the existence of other charges which the police and prosecutors could use to tackle the behaviour in question.

Mr Kelly's consultation received a total of 3,261 responses. The Policy Memorandum to Mr Kelly's Bill states that a majority of respondents to the consultation were fully or partially supportive of repeal, both of the provisions in the 2012 Act relating to offensive behaviour at football (73%) and of the provisions relating to threatening communications (69%).

The main arguments advanced in support of repeal of the provisions relating to offensive behaviour at football included:

- the lack of time for adequate scrutiny of the 2012 Act during its parliamentary passage (see section on Procedural History above) and consequent flaws in drafting
- the lack of clarity in defining "offensive behaviour" and the criticism that the 2012 Act was consequently illiberal, unfair and arbitrary in its application
- the targeting of football matches and criminalisation of football supporters by contrast with other sports or events which might equally be viewed as involving antisocial or sectarian behaviour
- that the 2012 Act infringes of human rights and freedom of speech
- whether the 2012 Act was needed in light of existing legislation to address the behaviour in question
- the negative impact on police/football supporter relations following implementation of the legislation

Those opposed to the repeal of the provisions relating to offensive behaviour at football, provided the following reasons:

- the 2012 Act was effective in challenging antisocial and sectarian behaviour and should therefore, be retained
- the legislation provided a powerful message that such behaviour was not acceptable at football matches and its repeal would give the impression that such behaviour was permissible
- there was no alternative proposal to replace the 2012 Act with something else
- instead of repeal, the 2012 Act could be amended to address any weaknesses

With regard to the provisions dealing with threatening communications, arguments in favour of repeal were similar to those supporting repeal of the offensive behaviour provisions in terms of lack of clarity within the provisions; human rights and freedom of speech issues; and the existence of other legislation which would cover the offences in question. Those opposed to repeal of the threatening communications provisions argued

that there was no adequate provision in existing law and that the provisions in the 2012 Act provided additional protection regarding online threatening communications.

A [summary of the consultation responses](#) was published in November 2016.

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

The Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill ("the Repeal Bill") was introduced in the Parliament by James Kelly MSP on 21 June 2017. The Bill is seeking to repeal, in its entirety, the 2012 Act.

Section 1 of the Repeal Bill states simply that "The 2012 Act is repealed".

Consideration has also been given to how the Repeal Bill should deal with people charged under the 2012 Act but not yet prosecuted, or whose cases have not yet been concluded when the repeal of the 2012 Act takes place. The Member's stated priority is to bring to an end what he regards as the injustices of the 2012 Act as quickly as possible.

On that basis, the starting point for the Member has been that there should be no further convictions for Section 1 or Section 6 offences from the date on which the repeal of those offences takes effect. The effect should be that no further prosecutions would be brought, and that ongoing prosecutions would be abandoned, at least insofar as they relate to offences under the 2012 Act. However, a person may be charged with a number of offences arising out of the same incident, and even once a conviction is no longer possible for offences under the 2012 Act, a prosecution may still be relevant in respect of other offences charged (i.e. not those under the 2012 Act).

The Member was also concerned to ensure that appeal rights were unaffected by the repeal. As a result, people convicted (prior to repeal) will still be able to bring an appeal (subject to the same criteria that currently apply) post-repeal, including an appeal against sentence or against conviction (or both). On the same basis, the Crown will retain its right to appeal, including against acquittal. In this way, the Member believes that the Repeal Bill upholds the principle of parity in the criminal justice system.

Accordingly, the Repeal Bill allows for the possibility that a person may still be convicted, post repeal, under the 2012 Act in very limited circumstances – for example, where the person was previously acquitted by a court but where the Crown subsequently appeals that verdict successfully. However, the Bill's prohibition on further convictions post-repeal will apply to any new prosecution brought (following an appeal) under Section 119 or Section 185 of the Criminal Procedure (Scotland) Act 1995.

As well as criminal prosecutions, the 2012 Act allows Section 1 offences to be dealt with by means of fixed penalty notices (issued under the Antisocial Behaviour etc. (Scotland) Act 2004). A person issued such a notice by a police officer has the option of paying a penalty (currently £40) as an alternative to facing prosecution, but may also opt to be tried for the offence instead. If the person does neither of those things within 28 days, he or she becomes liable to pay a higher amount (currently £60).

The repeal of the 2012 Act would, by removing the offences themselves, end (on the same date that the repeal of the 2012 Act comes into force) the right to issue fixed penalty notices for such offences. As a consequence, Section 4 of the Repeal Bill repeals the entry in Section 128 of the 2004 Act that refers to Section 1 offences.

Written evidence on the proposed repeal bill

The Justice Committee has been designated lead committee for consideration of the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill.

The Justice Committee issued a [call for evidence](#) on the Repeal Bill which closed on 18 August 2017. At the time of writing, the Committee had received 278 submissions. The vast majority of submissions came from individuals with the others coming from organisations.

The intention of this section of the briefing is to present a broad analysis of opinions as to whether the 2012 Act should be retained, repealed or amended. The [full list of written submissions](#) is available on the Justice Committee web page.

As would be expected, opinion was still very much divided on whether the 2012 Act had been a reasonable and proportionate response to the incidents which gave rise to it.

A substantial majority of the individual responses to the Committee's call for evidence were in favour of repealing the 2012 Act as set out in the Repeal Bill.

The main reasons put forward in favour of repeal mirrored, to a certain extent, those expressed in response to Mr Kelly's consultation (see above). Many individuals felt that football fans had been singled out for special treatment and that the implementation of the legislation had soured relations between football fans and the police. It was also felt that legislation in place before the implementation of the 2012 Act, could have been used to deal with the types of behaviour which the Act sought to address.

The call for evidence asked respondents whether they agreed with the proposal to repeal the 2012 Act in its entirety and to provide reasons for their response.

Individual responses

Among those who felt that the 2012 Act should be retained in its current form some said that certain types of behaviour (singing and chanting sectarian songs and slogans) had decreased at football matches since the 2012 Act came into force and that this, in their view, had led to a better and more positive atmosphere at games. Others felt that the 2012 Act had been successful in sending a strong message that certain types of behaviour were not acceptable at football. A number of individuals believed that the 2012 Act should be extended to cover similar types of offensive behaviour at other events such as parades.

In contrast, a substantial majority of individual respondents felt that the 2012 Act should be repealed in its entirety. Reasons put forward in favour of repeal tended to mirror the views expressed in relation to the 2012 legislation while it was passing through Parliament - that there were already existing laws in place which could deal with the types of behaviour identified; that the legislation (i.e. Section 1) was illiberal in that it only targeted football fans; and that the 2012 Act had soured relations between the police and football fans.

In his submission, Dr Stuart Waiton reiterated his opposition to the 2012 Act (see above) and agreed with the proposal to repeal the 2012 Act in its entirety. On whether he agreed with the proposal to repeal the 2012 Act, Dr Waiton said:

“ Yes. I am opposed to people being arrested for words they say. It is intolerant and illiberal to criminalise words.”

On being asked to consider whether other existing provisions of criminal law are sufficient to prosecute offensive behaviour related to football which leads to public disorder, Dr Waiton stated:

“ The other pieces of legislation are also intolerant and should be repealed, while the 'public order' aspect of these pieces of legislation is mythical as there is rarely, if ever, a public order problem. Again this is an illiberal and authoritarian use of unjustified force, predicated on a desire to clamp down on views or words and attitudes that are seen as unacceptable but which are not (or should not be) criminal. ”

In his submission, Dr Andrew Tickell said that:

“ On its introduction to the Scottish Parliament in 2011, I did not support the Offensive Behaviour and Threatening Communications (Scotland) Act. I retain significant concerns, described below, about the legislation’s logical structure and the scope of what it currently criminalises. However, the proposal to repeal the Act – with Lord Bracadale’s comprehensive and independent review into hate crime legislation still ongoing – is to take a sledgehammer to a task designed for the scalpel. ¹¹ ”

Dr Tickell goes on to say that, as the Appeal Court has recognisedⁱⁱ, Section 1 of the Act creates “a criminal offence with an extremely long reach.” Dr Tickell argues in his submission that this legislative overreach could be curbed by judicious amendments. He goes on to say that Scottish Government Ministers have suggested that repeal of the Act would “[send] completely the wrong message” and threaten “to set us back as a country in our efforts to effectively combat prejudice, hate crime and sectarianism.” He argues that:

“ The merits of a criminal statute cannot solely be evaluated with reference to the “social message” it sends. Just as supporters of the Offensive Behaviour at Football Act must defend the letter of the law and not just its spirit, so too, critics of the Act ought to explain in detail why the law cannot be improved. ”

Responses from organisations

In its submission, the Celtic Trust said that it agreed with the proposal to repeal the 2012 Act, stating:

“ The Offensive Behaviour at Football Act is discriminatory, unjust, contradictory, and badly drafted. It is in fact one of the worst pieces of legislation ever to have been passed in this country. It has completely soured relationships between those who attend football matches and the police and this is particularly worrying because the victims of this Act have been in the main young men who now no longer have any trust in or respect for the police. It can also be argued that police officers themselves have suffered because of this Act in that they are being ordered to pursue situations in the context of football matches very differently from how they would deal with the same situation in any other context. It has resulted in law abiding citizens being drawn into the criminal law system for the first and only time and often having criminal convictions to their name. ¹² ”

Supporters Direct Scotland (SDS) is officially recognised as the lead supporters group in Scotland by the Scottish Professional Football League and the Scottish Football Association. In its written submission, SDS state that they are in favour of the proposal to

ii Procurator Fiscal Dingwall v Cairns 2013 HCJAC 73, para 11.

repeal the 2012 Act and point to research which they have carried out amongst 266 supporters on the 2012 legislation which showed that 74% of those surveyed felt that the legislation should be repealed.

Fans Against Criminalisation (FAC) are also supportive of the proposal to repeal the 2012 Act and reiterate in detail their contention that the legislation is unnecessary and illiberal.

Victim Support Scotland (VSS) stated that it welcomed the 2012 legislation and viewed it as an important step in dealing with threatening communications and inciting racial hatred. VSS is opposed to the proposal to repeal the 2012 Act unless there was a viable alternative to support victims of threatening communications and religious prejudice whilst recognising that laws should be rational and enforceable.

The Equality Network ("the Network") argues that it would be very concerned about the potential effects of repealing the 2012 Act without other clear measures being implemented in its place. The Network states that those measures could include non-legislative policies and practices, for example by government, police, footballing authorities and clubs, and might also include more appropriate legislation.

The Network goes on to say:

“ Without such measures being introduced promptly, there is a risk that repeal would indicate to some that prejudice-based abuse at football matches is being decriminalised, and is therefore acceptable. We think the large majority of people consider such abuse to be unacceptable, and that it is vital that there is clear acknowledgement of the problem, and consideration given to what actions could address it, as part of the process of considering repeal. We agree that it is appropriate to rethink the 2012 Act. There is a review ongoing of hate crime law, including the Act, led by Lord Bracadale. We understand that that review will shortly start a public consultation, and will report next spring. We think that it makes sense to review the 2012 Act in the context of hate crime more generally, since a significant proportion of charges under it have been for prejudice related acts. We therefore suggest that decisions on the future of the 2012 Act might be best taken after Lord Bracadale’s review reports. ¹³ ”

The Network points out that findings from its Scottish LGBTI Hate Crime Report (to be published in September 2017) include that 67% of 459 survey respondents who watch football have witnessed homophobic, biphobic or transphobic hate or hate-motivated behaviour at or outside a football match, or travelling to or from a football match, or at a venue where a football match was being shown on TV. Fifty-one per cent witnessed this abuse directed at someone else (including for example a player or match official), and an additional 16% experienced such behaviour targeted at themselves.

The Scottish Women's Convention (SWC) said that it is not in favour of the proposal to repeal the 2012 Act. The SWC also says that it has consulted with women throughout Scotland who have spoken about the impact that offensive behaviour at football has had on their lives and argues that, at present, the 2012 Act fills a gap in the legislative agenda which is well meaning in its scope to protect communities throughout the country.

The SWC also points out that:

“ Football is gradually becoming more inclusive of women, both in participating and attending events. This is an extremely advantageous move and the large majority of male football fans are welcoming towards women in what was once seen as a strictly masculine event. However, the sectarian abuse that can be spouted specifically at women prior to and after football games is extremely discriminatory and should be viewed as reprehensible. ¹⁴ ”

The Law Society of Scotland ("the Society") accepts that the question of whether the 2012 Act should be repealed is a matter for the Scottish Parliament. However, the Society goes on to say that it remains of the view that offensive behaviour related to public disorder is likely to be caught by the substantive criminal law which was in existence prior to the 2012 Act and remains in force now. The Society points out that in 2015 -2016, 287 charges were brought under Section 1 of the 2012 Act and is of the view that all of them could have been prosecuted under pre-existing legislation or at common law. The Society goes on to say:

“ For example, in *Mark Harris v HMA* [2009] HCJAC 80 the appellate court held that a breach of the peace only requires a serious disturbance to the community or Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which addresses the situation where a person behaves in a threatening or abusive manner and such behaviour would be likely to cause a reasonable person to suffer fear or alarm where it is the intention so to cause fear or alarm or one is reckless as to whether behaviour would cause fear or alarm. These examples demonstrate the ability of the criminal law to address the types of behaviour that the 2012 Act has sought to address. We do not believe that the Section 1 offence has improved the common law breach of the peace or Section 38 of the 2010 Act and are not of the view that its repeal will leave a gap in the criminal law. ¹⁵ ”

The Crown Office and Procurator Fiscal Service (COPFS) agrees that the question of whether or not the Act should be repealed is a matter for the Scottish Parliament, and say that it would not be appropriate for COPFS to engage with all of the policy issues which arise.

With regard to the Section 1 offence, COPFS points out that the Policy Memorandum to the repeal bill focuses on Section 1(2)(e) of the Act and states that “the terms of this section do not differentiate between the specific behaviour it is targeted at (i.e. those involved in offensive behaviour at football) and a wider category of behaviour that people should be free to engage in (i.e. what may be considered to be offensive to some but would not be so to others)”. The Policy Memorandum also states that this “is liable to be unfair and arbitrary in its application”.

COPFS does not agree that the legislation is applied arbitrarily or unfairly and states that the legislation itself sets out the legal test which requires to be met before an offence is committed. Section 1(1) of the offence contains a two part test. Firstly, the behaviour must be one of the five different types at Section 1(2) and secondly, the behaviour must also incite, or be likely to incite, public disorder (an element of the test which requires to be considered in light of Section 1(5)). Both elements in this two-part test must be satisfied before any prosecution can be commenced. A charge cannot be pursued on the basis that there is behaviour which would be offensive to a reasonable person unless that behaviour is also likely to, or would be likely to, incite public disorder.

COPFS points out that it has prosecuted criminality in connection with regulated football matches involving violence, mass disorder, vandalism, threatening behaviour, and hate crime. Most relevant cases which are prosecuted do not rely on the terms of Section

1(2)(e) (other behaviour that a reasonable person would be likely to consider offensive). In 2016/17 such cases made up just 10% of all relevant charges reported to COPFS. COPFS points out that prosecutions are much more likely to relate to behaviour which is threatening under Section 1(2)(d), such as some of the behaviour witnessed at the Scottish Cup Final in May 2016 - 79% of the relevant charges reported to COPFS in 2016/17 related to such threatening behaviour.

With regard to the Section 6 offence, COPFS points out that it has been used successfully to prosecute individuals who have made serious threats of violence against members of the public, including threats of murder, and individuals who have made threats towards Jewish, Muslim and Catholic communities designed to stir up hatred on the basis of religious grounds. It has also been used successfully to prosecute accused who have used social media to post threatening material designed to stir up religious hatred and which referenced the proscribed terrorist organisation ISIS. COPFS argues that repeal of Section 6 may leave prosecutors less able in future to secure convictions in respect of the type of threatening behaviour described above.

Police Scotland say that, in relation to the proposed repeal of the 2012 Act, they recognise that repeal presents challenges but it is not believed that any of these challenges are insurmountable from a policing perspective.

In relation to the Section 1 offence, Police Scotland say that introducing the 2012 Act has kept football-related offensive behaviour in the forefront of public consciousness and, in its view, there have been observable improvements in behaviour, particularly mass offensive singing.

The response goes on to say that, for criminal behaviour which is overtly prejudiced in terms of race, religion, disability, sexual orientation or transgender identity, alternative provisions exist and in the event of repeal, Police Scotland would revert to utilising existing legislation (breach of the peace or threatening and abusive behaviour at Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010) to ensure any perpetrator within a football environment is dealt with in a robust manner.

However:

“ It is a reality that some behaviour which the Act can address may prove to be beyond the reach of the above alternatives and repeal could therefore result in some individuals avoiding charge and prosecution. For example, some of the offensive songs which make reference to proscribed organisations and which are currently reported by Police Scotland under Section 1 of the Act were not tested under the legislation which pre-dates the Act. ¹⁶ ”

With regard to the Section 6 offence, Police Scotland say that it is defined to deal with certain behaviour (threats of serious violence or threats intended to stir up religious hatred) and, due to its narrow scope, has not been widely used by police. The response goes on to say that Section 6 is not restricted to a football context, with a number of individuals being charged with non-football related offences. Police Scotland say that a large proportion of football-related online hatred in Scotland is dealt with by the Football Co-ordination Unit for Scotland (FoCUS) and, due to the wording of Section 6, the majority of this cannot be dealt with using this provision and is in fact dealt with as an offence under Section 127 of the Communications Act 2003, or Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

The Scottish Government response was submitted by the Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP. The Scottish Government response states that the 2012 Act continues to be an important tool in tackling all forms of offensive behaviours, including sectarianism and expressing support for terrorist organisations. With regard to the Section 1 offence, the response goes on to say:

“ Repealing the Act would remove 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. ¹⁷ ”

With regard to the Section 6 offence, the Scottish Government response states that repeal of Section 6 of the 2012 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. The response points out that, unlike elsewhere in the UK, prior to the introduction of the 2012 Act, this specific offence did not exist. The Scottish Government maintains that this was an obvious gap in the statute book and it was clear that legislation was required to address it. It is further argued that repeal of Section 6 will remove protection from religious communities in Scotland and would be a backward step.

The response goes on to say that, in recognition of the fact that police and prosecutors need the appropriate powers to tackle hate crime; Parliament’s concerns in relation to the 2012 Act; and the need to provide a responsible and practical way forward, the Minister for Community Safety and Legal Affairs commissioned the independent Review of Hate Crime Legislation in Scotland ("the Review"). The Review is considered below.

Review of hate crime legislation

Lord Bracadale is leading the [Review of Hate Crime Legislation](#) ("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.

In particular, Lord Bracadale will consider and provide recommendations on:

- whether the current mix of statutory aggravations, common law powers and specific hate crime offences is the most appropriate criminal law approach to take
- whether the scope of existing laws should be adjusted, including whether the religious statutory aggravation should be adjusted to reflect further aspects of religiously motivated offending
- whether new categories of hate crime should be created for characteristics such as age and gender (which are not currently covered)
- whether existing legislation can be simplified, rationalised and harmonised in any way, such as through the introduction of a single consolidated hate crime act
- how any identified gaps, anomalies and inconsistencies can be addressed in a new legislative framework, ensuring this interacts effectively with other legislation guaranteeing human rights and equality

The Review is about all hate crime legislation and covers all areas of Scottish life – not just sectarianism or football. Lord Bracadale’s [consultation](#), which runs until 23 November 2017, is seeking feedback from across society on the current legal framework. [Chapter 7](#)

[of the consultation document](#) focusses on the 2012 Act and looks at the purpose of the Act and its possible repeal.

In July 2017, James Chalmers and Fiona Leverick of Glasgow University published a report as part of the Hate Crime Review - [A Comparative Analysis of Hate Crime Legislation](#). Chapter 8 of the report focusses on the 2012 Act and also looks at approaches in other jurisdictions which are relevant to the 2012 Act.

The report points out that Section 1 of the 2012 Act is notable because it targets expressions of hatred and other offensive behaviour that take place in the specific context of a football match. The authors note that, while unusual, the legislation is not unique in this respect and point to its closest equivalents which are the offences of indecent and racist chanting in the Football Offences Act 1991 (applicable to England and Wales) and of sectarian chanting in the Justice Act (Northern Ireland) 2011.

Section 3 of the Football Offences Act 1991 provides that:

(1) It is an offence to engage or take part in chanting of an indecent or racist nature at a designated football match.

(2) For this purpose: (a) “chanting” means the repeated uttering of any words or sounds (whether alone or in concert with one or more others); and (b) “of a racist nature” means consisting of or including matter which is threatening, abusive or insulting to a person by reason of his colour, race, nationality (including citizenship) or ethnic or national origins.

The report points out that the maximum penalty attached to Section 3 of the 1991 Act (upon summary conviction, a fine not exceeding level 3 on the standard scale) is, however, in no way comparable to that under Section 1 of the 2012 Act where the maximum penalty can be up to five years’ imprisonment upon conviction on indictment.

The report states that a provision similar to Section 3 of the Football Offences Act 1991 is contained in the Justice Act (Northern Ireland) 2011, Section 37 of which provides that:

(1) It is an offence for a person at any time during the period of a regulated match to engage or take part in chanting falling within subsection (3).

(2) For this purpose “chanting” means the repeated uttering of any words or sounds (whether alone or in concert with one or more others).

(3) Chanting falls within this subsection if (a) it is of an indecent nature; (b) it is of a sectarian or indecent nature; or (c) it consists of or includes matter which is threatening, abusive or insulting to a person by reason of that person's colour, race, nationality (including citizenship), ethnic or national origins, religious belief, sexual orientation or disability.

The authors point out that there are two main differences between this and the equivalent provision in the Football Offences Act 1991.

First, the provision is not limited to football matches. It applies to any “regulated match”, a category which includes association football matches but also extends to Gaelic games and rugby union matches. Secondly, the type of chanting caught by the Act is wider. Section 37(3)(b) specifically prohibits “sectarian” chanting and Section 37(3)(c) extends beyond racist chanting to include chanting that is threatening, abusive or insulting to a person by reason of that person’s religious belief, sexual orientation or disability. As with

Section 3 of the Football Offences Act 1991, the maximum penalty following summary conviction is a fine not exceeding level 3 on the standard scale.

The Report also examines responses to hate speech and online hate crime (Chapter 6).

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