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Dear Convener,

**RESPONSE FROM THE SCOTTISH GOVERNMENT TO THE STAGE 1 REPORT ON
OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS
(REPEAL) (SCOTLAND) BILL**

I write in response to the Justice Committee's Stage 1 Report on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill.

I would like to take this opportunity to thank the Committee for its careful consideration of the Bill, and to all those who contributed to that consideration by providing evidence. I note that the Committee agreed to support the general principles of the Bill.

A response is attached in the Annex to this letter. The text in bold are the recommendations from the Committee's Report.

I hope the Committee finds this information helpful. I am also copying this paper to James Kelly MSP.



Annabelle Ewing

RESPONSE FROM THE SCOTTISH GOVERNMENT TO THE STAGE 1 REPORT ON OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (REPEAL) (SCOTLAND) BILL

Views on repeal

The Committee notes the views held by a range of stakeholders on both sides of the debate, and appreciates that the 2012 Act evokes strong feelings among both its supporters and opponents. The Committee unanimously condemns sectarianism, hate crime and offensive behaviour and considers it unacceptable. The Committee notes the evidence from some fans' groups that this has led to strained relations between their members and the police.

The Act makes no provision for policing – this is entirely a matter for Police Scotland and should be considered separately from the Act itself. In oral evidence to Committee, Police Scotland made it clear that repeal of the Act would make no difference to the operational policing of matches: “It would not pose a significant operational challenge; we would continue to discharge our duties in the same manner” and “regarding boots on the ground and how football matches are policed, little—if anything—would change”. It is therefore difficult to see how repealing the Act will improve the relationship between officers and those fans who seem to have difficulty recognising the important role of police in keeping all supporters, players and staff free from harm and abusive or threatening behaviour. Many of those campaigning to have the Act repealed appear to view the police with a great deal of scepticism and mistrust and there is little evidence to suggest that this will change simply because the Act is repealed.

The Committee also recognises that the number of football fans engaging in criminal behaviour is minimal, and welcomes the context provided by the SFA, Police Scotland and fans' groups to demonstrate this is the case.

The Scottish Government has always maintained that the majority of football fans are well behaved and simply want to enjoy the match day experience with friends or family.

The Scottish Premier Football League (SPFL) statistics noted 4.25 million separate attendances (i.e. including repeat attendances by the same people) at live matches alone in 2016-17, so the number of charges issued under section 1 (offensive behaviour at football) is small in relation to this.

However, there is a persistent minority who seek to engage in offensive behaviour and it cannot be denied that there continues to be a problem at football in Scotland. This season alone we have witnessed fans abusing a Dunfermline Athletic player who has a disability by throwing plastic eyeballs onto the pitch; vile online abuse towards young Celtic Foundation Ambassador Jay Beatty; banners at games which replicate images associated with paramilitary groups; and jokes about the Ibrox disaster on social media.

Also this season, David Cox, a footballer for Cowdenbeath spoke publicly about suffering from severe depression to try to help remove some of the stigma those with mental health problems can feel. After admitting that he has previously self-harmed and tried to kill himself he has faced appalling backlash from some supporters and fellow professionals, including

someone shouting from the stands “hang yourself and do it right this time”. This is beyond the bounds of acceptable behaviour.

The Committee acknowledges the statement made by the Minister regarding the inherent tension between different freedoms. However, the Committee notes the human rights concerns raised by the Scottish Human Rights Commission and others, and urges the Scottish Government to explore how it can continue to safeguard human rights and minimise the risk of misunderstandings around the legislation and individuals’ rights.

As I stated in my evidence session, the Act is compatible with the ECHR; in drafting the Bill that became the 2012 Act, Ministers were mindful of the need to ensure that the Bill should comply with Convention rights. The Bill was certified as being within the legislative competence of the Parliament, which includes compliance with Convention rights, when it was introduced, and there has been no successful legal challenge in the courts on the grounds that it breaches human rights in all the time that it has been in force.

In oral evidence, the Committee heard from Chris Oswald from the Equality and Human Rights Commission who said:

“Although the EHRC recognises that freedom of speech and freedom of expression are enormously important and are protected by article 10 of the European convention on human rights, they need to be balanced against the International Covenant on Civil and Political rights, which says that states need to have in place laws that counter “incitement to discrimination, hostility or violence. It is the commission’s position that the international convention overrides the ECHR, in this case.”

Regardless of whether or not the 2012 Act is repealed, the Committee believes that it would be appropriate for the Scottish Government to clarify what constitutes hate crime once the position on repeal of the 2012 Act is known and Lord Bracadale's review of hate crime legislation is concluded.

The Scottish Government accepts the Committee’s recommendation and is already committed to giving full consideration to Lord Bracadale’s recommendations.

Lord Bracadale is engaging with a wide range of interested parties in order to form a clear view of the extent to which conduct is motivated by hatred, malice, ill-will or prejudice, and this will inform his recommendations about the most effective approach for the justice system to deal with such conduct.

Section 1 Offence

The Committee notes the view of some witnesses that the Section 1 offence is not clearly drafted and that its sole focus is on football.

The Act applies to football because there is a particular problem with football. In their reports the Independent Advisory Group on Tackling Sectarianism in Scotland highlighted that football matches provided a “permissive environment” which allowed those attending to behave in ways which they would not do 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. The view of the Advisory Group that football is an area of concern is supported by research:

- A YouGov poll (June 2015) commissioned by the Scottish Government found 82% of respondents agreed sectarian singing or chanting at football matches is offensive. It also found 83% supported laws to tackle offensive behaviour at and around football matches while 80% directly supported the 2012 Act.
- Stonewall Scotland research shows 60% of sports fans have witnessed anti-LGBT language or behaviour in a sport setting and 82% of those said it took place in relation to football.
- The independent evaluation of the Act published in 2015 by University of Stirling 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).
- Scottish Social Attitudes Survey 2014 found football is the most commonly mentioned factor people believe contributes to sectarianism in Scotland – 88% mentioned it; 55% thought it was the main factor.

The Committee notes the example outlined by the Crown Office and Procurator Fiscal Service in evidence that a lack of definition is not unusual, but also observes that the lack of a definition of dangerous driving and breach of the peace do not appear to have caused the same difficulties with understanding as is the case with the 2012 Act.

As the Committee heard in evidence from COPFS, the lack of a definition of “offensive behaviour” in section 1 is not unusual in legislation. COPFS are used to prosecuting offences, such as dangerous driving and breach of the peace, where key terms are not defined in legislation. What may constitute dangerous driving or a breach of the peace is defined by the particular circumstances of each individual case.

It is important to note that section 1 contains two tests which must be met before a person can be found guilty of committing an offence under that section. In order for a person to commit an offence under section 1 the person must engage in one of five types of behaviour *and* that behaviour is likely, or would be likely, to incite public disorder. It is this two stage test that assists the police and the COPFS in determining whether, in the particular circumstances, an offence is likely to have been committed under section 1. As the committee has heard, the police have been trained to identify behaviour which is likely to be an offence under section 1 and the COPFS have been successfully prosecuting offences under that section.

I would point out that offensive behaviour is only one of five types of behaviour specified in that section. The other types of behaviour include stirring up hatred against specific groups of people and threatening behaviour.

The Committee understands that the Bill seeks to repeal the 2012 Act in its entirety. However, should this repeal Bill not be passed, and the 2012 Act remains in place, the Committee is of the view that the Scottish Government should bring forward amendments to Section 1 of the 2012 Act.

As I said during the Stage 1 debate, we have been consistently clear in our commitment to work with those people who have concerns about the 2012 Act and if any party still wishes to

pursue the amendment route, the door remains open. The Scottish Government acknowledges the will of Parliament to support the principles of the bill but it is our duty to ensure that the implications of such a move are fully understood and that action is taken to mitigate the impact of any gap in the law that would appear as a result of the repeal. We will seek to build consensus on putting in place necessary protections ahead of repeal including, delaying commencement of the repeal bill, to ensure there is time to do so.

Section 6 Offence

The Committee understands that the Bill seeks to repeal the 2012 Act in its entirety, and notes that the measures contained within Section 6 of the 2012 Act, unlike those in Section 1, are applicable beyond a football context.

We are pleased that this has been recognised by the Justice Committee. Section 6 – Threatening Communications is an important element of the 2012 Act which has not received as much attention as section 1, offensive behaviour at football, and is indeed applicable beyond a football context.

An offence is committed under Section 6 if a person communicates material to another person that is a) material that 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 it is the outcome; or b) the material is threatening and is communicated with the intention of stirring up hatred on religious grounds. The material or communication does not need to relate to football in any way.

Tackling such behaviour is central to ensuring that all of our communities feel welcomed and able to participate in civic society as equal partners.

The Committee also acknowledges and accepts that repeal of Section 6 would result in no specific offence of incitement to religious hatred in Scotland. However, the Committee also notes concerns that the wording of Section 6 has inadvertently created a high threshold, which has concomitantly led to its limited use and relatively low number of convictions.

The Scottish Government recognises that threatening communications, particularly those sent through on-line media, are an increasing concern for communities across Scotland which feel intimidated and marginalised through being the subject of repeated abuse. This has to be addressed and we are committed to ensuring that police and prosecutors have adequate tools available to them to tackle such abuse. We are happy to consider how section 6 could be amended to increase its effectiveness.

The Committee notes the view of Police Scotland that the drafting of Section 6 has precluded more widespread use of its provisions to tackle threatening communications.

We have consistently said that we are happy to listen to people's concerns and suggestions for how the Act could be improved. That applies equally to section 1 and section 6 and we are happy to look at how any legitimate concerns can be addressed through amendment of the 2012 Act. Given that it has been recognised by Committee that repeal would leave a gap in legislation due to no specific offence of incitement to religious hatred, we believe that

repealing the Act would not be the best way to deal with concerns about how widespread the provisions can be used. This would be better addressed through amending the Act.

The Committee therefore believes that, were the 2012 Act to be repealed and in light of the forthcoming recommendations from Lord Bracadale's Review of hate crime legislation, it would be appropriate for the Scottish Government to consider how the provisions within Section 6 could be updated as part of a wider revision of hate crime legislation.

The Scottish Government believes that the provisions in section 6 provide an important tool for tackling threatening communications, including those made through on-line media, and we are happy to accept this recommendation.

Gap in the Law

The Committee notes that there are opposing arguments regarding whether or not repeal of the 2012 Act would create gaps in the law.

The Committee concludes that repeal of the 2012 Act would have an effect with regard to extra-territoriality (with regards to Section 6) and the prosecution of certain offences on indictment. However, on balance, the Committee also concludes that repeal would not have a significant impact on the prosecution of the type of offences which the 2012 Act sought to capture in Sections 1 to 5.

Other than the offence of incitement to religious hatred covered by Section 6, the Committee is of the view that repeal would not result in behaviour or actions currently prosecuted under the 2012 Act becoming legal. The Committee is also mindful of the suggestion by Professor Fiona Leverick that sentencing aggravation provisions could be used to capture such offences in the absence of any replacement legislation.

Alternative charges to those under section 1 of the 2012 Act are available to prosecutors (Breach of the Peace and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010) and for section 6 in the provisions of section 127 of the Communications Act 2003. However, the alternatives to sections 1 and 6 have limitations.

Section 1 of the 2012 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 2010 Act, 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 section 1 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 abroad (this covers all Scottish teams including local clubs and the national team). The section 6 offence also applies to a communication made by a person from outside Scotland if the person intends the communication to be read, looked at, watched or listened to primarily in Scotland.

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 and 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.

In relation to section 6, the Committee has already acknowledged that there would be a gap in the legislation in terms of no offence of incitement to religious hatred in Scotland. This would put Scotland behind the rest of the UK in terms of protection under law. Section 6 also offers greater sentencing powers to its main alternative in the Communications Act 2003, as outlined in the oral evidence from COPFS: *“Section 6 also provides for greater sentencing powers than those in the 2003 act ... we have had a case in which an accused person posted comments that were supportive of a proscribed terrorist organisation—ISIS—and the view of the sentencer was that the severity of those actions should be reflected in a starting point of 24 months’ imprisonment. That starting point for the sentencer would not have been available in the alternative charge under the 2003 act.”*

Notwithstanding the above, should the Bill become law and the 2012 Act is repealed, the Committee considers it important that the Scottish Government and relevant stakeholders clearly communicate that offensive behaviour at football and threatening communications can still be tackled and prosecuted using other legislation and the common law. The Committee agrees with the view of Professor Leverick that a strong education campaign is required to ensure that people are aware that behaviour such as sectarian chanting is unacceptable.

If existing legislation had been effective in dealing with the behaviour at football then we wouldn’t have been faced with the escalation of problems which came to a head in 2011, and it is illogical and counterproductive to revert back to previous provisions when there is no evidence that they would be any more effective now than they were then.

Moving forward means accepting that social problems are deeply damaging to the fabric of society. Moving backwards and accepting taking the fatalistic view that what has always been will always be and that interventions are futile is the easy option. The Scottish Government will never accept this fatalistic view of our society – social change happens because we create the change which allows it to happen and legislation is a central element to create the environment for change. Legislation tells society what is and is not acceptable and it has a central role to play in tackling issues like sectarianism. It is of course not the only element of the Scottish Government’s work in this area.

It is also foolhardy to believe that we can reset the clock and go back to where we were. As pointed out above, this is the place that led to explosive devices being sent through the post, death threats posted online and a number of arrests at and around high-profile matches.

The world has moved on since 2011 and as long as football is seen as the acceptable space where bile, bigotry and abuse can go unchallenged and unpunished we hinder our efforts to make Scotland a better place for everyone, not just the minority communities that are targeted.

We are concerned about the message that is being sent to victim and equalities groups by repealing the 2012 Act. As the Committee heard in oral evidence, many of these groups feel repealing the legislation would be a backwards step and would send the message that the behaviour was no longer criminal. If the 2012 Act were to be repealed, the Scottish Government would continue to send out the strongest possible message that offensive

behaviour at football and in Scottish society generally is unacceptable and will not be tolerated. We will continue to work with our stakeholders, particularly those most affected by offensive behaviour at football to reassure them that the Scottish Government will do all it can to tackle offensive and threatening behaviour and communication.

Lord Bracadale's review of hate crime legislation

The Committee notes the views of many witnesses that it would be wise to wait until Lord Bracadale's review of hate crime legislation has reported in Spring 2018 before taking definitive action on the Bill (and, in turn, the 2012 Act).

The Committee is mindful that the timing of an independent review should not impinge on the Committee's role to carry out post-legislative scrutiny on any piece of legislation passed by the Scottish Parliament.

However, the Committee is also aware that the scope of Lord Bracadale's review of hate crime legislation extends beyond the 2012 Act, and that the Review itself states that its recommendations will cover both scenarios in relation to the 2012 Act so as to avoid any delay or confusion.

The Committee also accepts that the timescale for consideration and implementation of the review's recommendations is unknown, and may take years, as has been the case in other reviews, for example, with Sheriff Principal Taylor's review of civil litigation.

The Committee therefore believes that, while Lord Bracadale's review of hate crime legislation will be of great interest and importance to its future work, it would not be appropriate to delay consideration of this Bill while Lord Bracadale concludes his work.

Lord Bracadale's remit includes the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the Act) which recognises the concerns of Parliament in relation to the Act however the review is about all hate crime legislation – not just the 2012 Act.

Lord Bracadale will make recommendations in a report to the Scottish Ministers in spring 2018. The progress of Mr Kelly's Member's Bill is for the Scottish Parliament to determine.

Definition of sectarianism

The Committee notes that the 2012 Act covers many different offences and not just those resulting from sectarianism.

The Act was introduced to tackle all offensive behaviour at and associated with football, not just sectarianism. Offensive behaviour covered by the Act may include sectarianism but it also includes homophobia, racism and other behaviour that is deemed to be offensive.

However, the Committee is aware that the public perception of this Act is that it primarily deals with sectarian behaviour. The scrutiny of the Bill to repeal the Act has therefore sparked a new debate on sectarian behaviour, and the Committee believes this presents an opportunity to make progress on tackling sectarianism.

The Scottish Government believes that everyone deserves to live in a sectarian-free Scotland. We have been clearly focussed in this area, supporting a community-based approach to tackling sectarianism, an approach that was welcomed and then aided by the Independent Advisory Group on Tackling Sectarianism in Scotland.

Education has been a huge part of our work to tackle sectarianism, not only in schools but also in communities, workplaces, prisons and online. Over 6 years, £13 million (to March 2018) has been invested in this work including £9.8 million directly invested into the community-based projects across Scotland.

The Committee considers it important that the Scottish Government gives consideration to introducing a definition of sectarianism in Scots Law, which – whether or not the 2012 Act is repealed – would help any future parliaments and governments in taking forward laws to tackle sectarianism.

The Scottish Government accepts the Committees recommendation. We propose to establish a short-life working group to look at the benefits of creating a legal definition of ‘sectarianism’. By looking at the evidence given to the Justice Committee, this appears to have been the form of hate crime which was most often highlighted as needing further clarity, and we are therefore happy to look at this specifically.

Other measures for tackling hate crime and sectarianism

Regardless of whether the 2012 Act is repealed, the Committee is of the opinion that education is vital to tackling the root causes of sectarianism and offensive behaviour.

The Act was introduced in response to particular issues within Scottish football that have persisted for many years; it has never been the Scottish Governments focus to tackle the root causes of sectarianism with the Act.

As noted above, the Scottish Government has been focussed on a community based approach to tackle sectarianism, building on evidence of the issue and evidence of how best to respond. The Advisory Group laid out their recommendations in 2015 with Dr Morrow reviewing those recommendations in March 2017, Education remains a strong focus in each and a vital tool tackle the root causes but it requires wider work than just schools.

The Committee noted with interest the limited use of diversion schemes, such as that operated by SACRO, which aim to educate offenders on the effect of their behaviour. The Committee considers these schemes to be worthy of more widespread use, potentially as diversion from prosecution.

The Sacro scheme was introduced initially in July 2013 and focused on general sectarian offences alone; however, the programme was expanded at the end of 2014 to allow Sacro to take referrals in relation to other hate crimes including race related crimes and homophobia.

The scheme was further developed to allow Sacro to take referrals of people charged under, or likely to commit offences in relation to, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (the Act) from July 2015. The scheme is available Scotland-wide and to ensure anyone suitable can be referred, it is open to a wide range of organisations to make referrals. Recent referrals to Sacro have come from

Barnardo's; Criminal Justice Social Work teams; Early and Effective Intervention teams; Procurators Fiscal; and self-referrals.

Initial indications have shown that the majority of the people who have completed the diversion from prosecution programme have not reoffended. Referrals to the Sacro scheme in relation to those who have or who are likely to commit offences related to the Act have been low, but this does not undermine the validity of the scheme, it simply means that more needs to be done to demonstrate to those in a position to make referrals that this is an effective alternative to prosecution and not an ineffective "soft touch" approach.

In recognition of the important role that education plays in tackling offensive and abusive behaviour, the Crown Office has given a commitment to diverting those accused of such offences at football to the Sacro scheme whenever appropriate, and particularly in those under 18 years of age.

However, we also recognise that prosecutors need to look at a range of issues, for example whether violence or threats of violence have been involved or where the offender has a criminal history record, before making any decision to divert. Where the Sacro scheme is not appropriate, the Crown Office will continue to pursue prosecutions in court for those cases which merit it.

Whilst problems persist and there is more work to be done the Committee welcomes the work undertaken by football authorities to tackle sectarianism. The Committee asks the Scottish Government for an update on how sectarianism is addressed in schools and how diversion schemes for offenders in these areas can be expanded.

The Scottish Government will always welcome work being undertaken by authorities and institutions to tackle sectarianism with their members and in their communities: where possible we will work with those who are willing to tackle sectarianism. We were though, much like Dr Morrow has been previously, underwhelmed by the football authorities response to the Committee. The work cited by the football authorities, although worthwhile and well intentioned to tackle sectarianism is largely out of date and not been active for a number of years, namely boys against bigotry and follow with pride.

A number of community based projects that have been funded by the Scottish Government since 2012 developed resources and delivered anti-sectarian work in schools. Work between Scottish Government and Education Scotland has seen the development of a national resource, from the work and resources of those community based projects, for schools and practitioners to tackle sectarianism and discrimination as part of the curriculum.

This resource was published by Education Scotland in February 2017, offering resources at each stage of the curriculum with guidance to help increase the knowledge and confidence of practitioners and help to mainstream educational work. To aid this, Sense Over Sectarianism (SoS) has been working to take forward the implementation of the resource through training of teachers, offering CPD sessions across local authorities in 2017-18. SoS and Nil by Mouth continue to work with probationary and trainee teachers at Glasgow, Strathclyde and West of Scotland Universities.

The Scottish Government continue to fund the Sacro diversion from prosecution scheme which was specifically expanded in 2015 to ensure those charged under the Act could be referred when appropriate. The scheme is available across the country and remains a viable

option for prosecutors in the correct circumstances. Diversion and education are both important for offenders. This has continually been seen through work of Nil by Mouth with individuals who have been referred to them, Sacro through their work, and, early intervention being conducted with young people by Police Scotland through their Pitch In programme.