

Proposed Football Act (Repeal) (Scotland) Bill

**A proposal for a Bill to repeal the Offensive
Behaviour at Football and Threatening
Communications (Scotland) Act 2012.**

**Consultation by James Kelly, MSP for Glasgow
August 2016**



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Foreword by James Kelly MSP

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FOREWORD

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 was passed by the Scottish Parliament on 14 December 2011, received Royal Assent on 19 January 2012 and came into force on 1 March 2012.



The legislation was brought forward in response to a number of controversial incidents, both on and off the pitch, and mostly associated with Rangers or Celtic during the 2010-11 football season - in particular a match on 2 March 2011.

The Scottish Government's initial plan was for legislation to be in place before the start of the 2011-12 football season and it sought to achieve this by recourse to emergency legislation procedures. However, concerns were raised about this procedure and about the need for greater consultation on the Bill. The passage of the Bill was delayed to allow for this and for further debate by the Parliament.

The Act was opposed by every opposition party and by leading anti-sectarianism charities. There are still concerns about the legislation among lawyers, judges, civil rights groups, football fans and football clubs.

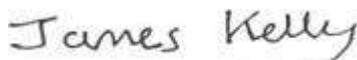
It is the only piece of legislation passed by the Scottish Parliament without any cross party support, having made it through the legislative process due to the SNP majority in the last session of the Scottish Parliament.

Across the political spectrum, there is absolute agreement that sectarianism cannot and should not be tolerated anywhere in Scotland, whether in our communities, schools or workplaces. Supporters of this proposal fundamentally disagree with the Scottish Government that the Act has helped to tackle sectarianism in a proportionate or effective fashion.

I propose the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. I do so on the basis that the legislation is flawed on several levels, including its illiberal nature, its failure to tackle sectarianism, and that the police already have appropriate charges to prosecute.

The proposal as it stands includes the repeal of provisions on "threatening communications" within sections 6-9 of the Act. On these parts of the Act in particular, I will consider the views from stakeholders through the consultation to confirm that the repeal is desirable.

I look forward to hearing from you.

A handwritten signature in blue ink that reads "James Kelly". The signature is written in a cursive, slightly slanted style.

James Kelly MSP
27 July 2016

1. HOW THE CONSULTATION PROCESS WORKS

This consultation relates to a draft proposal I have lodged as the first stage in the process of introducing a Member's Bill in the Scottish Parliament. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders which can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

At the end of the consultation period, all the responses will be analysed. I then expect to lodge a final proposal in the Parliament along with a summary of those responses. If that final proposal secures the support of at least 18 other MSPs from at least half of the political parties or groups represented in the Parliamentary Bureau, and the Scottish Government does not indicate that it intends to legislate in the area in question, I will then have the right to introduce a Member's Bill. A number of months may be required to finalise the Bill and related documentation. Once introduced, a Member's Bill follows a 3-stage scrutiny process, during which it may be amended or rejected outright. If it is passed at the end of the process, it becomes an Act.

At this stage, therefore, there is no Bill, only a draft proposal for the legislation.

The purpose of this consultation is to provide a range of views on the subject matter of the proposed Bill, highlighting potential problems, suggesting improvements, and generally refining and developing the policy. Consultation, when done well, can play an important part in ensuring that legislation is fit for purpose.

The consultation process is being supported by the Scottish Parliament's Non-Government Bills Unit (NGBU) and will therefore comply with the Unit's good practice criteria. NGBU will also analyse and provide an impartial summary of the responses received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of this paper can be requested by contacting me at:

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Enquiries about obtaining the consultation document in any language other than English or in alternative formats should also be sent to me.

An on-line copy is available on the Scottish Parliament's website (www.parliament.scot) under Parliamentary Business/Bills/Proposals for Members' Bills/Session 5 Proposals.

2. AIM OF THE PROPOSED BILL

The proposed Bill aims to repeal the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (“the Act”), and the case for repeal is set out in this consultation.

3. THE OFFENSIVE BEHAVIOUR AT FOOTBALL AND THREATENING COMMUNICATIONS (SCOTLAND) ACT 2012

3.1 Background to and origins of the Act

The Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 16 June 2011, little more than a month after the election when the SNP received an overall majority.

According to the Policy Memorandum¹ for the Bill, the “primary but not sole motivation” concerned football and a perceived need to tackle sectarian and other offensive behaviour associated with the game. It referred in particular to problems during the 2010-11 football season which had reached “an intolerable level” and included “misconduct from players and managers, death threats, and live ammunition and bombs sent to prominent figures directly and indirectly associated with football”.

Before the election, the Scottish Government organised a summit to discuss problems of sectarianism in Scottish football. Chaired by the then First Minister (Alex Salmond), the summit had been attended by representatives of Celtic and Rangers football clubs, the Scottish Football Association (SFA), the Scottish Premier League, Scottish Football League and Strathclyde Police. A joint statement was issued, setting out eight commitments on tackling sectarianism, alcohol abuse and violence. A Joint Action Group was established, which was to report to Ministers before the start of the 2011-12 football season.

Although the Scottish Government had acknowledged that there were a number of current legal provisions which could be applied to disorderly and offensive behaviour at football matches, there was concern that a substantial proportion of such behaviour which led to public disorder was not explicitly caught by the current law. Similarly, while there were existing legal provisions which might apply to making threatening communications, the Scottish Government believed that a specific offence would help to clarify the law in this area.

3.2 Scrutiny of the Act in the Scottish Parliament

The Scottish Government initially intended to fast-track the Bill through the Parliament so that it could become law in time for the new football season in late July 2011. To do this, it proposed that it should be treated as an emergency bill. Under the Parliament’s standing orders, the normal procedure for emergency bills is that the Parliament takes all three Stages on the same day.

¹ Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as introduced (SP Bill 1, Session 4 (2011)) and accompanying documents.

The Justice Committee took evidence on the Bill from five panels of witnesses in June 2011 and also issued a call for written evidence on the Bill targeted at key stakeholders.

On 23 June 2011, the Parliament agreed (on a division) a motion to treat the Bill as an emergency bill and debated the Bill at Stage 1. Shortly after the debate, the then First Minister (Alex Salmond) 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. The Parliament approved the general principles of the Bill at Stage 1 (by a majority of 103 to 5, with 15 abstaining).

On 29 June 2011, the Parliament agreed a motion not to take Stages 2 and 3 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. The Justice Committee's report on the Bill was published on 6 October 2011 and consideration of amendments at Stage 2 took place on 22 November. Stage 3 took place on 14 December 2011. The decision to pass the Bill was taken by a majority of 64 to 57, with no abstentions – the vote being split entirely on party lines, with only SNP members voting for the Bill, and all the other parties voting against. The Bill received Royal Assent on 19 January 2012, and came into force on 1 March 2012.

Notwithstanding the decision not to treat the Bill as an emergency bill, it continues to be argued that the timescale for the Bill's passage did not allow adequate time for proper scrutiny and for civic Scotland to be properly consulted.

3.3 What the Act does

The Act makes provision for two new criminal offences, one involving “offensive behaviour at regulated football matches” (section 1), and one involving “threatening communications” (section 6). A person guilty of either offence (if convicted on indictment) is liable to up to 5 years' imprisonment or an unlimited fine (or both); but the section 1 offence is also made subject to the fixed penalty regime under existing antisocial behaviour legislation. As a result, where a police officer considers that someone has committed a section 1 offence, the officer can give the person the opportunity to pay a fixed penalty (currently £40) as an alternative to prosecution.

The section 1 offence (offensive behaviour at football)

The section 1 offence is defined so as to include a number of separate elements. One is that the offending behaviour is “in relation to a regulated football match”. A “regulated football match” is defined by reference to Part 2 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which (in particular) provides for football banning orders. A person's behaviour can be “in relation to a regulated football match” even if it does not 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. And the same is true in relation to non-domestic premises where the match is being televised – so a person can commit the offence in (for example) a pub where the match is being shown to customers on a TV screen, or while entering or leaving the pub, or on a journey to or from the pub.

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 (threatening communications)

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 the 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 has an intentional element, in contrast to Condition A where recklessness as to whether the communication concerned would cause fear and alarm is sufficient (for that condition to be met).

Further provisions make clear that “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.

4. THE ACT IN PRACTICE

4.1 Section 1 (offensive behaviour at football)

During 2012-13, 267 charges were reported to the Crown Office and Procurator Fiscal Service (COPFS) for offences under section 1 of the Act. This fell to 206 in 2013-14 and 193 in 2014-15.² In 2015-16 this had risen to 287³.

Of the 287 charges in 2015-16, criminal proceedings had been commenced in 214 cases by June 2016. Scottish Government analysis⁴ stated only 86 had concluded, of which 73 (85%) involved convictions. Of these, 46 resulted in a financial penalty, 16 in a community penalty, six in a football banning order and three in a custodial sentence (the eighth custodial sentence given since the Act came into force).

The Crown Office and Procurator Fiscal Service⁵ provides tables which fully detail charges since enactment:

Table 6a: Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 - Section 1 (Football)					
Charges reported, 2011-12 to 2015-16 (numbers)					
Year	11-12 ⁶	12-13	13-14	14-15	15-16
Total number of charges under Section 1 (Football)	65	267	206	193	287
Decision on how charge will proceed					
Court proceedings	57	221	165	171	214
Not separately prosecuted	7	7	5	16	37
Direct measures	1	11	7		5
Referred to Children's Reporter	-	5	13	2	7
No action	-	23	16	4	5
Awaiting decision	-	-	-	-	19

² Scottish Government. (2015) Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2014-15.

³ Hate Crime in Scotland 2015-16.docx, COPFS, 10 June 2016.

⁴ Scottish Government. (2015) Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2014-15.

⁵ Hate Crime in Scotland 2015-16.docx, COPFS, 10 June 2016.

⁶ The legislation came into force on 1 March 2012, so 2011-12 figures relate to March 2012 only.

Table 6b: Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 - Section 1 (Football)

Charges reported, 2011-12 to 2015-16 (percentages)

Year	11-12 ²	12-13	13-14	14-15	15-16
Total number of charges under Section 1 (Football)	65	267	206	193	287
Decision on how charge will proceed					
Court proceedings	88%	83%	80%	89%	75%
Not separately prosecuted	11%	3%	2%	8%	13%
Direct measures	2%	4%	3%	0%	2%
Referred to Children's Reporter	0%	2%	6%	1%	2%
No action	0%	9%	8%	2%	2%
Awaiting decision	0%	0%	0%	0%	7%

4.2 Section 6 (threatening communications)

In 2012-13, there were 19 charges reported under section 6 of the Act. This fell to 11 in 2013-14, four in 2014-15 and seven in 2015-16. Of these, the numbers that were football-related were eight, six and one respectively in the years 2012-13, 2013-14 and 2014-15. Of the seven charges in 2015-16, three proceeded to court, the same number as 2014-15. One is on-going, one was no conviction and one resulted in a community sentence. Two of the charges related to social media.

The number of charges proceeding to court has dropped to 43% in 2015-16, down from 75% in 2014-15; 57% of charges proceeded as supplementary to other charges. Since enactment, of a total 46 charges, only 27, or 58%, proceeded to court as the main charge.

The Crown Office and Procurator Fiscal Service⁷ provides tables which fully detail charges since enactment:

⁷ Hate Crime in Scotland 2015-16.docx, COPFS, 10 June 2016.

Table 7a: Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 - Section 6 (Threatening communications)

Charges reported, 2011-12 to 2015-16 (numbers)

Year	11-12 ⁸	12-13	13-14	14-15	15-16
Total number of charges under Section 6 (Threatening communications)	5	19	11	4	7
Decision on how charge will proceed					
Court proceedings	5	10	6	3	3
Not separately prosecuted	-	4	2	-	4
Direct measures	-	2	1	-	-
Referred to Children's Reporter	-	2	-	-	-
No action	-	1	2	1	-
Awaiting decision	-	-	-	-	-

Table 7b: Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 - Section 6 (Threatening communications)

Charges reported, 2011-12 to 2015-16 (percentages)

Year	11-12 ³	12-13	13-14	14-15	15-16
Total number of charges under Section 6 (Threatening communications)	5	19	11	4	7
Decision on how charge will proceed					
Court proceedings	100%	53%	55%	75%	43%
Not separately prosecuted	0%	21%	18%	0%	57%
Direct measures	0%	11%	9%	0%	0%
Referred to Children's Reporter	0%	11%	0%	0%	0%
No action	0%	5%	18%	25%	0%
Awaiting decision	0%	0%	0%	0%	0%

A ScotCen survey carried out as part of an evaluation of section 6⁹ asked football supporters to what extent they believed the "threatening communications" legislation

⁸ The legislation came into force on 1 March 2012, so 2011-12 figures relate to March 2012 only.

⁹ *An Evaluation of section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.*

had achieved its aims of reducing threats of violence and incitements of religious hatred:

- Fifty-six percent believed the Act had made no difference in relation to frequency of incidents of threats of violence in football fan forums and elsewhere; 18% believed it had contributed to a reduction; and 5% believed it had caused an increase.
- Most respondents (58%) also said that they believed the Act had made no difference in relation to such incidents of incitement of religious hatred in football fan forums and elsewhere; 19% believed it had contributed to a reduction; and 7% believed it had caused an increase.

5. THE CASE FOR REPEALING THE ACT

This proposal for the repeal of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act is made on the basis that the legislation is flawed on several levels. This section will explore the key arguments for repeal, including: the illiberal nature of the Act, its failure to tackle sectarianism, and that the police already have appropriate charges to prosecute. In exploring these arguments, this section seeks to demonstrate how the handling of the Act has become politicised, and confidence in the legislation has been eroded.

5.1 The illiberal nature of the Act

Concerns were raised about the provisions of the Act at the outset of the Parliament's scrutiny of the Bill and continue to be expressed four years after the Act came into force.

Criticisms have come from across the board - including legal practitioners dealing with the Act in and out of court rooms, by football supporters and civil liberties stakeholders, and academics.

It was reported that, in a court decision, Sheriff Kenneth Hogg stated that: "The section [1] of the legislation you were charged under is very confusing. It is very unhelpful and until some appeals go through we won't get much guidance."¹⁰

And Professor Ewen Cameron is reported to have claimed that the legislation "doesn't really address the underlying issues, the deeply held cultural attitude and feelings. It addresses a symptom of sectarianism, the particular problem of articulation of sectarian language. Underlying attitudes can't really be dealt with by criminalising songs."¹¹

In written evidence to the Justice Committee, Supporters Direct Scotland¹² underlined the illiberal design of the legislation, stating that under this specific Act, certain behaviour is criminalised in a specific setting which may otherwise go unprosecuted:

"In particular it appears unreasonable to make certain actions illegal in the context of a regulated football match when the same actions apparently would be acceptable in other public situations, such as going [to] the cinema or attending the theatre."

"We believe that the issues this legislation seeks to address are adequately covered by existing legislation and we are not convinced that the measures outlined are clear enough to define the behaviour from which people should refrain."

¹⁰ BBC News, 19 June 2013. *Sheriff criticises 'confusing' anti-bigotry laws.*

¹¹ STV Glasgow, 12 November 2014. *Offensive behaviour at football act doesn't deal with sectarianism.*

¹² Supporters Direct Scotland. Written submission to the Justice Committee, 26 August 2011.

This view, that the legislation criminalised behaviour which otherwise may not be prosecuted at an alternative venue, was confirmed by Lord Carloway, the then Lord Justice Clerk, when he stated in a judgement:

“There is no blanket ban on singing sectarian songs and the appellants are at liberty to indulge their desire to do so at many alternative venues... Indeed, the type of conduct here is precisely what the law is aimed at. The questions will be answered in the negative and the appeals refused.”¹³

The targeting and intensity of policing has consistently heightened concerns that football fans are considered a specific target for Police Scotland. The creation of a Football Coordination Unit Scotland to meet these enforcement requirements has further undermined an already poor relationship and reduced confidence in the legislation. This was highlighted when officers were alleged to have given evidence which they knew to be untrue¹⁴. The announcement by the British Transport Police that “a dedicated football unit within the force consisting of uniformed and plain-clothes officers would identify and deter troublesome fans on trains”¹⁵ also underlined views that this was illiberal legislation. By targeting football fans at football matches, these are examples of how the already illiberal legislation is being used unfairly against one group of the population.

In its 2012 *Safety and Security* report, the Scottish Human Rights Commission notably reproduced concerns that the nature of the offences are too widely drafted, citing legal experts including the Law Society of Scotland, and Liberty. In particular, Liberty was critical of section 5 of the Act (Power to modify sections 1 and 4):

“[A]llowing for the modification of criminal conduct by way of Ministerial order is a breath-taking expansion of power”, and suggests that the Bill [now Act] is “poorly planned and poorly drafted”.¹⁶

Earlier this year, in its Session 4 legacy paper, the Scottish Parliament’s Public Petitions Committee invited the Session 5 Committee to consider a petition from Fans Against Criminalisation, “calling on the Scottish Parliament to urge the Scottish Government to hold a full and comprehensive review of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 with a view to having this Act repealed” and to seek clarification from the Scottish Government and Police Scotland on the points raised in the petition.

The inconsistent application of the Act has been particularly notable, fuelling a concern amongst interested parties that the Act is not delivering fair justice in a reliable or effective fashion. In one case, regarding the song “Roll of Honour”, a man was cleared of inciting public disorder during April 2013 by a Dundee Sheriff, while five months later two were convicted for singing the same song¹⁷. In another case a German football fan was not convicted due to his claim he didn't understand the

¹³ Appeal Court, High Court Of Justiciary [2015] HCJAC 35, HCA/2014/5142/XJ and HCA/2014/5140/XJ.

¹⁴ Police Scotland investigating football crime officers over perjury, Scottish Legal News, 29 September 2015.

¹⁵ New British Transport Police unit to focus on football fans, 5 January 2016, Scottish Legal News

¹⁶ Safety and Security, Scottish Human Rights Commission, 2012.

¹⁷ Offensive behaviour at football laws in the dock over Roll of Honour song convictions, The Herald, 19 March 2015.

lyrics, and the Sheriff was quoted in news reports as saying: “I do not find anything threatening or abusive in Mr Tussing's behaviour ... In respect of the first charge and in the absence of evidence, I have doubts of the likelihood of inciting public disorder and by virtue of these doubts I find Mr Tussing not guilty.”¹⁸

5.2 Alternative legislation

Questions have been raised as to whether a new offence of “offensive behaviour at football” is needed, given that a number of existing offences could be used to prosecute such behaviour, including:

- the common law offence of breach of the peace;
- the Public Order Act 1986 which introduced offences relating to the incitement of racial hatred for which the maximum penalty is an unlimited fine or seven years' imprisonment (Part III (racial hatred), sections 17 to 29);
- the Crime and Disorder Act 1998 which introduced offences of pursuing a racially-aggravated course of conduct which amounts to harassment of a person and acting in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress (section 30, inserting a new section 50A into the Criminal Law Consolidation (Scotland) Act 1995);
- the Criminal Justice (Scotland) Act 2003 which made provision for offences aggravated by religious prejudice, requiring courts to take such aggravation into account when determining sentence (section 74);
- the Offences (Aggravation By Prejudice) (Scotland) Act 2009 which provided for statutory aggravations for crimes motivated by malice and ill will towards an individual based on their sexual orientation, transgender identity, or disability;
- the Criminal Justice and Licensing (Scotland) Act 2010 which made provision for the offence of threatening and abusive behaviour (section 38);
- the Criminal Law (Consolidation) (Scotland) Act 1995 which provided Scottish Ministers with the power to designate sporting events and grounds that are subject to alcohol controls (Part II, sections 18 to 23);
- Football Banning Orders (FBOs) introduced as part of the Police, Public Order and Criminal Justice (Scotland) Act 2006 and which are designed to remove those involved in violence and disorder from all aspects of football. A person subject to an FBO is prohibited from entering any premises for the purposes of attending regulated football matches in the UK (sections 51 to 69).

(Some of these legislative provisions are also relevant to section 6 – Threatening communications.)

5.3 The lack of clarity in section 1

There has been strong criticism that section 1(2)(e) which criminalises “*other behaviour that a reasonable person would be likely to consider offensive*” (where it is or would be likely to incite public disorder) is confusing and unclear. The terms of this section are unclear and do not differentiate between the specific behaviour it is targeted at (i.e. those involved in offensive behaviour at football) and a wider

¹⁸ *German fan cleared of IRA singing 'as he did not understand lyrics'*, STV, 15 January 2015.

category of behaviour that people should be free to engage in (i.e. what may be considered to be offensive to some, would not be so to others). In this respect, the Act has been interpreted as being illiberal, and does not allow the public to understand what is and what is not allowed, and so is liable to be unfair and arbitrary in its application. Professor Sir Tom Devine was of the view that: “The legislation is likely to go down in history as the most illiberal and counterproductive act passed by our young Parliament to date”¹⁹.

Some of the evidence given to the Justice Committee expressed concern that the Bill could be used to criminalise songs and chants that may be “offensive” to some, but which might more generally be considered to have a political rather than a religious element.²⁰

Professor Devine, for example, said:

“There is a danger – in fact, possibly an inevitability – that you will make criminal certain behaviour that was not criminal under the 2003 Act. Certain people who do not regard themselves as behaving in a criminal way might react to that in a particular way. The second aspect, which is equally important, is that even if the legislation is not inflammatory, it will be incredibly controversial”.²¹

5.4 The focus on football and sectarianism

The Scottish Government made clear that the Act was not intended to solve the “sectarian” problem in Scotland on its own and, in evidence to the Justice Committee on 21 June 2011, the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham, told the Committee—

“I know that sectarianism is not confined to football. It is a much wider and deeper problem for Scotland, and this Government is committed to rooting it out. The bill is therefore only part of a much wider programme of actions against sectarianism. It is, however, a vital first step in the Government's programme in this new session of Parliament.”²²

It remains the case, however, that section 1 relates to football and concerns have been expressed as to “why football was being targeted in the legislation, and not, for instance, parades and marches of a perceived sectarian character”²³. Comments reproduced earlier in this document demonstrate an awareness - and general concern - amongst practitioners and experts that this focus on the setting of a football match means (sectarian) behaviours deemed offensive within this legislation would not otherwise be prosecuted where they occur elsewhere.

5.5 Freedom of speech

¹⁹ The Herald, 1 March 2016. *Scotland's top historian joined by Celtic FC and public figures in calling for repeal of controversial football laws.*

²⁰ Justice Committee. 1st Report 2011 (Session 4). *Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2.* (SP Paper 21). page 29.

²¹ Justice Committee. Official Report, 13 September 2011, Col 245.

²² Justice Committee. Official Report, 13 September 2011, Col 257.

²³ Justice Committee. 1st Report 2011 (Session 4). *Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2.* (SP Paper 21). page 6.

The Justice Committee, having considered oral and written evidence on the matter, invited “the Scottish Government to reflect on concerns that the “catch-all” test for offensive behaviour set out in section 1(2)(e) may be too expansive and may raise concerns in respect of adherence to freedom of speech and other requirements under the European Convention on Human Rights”²⁴.

²⁴ Justice Committee.1st Report 2011 (Session 4). Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2. (SP Paper 21). page 31.

6. WHETHER THERE IS A NEED FOR SECTION 6 – THREATENING COMMUNICATIONS

The proposal is also to repeal the provisions of the 2012 Act on “threatening communications” within sections 6-9. On these parts of the Act in particular, the views from stakeholders will be considered through the consultation to confirm whether repeal is desirable.

Opponents argued against the need for such legislation and questioned whether it would simply be a duplication of existing law. In the evaluation of section 6 of the Act²⁵, published by the Scottish Government in June 2015, it was noted that:

“... the high legal threshold of section 6 meant that existing legislation (i.e. section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and section 127 of the Communications Act 2003) would remain appropriate for the majority of cases involving threatening communications.”

6.1 Freedom of speech

At Stage 1, concerns were expressed about the implications of section 6 for freedom of speech.

Articles 9 and 10 of the European Convention on Human Rights are relevant in this context: Article 9 provides for the right to freedom of thought, conscience and religion and Article 10 provides for the right to freedom of expression.

However, the boundary between stirring up hatred on religious grounds (prohibited under section 6) and expressing antipathy, dislike, ridicule, insult or abuse of religions or the practices of adherents of a religion (not prohibited under section 7) still seems very unclear and uncertain, with a difficulty of distinguishing which is which.

²⁵ An Evaluation of section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.

7. THE SCOTTISH GOVERNMENT'S FAILURE TO REVIEW THE ACT

Section 11 of the Act requires the Scottish Government to review the operation of the two new offences (in section 1 and in section 6) over a period of at least two years, and then to report to the Parliament within a further 12 months (in practice, by 1 August 2015). The Scottish Government failed to deliver this post-legislative scrutiny. The evaluation of section 1²⁶, commissioned by the Scottish Government, and carried out by the University of Stirling, ScotCen Social Research, and the University of Glasgow, was published in June 2015. A separate evaluation of section 6²⁷ was carried out by Neil Davidson of the Scottish Government's Justice Analytical Service.

The section 1 evaluation research team issued a public statement²⁸ on the website of the University of Stirling stating that: "The evaluation is intended to be one contribution, sitting alongside other possible evidence, perspectives or material in the Scottish Government's consideration of the Act" and that: "Our evaluation neither endorses nor rejects the Act, but presents robust evidence on patterns of implementation, perceptions of impact and emerging issues and questions relating to section one of the legislation".

The Scottish Government has failed to fulfil its statutory obligation simply by laying an academic "evaluation" – given that section 11 clearly states that the task of "preparing a report" (and the duty to consult) lies with Ministers. The failure of the Scottish Government to provide this post-legislative scrutiny angered fans, and again impacted the way in which the legislation is perceived, as the Scottish Government has failed to adhere to its own legislative commitments.

²⁶ *An Evaluation of Section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.*

²⁷ *An Evaluation of section 6 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012.*

²⁸ University of Stirling, 12 June 2015. *Stirling study considers football behaviour legislation.*

8. THE SCOTTISH GOVERNMENT'S CONSIDERATION OF "STRICT LIABILITY"

In June 2016, the Cabinet Secretary for Justice, Michael Matheson, indicated at the Scottish Football Association AGM in Glasgow that the Scottish Government could consider "a form of "strict liability" to crack down on "unacceptable conduct"²⁹.

While no information is provided on the Scottish Government website, it was considered by the Advisory Group on Tackling Sectarianism in its final report [*Tackling Sectarianism and its Consequences in Scotland*](#) (April 2015), and is supported by anti-sectarianism charity 'Nil by Mouth'. The Scottish Parliament Information Centre (SPICe) advise:

"Under the strict liability rule, UEFA member associations and clubs are responsible for any violation of UEFA regulations committed by any of the people concerned, regardless of fault. This strict liability imposed on member associations and clubs means that even if they have committed no fault, the member association and club are responsible for the misbehaviour of their supporters. Once it is established that such incidents have occurred, the club is automatically held responsible and punished accordingly."

While the Scottish Government has not formally confirmed any consideration of this mechanism, the discussion of it by the Cabinet Secretary for Justice suggests alternative measures are now being more openly considered due to the failure of the Act to effectively deliver on its purpose. While this consultation does not propose a form of strict liability, consideration of the system is both necessary and topical in advance of potential formal consultation from the Scottish Government.

²⁹ [*Matheson ultimatum to football chiefs over cup disorder*](#), BBC News, 1 June 2016.

9. EQUALITIES ISSUES

In its most recent assessment of the charges brought under this section of the Act³⁰, the Scottish Government has itself indicated how disproportionately punitive the Act is towards young men, a concern consistently raised by fans groups. In particular, the document notes that charges brought against those under 20 were in fact increasing:

“Of the 287 charges, 281 (98%) involved a male accused. Forty-six per cent of the charges involved an accused aged 20 or under, 29% noted an accused aged 21-30 and 25% were 31 or older.

“The charges with an accused aged 20 or under have increased since 2014-15 (from 71 to 133 in 2015-16) as has the proportion of all charges with an accused in this age group (37% to 46%). An individual can have more than one charge in the course of a year. When looking at charges involving an accused aged 20 or under, 39% of these charges do not have a unique accused (compared with 24% in 2014/15).”

In practice the Act disproportionately and negatively affects a specific group who choose to attend a football match. The unjust design of the act impinges on certain groups of the population based on their attendance at stadia while failing to deliver justice in other settings. Combined with the assessment of experts and practitioners, it is clear that repeal of this legislation could have positive impacts in terms of justice for those who attend football matches in terms of levelling the playing field.

Many hate crimes are already reported under other offences within the “breach of the peace” category, including those identified within this consultation. These other offences will remain in place to ensure that justice can be delivered for protected communities following repeal.

³⁰ Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2015-16, Scottish Government, 10 June 2016.

10. COSTS

The Scottish Government, at the time the Bill for the 2012 Act was introduced³¹, argued that it would not necessarily involve a significant increase in cost, largely because where it resulted in charges or convictions, these could well have occurred anyway under existing law (such as breach of the peace). On the same basis, it would seem reasonable to assume that repeal will be largely cost-neutral, and could involve a modest saving.

³¹ Offensive Behaviour at Football and Threatening Communications (Scotland) Bill as introduced (SP Bill 1, Session 4 (2011)) and accompanying documents.

11. TRANSITIONAL ARRANGEMENTS

Any Bill to repeal the 2012 Act is likely to need to include “transitional provisions” to deal with any cases which may be “in the system” at the time that repeal takes effect. Views are sought on how the Bill should deal with—

- offending behaviour committed before the date on which the repeal of the 2012 Act offences takes effect. Should the section 1 and section 6 offences be preserved for the purposes of offences committed before that date, or should no further prosecutions be capable of being brought, across the board, after that date?
- ongoing criminal proceedings for section 1 and section 6 offences at the time of the Bill’s commencement. What should happen where an individual has already been charged (and the charge is still outstanding) at the point of commencement?

12 QUESTIONS

SECTION 1 - ABOUT YOU

- 1 Are you responding as:
- (i) an individual – in which case go to Q2A
 - (ii) on behalf of an organisation? – in which case go to Q2B
- 2A. Which of the following best describes you?
- (i) Politician (MSP/MP/MEP/Councillor)
 - (ii) Professional with experience in a relevant subject (e.g. lawyer, medical profession)
 - (iii) Academic with expertise in a relevant subject
 - (iv) Member of the public
- 2B. Please select the category which best describes your organisation:
- (i) Public sector body (Scottish/UK Government/Government agency, local authority, NDPB)
 - (ii) Commercial organisation (company, business)
 - (iii) Representative organisation (trade union, professional association)
 - (iv) Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)
 - (v) Other (e.g. club, local group, group of individuals, etc.)
3. Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.
- (i) I am content for this response to be attributed to me or my organisation
 - (ii) I would like this response to be anonymous (the response may be published, but no name)
 - (iii) I would like this response to be confidential (no part of the response to be published)

Name/Organisation

4. Please provide details of a way in which we can contact you if there are queries regarding your response. (Email is preferred but you can also provide a postal address or phone number. We will not publish these details.)

SECTION 2 - YOUR VIEWS ON THE PROPOSAL

Offensive behaviour at football (the section 1 offence)

1. Which of the following best expresses your view of the proposal to repeal sections 1 to 5 of the 2012 Act?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

2. In your view, what would be the advantages and disadvantages of repeal to:

- (a) the police and justice system
- (b) football clubs
- (c) football supporters?

3. Leaving aside the issue of whether sections 1 to 5 of the 2012 Act should be repealed, what do you think needs to be done to reduce offensive behaviour at football matches (including, for example, by politicians, the police and the wider justice system, clubs, fans and other interested parties)?

Threatening communications (the section 6 offence)

4. Which of the following best expresses your view of the proposal to repeal sections 6 to 9 of the 2012 Act?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

5. Leaving aside the issue of whether sections 6 to 9 of the 2012 Act should be repealed, what do you think is the most appropriate way of tackling threatening communications while upholding freedom of expression (for example, use of other legislation)?

Strict liability

6. Would you support measures to penalise football clubs for offensive behaviour by their fans? If so, should it be necessary to show that the club was at fault (for example, by failing to take reasonable steps to control fans' behaviour) - or should "strict liability" be applied?

Transitional arrangements

7. What transitional arrangements do you think would need to be included in a Bill to repeal the 2012 Act? [Possible options are set out in the consultation paper at page 23].

Financial implications

8. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have?

- Significant increase in cost
- Some increase in cost
- Broadly cost-neutral
- Some reduction in cost
- Significant reduction in cost
- Unsure

Please provide any comments.

Equalities

9. What overall impact is the Bill likely to have on the following protected groups (under the Equality Act 2010): race, disability, gender (including transgender), age, religion and belief, sexual orientation, marriage and civil partnership, pregnancy and maternity?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative

10. In what ways could any negative impact of the Bill on any of these protected groups be minimised or avoided?

General

11. Have you any other comments to make on the proposed Bill or on the matters raised in the consultation document?

12. Do you have any direct experience of the Act in practice that you would like to share?

13. HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Format of responses

You are encouraged to submit your response via an online survey (Smart Survey) if possible, as this is quicker and more efficient both for you and the Parliament. However, if you do not have online access, or prefer not to use Smart Survey, you may also respond by e-mail or in hard copy.

Online survey

To respond via Smart Survey, please follow this link:
<http://www.smartsurvey.co.uk/s/FootballActRepealBill/>

The platform for the online survey is Smart Survey, a third party online survey system enabling the SPCB to collect responses to MSP consultations. Smart Survey is based in the UK and is subject to the requirements of the Data Protection Act 1998. Any information you send in response to this consultation (including personal data and sensitive personal data) will be seen by the MSP progressing the Bill and by specified staff in NGBU, and may be added manually to Smart Survey.

Further information on the handling of your data can be found in the Privacy Notice, which is available either via the Smart Survey link above, or directly from member's bill proposal page on the Scottish Parliament's website (www.parliament.scot) under Parliamentary Business/Bills/Proposals for Members' Bills/Session 5 Proposals.

Smart Survey's privacy policy is available at: <https://www.smartsurvey.co.uk/privacy-policy>

Electronic or hard copy submissions

If possible, please submit your response electronically – preferably in MS Word document. Please keep formatting of this document to a minimum, and avoid including any personal data other than your name (or the name of the group or organisation on whose behalf you are responding).

Any additional personal data (e.g. contact details) should be provided in the covering e-mail (or a covering letter).

Please make clear whether you are responding as an individual (in a personal capacity) or on behalf of a group or organisation. If you are responding as an individual, you may wish to explain briefly what relevant expertise or experience you have. If you are responding on behalf of an organisation, you may wish to explain the role of that organisation and how the view expressed in the response was arrived at (for example, whether it reflects an established policy or was voted on by members).

Where to send responses

Responses prepared electronically should be sent by e-mail to:

james.kelly.msp@parliament.scot

Responses prepared in hard copy should be sent by post to:

James Kelly MSP
M1.17
Scottish Parliament
Edinburgh EH99 1SP

You may also contact James Kelly's office by telephone on 0131 348 6510.

Deadline for responses

All responses should be received no later than 23 October 2016.

How responses are handled

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that I would normally expect to publish all responses received on my website: <http://www.scraptheact.com/>.

As published, responses will normally include the name of the respondent, but other personal data (signatures, addresses and contact details) will not be included.

Copies of all responses will be provided to the Scottish Parliament's Non-Government Bills Unit (NGBU), so it can prepare a summary that I may then lodge with a final proposal (the next stage in the process of securing the right to introduce a Member's Bill). NGBU will treat responses in accordance with the Data Protection Act 1998. The summary may cite, or quote from, your response and may name you as a respondent to the consultation – unless your response is to be anonymous or confidential (see below).

I am also obliged to provide copies of all responses to the Scottish Parliament's Information Centre (SPICe). SPICe may make responses (other than confidential responses) available to MSPs or staff on request.

Requests for anonymity or confidentiality

If you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly. You still need to supply your name, but any response treated as anonymous will be published without the name (attributed only to "Anonymous"), and only the anonymised version will be provided to SPICe. If you request anonymity, it is your responsibility to ensure that the content of your response does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly. If the response is treated as confidential (in whole or in part), it (or

the relevant part) will not be published. However, I would still be obliged to provide a complete copy of the response to NGBU, and a copy of any non-confidential parts (i.e. a redacted copy) to SPICe when lodging my final proposal. As the Scottish Parliament is subject to the Freedom of Information (Scotland) Act 2002 (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Scottish Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

In summarising the results of this consultation, NGBU will aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published (or published only in part).

Other exceptions to publication

Where a large number of submissions is received, particularly if they are in very similar terms, it may not be practical or appropriate to publish them all individually. One option may be to publish the text only once, together with a list of the names of those making that response.

There may also be legal reasons for not publishing some or all of a response – for example, if it contains irrelevant, offensive or defamatory statements or material. If I think your response contains such material, it may be returned to you with an invitation to provide a justification for the comments or remove them. If the issue is not resolved to my satisfaction, I may then disregard the response and destroy it.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. As stated above, I will normally publish your response in full, together with your name, unless you request anonymity or confidentiality. I will not publish your signature or personal contact information, or any other information which could identify you and be defined as personal data.

I may also edit any part of your response which I think could identify a third party, unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received by NGBU or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees,

it is considered to be held by the Parliament and is subject to the requirements of the FOISA. So if the information you send me is requested by third parties the Scottish Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, potentially even if I have agreed to treat all or part of the information in confidence or to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at:
www.itspublicknowledge.info.