CHAPTER 7: The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012, section 1

This chapter should be read along with chapter 8 of the Academic Report which sets out the background to the provision and an analysis of it as well as examining the approach taken in other jurisdictions, particularly in England and Wales and Northern Ireland. In addition, the Academic Report explores the terms of the Lord Advocate's Guidelines on the 2012 Act.

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 ("the 2012 Act") came into force on 1 March 2012. It was introduced against a background of certain events in 2011 which were football related, as more fully described in chapter 3 above and paragraph 8.1.1 of the Academic Report. Since its introduction there has been significant opposition to the Act. This includes disapproval by opposition parties in the Scottish Parliament. On 2 November 2016, a motion by Douglas Ross MSP urging the Scottish Government to repeal the Act was passed. On 21 June 2017 James Kelly MSP introduced a member’s Bill to repeal the 2012 Act. The Justice Committee has issued a call for written evidence. Given the cross party support among opposition parties and the parliamentary arithmetic, there is a prospect that the Act will be repealed.

The 2011 Policy Memorandum

When the Bill was introduced in 2011 the Policy Memorandum noted at paragraph 12 that there was:

“…a small often determined minority for whom provoking, antagonising, threatening and offending are seen as part and parcel of what it means to support a football team. Whatever their motivation, this Bill seeks to demonstrate that such a view is mistaken and will no longer be accepted.”

At paragraphs 20 and 21 the Policy Memorandum noted that disorderly and offensive behaviour at football matches could, in certain circumstances, be prosecuted under the common law as a breach of the peace, or using the offence of “threatening or abusive behaviour” under 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Where there was a racist element to the behaviour, prosecution using the offences of incitement of racial hatred in the Public Order Act 1986 might also be appropriate. Section 74 of the Criminal Justice (Scotland) Act 2003 and section 96 of the Crime and Disorder Act 1986 which provided for statutory aggravations on grounds of religious or racial hatred, might also be relevant. However, there was concern that a substantial proportion of offensive behaviour related to football which led to public disorder was not explicitly caught by the pre-existing law. Such offensive behaviour might not satisfy the strict criteria for causing
“fear and alarm” required to prove breach of the peace or section 38 of the 2010 Act. The Policy Memorandum went on to explain that the Bill sought to put beyond doubt that behaviour related to football matches which was likely to incite public disorder and which would be offensive to any reasonable person was a criminal offence. The offence would serve to clarify rather than complicate the law and would provide reassurance to the public in relation to a collective abhorrence of that sort of behaviour. It would send a clear and powerful signal to football fans and the public more generally that such behaviour at football matches was simply unacceptable. It would also mean that the offender’s criminal record would clearly show that he or she had engaged in offensive behaviour specifically related to football, rather than to any more general offence.

The Policy Memorandum went on to state that there was no evidence of a significant problem with disorder or sectarian or otherwise offensive behaviour associated with sports other than football and that accordingly the new offence should apply in respect of football matches only. It was also to apply to problems of disorder outside stadia and on the way to and from matches on public transport and in the city streets as well as in pubs and other venues where matches were being televised.

The 2017 Policy Memorandum (Member’s Bill)
The Policy Memorandum accompanying the member’s Bill in June 2017 makes reference to the criticism of the Act. Picking up on the 2011 Policy Memorandum’s assertion that introducing the offence under section 1(2)(e) “will serve to clarify rather than complicate the law”, the Policy Memorandum at paragraph 18 states:

“However, there has been strong criticism that section 1(2)(e), in particular, 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 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, 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.”

The second principal criticism of the operation of the Act is at paragraph 20 where, noting that section 1 relates to football only, it points to concerns that had been expressed as to why only football matches were covered by the legislation, and not other sports events, or events such as parades. There had been concern that the focus on the setting of a football match meant that exactly the same (sectarian) behaviour could be treated differently in law solely because of the context in which it occurred.
The Advisory Group on Tackling Sectarianism in Scotland

In May 2015 the Advisory Group on Tackling Sectarianism in Scotland, chaired by Dr Duncan Morrow, reported. The report, which was wide ranging, included recommendations in relation to football. Dr Morrow was invited by the Minister for Community Safety and Legal Affairs to review the progress that had been made across all of the sectors at which recommendations had been aimed and in March 2017 he published his Review of Implementation of the Recommendations.

The recommendations made in 2015 in relation to football included:

“5.7.10 The football authorities and clubs should proactively work to address the close association in public perception of football in Scotland with sectarianism through direct programmes of intervention, clear and anti-sectarian messaging and active and visible leadership in partnership with other agencies such as local government, youth work, schools, police.

5.7.11 Respond to our question ‘if not strict liability then what?’ It is clear that a strategic and measured response to Scotland’s remnants of sectarian attitudes and behaviour cannot succeed without squarely addressing sectarian problems within and around football.”

In his 2017 Review Dr Morrow noted that the supporting evidence for the association between football and sectarianism remained very strong (page 29). Dr Morrow noted that as an alternative to a strict liability approach the football authorities had proposed a revised and more robust approach to tackle unacceptable conduct including, but not restricted to, sectarian behaviour. He noted that the evaluation and monitoring of unacceptable conduct should begin by the start of the new 2017-18 football season. While expressing a degree of scepticism as to whether these proposals would be sufficient to change “the evident sectarian behaviour in Scottish football”, he went on to state that in keeping with the spirit of the Advisory Group’s Report that changes should be evidence-based and collaborative, the sincerity and effectiveness of the proposals must now be explicitly and fully tested. He identified a number of outcomes which he considered would require to be supported by evidence. These included measurable evidence that sectarian singing at football matches had reduced and been replaced by other forms of identification.

The Scottish Premier Football League Limited (SPFL) and the Scottish Football Association (SFA)

In response to the questionnaire issued by this review, the SPFL set out in some detail their revised Unacceptable Conduct rules. In the course of the fact-finding stage of the review we met with the Chief Executives of the SPFL and the SFA, together with other representatives of each body. Each of the bodies has an identical code and a similar structure for dealing with unacceptable conduct in relation to the football matches falling within their jurisdiction.
Unacceptable Conduct is defined as conduct which is violent and/or disorderly. Disorderly conduct includes conduct which stirs up hatred against listed groups or against individuals based on their perceived membership of such groups. The listed groups are: female or male gender; colour, race, nationality (including citizenship) or ethnic or national origin; membership of a religious group or of a social or cultural group with a perceived religious affiliation; sexual orientation; transgender identity; and disability.

Where unacceptable conduct is alleged to have occurred, the SPFL or the SFA investigates the allegations and may impose sanctions on clubs responsible for unacceptable conduct. A club requires to have taken certain reasonably practicable steps in terms of Rule H 33: the home club must ensure, so far as is reasonably practicable, good order and security; that policies and procedures have been adopted and are implemented to prevent incidents of unacceptable conduct; and that any incidents of unacceptable conduct are effectively dealt with, all at its stadium on the occasion of an official match. Every club must ensure, so far as is reasonably practicable, that: persons, including its supporters, do not engage in unacceptable conduct at the stadium on the occasion of an official match; it identifies any of its supporters who engage in unacceptable conduct; and it takes proportionate disciplinary measures in respect of such supporters. Any failure by a club to discharge these requirements constitute a breach of the rules.

The range of sanctions against a supporter who has engaged in unacceptable behaviour should include: exclusion from the home ground of the Club concerned; exclusion from all forms of club organised and/or supported travel; confiscation, without compensation, of any season tickets held by the person for a period, or periods, of time, or indefinitely and/or exclusion from being able to purchase tickets for away matches.

Where a club has breached the rules a range of sanctions is open. These include: a warning as to future conduct; a reprimand; a fine; the annulment of result; an order that a match be replayed; the imposition of a deduction of points; the award of the result of a match to another club; ordering that the playing of a match be behind closed doors; ordering the closure of all or part of a stadium for a period; ordering the playing of a match at a particular stadium; ordering the relegation of a club to a lower division; expelling the club from the League.

The SPFL maintain an independent commission and the SFA a judicial panel to deal with matters of this kind.

For the 2017-2018 football season particular stress has been placed on the responsibility of each club to maintain discipline among its supporters. Clubs will be expected to take steps such as examining CCTV footage to identify persons engaging in unacceptable
conduct such as singing sectarian songs. It is expected that such persons will be disciplined, for example, by being deprived of their season ticket. Clubs require to report incidents to the governing bodies.

We were advised that some clubs considered that a useful tool in dealing with unacceptable conduct would be a provision which allowed a football club to make an application for a football banning order similar to section 52 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 which allows the Chief Constable of the Police Service of Scotland to apply to the sheriff for such an order. We shall return to this issue later in the chapter.

**Views of fans’ groups**

Some of the fans’ groups to whom we spoke shared Dr Morrow’s scepticism about how well the rules will operate in practice.

The view was expressed to us that many fans did not understand the 2012 Act or how it worked in practice. There was a lack of clarity about what was and was not acceptable. While most fans understood that certain forms of behaviour were clearly unacceptable and other forms of behaviour were clearly acceptable, the difficulty arose in making decisions about the middle ground. Who should decide what was offensive? More clarity was required. Some contrasted the vagueness of the 2012 Act with the specific list of songs which had been compiled by UEFA and which were not permitted to be sung. The groups expressed the view that it was not appropriate to have legislation which targeted football and football supporters in a specific way. There had been a very recent incident on an Orange march in Glasgow where persons spectating the march had been filmed singing “The Famine Song” and the video had been posted on social media. It was noted that nothing had been done to stop that at the time of the march. Fans did not like double standards and there was a risk that they would lose their faith in a system where behaviour was tolerated elsewhere but not at football. This was reflected in surveys of fans.

**Approach of the review**

It is clear that the progress of the member’s Bill through the Parliament is likely to coincide with the consultation period of the review and perhaps extend beyond it. No doubt the parliamentary process will inform and assist the consultation exercise. While the issues which are likely to emerge in the arguments as to whether or not the 2012 Act should be repealed overlap with those raised in the review consultation in relation to section 1, they do not precisely coincide with them. It is important to understand that not all the behaviour struck at by section 1 falls into the category of hate crime motivated by prejudice. In addition, some of the broader arguments advanced in favour of repeal may be outwith the remit of the review.
For the purpose of the consultation paper we intend to examine the use to which the provisions of section 1 have been put in practice in the past five years and identify questions that arise from that analysis. In addition, we shall address certain other developments in relation to section 1.

The Review will therefore consider how the law should best deal with the type of hate crime behaviour covered by section 1 in parallel with the Parliament’s consideration of James Kelly’s repeal bill. The final recommendations made by the Review will take into account the law as it exists or is anticipated at that point.

**Whether section 1 offences fall within the remit of the Review**

Section 1 creates an offence in relation to a regulated football match of engaging in certain types of behaviour which is likely, or would be likely, to incite public disorder. As noted above, it should immediately be recognised that not all of the behaviour struck at by section 1 would fall within the current definition of hate crime.

We have set out the five categories of behaviour which may be caught by the section 1 offence at chapter 3 above. The types of behaviour identified in section 1(2)(a) to (c) clearly fall within the remit of the Review. The behaviour identified in (a) is behaviour expressing hatred of, or stirring up hatred against, a group of persons based on their membership (or presumed membership) of (i) a religious group, (ii) a social or cultural group with a perceived religious affiliation, (iii) a group defined by reference to a thing mentioned in subsection (4). The things mentioned in subsection (4) are colour; race; nationality (including citizenship); ethnic or national origins; sexual orientation; transgender identities; and disability. The behaviour identified in section 1(2)(b) is behaviour expressing hatred of, or stirring up hatred against, an individual based on the individual's membership (or presumed membership) of one of the groups mentioned above.

The behaviours in section 1(2)(a) and (b) would fall into the category of hate speech as explained in chapter 6 of the Academic Report. Section 1(2)(c) covers behaviour that is motivated (wholly or partly) by hatred of such a group. This would fall within the definition of hate crime. In each case the behaviour must be related to a regulated football match and be likely to incite public disorder.

Section 1(2)(d) identifies one of the types of behaviour struck at by the provision as “behaviour that is threatening”. Thus, section 1(2)(d) contemplates an offence in relation to behaviour which is threatening, is likely, or would be likely, to incite public disorder and is committed in circumstances in relation to a regulated football match. There is in relation to this particular subsection no qualification of hatred or prejudice. We were told, for example, that most of the cases following the disruption after the 2016 Scottish Cup Final between Hibs and Rangers were brought under section 1(2)(d) or (e) and involved no
obvious prejudice. Another example given was an altercation within the crowd over seating arrangements: this could amount to threatening behaviour under 1(2)(d). We consider, therefore, that offences under section 1(2)(d) do not fall within the remit of the Review.

Section 1(2)(e) identifies “other behaviour that a reasonable person would be likely to consider offensive” as struck at by the provision. Although this subsection is very widely drafted and consequently could include behaviour which fell outside the remit of this review, we were advised by the football liaison prosecutors to whom we spoke that songs or speech which had a religious connotation would be prosecuted under one of section 1(2)(a) to (c), while songs, speech or gestures that glorify terrorist organisations such as the IRA or UVF would be brought under 1(2)(e). The vast majority of prosecutions under section 1(2)(e) involved that type of behaviour. While such action does not necessarily evince malice and ill-will towards others based on their membership of groups, it may be said to be driven by the same type of prejudice or sectarian culture. Accordingly, we are inclined to include offences under 1(2)(e) as falling within the remit of the review.

Evidence of conduct prosecuted under section 1
What emerged from the evidence from the football liaison prosecutors in COPFS and police officers in the Football Coordination Unit for Scotland (FoCUS) was that there are three broad categories of behaviour which have consistently given rise to offences under section 1 since its introduction. First, there were offences involving threatening behaviour (section 1(2)(d)). Secondly, there were offences involving behaviour expressing or stirring up hatred for, or motivated by, hatred based on religion, race or other characteristics, but very much focused on religion (section 1(2)(a)-(c)). Generally, this behaviour involved singing, speech, the waving of banners and making of gestures. Thirdly, there were offences characterised as “other offensive behaviour” (section 1(2)(e)). These generally involved singing, speech, the waving of banners and making of gestures all in support of proscribed terrorist organisations such as the IRA or the UVF. The use of pyrotechnics was generally dealt with as culpable and reckless conduct rather than section 1 offensive behaviour.

Statistics
This evidence as to the type of offences which have been brought under the Act is supported by the statistics. The Scottish Government publish an annual report analysing the statistics in relation to charges reported under the 2012 Act. The latest edition, Charges reported under the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 in 2016-17, was published on 9 June 2017. In 2016-17 there was an unusually large number of charges of threatening behaviour. This is perhaps due to the fact that 45% of the charges of threatening behaviour in that year arose from the Scottish Cup Final between Rangers and Hibs. Of the offences under section 1(2)(a) to (c) the statistics indicate that the vast bulk of charges of this type were
in relation to religion (Table 7 of the report). A much smaller proportion was in relation to race. Over the five year period between 2012 and 2017 there were a total of 337 charges relating to religion. There were 64 in relation to race. There were eight in relation to sexual orientation and one in relation to disability.

Table 9 of the report sets out the type of behaviour engaged in. This is broken down into the following categories: singing; speech; use of a banner; gesture; and “generally offensive”. The category of “generally offensive” refers to behaviour used by the accused that could not be categorised as singing, speech, banner, or gesture and any charges which involve the accused acting in a disorderly or aggressive manner, e.g. challenging others to fight or physically engaging in fighting. It is worthy of note that between 2012-13 and 2016-17 there has been a significant drop in the number of charges in relation to singing. In 2012-13 there were 112 charges relating to singing (42% of the total charges) while in 2016-17 there were 44 charges relating to singing (12% of the total charges).

Table 8 of the report provides a breakdown of the religions that were targeted. In 2016-17, 75% of the charges were directed against Roman Catholicism and 25% against Protestantism. There were no charges directed against Judaism and 2% (one charge) against Islam.

“In relation to a regulated football match”

In terms of section 2(2) behaviour is in relation to a regulated football match if it occurs not only in the ground where the match is being held but also while the person is entering or leaving or trying to enter or leave the ground, or on a journey to or from the match. A person may be regarded as having been on a journey to or from a regulated football match whether or not the person actually attended or intended to attend the match. A journey includes breaks, including overnight breaks. The behaviour also includes behaviour in premises, such as a pub, where the match is being televised.

We were advised by the football liaison prosecutors that the behaviour in the majority of the cases prosecuted had occurred within the stadium. A minority of cases involved behaviour outwith the stadium. Very few cases came from pubs in which the match was being televised. Some incidents occurred on trains on which fans were travelling to matches. This evidence is supported by the statistics. In each of the five years since the Act was introduced the majority of charges related to behaviour in a football stadium. In 2016-17 there was a significant increase in the proportion of charges relating to behaviour within the stadium but this, again, may be skewed by events at the Scottish Cup Final 2016. After charges occurring at football stadiums, the next most common are on the main street followed by public transport. The figures in relation to public transport in 2015-16 were particularly high compared to previous years; this was partly attributed to two incidents which accounted for 26 out of 66 charges.
The approach in other jurisdictions
This is explored in detail in paragraph 8.2 of the Academic Report to which the reader is referred. It is striking that, in comparison with the widely stated provision of section 1 of the 2012 Act, both the provisions in force in England and Wales and Northern Ireland specifically relate to chanting. Chanting is defined as meaning the repeated uttering of any words or sounds, whether alone or in concert with one or more others. In England and Wales the target is chanting of an indecent or racist nature, while in Northern Ireland the chanting may be of an indecent nature, a sectarian or indecent nature, or 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. We wish to consider whether anything is to be learned from these provisions for application in the Scottish context.

Conclusion on type of conduct prosecuted under section 1
When the threatening behaviour charges are left out of account, the history of the operation of section 1 of the 2012 Act makes it clear that the remaining charges have overwhelmingly been of a sectarian nature. The conduct giving rise to these charges comprised singing, speech, waving of banners and making of gestures. The charges which were brought involved either the expressing or stirring up of hatred of religion or offensive behaviour by glorifying proscribed organisations. A question arises as to whether conduct of that sort in the context of a football match should in Scotland be the subject of criminal proceedings. If the answer to that is that such conduct should be subject to the criminal law, then, whether or not the Act is repealed, a question arises as to whether section 1 in its current form is the best vehicle for prosecuting, in a focused way, the kind of conduct it has been used for in the past.

Question:
How clear is the 2012 Act about what actions might constitute a criminal offence in the context of a regulated football match?
Should sectarian singing and speech, and the waving of banners and making gestures of a sectarian nature at a football match be the subject of the criminal law at all?
If so, what kind of behaviour should be criminalised?
Does equivalent behaviour exist in a non-football context?
If so, should it be subject to the same criminal law provisions? Please give reasons for your answer.

Application of section 1 to conduct outwith Scotland
Section 10(1) of the 2012 Act permits prosecution in Scotland of an offence under section 1 committed outside Scotland by a person who is habitually resident in Scotland. This provision was used in the case of Procurator Fiscal, Glasgow v Jordan Robertson in
2013. The accused was prosecuted in Glasgow Sheriff Court on a charge of contravening section 1 by singing offensive songs at a football match in Berwick between Berwick Rangers and Rangers.

Question:
Is it beneficial to be able to prosecute in Scotland people who usually live in Scotland for offences committed at football matches in other countries? Please give reasons for your answer.
Should a similar provision apply to non-football related hate crime? Please give reasons for your answer.

The impact of the case of Cairns
Subsection 1(1)(b) requires that the behaviour (i) is likely to incite public disorder, or (ii) would be likely to incite public disorder. Subsection (5) provides that behaviour would be likely to incite public disorder if public disorder would be likely to occur but for the fact that measures are in place to prevent public disorder or persons likely to be incited to public disorder are not present or are not present in sufficient numbers. In MacDonald (PF Dingwall) v Cairns 2013 SCCR 422 this somewhat dense provision was considered in the context of its application to “other behaviour that a reasonable person would be likely to consider offensive” (subsection (2)(e)). The evidence disclosed that the accused was singing some of the words of The Roll of Honour, a song about the ten paramilitary prisoners who died during the hunger strikes in the early 1980s. He was also singing words from The Boys of the Old Brigade, which is a song from an earlier period in the history of the IRA. In addition, he was making a gesture which could be construed as firing a rifle into the air. The court held that the effect of subsection 1(5) was that, as it did not matter whether persons likely to be incited to public disorder were present in sufficient numbers, or were there at all, it could not matter whether or not the persons who were present (whether likely to be incited to public disorder or otherwise) actually became aware of the relevant behaviour.

The football liaison prosecutors to whom we spoke considered that, following the court’s interpretation in Cairns, section 1 was easier for the prosecutor to prove than (a) was thought before Cairns; and (b) a charge of breach of the peace. The effect of the decision has been that if it is proved that the conduct would be considered offensive by the reasonable person, the likelihood of inciting public disorder follows almost naturally. While evidence of actual disorder or evidence that equivalent conduct has provoked disorder in the past was led in some cases, it is no longer necessary to lead such evidence. Prior to Cairns the Crown had led such evidence in a section 1 case. In earlier breach of the peace cases sheriffs had taken different approaches to the nature of conduct in football grounds and level of disorder which might cause alarm to a reasonable person.
One football liaison prosecutor told us that a consequence of the decision in *Cairns* is that the difficulty, which arose when sheriffs were reluctant to convict of breach of the peace because the stadium was noisy and a reaction from anyone was unlikely, was now removed. One sheriff expressed the view that the impact of the decision in *Cairns* was to render the application of the section “counter-intuitive”. The offence amounted to a public disorder offence which could apply in circumstances where there was no real likelihood of anyone being caused upset or fear or alarm.

A question arises whether the decision in *Cairns* demonstrates that for practical purposes section 1(5) so emasculates the requirement in section 1(1)(b) as to make it virtually redundant. It may be argued that by its very nature sectarian singing, gesturing etc would not only be offensive to the reasonable person but would be likely to incite public disorder and that that is enough to satisfy the requirement of section 1(1)(b).

**Question:**
Is it appropriate to have a requirement that behaviour is or would be likely to incite public disorder in order for it to amount to a criminal offence? Please give reasons for your answer.

**Is any conduct subject to prosecution under section 1 of the 2012 Act not covered by pre-existing common law or legislation?**

The Policy Memorandum to the 2011 Bill stated at paragraph 48 that considerable thought had been given to whether it was necessary to create new criminal offences or whether the approach should involve what was described as “a further determination to use existing measures effectively”. It went on to state:

“While in relation to offensive and disorderly conduct at football matches there is coverage of existing law in relation to most of the behaviour we are seeking to eradicate, there are nevertheless areas where greater clarity and a strengthened response would be beneficial”.

The Policy Memorandum to the member’s 2017 Bill contends at paragraph 16 and 17 that an argument for the repeal of the Act is “that it is not needed as existing laws already make it possible for offenders to be brought to justice”.

There is no doubt that some offences currently prosecuted under section 1 could be prosecuted as breach of the peace. One sheriff described a case taken under section 1 which involved a person on a train travelling from Glasgow to Central Scotland following a match singing a sectarian song known as “the Sash”. The individual was convicted of an offence under section 1 and received a football banning order until the end of the season. One of the football liaison prosecutors described a similar case prosecuted before the introduction of the 2012 Act involving similar singing and remarks of a prejudicial nature.
towards Roman Catholics. That case was successfully prosecuted as a breach of the peace with an aggravation in terms of section 74 of the Criminal Justice (Scotland) Act 2003. Such conduct could attract a football banning order as coming within the definition of “disorder” in section 56 of the Police, Public Order and Criminal Justice (Scotland) Act 2006. It is important to bear in mind that football banning orders may be imposed on conviction for a variety of offences in addition to a contravention of section 1 of the 2012 Act.

As noted above, section 10(1) of the 2012 Act permits prosecution in Scotland of an offence committed extra-territorially. Offences at common law and other statutory offences, such as contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, could not be prosecuted if committed outwith the jurisdiction.

As noted above, the football liaison prosecutors expressed the view that since the decision in Cairns, it was easier to prove that singing within the stadium constituted an offence under section 1 than proving an offence of breach of the peace. Both a football liaison prosecutor and a sheriff expressed the view in relation to a lot of singing within the stadium that it would be difficult to show that the behaviour amounted to a breach of the peace or was threatening or abusive in terms of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.

These, and related issues will no doubt be the subject of scrutiny in the parliamentary process of the member’s Bill. It is also an issue on which the review would wish to receive full and clear responses.

**Question:**

Is there any conduct currently subject to prosecution under section 1 of the 2012 Act which would not be covered by pre-existing common law or legislation? Please give reasons for your answer.

**Diversion**

There is available as an alternative to prosecution a diversion scheme in relation to a person charged with an offence such as offensive singing. The community justice organisation, Sacro, operates a nationwide scheme for young people (aged 12 and over) charged under the 2012 Act. Under the scheme, young people can be offered diversion from prosecution in the form of a structured programme based on behavioural and attitudinal change, using Cognitive Behavioural Intervention techniques. The sessions support the individual to understand why they behave in a specific way and take ownership of their attitude and behaviours to ensure positive changes so as not to repeat the offence.

It was suggested to us that this was the preferred course of action in relation to young offenders where violence was not involved and it was considered that a football banning
order was not necessary. The requirement of the scheme was that the person should attend and successfully complete it. If they did not do so they could still be prosecuted.

The use of systems which allow for diversion from prosecution is discussed in more detail in chapter 9.

**Football Banning Orders**

For a more detailed analysis of the provisions in relation to the making of football banning orders, the reader should refer to the Academic Report at paragraph 8.2.

Sections 51 to 56 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 provide for the making of football banning orders. Subsection 51 makes provision for the making of such an order where a person aged over 16 years is convicted of an offence related to a football match and the offence involved violence or disorder. "Related to a football match" is defined as including: an offence committed at a football match or while the person is entering or leaving, or trying to enter or leave, the ground; an offence committed on a journey to or from a football match or “otherwise, where it appears to the court from all the circumstances that the offence is motivated (wholly or partly) by a football match”.

A football banning order prohibits the person from entering any premises for the purposes of attending any regulated football matches in the United Kingdom. It also has provisions in relation to regulated football matches outside the United Kingdom. It may extend to maximum periods of 3, 5 or 10 years, depending on the circumstances. Some of those to whom we spoke considered that football banning orders were an effective deterrent as persons did not wish to be prevented from attending a match.

We were advised that where a person is convicted under section 1 of the 2012 Act a football banning order was usually imposed. However, it is important to understand that football banning orders may also be imposed following convictions for offences other than those under the 2012 Act, provided that the offence related to football match and involved violence and disorder. The definition of ‘disorder’ in section 56 specifically includes stirring up hatred against groups of persons or individuals based on their membership of protected groups.

Under section 52 of the 2006 Act there is provision for the police to apply to the sheriff by summary application for a football banning order on a person who has not committed an offence if the court thinks that the person has been involved in violence or disorder in the past and that banning the person would help to prevent future violence or disorder at football matches. These are not common. There have been around twenty such applications in the past six years.
As noted earlier in this chapter, some football clubs have expressed the view that a similar provision which would allow a football club to apply for a football banning order would be a useful in maintaining discipline as required by the governing bodies of football.

**Question:**
Should a football club be able to apply to the court for a football banning order? Please give reasons for your answer.