

# Proposed Football (Strict Liability) (Scotland) Bill

## Page 2: About you

Are you responding as an individual or on behalf of an organisation?

on behalf of an organisation

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

*No Response*

Please select the category which best describes your organisation

Representative organisation (trade union, professional association)

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 am content for this response to be attributed to me or my organisation

**Name or Name of Organisation**

Scottish Professional Football League Ltd

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.

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## Page 7: Your views on the proposal

Q1. Which of the following best expresses your view of the proposal to introduce strict liability for football clubs in Scotland?

Fully opposed

**Please explain the reasons for your response**

25 Scottish Senior Football is overwhelmingly opposed to the introduction by legislation imposing strict liability for football Clubs in Scotland as regards misbehaviour by supporters at matches. Whenever the subject of such strict liability has been debated within the structures of the sport it has overwhelmingly been opposed. 26 The level of opposition is explained by the fundamental unfairness of seeking to penalise football Clubs and by extension the great majority of their supporters who are well behaved for

Q1. Which of the following best expresses your view of the proposal to introduce strict liability for football clubs in Scotland?

the misbehaviour of a few where the Clubs concerned are not at fault for the misbehaviour having occurred or for how it is dealt with. Scottish Senior Football does not consider that such measures have any advantages, that they would be appropriate or that it would be legally competent or workable to make a law imposing strict liability for the actions of others on football Clubs, all for the reasons set out in below. Our research has shown that strict liability does not have a deterrent effect either in theory or in practice.

Q2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

Yes (if so, please explain below)

**Please explain the reasons for your response**

27 Scottish Senior Football has been and is working to ensure that Unacceptable Conduct in general and sectarianism related supporter misbehaviour at matches in particular, can be substantially reduced and in some areas eliminated organically by robust cooperation between the government, football authorities and stakeholders.

28 There is a cultural element to sectarianism which has been rooted in Scottish culture for generations. Although, a creation of history and not sport, sectarianism, as manifested in Scotland now, occurs in a range of social, family and other contexts. It is deeply ingrained at various levels in Scottish society so it is hardly surprising that incidents of behaviour involving sectarian expressions of prejudice arise from time to time at football matches. Eradication of such expressions can only be achieved through cross-society action that has the result of changing beliefs and prejudices. Such work could be undertaken through educational programmes, government agency action and the actions and initiatives of private and third sector bodies in their individual areas of activity, including within football Clubs working with supporters and stakeholders. There is no 'one size fits all solution'. Everyone involved in the game of football, ranging from Clubs with a few hundred attending Home matches in county towns and with limited infrastructure and staffing through to international multi-million pound businesses with Home gates in excess of 60,000 and with supporters all over the world, must cooperate and put in place or professionalise their programmes in order to increase awareness of the impact which Unacceptable Conduct has on the game. This exercise will not be a rapid one and no immediate solution can eradicate something that has been culturally embedded for centuries.

29 In any event, the imposition of sanctions on Clubs based on strict liability for the conduct of spectators will do nothing to encourage such spectators to take responsibility for their own behaviour and to change habits and long standing modes of behaviour. It is only by misbehaving supporters being required to take responsibility for their own misconduct that there can be any hope of change.

30 Notwithstanding the challenging context, there has been a significant level of successes within football which has greatly improved the experience of supporters at matches and has resulted in much reduced levels of misbehaviour in general and sectarian expressions and misconduct in particular. Anyone who has been a regular attendee at domestic Scottish professional football matches will have identified the substantial progress that has been made in reducing overall levels of misconduct amongst supporters and in particular the reductions in the level of expressions of sectarian sentiment and misconduct involving a sectarian element. This is reflected in the high number of matches, including many in the Premiership, where no police officers are required to be present in the stadium and the much reduced numbers of police force in relation to matches at which a police presence, at the cost of the Home Club, is considered an appropriate precaution.

31 Initiatives such as the Supporter Liaison Officer, where the Scottish Government is helping to fund the initiative and closer links between Clubs and supporters and their organisations continue to improve and foster better relations between Clubs and those who support them. Stakeholder involvement and consultation, and in some cases ownership of Clubs by supporters is much more likely to encourage better behaviour than is the ineffective and unfair 'stick' of the threat of strict liability.

32 The football organisations have asked that Clubs be able to apply for 'banning orders' to ensure that so called supporters who are disciplined by Clubs can be effectively prevented from attending at Away fixtures. This is understood to be under consideration by government.

33 Scottish Senior Football already has very robust and well regarded rules concerning incidents of misconduct, known as "Unacceptable Conduct", by any person present at a senior level professional football match in Scotland. This includes all matches in all of the competitions owned and organised by the SPFL Limited and in the Scottish Cup owned and organised by the Scottish FA.

34 These existing Rules are based on the employer liability laws providing for criminal responsibility for

Q2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

injuries suffered by workers at their place of employment and by others who may be present at such workplaces. These existing Rules, which have been developed over a number of years, and through 3 separate consultation processes with the Scottish Government impose a prima facie responsibility on the Clubs taking part in a match for the acts and omissions of supporters and others at the match in relation to any Unacceptable Conduct committed by such supporters and others. That responsibility can only be avoided if the Clubs concerned can demonstrate, the onus being on the Clubs, that each has taken reasonably practicable steps to prevent the Unacceptable Conduct in question occurring.

35 The Rules include a comprehensive definition of what constitutes Unacceptable Conduct. This definition includes violent conduct, whether against persons or property, offensive behaviour, including all forms of sectarian and other discriminatory behaviour and very detailed guidance on what steps and measures Clubs are required to be able to demonstrate they have taken if they are not to be held responsible and liable for the Unacceptable Conduct of the supporters and/or others at the match.

36 Unacceptable Conduct is:

"H25 A person present at or in a stadium where an Official Match is being played engages in Unacceptable Conduct where their conduct is violent and/or disorderly.

H26 Conduct is violent where there is (i) actual, attempted or threatened physical violence against a person or persons; or (ii) intentional damage to property.

H27 Disorderly conduct includes

H27.1 conduct which stirs up or sustains or is likely or designed to stir up or sustain, hatred or ill will against or towards a group of persons based on their membership or presumed membership of a group defined by reference to a category mentioned in Rule H29 or against an individual who is or is presumed to be a member of such group;

H27.2 using threatening, abusive or insulting words or conduct;

H27.3 displaying any writing or other thing which is threatening, abusive or insulting; and

H27.4 using words or conduct or displaying any writing or other thing which indicates support for, or affiliation to, or celebration of, or opposition to an organisation or group proscribed in terms of the Terrorism Act 2000.

H28 Presumed in the context of Rule H27.1 means presumed by the person or persons engaged in the conduct.

H29 The categories referred to in Rule H27 are:- H29.1

female or male gender;

H29.2 colour, race, nationality (including citizenship) or ethnic or national origin;

H29.3 membership of a religious group or of a social or cultural group with a perceived religious affiliation; H29.4 sexual orientation; H29.5 transgender identity; and H29.6 disability.

H30 In Rule H29.3 religious group means a group of persons defined by reference to their religious belief or lack of religious belief, membership of or adherence to a church or religious organisation, support for the culture and traditions of a church or religious organisation and/or participation in activities associated with such a culture or such traditions.

H31 In Rule H29.5 transgender identity means any one or more of transvestism, transsexualism, intersexuality or change of gender.

H32 In Rule H29.6 disability means physical or mental impairment of any kind."

37 Clubs are responsible for disciplinary offences in relation to Unacceptable Conduct as follows:

"H33 The Home Club in any Official Match must ensure, so far as is reasonably practicable, H33.1 good order and security;

H33.2 that policies and procedures have been adopted and are implemented to prevent incidents of Unacceptable Conduct; and

H33.3 that any incidents of Unacceptable Conduct are effectively dealt with, all at its Stadium on the occasion of an Official Match

H34 Each Club must ensure, so far as is reasonably practicable, that:

H34.1 its Players, officials, supporters and any person exercising a function for or connected with the Club do not engage in Unacceptable Conduct at a Stadium on the occasion of an Official Match;

H34.2 it identifies any of its supporters who engage in Unacceptable Conduct at an Official Match; and

H34.3 it takes proportionate disciplinary measures in respect of supporters so identified in terms of Rule H34.2.

H35 Any failure by a Club to discharge a requirement to which it is subject by virtue of Rules H33 and/or H34 shall constitute a breach of these Rules.

H36 In any proceedings in terms of the Rules against a Club in which it is alleged that there has been a failure by that Club to discharge a requirement to which it is subject by virtue of Rules H33 and/or H34 it shall be for the Club concerned to prove that it was not reasonably practicable to do more than was in fact done or (as the case may be) that there was no better practicable means than was in fact used to discharge such requirement. Account shall be taken in such proceedings of the effect of decisions and

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actions of the local police, public authorities and other Club taking part in an Official Match, in determining whether the requirements of Rules H33 and/or H34 have been discharged."

38 The above quoted provisions which are drawn from the SPFL Rules and are reflected in the Scottish FA Article 28 provisions and in the Scottish FA Judicial Panel Protocol.

39 In order to establish that a Club has taken reasonably practicable steps it will be expected to have complied with the following detailed and onerous guidance. Identical guidance has been adopted by both the Scottish FA and the SPFL. The guidance is stringent, detailed and effective. It places significant obligations on Clubs. It has been recently updated in discussion with the Scottish Government: "Each Club should:-

#### Club Unacceptable Conduct Statements

1. Issue and publish a written statement in all forms of Club communication to its supporters, including on any Club website, by email and by all forms of social media used by the Club, that it condemns and will not tolerate any form of Unacceptable Conduct by any person at Official Matches at its Home Ground and by or amongst its supporters, Officials, Players and others connected with the Club at Away Matches ("the Statement").

2. Include:-

(i) in the Statement notification that search procedures may be operated by the Club at its Home Ground, that those entering its Home Ground are deemed to have agreed to be subject to such search procedures and that items may be confiscated during such a search if they are considered to fall within paragraphs 6 and/or 7 of this Guidance;

(ii) in the Statement examples the type of behaviour considered to constitute engaging in and/or contributing to Unacceptable Behaviour;

(iii) in the Statement examples of disciplinary sanctions(s) that the Club may take against those who are established by the Club to have engaged in and/or contributed to Unacceptable Conduct at an Official Match; and

(iv) the Statement in full in all match day programmes and similar Club publications, be posted in full in an easily accessible position on any Club website(s) and be referred to on Club social media messaging.

3. Display copies of the Statement permanently and prominently throughout, including at all entrances to, its Home Ground and replace any removed or defaced copies of the Statement before the next Official Match at that stadium.

#### Match Announcements

4. Make announcements over the stadium public address system at every Home first team Official Match and at every other Home Official Match at which the number of supporters present exceeds 250, condemning all forms of Unacceptable Conduct.

#### Ground Entry Conditions

5. In relation to all Official Matches, make it a condition of its Season and all match day tickets and its ground entry conditions and/or regulations that purchasers and holders of such tickets and all other entrants to its Home Ground:-

(i) must not engage in Unacceptable Conduct at an Official Match; (ii)

adhere to the 'Fans' Charter' published by the Scottish FA at

[www.scottishfa.co.uk/scottish\\_football.cfm?page=3441](http://www.scottishfa.co.uk/scottish_football.cfm?page=3441) and any amended or replacement version of that Charter; and

(iii) agree to be subject to being searched on seeking entry to and whilst in its Home Ground for any flag(s), banner(s) and the like which may contain offensive or otherwise unacceptable material and/or flares, fireworks, devices capable of emitting smoke or the like and/or any other object which may cause or be part of Unacceptable Conduct and that any such item(s) brought into or attempted to be brought into its Home ground shall be liable to be confiscated.

#### Search and Confiscation

6. If it suspects that a person seeking entry to or within its Home Ground for an Official Match may have in his/her possession any flag(s), banner(s) and the like which may contain offensive or otherwise unacceptable material and/or flares, fireworks, devices capable of emitting smoke or the like and/or any other object which may cause or be part of any incident of Unacceptable Conduct then it shall require that person to be searched and shall search that person and confiscate and deliver to the police any such flag(s), banner(s) and the like which may contain offensive or otherwise unacceptable material and/or flares, fireworks, devices capable of emitting smoke or the like and/or any other object which may cause or be part of any incident of Unacceptable Conduct.

7. Advise all entrants to a stadium at which an Official Match is or will be played that any person having any such any flag(s), banner(s) and the like which may contain offensive or otherwise unacceptable material and/or flares, fireworks, devices capable of emitting smoke or the like and/or any other object which may cause or be part of any incident of Unacceptable Conduct on his person or any such person refusing to be searched shall not be admitted to the ground and any Season book/ticket or ticket held by

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him/her shall be liable to be confiscated without compensation and he/she shall be liable to such other proportionate sanction as the Club may determine. Collection and Sharing of Ticket Issue Information

8. For Official Matches for which tickets have been or shall be sold and/or issued by the Home Club and/or where the Home Club has issued tickets to the Visiting Club to sell and/or issue to the Visiting Club's supporters the:-

(i) Home Club shall, except where it is impracticable to do so in circumstances where a ticket is sold by the Home Club at an entrance to the stadium in the period immediately before an Official Match as part of a complete transaction without any form of pre-ordering and where the transaction allows immediate entry to the stadium for a single match to the purchaser, record the names and addresses of all of those to whom it has sold and/or issued a ticket or tickets for any part of the stadium;

(ii) Home Club shall, when recording the names and addresses of all of those to whom a ticket or tickets for the Visiting support area(s) of its stadium for an Official Match are sold and/or issued by the Home

Club, obtain consent to the disclosure of that information to the Visiting Club;

(iii) Home Club shall, if requested to do so by the Visiting Club, provide the names and addresses of those to whom it has sold and/or issued a ticket or tickets to a Visiting support area of its Home Ground for an

Official Match;

(iv) Visiting Club shall, record the names and addresses of all those to whom tickets for a Visiting support area are sold and/or issued by the Visiting Club and shall obtain consent to the disclosure of that information to the Home Club;

(v) Visiting Club shall, if requested to do so by the Home Club, provide to the Home Club the names and addresses of those to whom it has sold and/or issued a ticket or tickets for the relevant Official Match;

and (vi) Home Club and the Visiting Club shall, if requested to do so by the Company, each provide to the Company, where recorded, the names and addresses of all of those to whom each has sold and/or issued a ticket or tickets for any part of the stadium for an Official Match.

Internal Disciplinary Action

9. Take disciplinary action against any Official, Player or other employee or contractor of the Club who engages in or contributes to Unacceptable Conduct at an Official Match.

Pre-Match Information Sharing

10. Contact in advance of each Official Match at its Home Ground the Visiting Club against which it is scheduled to play such Official Match and any Match Delegate for such Official Match appointed by the League, to ensure that they each understand the Home Club's policies and procedures regarding, to deal with and to prevent incidents of Unacceptable Conduct within its stadium. In the case of an Official Match in the Premiership, such contact shall be by meeting in advance of such an Official Match.

Policies and Procedures

11. Develop, document, implement and communicate a strategy, policies and procedures to be followed at Official Matches at its Home Ground by its Officials, Players, ground safety and operations staff, stewards, police and Officials of Visiting Clubs for preventing and dealing with incidents of Unacceptable Conduct; to include the identification of those who engage in such Conduct and, where reasonably practicable and supported by requisite evidence, the apprehension by police of such individuals within the stadium on the occasion of the Official Match or later where it is not reasonably practicable to undertake such apprehension within the stadium.

Removal of Unacceptable Material from Grounds

12. As soon as reasonably practicable and, in any event, before the next Official Match at its Home Ground, remove from its Home Ground any and all graffiti, propaganda or the like which constitutes, encourages or promotes Unacceptable Conduct.

Development of Programmes

13. Develop pro-active programmes and make progress towards raising awareness of the prevention and, where present, elimination of Unacceptable Conduct in stadia in which Official Matches take place; in conjunction with, amongst others, supporters, schools, voluntary organisations, local authorities, local businesses, sponsors, police, players, Officials and players' representatives.

Annual Report

14. Within two months of the last day of each Season make a written report to the Secretary including:- (i) all such programmes operated by the Club and the progress made with such programmes since the last such report;

(ii) the measures taken by the Club to prevent and, where present, eliminate in stadia within which Official Matches take place Unacceptable Conduct;

(iii) a summary of the number and type of incidents of Unacceptable Conduct: (a) at its Home Ground and (b) involving its Officials, Players and supporters at Away Grounds;

(iv) details of all identifications made and disciplinary actions taken against its players, Officials, supporters and others in connection with and arising out of incidents of Unacceptable Conduct at Official Matches; and

Q2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

(v) a copy of the Statement of the Club concerned for the next Season.

Incidents of Unacceptable Conduct

15. Bring any Unacceptable Conduct during an Official Match at its Home Ground to the immediate attention of:-

(i) any police match commander or his nominee; and (ii) to the Club's safety officer or other Official having control of the stadium.

16. Take all reasonably practicable steps, including by the involvement of spectators, supporters groups, stewards, police, players, Officials and others, to identify those who engage in and/or contribute to Unacceptable Conduct at an Official Match. CCTV Systems and Retention of Data

17. If it is a Club entitled for the time being to participate in the Premiership, install and fully utilise at every Official Match at which it is the Home Club an efficient and effective CCTV system capable of identifying, recording and retaining the facial image of persons engaging in Unacceptable Conduct within the areas of its Home Ground where the Match may be viewed and at other locations within the stadium to which spectators have access.

18. Record and retain all moving and still images and audio recordings of spectators and Officials taken and/or made by or on behalf of a Club relating to or concerning an Official Match until the later of:

(i) not less than [14] clear days have elapsed after the relevant Official Match; and

(ii) where the Company has notified a Club in writing that there is or may be an investigation by the Company regarding Unacceptable Conduct at an Official Match, the Company has given written permission for such recordings not to be so retained.

Investigation and Reporting of Incidents of Unacceptable Conduct

19. Where it has any evidence or information that they may have been Unacceptable Conduct at an Official Match in which any one or more of its Officials, Players, supporters or others engaged or contributed to, except to the extent that it would be unlawful for the Club concerned, expeditiously:- (i) investigate such alleged engagement and/or contribution on the part any one or more of its Officials, Players, supporters or others connected with the Club;

(ii) impose disciplinary action/sanctions, as set out in paragraphs 9 and 21 of this Guidance, on those established to have so engaged and/or contributed to such Unacceptable Conduct; and

(iii) report in writing to the Secretary, the details of all incidents of Unacceptable Conduct in which any of its Officials, Players, supporters and others connected with the Club have been engaged and/or have contributed to, the investigation carried out, the identity of those identified as having engaged in and/or contributed to such Unacceptable Conduct and the disciplinary action taken against those established to have so engaged and/or contributed.

20. Fully liaise with the police so as to assist any police investigations into an incident which may involve criminal conduct at an Official Match and seek to obtain from the police any evidence in the possession of the police which may assist a Club investigation, a Company investigation and/or the identification and disciplining by the Club of an Official, Player, other employee, contractor or supporter of the Club who has engaged in and/or contributed to Unacceptable Conduct at an Official Match.

Sanctions for Unacceptable Conduct

21. Apply proportionate sanction(s) against a supporter or person exercising a function for or connected with that Club (other than as an Official, Player or other employee or contractor of the Club, each of whom are to be dealt with in terms of paragraph 9 above) who engages in Unacceptable Conduct at an Official Match and who has been, or is reasonably capable of being, identified. The range of such sanctions should include exclusion from the Home Ground of the Club concerned, exclusion from all forms of Club organised and/or supported travel and/or the confiscation, without compensation, of any Season book/ticket(s) held by such person for a period or periods of time or indefinitely and/or the exclusion from being able to purchase or otherwise acquire tickets for Away Matches which may be sold or otherwise distributed by the Club concerned. Club Records

22. Keep a written record, a copy of which should be promptly made available to the Secretary on request, of all requests made by the Club for police assistance and/or police intervention in relation to incidents of Unacceptable Conduct at its Home Ground at Official Matches and the response of the police to such request(s) and of all Club investigations regarding alleged Unacceptable Conduct and any disciplinary action taken and/or sanctions imposed."

Q3. What do you think would be the main advantages, if any, of holding clubs responsible for the behaviour of their supporters?

40 Clubs in the senior competitions referred to above owned and organised by the Scottish FA and SPFL can be and are held responsible for the Unacceptable Conduct of their supporters unless such Clubs can demonstrate that each Club involved had done all that it could reasonably practicably have done to educate supporters against such conduct, prevent and intervene to stop such conduct and investigate and discipline any supporters who engage in such conduct.

41 Further, individuals that engage in conduct which is or would be likely to incite public disorder at football matches are criminally liable under section 1 of The Football and Threatening Communications (Scotland) Act 2012.

42 Accordingly, there are already sufficient deterrent and punishment measures currently in place to deal with unacceptable/offensive conduct.

43 In any event, it would be grossly unfair if Clubs were to be punished where Home and/or Visiting supporters were to engage in unacceptable/offensive conduct where the Club or Clubs concerned had done all that they could practicably do or have done and yet they are still held liable and punished. In a fair and just society only those who have acted or failed to act in some way which is blameworthy or culpable are held responsible and punished for their acts and omissions. For example, if a local authority authorises a public demonstration on the streets of a local town the local authority is not held liable and punished for any disorder which occurs at the demonstration provided it has taken the reasonable preparatory steps and measures which are part of its duty.

44 There have been very recent examples in a Scottish context, where FIFA and UEFA strict liability rules have operated so as to penalise Scottish football where the fault lay wholly with the supporters of the teams of other countries.

45 In the case of a match involving Scotland and Croatia at Hampden Park on 15 October 2013 the Scottish FA was fined by FIFA when Croatian supporters who had smuggled pyrotechnics into the ground set them off. The fine was imposed notwithstanding it been accepted by all concerned that it would have been impossible for the Scottish FA or its security to have detected the items being brought into the ground or prevented them being ignited when in the ground.

46 In another case, on 22 October 2015, Polish supporters took part in a pitch incursion which all accepted could not have been prevented by any conceivably reasonable ground security arrangements. On this occasion the Scottish FA was fined by UEFA.

47 These are examples of strict liability operating in practice where the result for the Home game organiser is arbitrary and unfair. The fines in each case do nothing to discourage the behaviour in issue and are completely unavoidable on the part of the Home match organiser.

48 If the proposed Bill were to become law it would expose every small Club in Scotland to unlimited liability every time a larger Club with potentially badly behaved Away supporters visited its Home ground. The police acknowledge that in the case, for example, of sectarian singing, that it is a practicable impossibility to prevent or stop such behaviour during the course of a match. Any attempt to intervene runs the risk of public disorder and of injury to innocent spectators caught up in the disorder which will be the inevitable result of the intervention. The police will not, in such circumstances, intervene and stewards have no legal authority to do so.

49 There is, in addition, the significant risk that Visiting supporters will engage in and/or provoke incidents of Unacceptable Conduct knowing that the Home Club will be punished on the basis of strict liability. 50 The proposed Bill will condemn every Home Club in Scotland to the risk of being put out of business on a permanent basis by sanctions imposed for the conduct of supporters of another Club where the Home Club is in no way responsible for and can do nothing to prevent the misbehaviour in question.

Q4. What do you think would be the main disadvantages, if any, of holding clubs responsible for the behaviour of their supporters?

51 These are covered comprehensively in the paragraphs below.

## Page 11: Behaviours and sanctions

Q5. If there is to be a system of strict liability, which of the following behaviours do you think should be covered (choose all that apply)--

**Please explain the reasons for your response**

52 These behaviours are already sanctioned appropriately by the system currently in place. These behaviours are all covered by the definition of "Unacceptable Conduct".

Q6. If there is to be a system of strict liability, which of the following sanctions do you think should be available (choose all that apply)--

**Please explain the reasons for your response**

53 These sanctions and more are already in place under the current SPFL disciplinary regime with equivalent for the Scottish FA in its competition: "J16 Upon determining that a breach of or failure to fulfil the Rules or Regulations has been established, the Board or, as the case may be, a Commission may:- J16.1 give a warning as to future conduct; J16.2 give a reprimand; J16.3 impose a fine; J16.4 annul the result of an Official Match; J16.5 order that an Official Match be replayed; J16.6 impose a deduction of points; J16.7 award an Official Match (with such deemed score as it thinks appropriate) to a Club; J16.8 order the playing of an Official Match or Matches behind closed doors; J16.9 order the closure of all or part of a Stadium for such period and for such purposes as it thinks appropriate; J16.10 order the playing of an Official Match or Matches at such Stadium as it thinks appropriate; J16.11 order the relegation of a Club to a lower Division and make such consequent orders as to promotion as it shall think appropriate; J16.12 subject to Rule J18, order that a Club be expelled from the League; J16.13 withdraw or withhold the award of a title or award; J16.14 order any Club, Official or Player to pay compensation to any Club, Player, person or party; J16.15 order any Club, Official or Player to comply with any obligation or direction; J16.16 cancel or refuse the League Registration of any Player League Registered or attempted to be League Registered; J16.17 order that a Club concerned be debarred from Registering Players for such period as it thinks appropriate; J16.18 order that any person, persons or group of persons be prohibited from attending at such Official Match or Matches and for such period as it thinks appropriate; J16.19 make such other direction, sanction or disposal, not expressly provided for in these Rules, as it shall think appropriate; and/or J16.20 make such order as to expenses, including the expenses of the Company and/or, as the case may be, Commission and/or other party, as it thinks appropriate. J17 When imposing a direction, sanction or disposal the Board or, as the case may be a Commission, may apply such number and combination of the directions, sanctions and/or disposals provide for in Rule J16 as it thinks appropriate, may make such provision for time to comply with any one or more of same as it thinks appropriate, may defer for such period or until such event as it shall think appropriate the decision on or imposition of a sanction or sanctions and shall be entitled to suspend the effect of any such direction, sanction or disposal for such period and/or on such conditions as it thinks appropriate." 54 Many of these competition specific sanctions will not be available if control of proceedings is taken away from the competition owner and organiser. The vast majority of matches in which such supporter related incidents may arise are in competitions owned and organised by the SPFL. The Bill proposes to make the Scottish FA responsible for the operation of the strictly liability system proposed. However, the Scottish FA has no sanctioning power or authority in relation to participation in and arrangements for SPFL competition matches. The practical effect of what is proposed is that there will be a substantial reduction in the range of effective sanctions available in cases of spectator misconduct in SPFL matches.

## Page 13: Financial implications

Q7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
<b>(a) Football clubs</b>	X					

Q7. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

<b>(b) Football supporters and other individuals</b>	X					
<b>(c) Scottish Government and public sector bodies (such as Police Scotland)</b>						X

### Please explain the reasons for your response.

(a) Football clubs 55 Scottish Senior Football considers that the football Clubs will suffer a significant financial backlash if strict liability is to be adopted by legislation. Firstly, in addition to the financial costs Clubs are required to spend every match in order to make sure that all reasonably practicable measures are in place to prevent Unacceptable Conduct; they will have to take on insurance to deal with potential claims. Secondly, insurance companies will force Clubs to put in place specific measures in order to access insurance cover which for small Clubs with a small amount of cash flow will be impossible. Thirdly, Clubs will be exposed to unscrupulous claims. Fourthly, it will detract investment. Fifthly, it will divert investments from player development and attracting new talent which will lead to long-term financial loss. Sixthly, it will expose Clubs to expensive legal costs in proceedings which are not under the control or direction of the competition owner and organiser. 56 Furthermore what is proposed in the Bill makes no distinction between the responsibilities of the Home and Visiting Clubs. If, under what the Bill proposes, a large Club with a substantial travelling support, plays a match at the Home ground of a small Club, perhaps in a cup competition, then what is proposed would render the small Home Club as liable as the larger Visiting Club for the acts and omissions of the Visiting support with all of the potential financial and sporting sanctions involved. It is apparent that no consideration has been given to the implications for small Home Clubs who may well be rendered insolvent as a consequence of the misbehaviour of a large Visiting support at their Home ground when they are strictly liable for their behaviour and are practically in a position where they can do nothing about it. 57 In such a scenario the Visiting Club also suffers a substantial unfairness because whilst the conduct may be that of its supporters it has absolutely no management control or responsibility for the match or ability to intervene with or modify the behaviour of its supporters. All of the safety at sports grounds legislation, regulation and guidance makes it clear that only the Home Club has any responsibility or control of the Home stadium and persons in it during a match. (b) Football supporters and other individuals 58 Significant increase in cost 58 Scottish Senior Football considers that supporters are the most likely to suffer financially as Clubs will have to pass the inevitable additional costs to them through increases ticket prices. For most Clubs, gate receipts are the bread and butter of revenue and therefore, in most cases, the only funding source available to shoulder the financial loss resulting from the increased costs described above. c) Scottish Government and public sector bodies (such as Police Scotland) 59 N/A

## Page 14: Equalities

Q8. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation?

Negative

**Please explain the reasons for your response**

Adverse, it will encourage misbehaviour in order to secure that home Clubs are sanctioned. The interests of equality will be substantially damaged by the Bill. An efficient and fair set of rules and procedures will be replaced by a wholly unfair and inefficient system imposed on football and operating under arrangements which will be to the substantial detriment of minority groups and smaller community Clubs.

Q9. In what ways could any negative impact of the proposed Bill on any of these protected characteristics be minimised or avoided?

There can be no such minimisation or avoidance.

## Page 16: Sustainability of the proposal

Q10. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

No

## Page 17: General

Q11. Do you have any other comments or suggestions on the proposal to introduce strict liability for football clubs in Scotland?

## Historic and Current Legal Framework

### Scots Law

64 As a concept, strict liability is a creature of civil law. It was designed to deal with harm caused by activities or objects that presented significant residual risk through the imposition of strict liability on the person who created the danger. Hence, at its origins, strict liability is a utilitarian remedy rather than a preventive one.

65 It was first introduced in Germany in 1838 to deal with damage caused by railway operators. However, it was never codified in the main body of the German Civil Code and it remained a specie of special legislation applicable in areas involving products or activities inherently dangerous such as nuclear power plants and the operation of airplanes.

66 Its use has remained narrow even in strictly civilian continental legal systems. From the perspective of a possible European codification, the Draft Common Frame of Reference (DCFR) reflects the same limited scope, restricting its applicability only to damage caused by dangerous substances or emissions where the substance or activity concerned is *ex facie* dangerous.

67 Given its civilian nature, the common law systems have been even more reserved, if not opposed, to the use of strict liability. For example in England, as in Scotland, in contrast with most continental systems, the operation of motor vehicles is not subject to strict liability and proof of fault is still required, albeit the standard of care is high.

68 The main reason for this is that the principles of tort/delict have been developed at common law by the judiciary with very little statutory intervention in the early days of formation.

69 Unlike English law, Scots law is a mixed legal system, comprising parts of both common and civil law. As such, the expectation might be that strict liability is more prevalent north of the border. However, this is emphatically not the case.

70 In Scots law there is a long standing authority to the effect that a delictual action at common law can only be sustained on the basis of averments of either negligence or some other form of *culpa*/fault. This is because the Roman law classification of quasi-delict, under which strict liability falls, was never fully adopted in Scots Law by the institutional writers or the courts.

71 Bell drew a distinction between delicts associated with intentional conduct, and quasi-delict, which he associated with negligence. This division still stands as the structure for delict and all three elements - loss, fault, and causation - must be present before liability in reparation arises.

72 Accordingly, the courts in Scotland have been careful to avoid the introduction of liability on any kind of basis, other than fault, for liability in delict. One attempt was made in *Kennedy*, where an argument was put forward on the basis of an English authority, that in imposing delictual liability in actions for nuisance, a deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required. Lord Murray, in the Inner House, forcefully, opposed the counsel's use of this authority as applicable in Scots Law, arguing that when Lord Fraser made his observations in *RHM*

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Bakeries, he was concerned with the more complex position of the state of the law in England as opposed to its applicability in Scotland. He added emphatically, in Scotland, where culpa is the ruling concept, this would apply a fortiori.

73 In *McDyer v The Celtic Football Club* the court fundamentally rejected strict liability in relation to damage caused on a no fault basis. In that case the pursuer alleged that he was injured by a piece of wood which fell from the stadium canopy while he was waiting at Celtic Park for the opening of the European Special Olympic Games. One of the bases for his claim was the Roman law actions of *de effusis et deiectis* and *de posito et suspenso* which impose strict liability for occupiers' negligence. 74 The Inner House went through the relevant authorities going all the way back to Roman edicts and concluded that in Scots Law, such actions result in liability on the basis of negligence or inadvertency and not on the basis of strict liability.

75 The facts of *McDyer* are important as it was argued that Celtic FC, albeit a third party, was liable to the pursuer notwithstanding that the stadium was in the control of the European Special Olympic Games organisers. As such, it was a form of third party liability which the claimant sought to have imposed. Nevertheless, the court showed no room for its application under Scottish Law. It emphatically rejected any suggestion of strict liability preferring instead the long standing principles of fault and negligence based on breach of duty of care where there was the requisite degree of foreseeability and proximity and provided it would be fair and reasonable to impose liability.

76 Accordingly, while it has been contended from time to time that strict liability has passed into Scots law from Roman Law, neither case law nor institutional writings support the introduction of liability without fault.

77 In describing the relevant law of Scotland with regards to strict liability the Consultation refers only to examples from the area of criminal law. Moreover, Dr Rosmarjin van Kleef, the expert referenced in the Consultation, states that in English law, strict liability is a rarity, present only in legislation to product safety (which is EU based) animals and employees (i.e. vicarious liability).

78 Consequently, in Scotland, the only sources of strict liability are the UK-wide statutes which Dr Kleef refers to. These are:

- (a) The Consumer Protection Act 1987, which implements the European Community Directive on Product;
- (b) The Animals Act 1971; and
- (c) Legislation in context of limited elements of employers' liability for damages to employees in relation to breach of health and safety legislation. Although, s.47 of the Health and Safety at Work etc. Act 1974 (the "1974 Act") has been amended to remove civil liability altogether (this is further discussed below).

#### Sports Rules

79 Football is operated as a pyramid structure. FIFA, as the international governing body, sets out the rules and principles but national associations have the discretion in relation to the form of implementation.

80 UEFA, who is a member of FIFA, governs football in Europe, regulating issues specific to European football associations, organising pan-European competitions such as UEFA European Championships and UEFA Champions League.

81 The Scottish FA is the governing body for football in Scotland including sanctioning the organisation of national-level competition. As mentioned in section 1, the SPFL Limited is a Recognised Football Body of the Scottish FA and bound by its rules.

82 The Scottish FA Articles of Association provide at Article 28 that:

"28.1 Each Club must take all such steps as are reasonably practicable to ensure the safety, good conduct and good behaviour of its supporters on any ground. A Club playing at its own ground or allowing its ground to be used for a match in which it is not participating shall also take all such steps as are reasonably practicable to ensure the safety, good conduct and good behaviour of all spectators at that ground."

83 Hence, the Scottish FA rule, similarly to the rules of the Dutch, Swiss, German and English football associations, is fault based and requires that Clubs fail to prove that they have taken reasonably practicable steps to prevent Unacceptable Conduct before liability can be constituted.

The Rationale behind Scottish FA Article 28 and SPFL Rule H34 (the "Scottish Rules") and the impracticability and unfairness of a strict liability rule in football

84 The reasonably practicable standard is by no means an invention of the Scottish Senior Football bodies. It has been developed incrementally through case law by the judiciary in the area of health and safety in the late 19th and 20th century and was later enshrined in statute by the implementation of the 1974 Act.

85 Following the disaster at the Ibrox Stadium in Glasgow in January 1971 and the subsequent public inquiry, the Safety of Sports Grounds Act 1975 was introduced with the purpose of expanding UK Government's policy on health and safety to football stadiums through a system of safety certification of

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sports grounds by the local authorities.

86 Under the 1975 Act, the local authority is required to determine the safe capacity of the ground, to prescribe and enforce such terms and conditions as it considers necessary or expedient to secure the reasonable safety of spectators and to undertake periodical inspection. This process was enhanced by Lord Taylor's recommendation for each local authority to set up a specialised advisory group, following the Hillsborough Stadium Disaster.

87 The advisory group liaises with the Club safety officers in relation to all matches, but in particular the ones which present high safety risks. Their assessments and particular measures needed to be undertaken to ensure the reasonable safety of spectators are informed by the Guide to Safety at Sports Grounds (the "Green Guide") which is now at its 5th edition. The guide works as a benchmark of safety measures and is regarded as authoritative in many other countries.

88 The preparations for matches are extremely detailed with specific roles being given to everyone involved in the process.

89 For instance, a regular match planning would involve the safety officer chairing match operation meetings involving representatives from the police authorities, ambulance services, specialised security services and Club managers from stadium to ticketing.

90 The main purpose of these meetings is to ensure that there is good communication in relation to the forthcoming match to allow the safety officer to gather information for the pre-match briefing meeting. The issues discussed at these meetings in relation to attendees' behaviour are then communicated to the supporters' representatives who relay the message to individual fans. These messages contain express references to Unacceptable Conduct and the consequences of engaging in such behaviour from fines to life bans from attending football matches.

91 Hence, from a policy standpoint, the rationale in Scotland, and in the UK, in relation to match organisation has been that supporters' safety is best secured through the robust cooperation of Police authorities, local authorities, Clubs and stakeholders under the guidance of the Green Guide. This cooperative enterprise has at its heart the idea that if reasonable practicable steps are taken by the 'community' as whole, compromises in safety will not be an issue.

92 The Consultation acknowledges at page 10 the efforts made by football, authorities, Clubs, Police Scotland and local authorities in tackling intolerable behaviour. However, it argues, that despite these efforts intolerable behaviours have not been fully eradicated. It argues, on the basis of the Scottish Government Advisory Group Report, that the only way to tackle intolerable behaviours is by imposing strict liability on Clubs.

93 The thrust of this argument is that it would deter supporters from engaging in intolerable behaviours as they would not want to see their Clubs being sanctioned.

94 Even a cursory examination of the experience of sports organisations which have operated on a strict liability basis in relation to spectator behaviour has shown that strict liability does not have a deterrent effect either in theory or in practice.

95 In theory, strict liability is about balancing the interests of individuals, private and public bodies. It distributes rights, duties and monies. As described above, the argument in favour of its use is that the creator of risk must pay for its consequences.

96 In the present context a football Club is neither the creator nor facilitator of Unacceptable Conduct. In most cases the Club is itself the victim by having to deal with disciplinary matters resulting from individuals' unacceptable behaviour.

97 In practice, its ineffectiveness has been showcased in the very area of law for which it was created. Prior to 1st of October 2013, under section s.47 of the 1974 Act, an employee was strictly liable for any breach of health and safety regulations. Therefore, any breach under the 1974 Act would trigger a claim against the employer.

98 Following two reviews of the health and safety legislation commissioned by the UK Government in 2011, Section 69 of the Enterprise and Regulatory Reform Act 2013 was adopted to remove civil liability claims for personal injury.

99 In the first review, titled Common Sense Common Safety, Lord Young argued that despite the success of the Act, the standing of health and safety in the eyes of the public has never been lower, and there was a growing fear among business owners of having to pay out for even the most unreasonable claims. The effects of strict liability resulted in businesses operating under a climate of fear. The advent of 'no win, no fee' claims and the all-pervasive advertising by claims management companies created nationwide compensation culture which meant that any employer not covered by accident insurance potentially faced bankruptcy in the event of a claim.

100 Lord Young recommended that the Government should clarify (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part and that the UK should take the lead in cooperating with the other member states to ensure that EU health and safety rules for low risk businesses are not overly prescriptive, are proportionate and do not attempt to achieve the elimination of all risk.

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101 The second review by Professor Ragnar Lofstedt went even further and recommended that regulatory provisions that impose strict liability should be reviewed and either qualified with 'reasonably practicable' where strict liability is not absolutely necessary or amended to prevent civil liability from attaching to a breach of those provisions. He argued that awarding compensation on the basis of a technical breach where there is no opportunity for a defendant to be aware of the danger, and no actions could have been taken to prevent the accident, clearly has the potential to stop employers taking a common sense approach to health and safety.

102 The Government response to Professor Lofstedt's report was to remove civil liability entirely. It stated that:

"In some health and safety regulations, including those arising from EU law, the duty imposed on the employer is a strict one and no defence of having done all that is reasonably practicable is available. This does not give rise to problems in enforcing criminal liability under the regulations because HSE's enforcement policy allows discretion as to whether to prosecute in individual cases. However, in the civil sphere it does have the potential to impact unfairly. Civil liability follows as a result of the breach of duties in health and safety regulations and strict liability duties impose a higher standard than the employer's common law duty of care. (emphasis added)

The Government recognises the unfairness which results where an employer is found liable to pay damages to an injured employee despite having taken all reasonable steps to protect their employees from harm. The Government will look at ways to redress the balance, in particular preventing civil liability from attaching to a breach of such provisions."

103 Accordingly, in practice, strict liability simply does not work as it, inter alia, creates incentives for fraudulent gain through compensation claims.

104 Applying this to the football context could also lead to premeditated actions by individuals designed to encourage punishment of football Clubs. Individuals that engage in Unacceptable Conduct do not do so with the best interest of the football Club they support in mind. Such actions are triggered either by the individual's personal views in relation to issues such as sectarianism, xenophobia etc. or in concert with others as result of his/her affiliation to a certain group. If such individuals know that their behaviour could ultimately punish a Club financially or in sporting terms it is highly likely that they would be even more incentivised to engage in Unacceptable Conduct individually or in an orchestrated manner.

105 Moreover, even if their intention is not to punish the Clubs, the attractiveness of financial gain would be exploited by unscrupulous claims consultants, as it was in the case of the health and safety regulations, which would put Clubs in severe financial difficulties and detract investment. Clubs are not equipped either financially or logistically to deal with compensation claims and therefore insurance will have to be purchased at high premium giving the variability of the insured risk.

106 Consequently, Scottish Senior Football considers that there is strong argument against strict liability in practice given that its use has proven to be impractical and ineffective in the only area of UK law in which it has been applied.

The Consultation's Expert Opinion and theoretical shortcomings of strict liability in football

107 The Consultation in advancing its case for strict liability relies on the opinion of Dr Rosmarijn van Kleef who has written a thesis on strict liability in football. According to the Consultation, Dr Kleef is cited to have said the following:

Scotland still has to catch up with the rest of Europe where strict liability of football Clubs is widely accepted and applied by both national and international football governing bodies... The rationale for this type of liability is that in the absence of a direct legal relationship with supporters, sanctioning the Clubs is the only means for governing bodies to try and prevent disturbances... Most importantly, liability without fault is accepted in case of an overriding public interest such as the fight against violence in football. 108 We have no view in relation to her expertise in this area within her own area of legal qualification and speciality. However, it is manifest that the above assertion is not supported by her theoretical findings.

109 In chapter 6 of her thesis, Dr Kleef states that at present, there is no general rule of strict liability for risk in any of the relevant jurisdictions (we assume that she refers to England, Germany, Switzerland, Netherlands and France which are the jurisdictions covered by her thesis) that courts can apply in all types of situations or which could include the case of liability for supporters' misconduct.

110 She further states that at present in England, Germany, Netherlands and Switzerland there is a strong reluctance to expand the reach of the existing rules of strict liability. Notwithstanding this, she argues that a general rule of liability for risk has been given ample thought in the different transnational projects in Europe. To this effect, Dr Kleef refers to the Principles of European Tort Law (PETL), which, she argues, provide a general rule for strict liability for risk.

111 The PETL have been developed by a working group of scholars from across Europe with the purpose of providing a harmonised framework for European tort law. They have no legal effect and are basically a compilation of legal thought.

112 The relevant articles are 1:101 and 5:101. Article 1:101 provides:

(1) "A person to whom damage to another is legally attributed is liable to compensate that damage."

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(2) Damage may be attributed in particular to the person a) whose conduct constituting fault has caused it; or b) whose abnormally dangerous activity has caused it; or c) whose auxiliary has caused it within the scope of his functions."

113 Hence, 1:101(2) mentions three forms of damage as the basis of liability in tort/delict: (a) fault based; (b) as a result of an abnormally dangerous activity, and (c) agency based. Clearly, the former and latter are not applicable in the present context. However, Dr Kleef argues that organising a football match should be regarded as an 'abnormally dangerous activity'.

114 Such an approach is fundamentally misconceived. Case law examples which have been associated with such kinds of activities include the use of explosives, vibrations caused by construction works, spread of fire, escape of water, toxic and radioactive emissions, contamination of land and water and damage caused by the escape of a wide range of substances, including gas, sewage, explosives, aberrant fairground machinery, yew tree clippings etc.

115 It is plain that organising a football match cannot be construed on any conceivable basis as an abnormally dangerous activity as the activity itself does not possess any significant inherent risk to spectators arising from the activity the playing of football itself. This is the experience of the lifetimes of millions of attendees at football matches over the last 140 or so years. To be clear this has nothing to do with the tragic incidents where injury has been suffered by spectators through poorly designed, maintained or operated stadia. That is part of the law of unsafe buildings and event management; although it is noteworthy that in those areas there is not the slightest suggestion of the imposition of strict liability on stadium operators. Rather in Dr Kleef's work she postulates that it is the very act of the organising of a football match which is to be regarded as the 'abnormally dangerous activity' for spectators and others attending.

116 This approach was attempted in *Scott's Trustees. v. Moss* The defender, an Edinburgh impresario, arranged a balloon flight by the "world-renowned scientific aeronaut", Professor Baldwin. The advertisement promised that the Professor would descend by parachute, landing on ground rented by the defender. In the event, he missed and landed in a turnip field owned by the pursuers. Fences and a large number of turnips were trampled by the crowd rushing to the scene. Previous American case law held that in such instance the balloonist was strictly liable because of the nature of the activity and counsel for the pursuer invited the court to make the same finding. However the Inner House declined counsel's invitation. It decided that the defender could be liable only on the basis of fault. Foreseeability was of the essence: the pursuer was entitled to damages if and only if the crowd's actions were the "natural and probable consequence" of the defender's activities. (emphasis added)

117 Accordingly, in Scotland, the consistent approach has been to ascribe liability to event organisers only where the risk of injury is foreseeable. Scottish Senior Football contends, based on long experience and expertise, that football match organising is not an inherently dangerous activity and that it does not give rise to a foreseeable risk from the organisation of the event itself.

118 Article 5:101(2) of PETL, also defines an abnormally dangerous activity as an activity which creates

(a) a foreseeable and highly significant risk of damage even when all due care is exercised in its management and (b) is not a matter of common usage.

119 Dr Kleef argues that football, in a broad sense, is a matter of common usage as it is the number one sport practised in Europe. However, Dr Kleef concedes that organising a football match in a professional league is not remotely as common, as is attending such match. It follows that strict liability could be applicable at international level but not at national level.

120 Article 3:201 of the PETL, states that the scope of the liability depends on factors such as:

- a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;
- b) the nature and the value of the protected interest (Article 2:102);
- c) the basis of liability (Article 1:101);
- d) the extent of the ordinary risks of life; and
- e) the protective purpose of the rule that has been violated.

121 Therefore, even if strict liability applies, the scope of what can be recovered has to be foreseeable at the time of the activity to the reasonable person taking into account the nature and value of the protected interest, the extent of ordinary risks and the protective purpose of the rule that has been violated.

122 The problem with this is that firstly, Unacceptable Conduct resulting from an organised football match in Scotland rarely leads to recoverable damage (for instance damage to property or financial loss) as it is usually manifested either individually or collectively with the purpose of injuring the feelings of another person. Usually this is done through some form of conduct designed to upset the opposing team's fans. 123 Secondly, if the basis of the liability (i.e. the protective interest) is the prevention of sectarianism, which is what the Consultation argues, how will this be quantified so as to provide proportionate compensation in case of a breach given that in Scots law there is no right to recover for injured feelings alone?

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124 Thirdly, there is an inherent difficulty in defining what Unacceptable Conduct is in relation to the extent of the ordinary risks of life. For instance, what would a reasonable person be expected to experience when attending a football match given that in certain instances the line between Unacceptable Conduct and acceptable football banter is very thin.

125 Moreover, the PETL offers a defence against strict liability if the injury was caused by an unforeseeable and irresistible (a) force of nature (force majeure), or (b) conduct of a third party. Dr Kleef argues that force majeure is not applicable to Unacceptable Conduct since, "while consisting of conduct of a third party, supporters' misconduct at a football match is decidedly not unforeseeable or irresistible."

126 As a concept, force majeure has different meanings in the various spheres of its application in Community law, its meaning in any particular case must be determined with reference to the legal framework within which it is intended to take effect. At common law, Bailhache J, made the following observation:

The words "force majeure" are not words which we generally find in an English contract. They are taken from the Code Napoléon, and they were inserted by this Romanian gentleman or by his advisers, who were no doubt familiar with their use on the Continent. I have had the evidence of a Belgian lawyer as to their meaning, and he said that the words are understood on the Continent to mean "causes you cannot prevent and for which you are not responsible." Mr. Hudson contended that they practically meant the same thing as "vis major," which in substance meant the same thing as "the act of God." In my construction of the words "force majeure" I am influenced to some extent by the fact that they were inserted by this foreign gentleman who was familiar with their meaning upon the Continent, but I am not sure that I am on that account bound or entitled to give them the full meaning that they have upon the Continent. At the same time I cannot accept the argument that the words are interchangeable with "vis major" or "act of God." I am not going to attempt to give any definition of the words "force majeure," but I am quite satisfied that I ought to give them a more extensive meaning than "act of God" or "vis major." The concept of force majeure is not limited to absolute impossibility. (emphasis added)

He concluded that force majeure could cover dislocation of business owing to a universal coal strike or accidents to machinery.

127 The Charges Report under the Football and Threatening Communications (Scotland) Act 2012 in 2015-16 (the "Charges Report") shows that in 2015-16 there were 287 charges under section 1 of the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012. The majority of charges occurred at a football stadium (50%), followed by a main street (24%) and public transport (23%). There were no charges at Celtic Park (Celtic FC), Easter Road (Hibernian FC), Excelsior (Airdrie), Firhill (Partick Thistle) and Tannadice (Dundee United FC). Therefore, on the basis of the available analysis, it is reasonable to conclude that supporters' misconduct at these stadiums would be unforeseeable and irresistible as the possibility of its occurrence is too remote.

128 Further, the other recorded offences at football stadiums were no more than 10 per stadium, with the exception of Ibrox where 17 section 1 offences were reported. Therefore, on the basis of the available statistics, it is reasonable to conclude, given the exceptionality of the occurrence, that Unacceptable Conduct at football matches could be construed as unforeseeable and irresistible and therefore subject to the force majeure defence.

129 Accordingly, even on Dr Kleef's analysis, strict liability in the context of Scottish Senior Football is theoretically unfeasible.

130 We have dealt with her analysis at some length because it is offered up as the sole legal justification for the introduction of strict liability into Scottish Law in this context. We have demonstrated that her analysis has no robust basis in Scottish law and that even in the context of civilian systems, its basis of application to football is doubtful. It is noted that the promoter of the Bill offers no supporting basis from established Scottish Law in the form of decided cases, institutional writers or modern legal experts for the introduction of the alien concept of strict liability into football.

Further Legal issues

131 Section 28 of the Scotland Act confers power to the Scottish Parliament to make laws. Section 29 qualifies this power, delimiting the legislative competence in the following way:

29.— Legislative competence

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply—

(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,

(b) it relates to reserved matters,

(c) it is in breach of the restrictions in Schedule 4,

(d) it is incompatible with any of the Convention rights or with [EU] law,

(e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Q11. Do you have any other comments or suggestions on the proposal to introduce strict liability for football clubs in Scotland?

(3) For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

(4) A provision which—

(a) would otherwise not relate to reserved matters, but

(b) makes modifications of Scots private law, or Scots criminal law, as it applies to reserved matters, is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise.

Incompatibility with ECHR Article

1 Protocol 1

132 In the UK, the Human Rights Act 1998 implements most of the provisions of the ECHR. However, some of the provisions such as Article 13, the right to an effective remedy, have been left out. Nevertheless, in Scotland, section 28 of the Scotland Act operates effectively as an implementation of the entire convention by requiring the Scottish Parliament when passing legislation to be compliant with the ECHR.

133 The Consultation does not put forward the framework of the Bill. However, we take the view that the Bill will face compatibility challenges in relation to Article 6 and Article 1 Protocol 1.

134 In *Axa*, Lord Hope stated that before the convention rights are engaged the claimant must prove its victim status under Article 34 of the ECHR. The victim of a violation of a Convention right for the purposes of Article 34 could be a natural or legal person who was, or was at risk of being, directly affected by the impugned measure. The impugned measure need not be implemented against the individual. It is sufficient to show that such a person was a member of a class whose Convention rights could be directly affected by the impugned measure.

135 The fact that the interference is not present or immediate and may not occur until sometime in the future does not exclude the person from being a victim for the purposes of Article 34. Thus, a victim, within the meaning of the Convention, is a person who is directly affected by the state measure or is required to modify its conduct either immediately or in the foreseeable future

136 Hence, since the expectation and intention of the Scottish Parliament, if the Bill is passed, is that Clubs should bear the burden of meeting the claims in relation to Unacceptable Conduct, the consequences of the Bill being enacted will directly affect Clubs which therefore acquire victim status under ECHR.

137 The next stage is proving whether the possessions of the victim will be affected by the implementation of the measure. The text of Article 1 Protocol 1 refers to possessions rather than property, but in substance the two terms are synonymous. In any case, 'possessions' is given an autonomous meaning and will include a wide and varied range of economic interests and assets, including social welfare benefits, intellectual property, ownership of a house, or other rights associated with heritable property, including non-registered title, or disputed title, the goodwill of a business, entitlement to rent, a security right in rem, an enforceable award made under arbitration or court, a patent a claim for a registration of a trademark, and a concession to work land owned by others.

138 Since the concept of "possessions" within the meaning of article 1 of the First Protocol includes a person's financial resources, the fund out of which the Clubs would be required to satisfy the claims as a result of Unacceptable Conduct constitute a possession for the purposes of the article

139 Under Article 1 Protocol 1, any interference with property rights must satisfy three tests: (i) the state interference must meet the test of legal certainty, (ii) it must be justified by the general or public interest, (iii) there must be reasonable degree of proportionality between the means selected and the ends sought to be achieved to ensure that a fair balance between individual and collective interests has been maintained.

140 Legal certainty requires that legal rules are 'clear and precise', and aim at ensuring that situations and legal relationships remain foreseeable. However, changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred.

141 The intensity with which courts will look at this requirement will depend on the impact the decision or legislative instrument has on the victim. A change in law will fail the test of legal certainty if it imposes an excessive burden on the claimant. A bill which purports to change the standard to which Clubs have to adhere in order to avoid liability for Unacceptable Conduct from reasonably practicable (which is already a high standard) to strictly liable would undoubtedly place an individual and excessive burden on the Clubs which the legislator will have to justify as proportionate.

142 Measures involving political, social and economic issues fall within the legislature's discretionary area of judgment and therefore a wide margin of appreciation is given to the legislature as to what is in the public interest unless the measure is shown to be manifestly unreasonable.

143 Accordingly, even before the consideration of proportionality is to be engaged, the Bill must be shown not to be manifestly unreasonable.

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144 The Consultation does not put forward any evidence to support the premise that strict liability will act as a deterrent to sectarian conduct. For example the Charges Report shows that only 63 charges have been made on religious grounds. Scottish Senior Football considers that implementing a measure, which effectively punishes Clubs which are not in any way at fault for the actions of the supporters concerned, would be manifestly unreasonable.

145 Further, even if this hurdle is passed, the interference resulting from the adoption of the Bill would have to be proportionate in that there has to be a reasonable relationship between the means employed and the aims pursued and a fair balance has to be struck between the general interest and individual fundamental rights.

146 For instance in *Axa*, the court found the measure to be proportionate because it redressed a social injustice by reversing a decision which held that asymptomatic pleural plaques did not increase susceptibility to asbestos-related diseases or shorten life expectancy and therefore did not constitute any injury capable of giving rise to a claim for damages. Individuals exposed to asymptomatic pleural plaques were left without a claim and, although the legislative intervention caused financial burdens on insurers who had contracts in place to that effect, it was justified to redress the injustice.

147 In the present instance there is no evidence that the means employed (the Bill) to tackle sectarianism (aim) are effective and necessary to outweigh the protection of Clubs' fundamental rights to the benefit of their interests and property. The effect of the Bill, if it becomes an Act, will be to render Clubs liable for expropriation of their assets and other property on the basis of the acts and omissions of third parties over whom they have no control or influence. Accordingly, the Bill will fail the proportionality test and, therefore, be incompatible with Article 1 Protocol 1 of the ECHR.

Article 6(1)

148 Article 6 provides:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

149 In assessing whether Article 6(1) would be infringed by the Bill the same considerations as above will apply. Accordingly, a limitation will not be compatible with Article 6(1) if it does not pursue a "legitimate aim" and if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

150 The Consultation argues that strict liability is applied by FIFA and UEFA and there is no reason why this shouldn't be the case in Scotland. It should be noted that the Court of Arbitration for Sport (CAS) - which is the supreme judicial authority in sporting matters - has held that Article 6(1) is not infringed by the strict liability rule. In both CAS 2002/A/423 and CAS 2007/A/1217 the court held the following: "It should be noted that UEFA has no direct disciplinary authority over a Club's supporters, but only over European football associations and Clubs. The latter are responsible for conforming to the standards and spirit of the UEFA regulations. If Clubs were able to extricate themselves from any responsibility by claiming that they had taken all measures they could reasonably be expected to take to prevent any breach of the UEFA rules, and if supporters still manage to commit such an act, there would be no way of penalising that behaviour, even though it constituted a fault in itself. UEFA's rules of conduct would therefore be nothing more than vague obligations, since they would be devoid of any sanctions. By penalising a Club for the behaviour of its supporters, it is in fact the latter who are targeted and who, as supporters, will be liable to pay the penalty imposed on their Club. This is the only way in which UEFA has any chance of achieving its objectives. Without such an indirect sanction, UEFA would be literally powerless to deal with supporters' misconduct if a Club refused to take responsibility for such behaviour." (emphasis added)

151 Accordingly, the justification for the applicability of strict liability rule at the UEFA level is that the latter would otherwise be left powerless in enforcing its rules as there is no legal relationship between UEFA and individuals who attend football matches. Therefore, the only legally practicable way that FIFA and UEFA can effectively enforce their objectives is through disciplinary actions against their members who will then sanction the individuals directly.

152 Furthermore, UEFA is a legal entity domiciled in Switzerland, and as such subject to Swiss law. Sporting associations have a wide margin of autonomy to regulate their own affairs (see CAS 2005/C/976 & 986, CAS 2007/A/1217, para. 11.1) and possess the power (i) to adopt rules of conduct to be followed by their direct and indirect members and (ii) to apply disciplinary sanctions to members who violate those rules, on condition that their own rules and certain general principles of law – such as the right to be heard and proportionality – be respected (CAS 2011/A/2426, para. 62)

153 As such, strict liability is placed on its members, including Scottish FA, by virtue to their adherence to

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the association and it is not an imposition. Accordingly, a Club cannot argue that Article 6(1) has been infringed in the context of UEFA or FIFA proceedings as it freely agreed to be bound by it when it became a member of the relevant sporting body. In effect the agreement which the Scottish FA gives in order to be member of UEFA, of which effects cascade upon its members such as the SPFL Clubs, precludes the engagement of Article 6(1). This view was taken by CAS in *Fenerbahçe SK v. UEFA*:

"The Panel finds that a Club's right to a fair hearing is, in general, not violated by the application of the strict liability principle, particularly not because the Panel finds that the application of such principle is justified in light of the responsibility of Clubs over its supporters and UEFA's lack of disciplinary authority over Clubs' supporters, but also because of the membership structure of European football and the Clubs' subordination to UEFA's regulatory power over its members." (emphasis added)

154 Therefore, strict liability imposed by legislation in the domestic football context will infringe Article 6 (1) because it is not necessary for the Clubs to be made strictly liable for the acts and omissions of supporters for the state to effectively sanction the Unacceptable Conduct in issue. If the state regards the conduct in question as being deserving of sanction the state can enforce such sanction as it thinks appropriate directly against the spectators in question. In a strict liability context if the Bill becomes law a finding of Unacceptable Conduct on the part of a spectator will operate as a deemed liability irrespective of fault on the part of the Clubs concerned which will be liable for sanction without culpability; in such circumstances there would be a breach of Article 6(1).

Contrary to EU law principle of freedom of contract

155 The principle that parties are in law free to agree whatever contract they choose to conclude was strongly held in the 19th and early 20th centuries. Modern legislation has frequently interfered with freedom of contract, e.g. the Rent Acts, the Contracts of Employment Act 1972 and the Unfair Contract Terms Act 1977, in order to prevent the abuse of its use in instances when one of the parties to the contract has a considerably greater bargaining power as opposed to the other, as for example in consumer contracts where the consumer is forced to accept the term and conditions of the seller. Freedom of contract is recognised as a general principle of European Community law. Article 16 of the Charter of Fundamental rights of the European Union (the Charter) provides:

"The freedom to conduct a business in accordance with Community law and national laws and practices is recognised."

157 The explanation of Article 16 states:

This Article is based on Court of Justice case-law which has recognised freedom to exercise an economic or commercial activity (see judgments of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraph 14 of the grounds, and of 27 September 1979, Case 230-78 *SpA Eridiana and others* [1979] ECR 2749, paragraphs 20 and 31 of the grounds) and freedom of contract (see inter alia *Sukkerfabriken Nykøbing* judgment, Case 151/78 [1979] ECR 1, paragraph 19 of the grounds, and judgment of 5 October 1999, *C240/97 Spain v Commission* [1999] ECR I-6571, paragraph 99 of the grounds) and Article 119(1) and (3) of the Treaty on the Functioning of the European Union, which recognises free competition. Of course, this right is to be exercised with respect for Union law and national legislation. It may be subject to the limitations provided for in Article 52(1) of the Charter. (emphasis added)

158 Although the Charter is only applicable to national authorities when they are implementing EU law (such as when they adopt directives or enforce regulations), freedom of contract as a recognised EU right by the Court of Justice of the European Union (the CJEU) means it is directly enforceable in domestic law (i.e. any person can rely on it directly in national court proceedings involving the state).

159 The Bill would be incompatible with the principle of freedom of contract as it will have the effect of requiring by law that the Scottish FA imposes strict liability on Clubs for the acts and omissions of supporters thereby restricting the freedom of Clubs to agree the terms of their contractual relationship with the Scottish FA. A contractual relationship which currently provides for liability only when there has been a failure by a Club to use reasonably practicable means to avoid or otherwise deal with the threatened or apprehended Unacceptable Conduct by supporters and which compels the Scottish FA to deal with such cases in the context of SPFL competitions which are currently within the jurisdiction of the SPFL. 160 As with ECHR infringements, measures which are incompatible with EU law have to satisfy the proportionality test in order to survive an action of declarator of incompatibility. However, proportionality under EU law is applied more strictly in that the prohibitive measure must be the least onerous measure between the available choices. In *Fedesa*, CJEU sets out an overview of the principle as follows: "The Court has consistently held that the principle of proportionality is one of the general principles of Community [EU] law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."

161 Accordingly, in order for a measure to pass the test of proportionality it must answer the following questions in the affirmative:

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- Does the measure pursue a legitimate objective? Where applicable, is it one which is capable of justifying a derogation from a fundamental freedom (in other words, do the Treaties acknowledge the interest to be worthy of protection and sufficiently important to justify a derogation, or has the CJEU recognised it to be so)?
  - Is the measure suitable to achieve the desired end?
  - Is the measure necessary to achieve the desired end (i.e. is it no more restrictive than is necessary to produce that result)? • Are the disadvantages caused disproportionate to the aims pursued? (or sometimes, depending on context: does the measure impose an excessive burden on the individual in relation to the desired end?)
- 162 The Consultation does not reveal a general interest for the applicability of strict liability in Scotland. The paragraph of the Consultation which cites Dr Kleef's position as to why strict liability should be adopted in Scotland, contains a reference to public interest, such as the fight against violence at football, as the overriding objective. Nevertheless, public interest is not an interest acknowledged by the Treaties as a legitimate derogation from their applicability. There are references in the Treaties to public policy, public morality or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.
- 163 The Consultation has not put forward a recognised EU objective that could justify the imposition of strict liability. The first question must therefore be answered in the negative.
- 164 The second hurdle requires the state to put forward evidence that the impugning measure is suitable to achieve the desired end. As discussed above in relation to ECHR, the Consultation has not put forward any tangible evidence that strict liability would eradicate or act as a deterrent to sectarianism or Unacceptable Conduct in general.
- 165 In relation to the third hurdle, the Consultation does not put forward any evidence to support the argument that the current measures are not effective to deal with Unacceptable Conduct. The current enforcement mechanisms applied in relation to findings of Unacceptable Conduct either through disciplinary and/or criminal prosecution have sufficient deterrent effect.
- 166 Finally, as discussed above, the imposition of strict liability would cause an excessive financial burden on Clubs which would be disproportionate to the aims pursued by the Bill and which would lead to more financial pressure on Clubs in an area which is already subject to financial pressure.
- 167 The Bill would be incompatible with EU law and therefore outwith the Scottish Parliament's legislative competence.
- Breach of FIFA's third party influence rule
- 168 The UK, in common with many other northern and western European states, has traditionally taken a non-interventionist approach to sport. Historically, the provision of sport has not been regarded as a public service responsibility of the government but rather a matter for the private, voluntary sector to run, with general encouragement from the government.
- 169 Accordingly, in contrast with the approach in France, the UK governments have left the sport sector almost entirely alone not only to organise and manage itself, but also to regulate the entire conduct and administration of the sport, including in areas of important public interest such as child protection, matchfixing and anti-doping.
- 170 In football, FIFA/UEFA statutes specifically prohibit any form of third party influence/intervention, including government intervention, in football. FIFA has not hesitated to suspend the membership of a national association whose independence it considers to have been compromised by government interference.
- 171 Rule 14 of the FIFA statutes states:  
"Member associations have the following obligations:  
(...)  
i) to manage their affairs independently and ensure that their own affairs are not influenced by any third parties in accordance with art. 19 of these Statutes;  
(...)  
3. Violations of par. 1 (i) may also lead to sanctions, even if the third-party influence was not the fault of the member association concerned. Each member association is responsible towards FIFA for any and all acts of the members of their bodies caused by the gross negligence or wilful misconduct of such members. (emphasis added)."
- 172 Rule 7bis (2) of UEFA provides:  
"Member Associations shall manage their affairs independently and with no influence from third parties. Member Associations shall provide in their statutes for a procedure guaranteeing that their executive body is freely elected and that their other bodies are elected or appointed in a completely independent way. Anybody or decision from a body that has not been elected or appointed in compliance with such a procedure, even on an interim basis, shall not be recognised by UEFA."
- 173 The most recent case in which FIFA and UEFA had to intervene against state measures which

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affected the independence of a member association was in relation to the Greek Football Federation (GFF).

174 In early March 2015, the Greek government was preparing to pass laws on violence following a series of incidents at a number of football matches. On 30 March 2015, a joint FIFA and UEFA mission visited Greece to meet officials from the GFF as well as Greece's Minister for Culture and Sport and other ministry officials, in order to discuss the aforementioned draft legislation proposed by the Greek government. During the visit, Thierry Rezna, the Director of National Associations of FIFA raised concerns about the legislation, emphasising the great importance of the autonomy of sport and nongovernment intervention and extra-institutional football authorities.

175 On 22 April 2015, on learning that the draft bill 'Emergency measures for the confrontation of violence in sports and other provisions' had been submitted to parliament for a vote, the general secretaries of FIFA and UEFA, Jérôme Valcke and Gianni Infantino, wrote a joint letter to the President of the EPO Georgios Gkirtzikis. In it they warned that the adoption and application of the draft bill without amendments would contravene the FIFA and UEFA third party influence rules stated above. The letter further warned of sanctions that would likely be imposed upon the GFF by FIFA and UEFA, including the suspension of the GFF, meaning that no Greek team of any sort would be able to participate in FIFA or UEFA competitions.

176 On meeting with representatives of the Greek government just a week after the aforementioned letter, Infantino reiterated that it was absolutely essential to ensure that the self-rule and therefore autonomy of the GFF would be protected. Infantino stressed that the priority of the law was in any case not to remove the GFF's ability to work independently and on its own, but to fight violence and matchfixing, which he said were the main problems to be addressed by Greek football.

177 Following the meeting on 29 April, the Greek government informed UEFA of modifications to the articles of the draft bill as discussed during the meeting. However in a letter to Stavros Kontonis, the Deputy Minister of Culture, Education and Religious Affairs, UEFA's Infantino stressed that there were still remaining points that needed to be addressed in order for the legislation to comply with its autonomy principles, and that failure to do so would be considered as going against the principle of self-governance required from FIFA/UEFA member associations. In the letter FIFA/UEFA made amendments to the provisions regarding fines, the ability of the government to appoint judges and administrative charges imposed on ticket sales.

178 Following correspondence and meetings held between Infantino and Gkirtzikis, the President of the

GFF, in early May, UEFA once again wrote to the EPO on 6 May. In the letter Infantino expressed UEFA's surprise in learning that some new changes had been submitted that day to the Greek Parliament – the day the bill was set to be voted on – before reportedly having been approved by UEFA.

179 No further action was taken by FIFA/UEFA as the proposed amendments were implemented and the final form of the Bill was in terms which satisfied the football authorities that there was no compromise to the autonomy of the GFF.

180 It is clear that the internationally enforced third party influence rule would be breached if the Scottish Parliament were to pass the proposed Bill imposing on the Scottish FA (i) the adoption of the strict liability standard against Clubs in cases of Unacceptable Conduct by spectators; (ii) the requirement that the Scottish FA operate disciplinary procedures in competitions which it does not own and operate; and (iii) the imposition of sanctions by the Scottish FA against Clubs in competitions which it does not own and operate and where it has no sanctioning authority. If the Scottish Parliament were to proceed as envisaged in the proposed Bill the Scottish FA would be liable to be suspended by FIFA resulting in its international team being prohibited from competing in international competitions and Scottish Clubs being prohibited from taking part in European Club competitions.