

# **The transfer of English legislation to the Scottish context: lessons from the implementation of the Football Banning Order in Scotland**

**Niall Hamilton-Smith & Matt Hopkins**

## **Abstract**

*This paper compares the enactment of Football Banning Order legislation in Scotland to that in England and Wales. Football Banning Orders evolved in England and Wales through the 1990s into a particular form of hybrid legislation, culminating in the Football (Disorder) Act of 2000. The legislation was not introduced into Scotland until the Police, Public Order and Criminal Justice (Scotland) Bill in 2006. By 2010, it appeared that Orders were being under-utilised in Scotland. This raised questions as to whether there was less need for Orders within the context of Scottish football, whether the legislation was either being poorly implemented or if imposing orders was being actively resisted. In focussing primarily on the utilisation of the legislation by police on the ground, this paper questions whether the football or policing contexts are markedly different in the two jurisdictions. We argue that one of the dominant explanations for the comparatively low use of Orders in Scotland relates not to the content or interpretation of the particular legislation involved, but to broader differences in how criminal justice legislation is typically enacted.*

## **Keywords**

Football Banning Orders, Sectarianism, Policy Implementation.

## **Word Count**

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## **Introduction**

Football banning orders (FBOs) are court-issued, preventative orders that impose a number of restrictive conditions on an individual who has (a) previously been involved in football-related disorder and (b) is likely to be involved in disorder in the future (Moss, 2009). At their simplest, FBOs aim to prevent future disorder by banning individuals from attending specified matches for a set period of time, though they also belong to a broader family of legislative innovations that emerged in the UK in the late 1990s (Moss, 2009; Zedner, 2009). Anti-social behaviour orders (ASBOs) represent the most high profile of such innovations, which primarily aim to prevent specific populations from engaging in particular types of behaviours (see Squires, 2008). These preventative orders are commonly labelled as 'hybrid' in that they can be issued on top of a sentence resulting from a criminal conviction, or they can be issued through a civil application process, where the

qualifying misbehaviour need not be established with a criminal standard of proof but only with the lesser civil standard (e.g. on the balance of probabilities) (Moss, 2009). However, breach of such orders, even when they are issued as part of a civil process, can result in a criminal conviction.

In their current form FBOs were introduced into England and Wales in 2000, but were not extended to Scotland until the Police, Public Order and Criminal Justice (Scotland) Act of 2006. As Nixon et al. (2010) note this type of policy transfer has become more common as legislators are keen to draw upon lessons and good practice from other jurisdictions. With the establishment of a devolved Scottish Parliament at Holyrood in 1999 – and the ceding of limited legislative and policy making powers from Westminster to Holyrood – the variety of ways in which policy transfer can occur between England and Scotland have increased in number and complexity. Legislation can still be effectively imposed by Westminster in some areas, whilst in others legislation may be copied or significantly adapted by Holyrood (Keating et al., 2003). Even where legislation *is* transferred to Scotland with similar drafting and shared objectives, the *application* of that legislation in a Scottish context can lead to significant deviation or innovation. For instance, ASBOs, a similar type of hybrid order to FBOs, were introduced across the UK in the 1998 Crime and Disorder Act. However, in Scotland ASBOs were both resisted and significantly subverted as practitioners steered the policy agenda away from the imposition of punitive orders towards other interventions focussing more on the root causes of anti-social behaviour (Nixon et al., 2010)

No previous research has examined the transfer of the FBO legislation from the English to the Scottish context. This is somewhat surprising for two principal reasons. Firstly, the composition of Scottish football is different to English football. In total, 92 professional clubs operate in England and Wales. They play in four divisions (The Premiership, Championship, League One and League Two) and in 2010-11, 30% (n=28) of all English teams had average attendances of over 20,000. Although,

42 clubs operate in Scotland across four divisions,<sup>1</sup> (The Scottish Premier League (SPL), Leagues One, Two and Three) the professional game is dominated by Rangers and Celtic, whose average attendances are over three times that of other 'larger' Scottish teams.<sup>2</sup> Secondly, the FBO was implemented in England and Wales to tackle the persistent problem of violence involving English hooligans abroad (Stott and Pearson, 2006), whereas in Scotland – in the absence of any notable problems with followers of the national team (see Guilianotti, 2005), the focus was on disorder at domestic club football, and in particular disorder related to sectarianism.

The issue of sectarianism<sup>3</sup> in Scotland has been the focus of much academic attention (see Bruce et al., 2004; Devine, 2000) and club football has long been associated with the problem (Flint & Powell, 2011). Although sectarian allegiances have been observed with the supporters of several Scottish football clubs, the issue is most commonly linked to the 'Old Firm' of Rangers and Celtic (Bradley, 1995). Within these clubs, sectarianism is centred on the British protestant heritage of Rangers and the Irish Catholic tradition of Celtic and commonly manifests itself in the display of banners and the singing of songs (Millward, 2009). In academic circles, debates exist as to whether the Old Firm rivalry should be understood in terms of being symptomatic of substantive sectarian hatred that reaches beyond the confines of football or as merely ritualised forms of abuse intended to 'wind-up' rival supporters (Bruce et al., 2004). However, until recently the issue of sectarianism was often ignored in official discourse on football disorder. For example, in the influential 1977 working group report on football crowd behaviour, commissioned by the then –Secretary of State for Scotland, *not*

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<sup>1</sup> 41 of these clubs are 'professional' in that players are paid. One, Queens Park, is an amateur club.

<sup>2</sup> In 2010-11 the average attendance for Celtic was 49,000 and 45,000 for Rangers. In comparison, the average for Hearts was 14,000 and 11,000 for Hibernian.

<sup>3</sup> Sectarianism is a highly contested term, with varying sociological and legal definitions. Broadly speaking, sectarianism may be viewed 'as bigotry, discrimination, prejudice or hatred between subdivisions within a group, such as between different denominations of a religion or the factions of a political movement'. (quoted from the Scottish Reformation Society: <http://www.scottishreformationssociety.org.uk/about/james-begg/james-begg-and-sectarianism/>). The legal framework in Scotland does not define 'sectarianism' specifically, but has gradually evolved to criminalise what might be said to constitute sectarian behaviours, through successive pieces of legislation targeting prejudice, incitement and discrimination against people on the basis of their race, ethnicity, colour, religious group, sexual orientation etc.

*one* mention of sectarianism is made (Scottish Education Department, 1977). The 2006 Action Plan on Tackling Sectarianism in Scotland marked a new determination to address behaviours that had previously at least enjoyed some level of official resignation or neglect. The Plan emphasised the problematic nature of sectarian behaviour at football and proposed to introduce FBOs to help prevent such incidents.

This paper examines the implementation of FBO legislation in Scotland and England by utilising data collected as part of a Scottish Government-commissioned evaluation.<sup>4</sup> The evaluation sought principally to explore the operation of banning order legislation in Scotland, and through comparative analysis of the legislative process in England revealed a number of findings that are pertinent both to the control of football related disorder and policy transfer. The paper begins by describing the development of the FBO legislation in England and Scotland, and it outlines the backdrop to the evaluation. Patterns of FBO imposition are then compared, and we consider a number of explanations for the differences that are observed. Overall, the paper identifies that key differences in how the legislation has been driven and resourced across the two jurisdictions has resulted in a low use of civil orders in Scotland with the focus being on the imposition of orders upon conviction. However, we argue that in light of the perceived recent increase in sectarian disorder in Scottish football, this relatively restrained use of the orders could be superseded by a more draconian regime, pushed by an increasingly assertive Scottish Government intent on making its mark on criminal justice issues.

### **The development of Football Banning Order legislation**

The incremental development of FBOs in England and Wales has been well covered, notably in the work of Stott and Pearson (2006, 2008). Prior to the Football (Disorder) Act of 2000, which introduced FBOs in their current form, attempts at to ban hooligans from matches had gathered

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<sup>4</sup> The evaluation report, Hamilton-Smith et al. (2011) is available at:  
<http://www.scotland.gov.uk/Publications/2011/07/22120711/0>

momentum from the early 1980s onwards (Stott and Pearson, 2006; Frosdick and Marsh, 2005).

Early attempts to control match attendance focussed on preventing fans from travelling abroad to attend fixtures through the imposition of 'restriction orders' that compelled individuals to surrender their passports for a limited period either side of specified matches (Stott and Pearson, 2006).

However, these orders could only be imposed on the back of a criminal conviction and it was often difficult to secure convictions against some hooligans (James and Pearson, 2006). FBOs were therefore introduced in the Football (Offences and Disorder) Act 1999 and the Football Disorder Act (2000), extending existing powers in three key respects:

1. FBOs could be targeted at stopping troublemakers from attending specified regulated domestic football matches for an extended period of up to ten years (provisions for surrendering passports prior to international matches were retained).
2. FBOs could include restrictions that went beyond stadia bans to include measures that sought to prevent trouble in locations that – whilst away from stadia – nevertheless attracted trouble on match days.
3. Finally, FBOs could also now be imposed through a civil application process (14B applications) whereby a chief police officer could apply to a court to issue an FBO on the basis that there were '*reasonable grounds to believe that making a banning order would help to prevent violence or disorder.*'<sup>5</sup> This allowed police forces to apply for FBOs in the absence of a criminal conviction. Rather, intelligence and action taken in other jurisdictions (e.g. being arrested at a match abroad) could be used to establish reasonable grounds to show that an individual was associated with violence and disorder of some sort, and that imposing an FBO might help prevent future violence and disorder '*at, or in connection with any regulated football match*'.

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<sup>5</sup> Section 14B, Football Spectators Act (1989), amended in Schedule One, Football (Disorder) Act 2000: <http://www.legislation.gov.uk/ukpga/1989/37/section/14B>

Whilst FBO's imposed through these new civil powers were less restrictive than FBOs issued on the back of a conviction (with the maximum period of any ban being three years compared to ten years on conviction), the provisions still caused controversy. As with ASBOs, the ability to impose significant restrictions on an un-convicted individual's freedom of movement or association, and the ability to then criminalise them for failure to comply with such restrictions –were widely criticised as disproportionate (Pearson, 2002). Indeed, the civil aspects of the FBO legislation survived an early legal challenge (see the case of *Gough and Smith V Chief Constable of Derbyshire*, 2002), with a Court of Appeal ruling that section 14B orders were a preventative measure that were justifiable, proportionate, and did not contravene EU Human Rights legislation. However, the court recognised that the preventative measure *did* impose serious restrictions on recipients and in upholding the orders issued against Gough and Smith ruled that the standard of evidence used to support these orders should meet an 'exacting standard hard to distinguish from the criminal standard' (para. 90, 2002:96). Pearson (2002) is unsparing in his demolition of the court's logic, questioning why – if a criminal standard of proof existed – wasn't a criminal charge brought against the defendants? Equally damning is Pearson's reminder that a key justification for section 14B orders in the first place was that there were active hooligans who the police *did not have sufficient evidence on* to secure a criminal conviction. James and Pearson (2006) go on to demonstrate that not only were the FBO's issued to Gough and Smith based on insufficient evidence, but that courts have subsequently continued to issue 14B orders on the basis of circumstantial evidence. For example, being in the wrong place at the wrong time when disorder occurs (even if an individual is not caught actually participating in that disorder), can be 'evidence' enough to secure an Order.

Both the UK Football Policing Unit (UKFPU) and the courts have also argued that the provisions for restriction of movement contained within Orders, typically the confiscation of passports, represents a proportionate response to the problem of football hooliganism as they are an effective preventative remedy. However, as Stott and Pearson (2006; 2007) have posited, available evidence

as to the effectiveness of FBOs in preventing violence at football tournaments abroad suggests that such measures are ineffective, failing to prevent violence abroad even when banned hooligans *comply* with the orders and stay within the UK.<sup>6</sup>

Concerns about the civil power element of the FBO legislation were also raised in the Scottish parliament when the legislation was introduced at Holyrood in 2006.<sup>7</sup> Nevertheless the legislation was ultimately copied – largely unamended – into the Scottish statute book, which appears surprising given the substantive difference in the stated aim for introducing FBOs (tackling sectarianism). The only distinction of note between the two versions of the legislation is that a requirement for the judiciary in England and Wales when convicting someone of a football-related offence, to explain their reasoning if they chose *not* to issue an FBO, was not adopted in Scotland. This may reflect a reluctance by policy makers at the time to encroach on the autonomy of the Scottish Judiciary. Scotland has a distinct legal system, and pre-devolution professionals within this system enjoyed – unlike their counterparts in England and Wales – relative freedom from scrutiny or interference by politicians in Westminster (Tombs, 2008).<sup>8</sup>

### **The Scottish Government Evaluation**

By 2010, the FBO ‘regime’<sup>9</sup> in Scotland was relatively well established, yet the actual number of FBOs being issued by the courts still ostensibly looked low when compared to the numbers of orders issued in England and Wales. Up to May 2010, approximately three and a half years after the introduction of FBOs, only 85 orders had been issued by Scottish Courts (Football Banning Order

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<sup>6</sup> Stott and Pearson (2006) suggest that incidents of hooliganism involving England supporters abroad have commonly been ‘crowd events’ that have not involved ‘risk supporters’ that could have been avoided through better public order policing tactics.

<sup>7</sup> For links to Scottish parliamentary consideration of the Bill see <http://www.scottish.parliament.uk/business/bills/46-policePublic/index.htm>

<sup>8</sup> For an authoritative guide to the Scottish legal system see White and Willock (2007).

<sup>9</sup> We use the term ‘regime’ here as it best denotes the network of institutional resources, formal policies and guidelines that were put in place in support of the legislation.



Authority 2010: 1)<sup>10</sup> or an average of two per Scottish football club. In comparison, by the of the 2003-04 football season in England and Wales, again some three and half years after the introduction of the legislation in that jurisdiction, over 2,596 FBOs had been issued (Home Office, 2005) or an average of 28 per English league club. This led to concerns in Scotland, not only about the number of orders issued, but also the proportion of applications that were not granted, with the Scotsman newspaper reporting in April 2009 that nine out of ten police applications for an FBO were not granted.<sup>11</sup> By mid 2010 the number of ‘applications’ made for orders on conviction stood at 657, with 85 (13%) orders granted (Football Banning Order Authority, 2010: 1).<sup>12</sup>

It was against this background that in 2010 the Scottish Government commissioned an evaluation to examine the progress of the FBO legislation to date. There was an over-arching concern that the FBO legislation in Scotland was not being effectively utilised and the evaluation aimed to identify whether this perceived under-utilisation was due to poor awareness and processes, or whether it was due to active and principled resistance to the legislation. In examining these questions the evaluation had a comparative element, looking at the experience of implementing the legislation in England and Wales.

The evaluation was broadly divided into two inter-related parts, the first looking at how cases were identified and processed by the police, the second looking at how cases were then subsequently dealt with in court. The first part of the research (the role of the police in targeting FBOs) is the primary focus of this paper. In order to address the research questions, the methodology focused on a multi-site case study approach both in Scotland and in England and Wales. The logic behind this approach was that it would allow the research team to examine the practices underpinning the

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<sup>10</sup> To put this in context, when the FBO legislation was being drafted it was estimated that – after a slow initial uptake – approximately 100 FBOs per annum would be issued (Association of Chief Police Offices in Scotland 2006).

<sup>11</sup> ‘Nine in ten thugs dodge stadium ban,’ The Scotsman newspaper, Monday 13<sup>th</sup> April 2009.

<sup>12</sup> It should be noted that similar concerns were expressed about the proportion of ASBO applications that were not granted (see for example, <http://www.scotsman.com/news/scottish-news/edinburgh-east->)

identification and processing of FBO cases and to compare these practices across the two jurisdictions. It was also thought that the use of FBOs would be strongly influenced by how individual police forces approached the policing of football, and in turn by how individual police divisions worked with football clubs within their division to maintain order and security on match days. In total we examined practices in seven police force areas (three in Scotland and four in England and Wales), focussing in turn on eleven football clubs (five Scottish Premier League clubs and six English League clubs<sup>13</sup>). In addition, interviews were conducted with club officials, officials from the Scottish Football Association and the Scottish Premier League, prosecutors (known in Scotland as ‘procurator fiscal deputes’) and the judiciary. The purpose of the interviews was not only to elicit an account of how practitioners understood and used the legislation, but also to contextualise this use against the backdrop of the particular characteristics of football disorder in their area. Interviews were supplemented with attendance at various FBO-related training events, as well as qualitative and quantitative analyses of electronic case records, and police incident and conviction data.<sup>14</sup> The timing of the research was fortuitous, with fieldwork largely preceding the controversial events of the 2010-11 Scottish football season, the evaluation thereby benefitting from unimpeded access and co-operation.

For the Scottish Government the value in having a comparative approach was conceived in a fairly conventional manner, principally that lessons might be learnt from practices in England and Wales. However, practitioners are themselves active in learning comparative lessons from other sites and institutions (Bloor, 1997), and as evaluators we rapidly found that Scottish practitioners were fully appraised of innovations in practices and policies South of the border. This should not have been surprising, for in spite of certain structural differences<sup>15</sup> and a strong rhetorical emphasis on the

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<sup>13</sup> Four of these clubs were in the Premiership, one in the Championship and one in League Two.

<sup>14</sup> For a fuller discussion of the methods employed see Hamilton-Smith *et al*, (2011)

<sup>15</sup> As with the Scottish judiciary, a key pre-devolution difference was a comparative lack of interference in Scottish policing by the Westminster executive, with accountability structures placing greater emphasis on local scrutiny (see Scott, 2011 for a detailed account)

‘Scottishness’ of Scottish policing (Gorringe and Rosie, 2010), there are, in reality, very strong institutional links between police forces North and South of the border, with a fluid interchange of policies, practices and personnel (Donnelly and Scott, 2005). However, the comparative, case study-based approach to the work nevertheless threw up more subtle lessons regarding how FBO practices varied in different settings.

The cross-border interconnections are obviously by necessity fairly dense when it comes to the policing of football. This is an operational requirement when Scottish clubs frequently play their English and Welsh counterparts in pre-season friendlies and European fixtures, and when sets of fans have cross-border allegiances and rivalries (Dunning et al., 1986). However, these interconnections also have a historical basis in terms of the development of policies and practices designed to address the issues of safety and security at football. In particular, certain key events in each jurisdiction have been seen as a catalyst for changes to security governance in both jurisdictions (e.g. the Ibrox disaster in 1902, the Ibrox disaster of 1971, the Bradford City Stadium fire in May 1985; and the Hillsborough disaster of 1989).

#### **Contrasting implementation: Numbers of FBO’s issued in Scotland compared to England & Wales**

Once the legislation had bedded in, the key question was why there was such a large disparity in the average numbers of orders issued in Scotland compared to England and Wales. A retort at the time might have been that the disparity wasn’t problematic given the calm that had come to characterise crowd behaviour in Scottish football. Amongst evaluation respondents, there was a consensus that Scotland had been enjoying a downward trend in football-related violence and disorder. This was partly attributed to a decline in the size and activity of some notorious hooligan groups, but other factors were also deemed important. The commercial success of Scottish Premier League football in terms of record season-ticket sales (Ellen, 2010) had leant a certain stability and predictability to match days, with supporters and officials alike broadly well-drilled in what to expect and how to

behave<sup>16</sup>. Season ticket sales were also seen to strengthen controls as ticket-holders attending home matches were identifiable via allocated seats inside stadia. However, England and Wales had also been enjoying similar clement conditions, so these factors alone cannot account for the low take-up of FBOs in Scotland.

There are other background factors unique to Scotland that may, at least partially, account for these differences. This might include the lack of opportunity for fans to cause high-profile trouble abroad given the comparative lack of success of Scottish clubs in international tournaments. Moreover, whereas English fans have acquired a reputation for violence<sup>17</sup>, the Tartan army (supporters of the Scottish National Team) had decided that the best way to outshine the English, was not to outdo them in 'thuggery', but to cultivate a contrasting reputation for being 'not hooligans but friendly fans' (Giulianotti 2005: 292).

Another persuasive reason for the disparity in the number of FBOs issued was that outside of the SPL, crowd attendance drops off rapidly to much lower levels than for equivalently ranked English teams. Average attendances for all clubs in the English league championship in 2009-10 were circa 18,000 spectators per game<sup>18</sup>, compared with an equivalent of only 2,500 spectators per game<sup>19</sup> for Scottish league division one matches during the same season. Certainly, FBO figures in England do appear to support what might be called the 'strength in depth' argument; namely that a higher total volume of FBOs reflects a higher total volume of attendance across the English divisions. Indeed, across England and Wales as a whole, 64% of all FBOs issued, were issued for incidents outside the Premiership. This compares with only 7% of Scottish FBOs being issued to fans of teams outside the SPL.

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<sup>16</sup> Although, some respondents argued that tolerated behaviour included an unacceptable level of sectarian insult and provocation.

<sup>17</sup> The reputation of English fans may certainly have driven the demand for FBOs, though this has been against a backdrop of a significant reduction in recent year of violence involving England (see Stott & Pearson, 2006).

<sup>18</sup> [http://soccernet.espn.go.com/stats/attendance/\\_/league/eng.2/year/2009/english-league-championship?cc=5739](http://soccernet.espn.go.com/stats/attendance/_/league/eng.2/year/2009/english-league-championship?cc=5739)

<sup>19</sup> [http://soccernet.espn.go.com/stats/attendance/\\_/league/sco.2/year/2009/scottish-division-one?cc=5739](http://soccernet.espn.go.com/stats/attendance/_/league/sco.2/year/2009/scottish-division-one?cc=5739)

However, on closer inspection of English and Scottish figures, the contrast between the two jurisdictions becomes less marked. In particular, if one considers FBO performance in terms of the rate of FBOs issued per 1,000 spectators, the gap between the top clubs in the Premiership and the top clubs in the SPL narrows considerably. This can be seen in table 1 which compares rates for the six clubs with the highest average attendances in the two divisions.

**Table 1: Top six average attendances, banning order rates compared\***

Premiership Teams	Average attendance	FBO rate per 1,000 spectators	SPL Teams	Average attendance	FBO rate per 1,000 spectators
Manchester United	75,304	1	Rangers	47,564	0.5
Arsenal	60,039	0.7	Celtic	45,582	0.5
Newcastle United	48,749	2	Heart of Midlothian	14,484	0.1
Liverpool	43,625	1.8	Hibernian	11,806	0.3
Manchester City	42,900	1.2	Aberdeen	10,461	0.9
Chelsea	41,588	1.5	Dundee United	7,821	0.8

\* It should be noted that English figures are drawn from the 2008-09 season and Scottish figures are drawn from the 2009-10 season.

There are two key observations to be made here. The first is that, far from banning rates being of another order of magnitude in the Premiership – as a simple reading of FBO figures might lead us to expect – rates of FBO use are similar for several clubs in the SPL. Second, there are wide disparities between clubs in terms of banning order rates. These disparities are as notable *within* the two divisions as they are across the two divisions, suggesting that the use of FBOs is significantly mediated not only by differences between the two national jurisdictions, but also by factors operating at a more local level.

The notion that there is any linear relationship between levels of attendance and the rate of issued FBOs is further dented when one looks at those clubs in England & Wales that are associated with the highest rates of FBO use. The top ten clubs in the 2008-09 season with the highest banning

order rates were all non premier league clubs with much lower average attendances than clubs in the top division. The highest banning order rate was for Millwall (12.3 per 1,000) who played in League One during that season, followed by Chesterfield (10.4 per 1,000) who played in League Two. The most straight forward explanation for these patterns would be that, relative to the number of spectators, there are more problems of disorder in lower league matches in England and Wales. However, Home Office figures from the 2009-10 season (Table 2) casts doubt on this explanation. Whilst the police arrest people with a remarkable degree of consistency across the four divisions (relative to the average number attending a given match), the rate at which FBOs are issued per 1,000 spectators rises consistently as one drops down the divisions. Furthermore, an analysis of the type of offences leading to arrests showed no marked differences between leagues that might help explain the greater propensity for issuing FBOs in lower leagues (e.g. if offences in lower leagues were markedly more serious this might account for any difference).<sup>20</sup>

**Table 2: Overview of the 2009-10 season – England and Wales\***

League	av. attendance in season	arrests in season	% of all arrests	arrests per 1000 av. attendance	FBOs during period**	% FBOs during period	FBOs per 1000 av. attendance
<b>Premier</b>	34,150	1,673	52%	4.9	339	37%	1
<b>Champ</b>	18,106	848	26%	4.7	279	30%	1.5
<b>L1</b>	9,305	477	15%	5.1	216	23%	2.3
<b>L2</b>	3,918	211	7%	5.4	95	10%	2.4

\* Figures taken from Home Office (2010)

\*\*One minor limitation of these figures is that whilst arrest and FBO figures relate to league and other competitions, average attendances are based on home league fixtures.

Given that there appears to be no startling inverse relationship between disorder and the size of a football crowd these findings need explanation. The findings look even more peculiar when one considers the equivalent Scottish picture, where lower division clubs accounted for hardly any FBOs.

<sup>20</sup> There are unquestionably limits to the value of arrest figures in terms of fully reflecting the threat posed from hooligans. In instances where trouble from risk supporters is routinely organised well away from football stadia, any incidents of trouble will not be included in match day statistics. However, there is no credible evidence to suggest that this type of hooliganism is disproportionately associated with teams in the lower English divisions. One alternative hypothesis might be that fans of lower league clubs follow the English national team in proportionately greater numbers, and are therefore more likely to be targeted with FBOs.

The most plausible explanation for these findings is a key difference in how FBOs are administered and promoted in England and Wales. In Scotland, the expense of applying for and administering FBOs is entirely borne by the criminal justice agencies involved. This applies both to applications made on the back of criminal convictions and those made using civil powers (termed ‘summary applications’ in Scotland). Contrastingly, in England and Wales funding for specific ‘football related’ posts (such as Banning Officers), and pump-priming monies to help police forces pursue civil FBO applications, are provided by the UK Football Policing Unit<sup>21</sup>. As a consequence, informal quotas are set from area to area before the start of each season, and these would appear to artificially inflate the volume of FBO applications in the lower leagues. This links in with the broader theme of resourcing, to which we will return.

### **Effective processes**

Even after accounting for attendance levels and financial incentives, there is still a performance gap to account for between the two jurisdictions. Whilst during the 2009-10 SPL season – in a sample of five forces<sup>22</sup> where complete figures were available 53% of all football-related convictions where an FBO request was made successfully resulted in an FBO being issued, the comparable figure for England and Wales was reportedly in the region of 80% (Hamilton-Smith et al., 2011:11). In Scotland, our research examined whether this was down to deficiencies in terms of identifying suitable FBO subjects<sup>23</sup> or weaknesses in terms of how cases were subsequently handled through the criminal justice process.

On both sides of the border, the processes observed were robust and broadly identical. This is unsurprising given the aforementioned inter-connectedness of approaches for managing football security. In both jurisdictions there are professionalised police ‘match commanders’ who have

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<sup>21</sup> The UKFPU was set up in 2005. Part of its remit is to monitor the use of banning orders and to help manage and support their administration.

<sup>22</sup> Strathclyde, Northern, Tayside, Fife and Dumfries and Galloway

<sup>23</sup> A ‘suitable subject’ may be taken to mean here either an individual charged with a serious football-related offence (particularly if they have previous convictions for similar offences) or individuals who were deemed ‘risk supporters’ namely those who were believed to be a member of a ‘hooligan group’.

overall responsibility for match-day security, and both police and club officials seek guidance on match-day safety and security from a shared source: the Football Licensing Authorities' "Guide to Safety at Sports Grounds" (2008). Similarly, policing policies and FBO practices are also underpinned with additional, substantially similar guidance, principally from the National Policing Improvement Agency <sup>24</sup>(2010) in England & Wales and the Association of Chief Police Officers in Scotland<sup>25</sup>(2010).

Whilst procedures were similar on paper, and whilst there was general agreement as to the sorts of behaviour that typically merited an FBO application (a violent incident involving a repeat offender), there were occasional decisions that invited disagreement amongst Scottish practitioners.

*"young lad, got a wee bit excitable [...] a goal celebration, he's ran on to the pitch, and before he's realised what he's done the police are on him, very apologetic, didn't make any contact, no previous convictions [...]it's an ideal opportunity for a bit of common sense, it could have been approached based on its merits, but as is, pitch incursion, football banning order request put in and based on the circumstances he's been given a football banning order for twelve months [...]might have been a bit harsh."* Scottish Football Intelligence Officer A

However, an analysis of a sample of Scottish conviction data and electronic court records demonstrated broadly consistent decision-making. Those receiving an FBO on conviction were significantly more likely to have an existing criminal record than individuals who were convicted of a similar football-related offence but did not receive an FBO. They were also significantly more likely to have had a previous conviction for a violent and/or a football-related offence (Hamilton-Smith et al., 2011: 15). Finally, when detailed court records relating to the index offence were examined, cases where FBOs were issued were more likely to involve comparatively serious violence, or

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<sup>24</sup> The National Policing Improvement Agency (NPIA) was formed in April 2007 to improve public safety through the provision of critical national services, building capability across the police service and providing professional expertise to police forces and authorities.

<sup>25</sup> The Association of Chief Police Officers in Scotland (ACPOS) is a professional body for police leadership. It works in partnership with government to set strategic objectives for policing in Scotland.



behaviour in a football ground that was deemed particularly dangerous (e.g. throwing flares).

Reportedly, FBOs on conviction were targeted at similar types of offenders in England and Wales (Hamilton-Smith et al., 2011: 45).

Superficially, the use of civil 14B orders (or in Scotland, civil summary applications) also looks similar, accounting for roughly 13% of all issued FBOs in both jurisdictions. However, the Scottish figures are misleading, as the majority of cases in Scotland relate to the imposition of a Scottish ban on individuals already in receipt of English bans. These additional bans were obtained, because until the implementation of the 2009 Policing and Crime Act, English and Welsh bans were not enforceable in Scotland. The majority of these retrospective impositions also related to a series of incidents of violence and disorder that accompanied the UEFA cup final match between Rangers and Zenit St Petersburg in Manchester in May 2008 (see Millward, 2009; Manchester City Council, 2008). Of the 13 summary orders issued in total in Scotland up to the start of 2011, nine were in fact issued from 2006 to 2008, and eight were issued against Rangers fans. Only one summary order was issued in 2010.

In England, the interviews with police officers revealed that 14B FBO were almost exclusively focussed on individuals believed to be 'risk supporters'; individuals who associated with – or belonged to – 'hooligan' groups that sort out confrontation with rival groups of fans.<sup>26</sup> In Scotland, with little use made of the available civil powers, the focus on risk supporters was more opportunistic. Whether FBOs on conviction were a useful tool in tackling hooliganism depended on whether they were caught being engaged in violence in a way that could clearly be related to football. Whilst some Scottish hooligan 'firms' have always had a clear interest in both violence and actively supporting their club (e.g. the Aberdeen casuals), other groups of hooligans have a

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<sup>26</sup> Risk supporters are also commonly referred to as 'casuals' due to the style of clothing commonly worn, which includes designer labels such as Stone Island and Aquascutum. These groups often have collective names, such as The Inter City Firm (Rangers), The Capital City Service (Hibernian) and The Aberdeen Casuals (Aberdeen).

reputation for displaying a measure of indifference to football, rarely attending games, and often preferring (in the case of Celtic) to spend match days in a pub, or attempting to seek out disorder in areas well away from football stadia (a feature of the Hibernian risk supporters). The difficulties that such loose associations present are twofold:

- First, if disorder does occur, it is often in a context – and at a time (away from the match, and after a match day police operation has wound down) –that makes it unlikely that the police will either make the connection to football, or will be able to convincingly evidence that connection in court.
- Second, even if such a connection is successfully evidenced – FBOs as typically issued in Scotland – tend to focus narrowly on simply banning fans from stadia. In the absence of FBOs with additional conditions (for instance banning individuals from congregating in certain geographical areas on match days) the utility of such orders was questioned:

*“the fiscal decided to go along with a banning order that would ban them from within 500 yards of [...the stadia...] so there was not much effect, which caused a bit of hilarity when we went down to speak to them [the convicted risk supporters] the next day.”* Football Intelligence Officer B

Some of the interviewed prosecutors and judiciary did express reservations about the imposition of the sorts of sweeping conditions used in some areas of England. However this resistance was predominantly hypothetical as very few respondents had ever been presented with a case where the police had requested such conditions. Further anecdotal data from police respondents partially justified this on the grounds that conventional FBO’s were hard enough to secure without attempting to ask for more restrictive conditions: *“because we have not been getting banning orders to start with, to start going down the line of asking for specifics, I would be wasting my time.”*

Football Intelligence Officer C

Another likely disincentive to apply for conditions was that most Scottish FBO requests were based on only basic offence information. Forces rarely resourced the compilation of more detailed packages of evidence and intelligence that could demonstrate how an individual's bad behaviour or disreputable associations away from a football game were nevertheless plausibly linked to football. This contrasts with England, where intelligence packages were routinely prepared for risk supporters. This touches on what proved to be the key difference in explaining the performance gap between the two jurisdictions. Whilst processes in both jurisdictions were broadly the same, the resources available to support the implementation of the FBO legislation were very different.

### **The resourcing of the banning order legislation**

In England and Wales the administration of FBOs and the collation and coordination of intelligence are both centrally supported by the UK Football Policing Unit (UKFPU), a Home Office embedded body, staffed by seven seconded police officers, with an annual budget in 2009-10 of £2.2 million.<sup>27</sup>

The UKFPU has provides funds to forces to develop proactive intelligence packages on key risk supporters in support of 14B FBO applications. Most premier league and many championship football clubs also have a full-time Football Intelligence Officer dedicated to them who has the role to 'direct, collate, evaluate, analyse and disseminate intelligence' (ACPO 2010:18). Many clubs also have a police Football Liaison Officer who has a more general responsibility for liaising with them regarding policing and match day operations.

This level of resourcing is in stark contrast to the situation that pertained in Scotland during our Evaluation. Here, a single civilian officer held the national responsibility for coordinating FBOs. The individual had no budget to support force-level activity, and no support from seconded police staff. There was no capacity for the central coordination or collation of intelligence. Meanwhile, whilst most SPL clubs had a dedicated Football Intelligence Officer (FIO), the posts were normally part-

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<sup>27</sup> Response to a written question in the House of Commons, Hansard, 22<sup>nd</sup> February 2010.  
<http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100222/text/100222w0082.htm>

time. A number of interviewed FIOs described the time available to dedicate to this role as highly limited, often less than a day a week. These limited resources impacted on the comparable effectiveness of Scottish processes in four ways:

1. Football-related arrests made well away from a match, or outside the period when the match day operation was running, ran the risk that the arresting officer might not flag-up that the arrest was football-related or be aware of the option to seek an FBO. Even if officers knew to ask for an FBO, they didn't always couch requests in a manner that persuasively linked the incident to football, or evidenced the impact of the incident on the victim. FIO's attempted to counter this by scanning arrests on match days across a wider area, quality checking FBO requests that were made. But most also admitted that they had limited capacity to do this.
2. Limited capacity also curtailed opportunities to develop intelligence or risk supporter profiles on the back of offences that were identified.
3. Even where profiles were available funding for using those profiles to apply for civil summary applications was not normally available.
4. Limited FIO resource had a knock-on effect in terms of the quality of communications with partner agencies in the criminal justice system. In particular, whereas colleagues in England frequently liaised with the Crown Prosecution Service to discuss cases, and attended court to follow proceedings and provide expert testimony where helpful, face to face liaison in Scotland was rare, and usually case-files were sent up to prosecutors with no additional communication. Case files were often not that detailed and police officers usually had no opportunity to explain in person the significance of cases with prosecutors, or to follow-up failed requests in order to understand why orders weren't granted. This was important, because in practice prosecutors and the judiciary often had limited awareness of the

relevance or content of the FBO legislation, leading to FBO requests either being 'discarded' by prosecutors, or being poorly presented or misunderstood in court.

Consequently the resources available for implementing the FBO legislation in Scotland impacted on who was targeted by that legislation and how effectively cases were progressed, with clear-cut *in-stadia* incidents appearing to be more likely to result in an FBO. However, the types of incidents that the legislation in Scotland was specifically intended to tackle, namely incidents of sectarian disorder, were often less clear cut. As a result, individuals convicted of sectarian disorder were *less* likely to receive an FBO than those convicted of violent offences.<sup>28</sup> The police and football clubs alike have faced accusations in the past of turning a blind eye to sectarian behaviour in football (Moorehouse, 2006). There is evidence, however, that many clubs have been proactive in trying to deal with sectarianism. For example, Flint and Powell (2009: 199) note that as recently as 2003 Rangers took action to minimise the visibility of sectarian identities through 'proscribing legitimate banners such as Union flags and Saltires'. Despite this, from our interviews with police officers and club officials it was clear that, whilst united in condemnation of sectarian behaviour, they held very mixed views on the practicality of using FBO legislation to target it.

Sectarian offences that involved insult rather than actual violence threw up a range of practical and legal challenges. Proving that an insult is sectarian is not straightforward. Most knowledgeable fans are aware of the songs or flags that are currently 'proscribed' as sectarian under existing legislation, and often simply adapt their insults to fall slightly outside of these categories (Howe, 2010). Even if the insult can be proven as sectarian, many police officers were of the view that an FBO was unlikely to be granted unless one could prove that a) the offender was prominent in some way (e.g. a ringleader), and that b) the offender's actions caused 'alarm' or 'distress.' In the absence of these aggravating factors, it is more difficult to issue an FBO for sectarian insults than for offences

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<sup>28</sup> Sectarian offences constituted 19% of all banning orders issued on the back of criminal conviction between November 2006 and July 2010. Conversely, they made up 41% of all cases where a banning order was not issued on the back of conviction (see Hamilton-Smith *et al.*, 2011: 14)

involving some form of violent conduct. Key to successfully prosecuting many of these offences therefore was inserting surveillance into the stadia to identify individuals, and to clearly record the nature and impact of their behaviour. At the time of the evaluation however, resources for conducting proactive surveillance operations were very limited.

## **Discussion**

Superficial comparisons of the use of FBO legislation in Scotland and England & Wales are misleading. The comparative use of orders 'on conviction' in Scotland is not nearly as low as headline figures would suggest, whilst civil summary applications are – in effect – hardly used at all. Thus, if we re-visit the criticism of FBOs made by Stott and Pearson (2006; 2008), the Scottish position would appear to be one of admirable moderation, with orders being used sparingly for the most appropriate cases of violence and disorder, where guilt is proven to a criminal standard in a court of law, and where restrictions rarely infringe on a recipient's liberties beyond a ban from football grounds. Such an account may certainly please advocates of Scottish judicial independence and restraint. However, our research suggests that this restraint is driven as much by considerations of economy as of due process. Whilst there was principled resistance amongst some respondents to the excessive use of FBO powers, it must be noted that reservations were expressed by criminal justice practitioners in England as well.

The main point that comparative work in this area seems to illuminate, is a more general one, namely differences between two jurisdictions in terms of how legislation is introduced and 'driven'. Common security needs and inter-dependencies can recommend uniformity in the framing of many areas of criminal justice policy and legislation (Keating et. al., 2003) yet there is often divergence in the detail of how policies and laws are actually implemented (Mooney and Poole 2004; Nixon et al., 2010). Policy making and legislation in Scotland is traditionally less centralised, and more mediated by the professional autonomy of public sector and legal professionals, whilst legislation is less driven by targets and performance indicators (Keating et al., 2003). It would appear that in England the

number of FBOs issued may have been as much a reflection of political determination to target the English football hooligan problem— with that determination being given added ‘expression’ with central funding and targets – as it was a reflection of the natural demand for orders from the police and courts. Another, example of this political intent would appear to be the additional pressure imposed on the English & Welsh judiciary, with provisions in the Westminster version of the legislation requiring them to openly justify their reasoning for *not* imposing FBOs. It would appear reasonable to hypothesise that this measure may also have ‘encouraged’ a greater use of FBOs.

The implementation of the legislation in Scotland could therefore be characterised as a consequence of weak central ownership of that legislation, though this would be to ignore the fact that in transferring the legislation, the Scottish government had its own distinct agenda- namely tackling sectarianism in football. Nevertheless, the limited central support given to implementing the legislation, the absence of mechanisms incentivising its use, and the initial lack of any effective monitoring, chimes with work previously undertaken by Forbes et al. (2010) – which highlighted general weaknesses in the policy-formulation and delivery capabilities of the newly empowered but inexperienced Scottish executive. In particular, given the professed focus on sectarian disorder, the apparently negligible consideration given to how an English legislative instrument could be successfully adapted to target these quite distinct behaviours appears damning. On the other hand, even if Scottish ministers or policy makers had wished to drive legislation harder, with more robust implementation mechanisms, a prosaic constraint on their actions has been limits to fiscal autonomy placed on Scottish Ministers by the British Treasury (Adams and Robinson, 2002). The £2million annual fund to pump-prime the pursuit of FBO applications through the UKFPU did not extend to Scotland and Scottish Ministers would have been constrained in their ability to bank-roll an equivalent fund.

As devolution has developed, this characterisation of Scottish policy making as being weak at the centre and largely ‘bottom-up’ has been qualified by commentators observing a gradual

centralisation of powers at the expense of local autonomy and professional independence (Parry 2002). In Scottish criminal justice in particular, a sphere traditionally resistant to the punitive policies of Westminster (McAra, 2008), it has been argued that an ironic consequence of devolution is that criminal justice policy has in fact converged with the punitive policies of Westminster (Croall, 2006). This may be *precisely because* the independence of the Scottish legal and criminal justice systems has provided Scottish politicians with a key area in which they can exert and demonstrate influence, courting the electorate with their own brand of popular punitivism (Scott, 2011).

Initially, as with some other notable areas of criminal justice policy<sup>29</sup>, the FBO evaluation did not seem to support such characterisations. The FBO regime was markedly free of political interference, with professionals being left to use the available legislation as they saw fit. However, a subsequent upsurge in football-related sectarian controversy, which included disorder surrounding the Rangers verses Celtic match in March 2011, letter bombs being sent to Celtic manager Neil Lennon and an attack on the same man by a Hearts supporter in May 2011, led to proposals to considerably strengthen/harshen the law in respect of sectarian offences associated with football matches.

Consequently, the 'Offensive Behaviour at Football and Threatening Communications (Scotland) Bill (2011)' was passed by Scottish Parliament in December, 2011.<sup>30</sup> Under the Act, criminal penalties have been significantly increased for offensive behaviours that may generate sectarian disorder and for communications that are perceived as threatening (those that intend to cause fear and alarm, implied threats or those intended to incite religious hatred). These proposals have attracted heavy criticism as being impractical and excessively draconian – with maximum penalties being increased from a six month to a five year custodial sentence. In addition, the Act extends the use of FBOs through the creation of a new offence 'offensive behaviour at a regulated football match', for which

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<sup>29</sup> See for instance the Scottish Government's 2010 Anti-Social Behaviour Framework.  
<http://www.scotland.gov.uk/Topics/Justice/public-safety/asb/ASBframework>

<sup>30</sup> Details of the bill, including consultation responses can be found at:  
<http://www.scottish.parliament.uk/business/bills/index.htm>



an FBO can be sought in every case.<sup>31</sup> Alongside these new powers, significant extra resources have been earmarked for supporting the administration of FBOs in Scotland, in particular increasing the capacities and capabilities of prosecutors and the police.<sup>32</sup>

To some critics, the Act represents little more than a moral panic, with legislation being hastily drafted in response to a brief period of heightened tensions between the supporters of Scotland's two major football clubs<sup>33</sup> (Laver, 2011). Certainly in the face of sustained tabloid media coverage and with parliamentary elections looming, Ministers were under pressure to be seen to act.

Nevertheless, it is also worth noting that the Government was responsive to some of the criticisms of the draft legislation, making limited concessions<sup>34</sup> and agreeing to review the legislation two years after its enactment. Whist the legislation may still appear potentially punitive, what it *cannot* be said to represent is a convergence with Westminster policies. The 2011 Act is a distinctly Scottish solution to a Scottish problem, though its inception also arguably conforms to the well-established thesis that the interaction of media coverage and electoral politics tends towards the production of punitive criminal justice policies (see Newburn and Jones 2005). One key question therefore that stands prominently in the wake of recent events, is whether the 2011 Act marks the start of more politicised and punitive criminal justice policy making in Scotland, or whether Ministers will find a way to better balance the pressures of political accountability with maintaining many of the valued attributes of Scottish Criminal Justice.

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<sup>31</sup> See <http://www.scotland.gov.uk/Topics/Justice/law/sectarianism-action-1/football-violence/bill>

<sup>32</sup> See <http://www.scotland.gov.uk/Publications/2011/07/football-summit-report>

<sup>33</sup> See submissions to the Scottish Parliament's Justice Committee. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31448.aspx>

<sup>34</sup> See <http://news.scotsman.com/scotland/Salmond-to-agree-review-of.6850134.jp>

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