



Law Society
of Scotland

Consultation Response

Proposed Protection of Workers (Retail and Age-restricted Sales etc.) (Scotland) Bill

19 April 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Daniel Johnson MSP consultation in relation to the Proposed Workers (Retail and Age-restricted etc. Sales) (Scotland) Bill (proposed Bill). The committee has the following comments to put forward for consideration:

General Comments

We are aware that there have been previous similar consultations¹ in relation to the general principle of providing greater protection to those working in retail industries. The suggestion appears to be for the proposed Bill to make offences in relation to:

- assaulting a worker in the retail sector
- assaulting a worker involved in the sale or supply of age-restricted goods or services
- abusing, harassing or obstructing a worker involved in the sale or supply of age-restricted goods or services.

From the evidence supplied, there seems little doubt that those working in the retail sector can and do experience abuse and violence which is not acceptable. We fully condone this type of behaviour.

We understand the well intentioned background to the introduction of the proposed Bill. However, we would state at the outset that we are not persuaded that any failure to prosecute arises in relation to any incidents where such conduct occurs and is criminal. There are a number of reasons where the evidence in

1 Scottish Executive Consultation entitled 'Protection of Emergency Workers' in February 2004 and the public Consultation by Hugh Henry MSP entitled 'Workers (Aggravated Offences) (Scotland) Bill in August 2009.

the consultation does not seem to us to support the creation of either a separate or new offence that includes a statutory aggravation.

Prosecution: As far as such offending conduct is concerned, there are a number of criminal offences which can be selected for criminal prosecution for such behaviour where it arises. These include common law crimes of assault and breach of the peace. Statutory crimes are also included such as contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and those involving aggravations on racial or religious grounds (since frequently, abuse of a racial or religious nature runs in tandem).

There are of course other statutory offences where prosecutions can take place specifically related to the actual selling of age-restricted goods and services to minors set out under Annex B of the consultation. Any prosecution will of course be subject to sufficient admissible evidence being available to establish that a crime has taken place and as to the identity of the perpetrator. The consultation does suggest that:

'any improvement in police and Crown Office and Procurator Fiscal Service [(COPFS)] response to these crimes would be welcome.'

There does not appear to be any gaps in the common law or legislation that hinder or prevent prosecution for behaviour that is criminal or in any COPFS response to such crimes when such incidents are reported. We also note the suggestion that *'reports are not being followed up or bargained away at court.'*

We think it is important to understand the relevant steps in considering prosecution. For any criminal prosecution to take place, there has to be a report made to the police. Thereafter the police will report the case to COPFS for consideration for prosecution. COPFS are then responsible for prosecution in the public interest. Once the decision is made that the case is to be prosecuted, the case may resolve at any stage without the need for a trial.

We assume that the reference to *'bargained'* implies a negotiated plea. There are many circumstances in which a plea of guilty to the substantive charge or combination of charges may be accepted; there appears to be no suggestion from the consultation that this is as a result of the Crown failing to take these offences seriously or taking soft-pleas.

What would have been useful, if available, would have been to include evidence or analysis to demonstrate if and where such cases involving criminal behaviour in the retail forum are failing at any specific stage in the criminal prosecution process.

Sentencing: There are no suggestions within the consultation that where convictions for such crimes arise that either the sentencing powers of the judiciary are not sufficient or the sentencing that has taken place is not appropriate to the circumstances of the offence. Had such issues been included within the consultation, these would have been potentially matters for judicial education where an approach could be made to the

Judicial Institute for Scotland² who is responsible for the development and delivery of such judicial training to consider covering this in its training provision.

Furthermore, the role of the Scottish Sentencing Council³ should not be ignored as they are currently engaged on a programme of developing sentencing guidelines for the judiciary. The aim and objectives of the Scottish Sentencing Council are to:

- prepare sentencing guidelines for the courts
- publish guideline judgments issued by the courts
- publish information about sentences handed down by the courts

This approach promotes consistency in sentencing, develops sentencing policy and greater awareness and understanding of sentencing. There does not seem to be any complaint of inconsistency of sentencing causing any issues. If there is, they would be well placed to consider any guidelines that might be required or indeed highlight any appropriate judgement outlining the factors in considering sentence that may well have aggravated the commission of the assault or breach of the peace.

Even if new offences were actually created, the sentencing powers would remain the same. Most of these crimes would be expected to be prosecuted in the summary courts. There would not therefore be, in our view, any difference in relation to the outcome by way of sentence as increased sentencing is not being proposed.

Creation of such offences will not enhance the safety of the public as the existing law is adequate for the reasons that we have set out. Creating new offences would merely create further legislation which, in our view, overlaps with the existing law, which will, in turn, create more problems for those such as the police and the Crown in handling such incidents. Summary complaints will become more complicated as there may well be an increase in the charges needing to be included as well as the inclusion of alternative charges.

If a new offence was introduced and an altercation took place within a shop involving a retail worker in relation to the production of under 25 proof of age that involved unacceptable conduct, it would be prosecuted under the new offence. The offence would then be treated as an aggravated offence due to the occupation of the retail worker. Thereafter, a customer who objects to the conduct directed towards the shop assistant is then subjected to abuse. That offence would only be able to be prosecuted at common law and would not therefore be subject to same sanctions. The abuse in both scenarios is the same.

- Should the punishment not be the same as the actual abuse amount to the criminal conduct is the same?
- Should what makes it worse as a result of the aggravation is the role of the retail worker?

² <http://www.scotland-judiciary.org.uk/59/0/Judicial-Training>

³ <https://www.scottishsentencingcouncil.org.uk/>

The court at present does take into account all the facts and circumstances surrounding the offending conduct when sentencing and apportions the sentence between the two offences if appropriate.

What we did consider an interesting concept, as highlighted in the consultation, is development of a scheme in Scotland to promote joint working among the relevant parties to raise awareness of the issues around the occurrence of this type of behaviour in retail outlets.

What exists in England⁴ could well be developed in Scotland. We note that this joint working concerned the practical issues involving the police, the Crown and the NHS who undertook to work closely together to reduce the problem of violence and anti-social behaviour affecting the NHS. One possible problem with this approach is that the NHS is one organisation whereas there are multiple retail outlets with different parties involved, from the big supermarkets to small one person shops. There are however points of similarity in relation to the offending behaviour that affects both NHS employees and retail workers. That includes multiple unit working, lone or few persons working at locations and 24/7 and 365 days per year working practices.

Joint working or a development of a protocol might:

- raise awareness and highlight the issue
- encourage any current under-reporting
- stress what is involved in a criminal prosecution and
- highlight the range of potential sentences for those convicted.

That seems to us to be a preferred approach rather than developing further offences. That route too would allow evidence and statistics to be obtained that may support the intention that lie behind this consultation for the future.

We would respond to the proposal's specific questions as follows:

Part 2

Aim and approach

1 Which of the following best expresses your view of creating a new offence of assault against a worker in the retail sector?

As highlighted above, we would oppose the creation of any new offences. We consider that the current common and statutory law does adequately cover those working in the retail sector where offences occur. Additionally, we consider that judges already require to take account the circumstances of the offence, on conviction, which will include any aggravation where the offence is committed on any person who is required by nature of their role to interact with the public; such as asking for proof of age or is involved in the sale of age-restricted products.

We would stress that non-legislative programmes and measures would seem to be the best way in which to protect such workers. This would raise public awareness of the issues and provide education that such

4 Tackling violence and antisocial behaviour in the NHS: Joint Working Agreement between the Association of Chief Police Officers, the Crown Prosecution Service and NHS Protect (https://www.cps.gov.uk/sites/default/files/documents/publications/joint_working_agreement.pdf)

behaviour is unacceptable and will be prosecuted. This can include practical measures too such as the installation of CCTV and emergency lines to the police station, community policing roles with schools and the public and targeting problem areas.

There would also be considerable difficulties in defining what a worker is in the retail sector for the purposes of any statutory aggravation.

2 Which of the following would you support as a way to respond to assaults on workers upholding statutory age-restrictions?

We would refer to our response above. For the reasons that we have indicated, we do not consider that there is any requirement to create a new statutory offence or aggravation.

3 Which of the following would you support as a way to respond to abuse, harassment, threatening or obstruction of workers upholding statutory age-restrictions?

Where such behaviour is criminal, we would consider that it is covered adequately by the existing common and statutory law.

We can foresee that there could be possible evidential issues which would include:

- demonstrating the necessary knowledge of the accused that the person to whom the behaviour was directed is a worker. There may well be no requirement for a worker to wear a uniform and therefore problems could arise in establishing them as being recognised as a worker. There is no identifiable uniform for workers to wear such as with the police or ambulance service who are all covered under the Emergency Workers (Scotland) Act 2005
- the requirement to prove the necessary legal qualification of being a worker could prove more challenging than the current law's requirements
- showing that the behaviour was motivated in whole or in part by malice towards the worker by reason of the worker's employment

4. Do you think that there are other steps which could be taken (either instead of or in addition to legislation) to achieve the aims of the proposal?

We refer to our response above.

We do consider that a campaign of awareness-raising and joint working as highlighted above could much to address the issues.

Financial implications

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

We have no comment to make on any financial aspects of the proposed Bill.

6. Are there ways in which the Bill could achieve its aim more cost effectively (e.g. by reducing costs or increasing saving)

We have no comment to make.

Equalities

7. What overall impact is the proposed Bill likely to have on equality taking into account of the following protected groups under the Equality Act 2010?

A review group has been set up by Lord Bracadale⁵ in relation to hate crime to consider:

- whether current laws are appropriate and consistent
- if hate crime legislation needs simplified, rationalised or harmonised
- if new categories of hate crime for characteristics not currently legislated for, such as age and gender, need to be created.

We understand that the review group is due to report shortly. This will provide an opportunity for Government to take forward any of its proposals. There may be an opportunity as part of that review to consider if there should be any extension of the categories that are considered to amount to an aggravation in certain circumstances. We note on many occasions offences against those working in retail may well already be aggravated by one or more of the 'protected characteristics.'

The lack of a statutory aggravation does not make, as highlighted above in our example, the crime any less serious. Their experience as a victim of crime still remains the same.

8 In what ways could any negative impact of the proposed Bill on equality be minimised or avoided.

We have no comment to make.

Sustainability of the proposal

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

We have no comment to make in relation to this question.

10. Do you have any comments or suggestions on the proposal for example other trigger points for violence or abuse and other workers who should be covered?

We have nothing to add to our response above.

We would be happy to provide any further information that may be required.

⁵ <https://news.gov.scot/news/hate-crime-legislation-review>

For further information, please contact:

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