



Law Society  
of Scotland

# Consultation Response

## Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill

31 January 2020



## Introduction

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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 Scottish Parliament's call for views on the Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill (the Bill). The committee has the following comments to put forward for consideration.

## General Comments

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The issue of providing better protection to those working in the retail sectors has been discussed for some time. We refer to the Scottish Executive's Consultation entitled "Protection of Emergency Workers" in 2004, a subsequent consultation in 2009, a private member's Bill under Hugh Henry MSP and to our response to an earlier consultation on the Proposed Workers (Retail and age-restricted Sales etc) (Scotland) Bill.<sup>1</sup>

Those working in the retail sector can and do experience abuse and violence at what is an unacceptable level. The British Retail Consortium in March 2019 identified that "preventing crime remains a major concern for retailers" where for their members, "violence remains by far the most significant type of crime, and is the area where we and they have most concentrated our crime reduction work and spend. Other priority crime types include customer theft, fraud and cyber-crime."<sup>2</sup> To provide a scale of the issue, the "Crime against businesses: findings from the 2017 Commercial Victimization Survey revealed that there were 510,000 assaults and threats made against retail staff in 2017. This equates to 1,433 crimes per 1,000 premises and 250 assaults or threats per day, on average."<sup>3</sup>

Where violence occurs, the criminal law should be utilised to deal with this in a criminal context. We support what are the laudable objectives of the Bill. However, we recognise that this presents continuing

<sup>1</sup> <https://www.lawscot.org.uk/media/360088/consultation-response-proposed-protection-of-workers-retail-and-age-restricted-sales-etc-scotland-bill.pdf>

<sup>2</sup> <https://brc.org.uk/media/404253/brc-annual-crime-survey-2019.pdf>

<sup>3</sup> <https://www.personneltoday.com/hr/violence-against-retail-staff-increases-25/>

and complex issues which need to be addressed for many of the reasons outlined in the Bill's Policy Memorandum.

It is to the best way in which to seek to improve the position of retail workers that is perhaps the focus of discussions.

We suggest that the problem of violence against retail workers requires a multifaceted approach. For that, we suggest that gaps should be identified in the current range of criminal offences to cover the type of offending behaviour that should not be accepted. We are not convinced that there are such gaps.

We suggest that the first regard should be had to the overwhelming need for enhanced provision of education, training and awareness raising of the issue to the public as a major and much needed policy objective which we discuss more fully in our response to Question 8. There are a range of organisations that could contribute to the compilation of that training which we suggest would include Crown Office and Procurator Fiscal Service as to what constitutes criminal behaviour and the possible conviction which follows and the effect on future employment.

The Bill indicates that there are difficulties regarding cases not being reported in the first place. Action does depend on the employee (and employer) reporting the case. Though we note some of the reasons indicated in the Bill's Policy Memorandum, the creation of new criminal offences would not address these concerns. Regarding the issue of under-reporting, we suggest that the following aspects could be more fully considered before adopting the route of creating any new offences. If that information is available, it would also help inform the specific drafting of any such offences.

Employee reporting: It is unclear exactly why that is an issue. Is the employee unaware that the conduct amounts to a criminal offence? Is the employee scared of possible reprisals from the perpetrator? Does the employee not want to go to court? Does the employee consider that it is a waste of time because there will be no conviction and/or the sentence that is imposed?

Evidential/prosecution issues: For any such incidents to be prosecuted, the conduct must amount to a criminal offence, sufficient admissible evidence must exist, and it is in the public interest to prosecute as determined by the COPFS. Is there evidence to suggest that

- cases are being reported by employees and not being progressed by the police?
- Where cases are reported to COPFS, have issues arisen over the need for corroboration? Given the circumstances, we can envisage that incidents may tend to arise on a one to one basis so there may not be any witnesses other than the complainer. However, with the increase in the use of CCTVs and the decision in the case of *Gubinas & Radivicius v HMA*,<sup>4</sup> that has clarified the position on the use of CCTV evidence.
- Once there is a conviction what about sentencing? In sentencing, it is a matter for the judge to consider the facts and circumstances of any case in determining the sentence. Much depends on

<sup>4</sup> 2017 SCCR 463,

the nature of the offence as an assault could vary from prosecution in the High Court to the JP Court.

We think that there should be more research to be undertaken specifically targeting the aspects highlighted above to identify how the system can be improved.

Under Question 9 we outline some evidential considerations with the Bill which may be helpful.

## Consultation Questions

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### Question 1: What are your views on the Bill and what impact will it have?

The Policy Memorandum of the Bill states that it aims to “increase protection for workers in the retail sector or enforcing a statutory age -restriction in relation to the sale or supply of goods or services.”<sup>5</sup> It will seek to achieve these aims by the following actions:

- to create a new statutory offence of assaulting, threatening, abusing, obstructing or hindering a retail worker; and
- to allow for aggravation of that offence where the retail worker is enforcing a statutory age restriction.

As far as impact is concerned, we refer to our general comments above. A gap in the law needs to be identified to show that incidents that are arising are not being prosecuted. From the prosecution perspective, creation of new criminal offences would only be justified in these circumstances. If criminal offences are to be created, there needs to be clarity of the law.

What might be helpful when considering the scope of the potential new offences in the Bill is if various scenarios could be drafted outlining the conduct that should be considered criminal and would be caught under the Bill’s provisions. That would show how the Bill would enhance the current suite of prosecution offences.

There are a range of offences, at common law and statute, which are used currently for prosecution. Scoping these out now and considering the relationship with the forthcoming Hate Crime bill may provide a useful route depending on the content of that bill when it is introduced as that may provide a means to prosecute this type of behaviour too.

The scope of the criminal offence in section 1 of the Bill seems wide.

<sup>5</sup> Paragraph 3 of the consultation

Under section 1(1) of the Bill, “hinder” would not seem to us (in the absence of any examples) to amount to a criminal offence. We also have concerns that a customer legitimately complaining about services or goods could be seen to amount to hindering.

We suggest that “hindering” which may be legitimate in other legislation should be removed from the draft.

If any new offences are created, the sentencing powers should remain. Many of these crimes would be expected to be prosecuted in the summary courts so that there may be little difference in outcome unless the new offences being created under the Bill cure any gaps in the law. Clarity about gaps in the legislation would assist in checking whether the sentencing powers would be adequate.

## **Question 2: Having regard to existing offences (e.g. common law assault), is there a need for a new statutory offence of assaulting, threatening, abusing, obstructing or hindering a retail worker?**

We refer to our answers to questions 1 and 2. Assault as a common law offence catches a wide variety of offending. Putting it in the context of a statutory offence can make it more challenging to prosecute. An example is the English Offences against the Persons Act 1861 which receives much criticism with no clear definition of the terminology of the legislation leading potentially to conflicting case law seeking to interpret the statutory provisions.

## **Question 3: What are the potential benefits or problems in having such an offence?**

The benefits would not lie in the creation of the new offences alone. It would need collaborative work being taken forward as we suggest above to promote joint working among the retailers, the Crown and the police to raise awareness of the issues arising relating to the incidence of unacceptable and therefore criminal behaviour arising in retail outlets.

We stress that more, not relating to criminal matters, can be done as we highlight in our answer to Question 8.

## **Question 4: Should any new offence include all of the elements proposed in the Bill (e.g. should obstructing or hindering a retail worker be a crime, as is already the case in relation to various providers of emergency services)?**

We do not consider that criminal obstruction or hindering of an emergency worker and police officer are necessarily good comparisons. Exactly what conduct an offence of “hindering” is intended to cover should be clarified rather than left to future case law interpretation. Emergency workers and police officers have specific roles to undertake as public sector employees which do not compare with the day to day work of

retail employees. There could also be a vast increase in number of potential offences which we would suggest would be out of proportion to the number of offences relating to the police and emergency workers. “Abuse” goes beyond the terms of section 1 of the Emergency Workers (Scotland) Act 2005.

Retail workers carrying out assessments as to age do have to comply with legal requirements but that is equally pertinent to those who have health and safety assessments or trading standards where there are not necessarily these types of safeguards. As highlighted above, there is a risk that complaints about service could result in criminal prosecution and add to the work in criminal courts rather than address the root cause of the complaint in the first place.

**Question 5: Is the focus on retail workers appropriate (e.g. is it too narrow in not covering other workers who may, because of their work, be vulnerable to abusive behaviour)?**

The focus should be on preventing offending behaviour however and to whom it is caused.

**Question 6: What difference will the proposed aggravation, where the enforcement of a statutory age restriction is involved, make?**

The creation of an aggravation is an interesting concept given the forthcoming Hate Crime bill.

Exactly how the forthcoming Hate Crime bill, shortly to be introduced, proposes to deal with aggravations might be useful to ascertain to consider if there could be any aggravation for an offence included in line with section 4 of the Bill dealing with the enforcement of statutory or age restrictions.

We can understand why an employee undertaking his job such as requesting sight of age certification could put workers into areas of potential challenge more often.

Would this extend to those acting as bouncers at premises? The scope of the Bill might be discussed with the Security Industry Authority<sup>6</sup> which is the UK organisation responsible for regulating the private security industry. They have a strategy to deal with “violence directed towards security operatives whilst they are doing their jobs.”

**Question 7: What are the financial implications of the proposals?**

We are unable to comment directly on the financial implications of the proposals.

<sup>6</sup> <https://www.sia.homeoffice.gov.uk/Pages/about-us.aspx>

Clearly the policy intention is to promote prosecutions that fall under the ambit of the Bill but as we are unsure of any gaps in legislation, it is difficult to quantify what the increase in prosecution costs would be.

Any increase in prosecutions would have to be dealt within the Scottish criminal justice system with costs for prosecution, court service and legal aid all being relevant.

### **Question 8: What other action is or should be taken to protect retail and other workers?**

We have highlighted the need for joint working and /development of a protocol or adopting non legislative measures in our earlier response to Proposed Workers (Retail and age-restricted Sales etc) (Scotland) Bill<sup>7</sup>.

In England<sup>8</sup>, the joint working project “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” put in place is to put in place a broad framework to assist the Association of Chief Police Officers, the Crown Prosecution Service and the NHS in setting up closer working arrangements to reduce the problem of violence and anti-social behaviour that affects the NHS. The NHS has similarities to retail shops in that there are many outlets with different parties involved from supermarkets and small local shops. In that context, offending behaviour has included multi-unit working, lone, or few persons working 24/7 and 365 days a year. A focus on joint working would seek to:

1. raise awareness and highlight the issue
2. encourage and support the reporting of incidents
3. stress and clarify what amount to criminal conduct
4. highlight the potential range of sentences for such offending.

### **Question 9: Are there any other aspects of the Bill you would like to comment on?**

We have the following comments to make on the drafting of the Bill:

- Why restrict prosecution to summary procedure? Should serious cases not be prosecuted under solemn procedure?
- A single source of evidence may not be sufficient to prove an aggravated offence. There would need to be corroboration of the material facts as to how the offence was committed by the retail worker enforcing an age restriction.

<sup>7</sup> <https://www.lawscot.org.uk/media/360088/consultation-response-proposed-protection-of-workers-retail-and-age-restricted-sales-etc-scotland-bill.pdf>

<sup>8</sup> [https://www.cps.gov.uk/sites/default/files/documents/publications/joint\\_working\\_agreement.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/joint_working_agreement.pdf)



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