



Law Society
of Scotland

Stage 1 Briefing

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

22 September 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 previously responded to the Scottish Parliament's Justice Committee's Call for Evidence on the Protection of Workers (Retail and Age-restricted Goods and Services (Scotland) (the bill)).¹ The Committee has also published its Stage 1 Report on the bill on 30 June 2020.²

The purpose of the bill is "to increase protection for workers in the retail sector and those applying or enforcing a statutory age-restriction in relation to the sale or supply of goods or services."³ It aims to achieve this by:

- Providing additional protection for relevant workers by creating a new statutory offence of assaulting, threatening, abusing, obstructing or hindering a retail worker⁴
- Allowing for aggravation of that offence where the retail worker is enforcing a statutory age restriction

By creating these offences, the bill seeks to increase awareness and encourage the successful reporting of such incidents.

We have the following comments to put forward for consideration at the Stage 1 debate which is scheduled to take place on Thursday 24 September 2020 that address:

- Purpose of the bill
- Absence of statistical evidence on the reporting of incidents
- Raising awareness and need for education campaigns
- Creation of offences

¹ https://www.parliament.scot/S5_EconomyJobsFairWork/Inquiries/EEFW-S5-20-PoW-15-LawSociety.pdf

² <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

³ Paragraph 3 of the bill's Policy Memorandum

⁴ Paragraph 4 of the bill's Policy Memorandum

The purpose of the bill

Understanding the motivation for bringing forward the bill is necessary. The bill focuses on how to provide better protection for retail workers which has been a topic under discussion for some time.

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...”⁵ Where and however such violence occurs, within the retail forum, Scots criminal law should be utilised and able to deal with such incidents effectively.

That responsibility initially lies under the auspices of Police Scotland who then report such incidents to the Crown Office and Procurator Fiscal Service (COPFS). COPFS must then consider the merits of potential prosecution. For prosecution to take place, sufficient admissible evidence must exist, and prosecution must be in the public interest.

Sections 1 and 2 of the bill create the relevant offences. It is essential that any new offences being created achieve the clarity and precision that criminal law requires. That is to ensure that:

- the public understand that the commission of such conduct is wrong
- solicitors, both prosecution and defence, can understand what amounts to criminal conduct and provide appropriate advice to those that offend
- judges can sentence appropriately, assessing the significance of factors required to achieve effective sentencing and provide deterrence with regard to offending.

What is important is that effective prosecution can be achieved, especially where there may or are any gaps in the existing law. To that extent providing examples of how the creation of the new offences will address such gaps would help illustrate and promote understanding as to how such new offences are intended to operate.

That would help address the ongoing commission of offending behaviour and provide an effective deterrent to the reoccurrence of any such conduct.

Absence of statistical evidence on the reporting of incidents

We are concerned at suggestions made in the bill’s Policy Memorandum that referred to “an acceptance of a culture of aggression which is reflected in the low-levels of incident reporting to the police.”⁶

⁵ <https://brc.org.uk/media/404253/brc-annual-crime-survey-2019.pdf>

⁶ Paragraph 22 of the Stage 1 Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

There should be no acceptance of violence. However, we consider that this statement merits further examination as to why there are low levels of reporting. Such information if obtained could be examined to ascertain if there are issues with low prosecution or conviction rates and/or light sentencing. These would all help to identify where the problems arise.

It would help what the Society suggested should comprise a multi-faceted approach to the issue of violence affecting retail workers. That approach was about promoting better knowledge of legislation and support for retail workers who do report or are victims of such conduct. Criminal prosecution depends on the employee (and employer) reporting the case. The creation of new criminal offences will not address these concerns on their own.

The bill's Stage 1 Report⁷ highlighted that there was a need to work with Police Scotland and its justice partners to explore how data collection could be improved in relation to the recording and monitoring of criminal incidents occurring in retail premises.

Before any new offences are created, improving how that and what information is collated from Police Scotland, COPFS, and Scottish Courts and Tribunal Service would provide a first and necessary step. That would assist in measuring how effective any measures being or to be introduced by the bill or indeed as a result of education/raising awareness campaigns suggested below, are. Being able to identify and differentiate exactly where such violence arises in relation to types of retail premises would also be beneficial in seeking to target any awareness campaigns.

Raising awareness and the need for education campaigns

The role of retail workers has been much equated with that of key workers both before and during the provision of vital services at the time of the COVID-19 pandemic. That comparison had already been a factor in our earlier submission and discussions to date over the bill. We had highlighted a parallel between NHS workers and retail staff who work across different premises often with lone workers and 24 hours a day, 365 days a year.

In looking at England and Wales, we referred to what we felt would be a beneficial step to consider adopting. There, the development of a joint working approach was taken to address these concerns of retail violence. The Association of Chief Police Officers, the Crown Prosecution Service and NHS Protect have a joint working agreement to reduce the problem of violence and anti-social behaviour that affects the NHS. A similar approach affecting the retail sector could be effective in tackling problem behaviour. Perhaps that approach could be adopted at the same time as any new legislation is introduced. Could the bill provide for the development of guidance?

⁷ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

The majority of respondents thought that a publicity campaign would be beneficial, reflecting our views that there was an "overwhelming need for enhanced provision of education, training and awareness-raising of the issue to the public."⁸ A number of organisations would be able to contribute to the development of training including COPFS as to what constitutes criminal behaviour and the possible effect of a conviction that follows on future employment.

Creation of offences

We refer to the creation of offences and the specific bill provisions.

Evidential: Do issues arise in respect of the need for corroboration? In the circumstances of these specific offences, incidents may arise on a one to one basis. That presents witness difficulties as there may only be the complainer. However, with the increase in the use of CCTVs and the decision in the case of *Gubinas & Radivicius v HMA*⁹, that may have helped clarify the use and support to be obtained from CCTV evidence. Remember too that a single source of evidence may not be sufficient to prove an aggravated offence. Corroboration is required of the material facts as to how the offence was committed which may include the retail worker seeking to enforce an age restriction.

Court Forum: Under section 1(3) of the bill, why restrict prosecution to summary procedure? Serious cases should be prosecuted under solemn procedure.

Retail worker: Section 5 of the bill defines retail workers which is crucial in understanding the scope of the bill. We support the need for maintaining flexibility "to capture the changing nature of retail work."¹⁰ As much certainty over what retail workers should be included should be considered before the bill passes.

For instance, will this extend to those acting as bouncers/store detectives at or working for retail premises? The views of the Security Industry Authority,¹¹ the UK organisation responsible for regulating the private security industry would seem pertinent who have a strategy to deal with "violence directed towards security operatives whilst they are doing their jobs."

The suggestion of including a regulation making power to the bill in the Stage 1 Report seems a good idea to obtain a measure of some future proofing.¹²

Offence of assaulting: Section 1 of the bill sets out the scope of the offence which seems rather wide. There are issues regarding the practical impact of including "obstruct and hinder" as an offence against

⁸ Paragraph 108 Stage 1 Report <https://sp-bpr-en-prod-cdneq.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

⁹ 2017 SCCR 463

¹⁰ Paragraph 37 of the Stage 1 Report <https://sp-bpr-en-prod-cdneq.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

¹¹ <https://www.sia.homeoffice.gov.uk/Pages/about-us.aspx>

¹² Stage 1 Report <https://sp-bpr-en-prod-cdneq.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

retail workers as outlined in the Stage 1 Report since this could be open to misinterpretation.¹³ Either “hinder” should be statutorily defined so there is an understanding of the conduct and not leave this to judicial interpretation or deleted. Our example illustrating concerns outlines where a customer legitimately complaining about services or goods could be seen to amount to hindering.

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.

Creation of an aggravation: Section 4 of the bill refers to the statutory aggravation. Those workers who enforce statutory age restrictions on the sale and supply of goods and services are upholding the law which may act as a trigger for acts of violence and abuse. We note that the Stage 1 Report¹⁴ recommends that such an aggravation could apply in relation to offences outlined in this bill and to existing offences which apply where retail workers are enforcing age-restrictions.

The creation of an aggravation is an interesting concept given the Hate Crime and Public Order (Scotland) Bill¹⁵.

We wondered if there is scope 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.

¹³ Paragraph 63 of the Stage 1 Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

¹⁴ Paragraph 94 of the Stage 1 Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EEFW/2020/6/30/Stage-1-Report-on-the-Protection-of-Workers--Retail-and-Age-restricted-Goods-and-Services---Scotland--Bill/EJFWS052020R06.pdf>

¹⁵ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/hate-crime-and-public-order-scotland-bill/introduced/bill-as-introduced-hate-crime-and-public-order-bill.pdf>



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