

PROTECTION OF WORKERS (RETAIL AND AGE-RESTRICTED GOODS AND SERVICES) (SCOTLAND) BILL
MEMORANDUM BY THE SCOTTISH GOVERNMENT TO THE ECONOMY, ENERGY AND FAIR WORK COMMITTEE

Introduction

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Economy, Energy and Fair Work Committee of the Protection of Workers (Retail and Age-Restricted Goods and Services) (Scotland) Bill (“the Bill”), which was introduced by Daniel Johnson MSP on 10 October 2019.

Background

2. Mr Johnson’s Bill provides for a new statutory criminal offence for a person to:

- Assault,
- Threaten,
- Abuse,
- Obstruct, or
- Hinder

another person.

3. This offence is restricted to circumstances where the person against whom the conduct is committed is a retail worker and is at the time of the conduct engaged in retail work.

4. The maximum penalties provided for upon conviction are up to 12 months imprisonment and/or a fine not exceeding the prescribed sum (currently £10,000).

5. The Bill provides a definition of certain behaviour (threatening, abusing, obstructing or hindering) that constitutes an offence.

6. The Bill provides that where a person is charged with an offence of obstructing or hindering a retail worker, it is a defence for the person to show that the behaviour was, in the particular circumstances, reasonable. This defence does not extend to assaulting, threatening or abusing a retail worker.

7. In addition, the Bill provides that where the behaviour constituting the offence occurred because of the enforcement of a statutory age restriction, then this results in the offence being aggravated. Certain requirements fall on the court in respect of the aggravation such as taking the aggravation into account in determining the appropriate sentence.

8. Although not provided for directly in the Bill itself, examples of retail work that were provided in Mr Johnson’s consultation where age verification is required included the sale of good and services relating to:

- Air weapons and imitation firearms

- Alcohol
- Butane lighter refills
- Cinema films
- Caps, cracker snaps, party poppers etc.
- Firearms
- Fireworks
- Gambling
- Knives and articles with a blade or point
- National Lottery products
- Petrol
- Scrap metal purchasing
- Solvents
- Sunbeds
- Tattoos and piercings
- Tobacco and Nicotine Vapour Products
- Video works and video games

9. The table below provides an analysis of how Mr Johnson’s new specific offences interacts with existing laws.

Method of committing new offence	Interaction with existing laws
Assault	Common law offence of assault protects everyone in Scotland including retail workers. This element of the new offence would not extend the scope of the criminal law in any way.
Threaten Abuse	<p>The offence of threatening or abusive behaviour in the Criminal Justice and Licensing (Scotland) Act 2010 (‘section 38 offence’) protects everyone in Scotland including retail workers. The element of the new offence in Mr Johnson’s Bill relating to threatening or abusive behaviour is similar to the section 38 offence, but with some subtle differences.</p> <p>The section 38 offence requires three elements for an offence to be committed:</p> <ul style="list-style-type: none"> • a person to behave in a threatening or abusive manner, • the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and • the person intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm <p>The new offence of either threatening or abusing a retail worker requires only two of the three elements contained in the section 38 offence for an offence to be committed. The new offence is made out if:</p>

Method of committing new offence

Interaction with existing laws

- a person to behave in a threatening or abusive manner (towards the retail worker), and
- the person intends by the behaviour to cause the retail worker or any other person fear or alarm or is reckless as to whether the behaviour would cause fear or alarm

For Mr Johnson's offence, in contrast with the section 38 offence, there is no requirement for the behaviour to be likely to cause a reasonable person to suffer fear or alarm. This requirement in section 38(1)(b) is an objective test and a reasonable person is someone who is not of abnormal sensitivity. Context is critical in assessing the standpoint of the reasonable person. It is not a requirement of the section 38 offence for the complainer to actually suffer fear or alarm.

Mr Johnson's offence would seem to broaden the scope of the criminal law in that the new offence could be committed by conduct that is not likely to cause a reasonable person to suffer fear or alarm. It is unknown why this approach has been taken and it seems unusual that there is no requirement in the offence either:

- for the behaviour to be likely to cause a reasonable person to suffer fear or alarm (akin to the requirement in section 38(1)(b)); or
- for the retail worker to actually suffer fear or alarm (akin to the requirement in stalking offence in section 39(2)(c) of the Criminal Justice and Licensing (Scotland) Act 2010) or;
- for a reasonable person to consider the behaviour to be likely to cause the retail worker to suffer fear or alarm (akin to the requirement in section 1(2)(a) of the Domestic Abuse (Scotland) Act 2018).

Also, there is no reasonableness defence in Mr Johnson's offence which contrasts with the section 38 offence. As such, the practical effect is again that Mr Johnson's offence broadens the scope of the criminal law as the offence would be committed even if the court took the view that the behaviour was, in the particular circumstances, reasonable.

While examples of threatening or abusive behaviour which are also reasonable are not common, the defence in section 38(2) is a wide one and could cover many different situations including where the accused wishes to advance an argument to the effect that he was acting in self-defence. It is possible that, for example, a customer may react in a threatening or abusive manner to violent or threatening behaviour by a retailer worker and yet Mr Johnson's

Method of committing new offence	Interaction with existing laws
	offence would not allow the accused to show to the court that such behaviour was reasonable in the circumstances.
Obstruct Hinder	<p>Under the Emergency Workers (Scotland) Act 2005 (“the 2005 Act”), it is an offence to, amongst other things, obstruct or hinder an emergency worker or those assisting emergency workers. This new offence would extend that approach to retail workers.</p> <p>The justification given at the time the 2005 Act was being scrutinised as to why obstructing or hindering should be criminalised in the context of emergency workers is that emergency workers have the responsibility of protecting life and limb in the course of their duties. Therefore even mild interference with their work e.g. hindering them could have fatal consequences in a given situation.</p> <p>While no doubt retail workers have an important role to play, there is a fundamental criminal law policy question which is whether it is an appropriate threshold to criminalise a person’s conduct when that conduct amounts merely to ‘obstructing’ or ‘hindering’ a retail worker. As a matter of criminal law policy, this seems a very low threshold in terms of what conduct should be criminal. The definition given in the Bill is that obstructing or hindering means a person behaves in a way that prevents or impedes the retail worker from carrying out the retail work in which the worker is engaged. This could mean behaviour becomes criminal when, for example, a person switches off an electronic till used by a retail worker for whatever reason or debates extensively with a retail worker about, say, a refund which means the worker wishes to but cannot serve other waiting customers.</p>

10. The way in which the new offence operates can broadly be split into two distinct parts; namely criminalisation of conduct that is already criminal and criminalisation of conduct that is not already criminal.

11. The offence in criminalising assaulting, threatening or abusing a retail worker does, subject to the discussion above relating to minor differences in establishing proof of the threatening or abusive elements, replicate existing law. As such, it does not significantly expand protection of the law and would result in overlap between the general offences of assault and threatening or abusive behaviour and this new offence.

12. The offence in criminalising obstructing or hindering a retail worker would criminalise behaviour that is not currently criminal. In other words, it would expand the criminal law to cover behaviour that if undertaken now would not be criminal.

Examples of what such behaviour would be, in addition to those given in the table, would seem to include:

- A customer refusing to move out of the way of a retail worker who is walking down an aisle with goods to restock shelves with the effect the retail worker cannot get to the shelf to be restocked;
- A customer refusing to move away from the payment area after being served while other customers are waiting;
- A customer debating in a non-aggressive manner with a retail worker over an extended period of time when the retail worker wishes to end the discussion and move onto other work.

13. The accompanying documents for the Bill make mention of the 2005 Act.

14. At the time the 2005 Act was being scrutinised in Parliament, the legislation, which broadly replicated more general existing criminal offences, was justified as being necessary on the basis of the importance of the work carried out by emergency workers.

15. The then Lord Advocate, Colin Boyd PC QC, explained in the Scottish Parliament in 2004 why specific laws were thought necessary as follows:

“It is completely unacceptable that anyone should be the subject of assault or abuse at work. We want to make sure that the law is an effective tool in ensuring the safety and welfare of emergency workers and all public service workers. We are prudent to recognise that legislation is not the answer in every case. In some situations the best possible solutions lie within existing law. I am firmly of the view that this is true for the protection of public service workers.

However, the situation is different for emergency personnel. These workers perform a unique and vital role in our society. The nature of their work renders them, and those who assist them, particularly vulnerable to attack. When emergency workers are assaulted, obstructed, or hindered, in the course of dealing with an emergency, it is not only their lives which are put at risk, but the lives of those they are working to protect.”

16. This explanation provides justification for the current operation of our criminal laws in this area; namely specific protections for certain emergency workers and more general protections for everyone.

17. It is clear that someone obstructing or hindering an emergency worker in the course of their duties could be putting someone’s life at risk. That is why the 2005 Act criminalises someone obstructing or hindering an emergency worker.

18. It is apparent that similar considerations do not apply to someone obstructing or hindering a retail worker. There is no obvious policy justification for requiring the involvement of the criminal justice system in dealing with undoubtedly irritating matters that retail workers have on occasion to deal with in terms of customer interactions where the conduct in question does not amount to assault, breach of the

peace or threatening or abusive behaviour (when, of course, existing laws can be used as necessary).

19. The policy memorandum for the Bill indicates that because retailer workers are often required to verify age and that this age verification is a legal requirement for certain goods, then that justifies the additional protection of the Bill including obstructing or hindering behaviour becoming part of the new offence. While it is true that there are some regulatory offences whereby obstruction or hindering behaviour feature as part of the enforcement regime (e.g. obstructing an environmental health officer carrying out checks on hygiene at a restaurant), the difference in this context as compared to the food standards area is significant.

20. In respect of age verification, where a customer does not provide verification of age then the good in question will simply not be sold. Should the customer react to that situation in a threatening or abusive manner or indeed carry out an assault, existing laws can be used. In the food standards example however, the authorised officer cannot carry out their regulatory function in assessing hygiene standards if, for example, they are obstructed. They cannot therefore keep the public safe from unhygienic restaurants which threaten public health.

Consultation

21. Mr Johnson carried out a consultation exercise on a draft proposal, lodged on 19 January 2018, which ran until 20 April 2018. There were 385 responses to the consultation, of which 32 were from organisations (including retailers, trade unions, and third sector bodies) and 353 from individuals (including politicians, professionals and academics).

22. The vast majority of respondents were in favour of creating a new offence of assault against a worker in the retail sector – with 92% expressing full or partial support for this proposal. The main argument made in favour was that this would be an effective means of reducing the number of assaults against retail workers. It was considered that the creation of a new offence would make clear that such behaviour was unacceptable and would not be tolerated – creating a deterrent effect.

23. Those who were less supportive of this proposal said that there was already adequate legislation in place to protect retail workers and that any additional protections should not be limited to those in retail but also cover other public-facing workers.

24. The consultation also asked which would be the best method of responding to assaults on those involved in the sale of age-restricted goods or services – a new statutory offence or a new statutory aggravation. 58% of respondents considered that the creation of a new offence would be the better option, while 7% favoured a new statutory aggravation, 19% supported either option and 4% supported neither. The remaining respondents were unsure.

Financial Impact

25. The Financial Memorandum to the Bill indicates the financial implications of the provisions are relatively limited with no significant on-going costs. We agree with this assessment as the Bill would place on statute conduct that is already largely criminal under existing laws. The exception to this is the obstructing and hindering elements of the new offence which would criminalise behaviour that is not currently criminal.

26. It is unlikely any significant costs would arise as no significant numbers of new prosecutions would likely emerge. There would be normal minor transitional costs for justice system partners (the Crown Office and Procurator Fiscal Service, the police, the Scottish Court Service) associated with the creation of a new statutory criminal offence e.g. updating IT systems.

Scottish Government's Position

27. The position of the Scottish Government is that retail workers carry out an important role across Scotland in serving the needs of our communities. It is only right they receive effective legal protection.

28. However, existing laws already criminalise much of the conduct captured by the proposed new offences. The maximum penalties for these existing offences allow for sentences far in excess of those proposed in the Bill.

29. Where an extension of the law is proposed - namely the offence of obstruction or hindering of a retail worker – then it is not considered appropriate to criminalise such conduct. This is because if the obstruction or hindering was carried out in a threatening or abusive way or if the nature of the obstruction or hindering was such that it also amounted to an assault or breach of the peace, then the existing criminal law already criminalises such conduct. And if the obstruction or hindering was not carried out in such a way, then there is no obvious policy justification for requiring the involvement and incurring the expense of the criminal justice system having to deal with the undoubtedly irritating matters that retail workers have on occasion to deal with in terms of customer interactions where the conduct in question does not amount to assault, breach of the peace or threatening or abusive behaviour (when, of course, existing laws can be used as necessary).

Conclusion

30. For the reasons given, the Scottish Government will not be supporting the Bill.

Justice Directorate
Scottish Government
January 2020