



OFFICIAL REPORT
AITHISG OIFIGEIL

Economy, Energy and Fair Work Committee

Wednesday 13 May 2020

Session 5



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ECONOMY, ENERGY AND FAIR WORK COMMITTEE
13th Meeting 2020, Session 5

CONVENER

*Michelle Ballantyne (South Scotland) (Con)

DEPUTY CONVENER

*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

COMMITTEE MEMBERS

*Colin Beattie (Midlothian North and Musselburgh) (SNP)

*Rhoda Grant (Highlands and Islands) (Lab)

*Alison Harris (Central Scotland) (Con)

*Dean Lockhart (Mid Scotland and Fife) (Con)

*Richard Lyle (Uddingston and Bellshill) (SNP)

*Gordon MacDonald (Edinburgh Pentlands) (SNP)

*Andy Wightman (Lothian) (Green)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Kenny Htet-Khin (Scottish Parliament)

Daniel Johnson (Edinburgh Southern) (Lab)

Andrew Mylne (Scottish Parliament)

CLERK TO THE COMMITTEE

Alison Walker

LOCATION

Virtual Meeting

Scottish Parliament
Economy, Energy and Fair Work
Committee

Wednesday 13 May 2020

[The Convener opened the meeting at 09:30]

Decision on Taking Business in
Private

The Convener (Michelle Ballantyne): Good morning. I welcome members of the committee, Daniel Johnson, the officials and those who are joining us online to the 13th meeting in 2020 of the Economy, Energy and Fair Work Committee. This is the second meeting that the committee has conducted remotely and, on behalf of the committee, I thank the broadcasting team for making that possible.

Agenda item 1 is a decision on taking business in private. Given the complexities of group discussion over videoconference, I will assume that everyone agrees to take item 3 in private unless they say otherwise.

No member has spoken, so the committee agrees to take item 3 in private.

Protection of Workers (Retail and
Age-restricted Goods and
Services) (Scotland) Bill: Stage 1

09:31

The Convener: Our main item of business is continuation of our evidence taking on the Protection of Workers (Retail and Age-restricted Goods and Services) (Scotland) Bill. I am pleased to welcome our witnesses: Daniel Johnson MSP, who is the member in charge of the bill; Andrew Mylne, who is head of the non-Government bills unit; and Kenny Htet-Khin, who is a solicitor for the Scottish Parliament.

The bill has been proceeding through our committee, and we have taken evidence from a number of people. This is our final session, in which we will take evidence from the member who introduced the bill. I invite Daniel Johnson to make a short opening statement.

Daniel Johnson (Edinburgh Southern) (Lab): Thank you very much for that introduction. I thank the committee for its diligent work in examining my bill and for resuming its work in doing so. Parliamentary time is at an absolute premium, given that we are limited to online sessions, so I am truly grateful that the committee has prioritised examination of my bill.

I was struck—I am sure that the committee was, too—by the powerful testimony that was given by trade unions and the industry in the evidence that the committee took at the beginning of March. They powerfully brought to life the real issues that shopworkers face, such as being subjected to abuse and violence just through doing their job and upholding the laws that we have created for them. The witnesses brought to life the clear survey evidence that the industry and trade unions have to back that up.

In its survey, the Union of Shop, Distributive and Allied Workers estimates that 15 shopworkers are assaulted every single day in Scotland. Every respondent to the Scottish Grocers Federation retail crime report stated that they had experienced abuse when a sale was refused for failure to provide proof of age, and the Scottish Retail Consortium has published its findings that the vast majority of workers do not believe that the police take the problem as seriously as they should.

In the context of the current crisis, those facts become even more stark. We have all become much more aware of how vital the work that shopworkers do is. Shopworkers have very much been on the front line of the Covid-19 response

and have assumed a key public health function that none of us could have foreseen.

Unfortunately, a conspicuous minority of people have responded to the restrictions in stores by swearing at, abusing and, in the worst cases, threatening to cough and spit on retail workers. USDAW has reported a doubling of the rate of incidents of violence and abuse against shopworkers through this period.

The primary objective of my bill is to respond to and deal with such abuse and violence, and the general principles of my bill stem from those issues. Shopworkers are required to uphold the law and, if they fail to do so, they face a possible penalty of a £5,000 fine or three months in prison.

Emergency workers and police officers are protected by the specific statutory offences of assault, obstruction and hindering, which carry penalties of £10,000 or a prison sentence. It could be argued that those offences duplicate common law. However, we deem them necessary, given the public protection role that critical workers undertake. The Emergency Workers (Scotland) Act 2005 is effective; hundreds of people are convicted under the legislation every year.

In carrying out identity checks, shopworkers act as agents of the law, but that function triggers acts of violence and abuse against them. The statutory aggravation provision in my bill would provide a key recognition of that vital function and the seriousness with which shopworkers undertake it.

My bill seeks to address a well-demonstrated issue. It would apply a legal approach that is well established elsewhere in law. I appreciate that there are various points of detail to consider but, as the committee assesses the purposes and general principles of the bill at stage 1, I hope that you will agree that retail workers play a vital role in upholding the law and keeping us safe, and that there should be much more focus on ensuring that they get the protection that they deserve. I hope that my bill provides an opportunity for the Parliament to take a step forward, and I look forward to answering the committee's questions.

The Convener: Thank you. I will invite each member in turn to put questions to you, to scrutinise the bill. I will come back to you after each question.

I will ask the first question, to set out the context. You have talked a little about why you think that the bill is required. However, much of the evidence that the committee has received suggests that the problem is to do with not a gap in the existing criminal law but awareness, reporting and effective enforcement. Is that a reasonable suggestion?

Daniel Johnson: There is an important principle at stake here. When we ask people to uphold the law, they should have the protection of the law. I would go further: we should give them specific legal protections.

The analogy of the Emergency Workers (Scotland) Act 2005 is useful: the bill that became that act was introduced to address a serious issue of violent acts against first responders. At the time, we heard many of the arguments that you are describing. However, the existence of case-specific protection has reduced the phenomenon of violence against emergency workers; we do not hear as much about that in the media. Furthermore, the legislation is used.

Communication is a valid function of the law, as Lord Bracadale acknowledged recently in his independent review of hate crime legislation in Scotland. It is important that we make the key clarification that abuse of retail workers is unacceptable and illegal. Furthermore, when retail workers ask for proof of age they are acting as agents of the law; that is a critical point, which needs recognition in law.

The Convener: Will you clarify whether you are saying that there is a gap in the existing criminal law or agreeing with the suggestion that the issue is not a gap in the law but how the law is understood, promoted and enforced?

Daniel Johnson: The key issue is that there is no recognition in the law of the important legal function that retail workers carry out when they uphold proof-of-age legislation. The bill seeks to provide that recognition and to ensure that the issue is taken into account when people who commit crimes against retail workers are sentenced, through the creation of a statutory aggravation.

As we heard from the Minister for Community Safety last week, the bill would—at the very least—ensure that we had an accurate picture, because we would have the statistics.

Whether we understand this as being about addressing a gap in the law, ensuring that the law better reflects the important role of retail workers, ensuring that crimes against retail workers are taken seriously and dealt with appropriately in sentencing, or simply getting more information, the bill seeks to address all those issues.

The Convener: You keep using the word “recognise”—you say that the bill is about recognising people's contributions. However, the law is there not to recognise people's contributions or the job that they do but to identify where a crime or an offence takes place and to deal with that adequately. Is that what you mean by “recognise”, or are you really talking about sending a clear message to people that they cannot behave like

that and that if they do, they will be punished? Can you make that clear?

Daniel Johnson: The bill would cover both those points. The Emergency Workers (Scotland) Act 2005, and section 90 of the Police and Fire Reform (Scotland) Act 2012, which creates the offence of assaulting, obstructing or hindering a police officer, reflect in law the important role that those people carry out. That ensures that when such crimes are committed, they are dealt with adequately. The function of providing communication and clarity also stems from those pieces of legislation, which both set a precedent for the bill.

Alison Harris (Central Scotland) (Con): The Minister for Community Safety suggested to the committee that a high-profile campaign might be a more effective way of raising awareness among retail workers and the public, highlighting that abuse towards workers is not acceptable and that people will be prosecuted under the current laws. Do you think that such a campaign would be effective or have any benefit?

Daniel Johnson: Any effort to raise the issue would be welcome. However, I note that in response to previous attempts to introduce such legislation, the argument has been made that a campaign should be formed, and yet nothing has happened. It is not an either/or situation. Passing my bill into law would not preclude running an information campaign—indeed, such a campaign would greatly help, and I suggest that we do both.

Alison Harris: Is data collection part of the problem? Would you agree that—as has been suggested—other non-legislative measures such as an improvement in data collection would help to ensure that the police and other parts of the justice system have a clear understanding of the scale of the problem and treat it with the seriousness that it deserves?

Daniel Johnson: There are various strands to what my bill may do, including communication, legal and data collection aspects. There is also a broader issue for policing policy and criminal justice with regard to the data that we have available; it is a source of frustration that we do not have greater insight. Other options for collecting those data might well be open to Government, but it is Parliament that is currently considering the merits of my bill and the options in front of it. If members are interested in improving data collection, passing the bill is the one key step that will do that, which is a point that the minister acknowledged in committee last week.

The Convener: We move to questions from Richard Lyle.

Richard Lyle (Uddingston and Bellshill) (SNP): First, I declare an interest: I am a member

of the cross-party group on independent convenience stores and, as members know, I previously worked as a manager in the grocery trade.

Daniel Johnson's bill will cover some, but not all, public-facing workers. Is it right to say that it will not cover bus or taxi drivers or refuse collectors? What is the position in relation to postal workers and other courier services?

09:45

Daniel Johnson: I might bring in Kenny Htet-Khin and Andrew Mylne on the full technical details of that.

As a preamble, there is a balance to be struck in introducing any bill, and particularly a member's bill, as the available resources are limited. When Hugh Henry attempted to bring in legislation in 2010, one of the key criticisms of his Protection of Workers (Scotland) Bill was that it was too broad.

The observation that my bill starts from is that there is a key legal function that retail workers carry out in upholding age restrictions. Indeed, that responsibility has increased because of the introduction of challenge 25, which is welcome and important. I sought to start from that observation on that key legal function and to ensure that, if people are carrying out that function and are exposed to risk because they are carrying it out, they will have a degree of legal recognition and legal protection.

As we were preparing the bill, we were very aware that the nature of retail is changing and we wanted to ensure that we protected not just people who carry out that function at a shop counter but people who are involved with the transaction at any stage, however customers might purchase goods. With the rise of online retail and people delivering, proof of age might well be requested at the doorstep rather than at the shop counter. Therefore, we sought to include, for example, delivery staff who might ask for proof of age in relation to the sale of goods. We extended the approach to people who sell age-restricted goods and services in a non-retail context, so the bill will protect bar staff and people who carry out door-to-door sales, for example.

In drawing up the bill and focusing on age restrictions, we have not covered bus drivers or other public-facing workers. A criticism of Hugh Henry's bill was that having a broad definition of public-facing workers meant that there was a clarity issue about who would have protection. I have sought to avoid that lack of clarity.

I genuinely hope that the bill will cause the Scottish Government to reflect on the broader issues of public-facing workers and which workers

should have specific legal protections and what legal protections they should have. Examining those broader issues is a job that is much better suited to the much greater resources that are available to the Scottish Government.

I will bring in Kenny Htet-Khin or Andrew Mylne to provide greater clarification on precisely who is and is not included in my bill from the legal perspective.

Andrew Mylne (Scottish Parliament): Obviously, our role in the non-Government bills unit is to deliver a legislative vehicle to reflect the member's policy. Daniel Johnson has explained what his policy starting point was. The focus was always on retail workers, and that is what the bill focuses on. It was never about public-facing workers. Obviously, it is for Mr Johnson to explain why he made that particular choice, but that is the basis on which we developed the bill.

One of the challenges that we faced in developing the bill was identifying as clearly as we reasonably could who was covered and who was not. That was not straightforward, but we are fairly clear that the bill covers all the people whom Mr Johnson is interested in protecting. We tried to draw boundaries around that as clearly as we could. In paragraph 68 of the policy memorandum we have given as clear a list as we could of how the bill and its various provisions capture different groups of people in particular circumstances. We also put in a list of some of the people who are not covered.

To pick up on the things that were mentioned in the question—Daniel Johnson has already covered this to some extent—bus drivers, refuse collectors and postal workers are not covered. They are not people who specifically do retail work.

The bill has a specific provision for delivery drivers who deliver supermarket shopping to people's doors, for example, which will sometimes include age-restricted goods.

I hope that that helps to clarify the position. With legislation, one does not always get perfect definitions at every point of the boundaries that are defined; at some point, it will come down to interpretation and precedent. However, we are confident that the bill provides as much clarity as it reasonably can.

The Convener: Does Kenny Htet-Khin have anything to add to that?

Kenny Htet-Khin (Scottish Parliament): No, I have nothing to add.

The Convener: Does Richard Lyle want to ask anything else?

Richard Lyle: No. My question was about who is not covered by the bill's provisions and Daniel Johnson has explained that.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I welcome the fact that you have introduced your bill, because it highlights an issue that I know is a problem even in my constituency from time to time. However, there are some aspects of the bill that I have a wee bit of concern about, which you might be able to help me with.

Existing offences already allow for the prosecution of a person who assaults, threatens or abuses another person. Where appropriate, those offences can be prosecuted under solemn procedure, which allows for higher sentences than those that are available under the bill. Why should we not rely on those existing offences when a retail worker is assaulted, threatened or abused?

Daniel Johnson: I have two things to say about that. First, the provision in question is virtually identical to a provision in the Emergency Workers (Scotland) Act 2005 and the Police and Fire Reform (Scotland) Act 2012, and those bits of legislation have not created a problem.

Secondly, it is up to the Crown Office and Procurator Fiscal Service to decide what charges to bring. It can bring charges under different legislation if it thinks that that is warranted and believes that the higher penalties that are available under that legislation would better reflect the crime. That process is part and parcel of our legal system.

My bill does not preclude crimes being prosecuted under different pieces of law; indeed, it reflects what has already been acknowledged to be a useful legal provision in the Emergency Workers (Scotland) Act 2005 and in section 90 of the Police and Fire Reform (Scotland) Act 2012.

Colin Beattie: In your opening remarks, you mentioned your belief that, under the existing legislation, the police did not necessarily respond to reports of such offences against retail workers as quickly or with as much priority as they should. If the bill were passed, what would compel the police to respond more quickly and with more urgency?

Daniel Johnson: There are various strands to that. First and foremost, simply by having new legislation—the introduction of a new law is preceded by a process of discussion and discourse—the police will be required to re-examine their policies. That is what they have to do whenever new legislation is passed.

Furthermore, I point to the fact that the Emergency Workers (Scotland) Act 2005 has been used, on average, between 200 and 300

times a year over the past few years. With regard to efficacy, that act is a useful analogue for what the bill might do and how useful it might prove to be.

Colin Beattie: I am still a wee bit concerned. If we are not getting the police to respond under the existing system, why will that suddenly change simply because the legislation in this area is updated or refurbished? I am trying to think of the practicalities here. We all know about police priorities, the call on police time and so forth. How do we get the police to treat such crimes as a priority without having to produce a whole slew of new legislation?

Daniel Johnson: I would not describe my bill as a slew of legislation. Through a few parliamentary votes, we might be able to provide the focus and priority on this issue that is needed.

In a sense, Mr Beattie, you are highlighting a dilemma that we have in our system. We have a system in which the police cannot be directed by politicians or ministers, and that is absolutely correct. What we can do, though, as politicians, is pass laws. By passing laws, hopefully we communicate our priorities to the public and ensure that the law operates in a way that reflects the seriousness of the crimes that are perpetrated and the duties and obligations that we place on people.

The bill does not necessarily automatically mean that there will be an overnight change in the way that the police respond to certain crimes. However, the options that we have available to us—the powers that we have as parliamentarians and as a Parliament—allow us to state what we think the priorities are and what we think that the law should do and how it should deal with people who commit such offences.

Colin Beattie: You seem to be indicating that the bill would highlight to the police the priority that should be attached to protecting retail workers. If that is the purpose of the bill, surely a high-profile campaign of the kind that we talked about before would have the same result, in that it would bring such crimes to the front of police priorities.

Daniel Johnson: As I said to Alison Harris, I do not think that it is a case of either/or. I would like both those things to happen. I urge Parliament to pass my bill and I urge the Government to produce a clear communication plan.

The issue is not purely one of communication, though. The statutory aggravation is an important element in ensuring that, when people commit such crimes, the sentence that they receive reflects the seriousness of the crime. That is not to say that that cannot already happen, but the bill would ensure that it would happen in future. It is not simply a matter of communication or of

reprioritising the issue or making a statement. It is also a question of ensuring that, when those crimes are prosecuted and people are found guilty, the penalty reflects the seriousness of the crime. After all, the crimes that we are talking about are being committed against people who are simply trying to do their job and uphold the law.

Willie Coffey (Kilmarnock and Irvine Valley) (SNP): Good morning, Daniel. At the committee's previous meeting, there was quite a lot of discussion about obstructing and hindering. We heard evidence that that offence is already covered in law when it is accompanied by threatening and abusive behaviour and so on, and that the punishments are already more severe than those that are proposed in the bill. Some people believed that your bill, if it were to proceed unaltered, would, in effect, criminalise what they said amounted to irritating or nuisance behaviour, perhaps by children.

Could you set out your vision in that regard and give us an indication of whether you might consider changing that aspect of your bill in order to get wider support for it? I think that the minister said that she was open to looking at the issues and listening to people's views, if the bill proceeds. I would be obliged if you would give us your perspective on that important issue, which was discussed by the committee.

10:00

Daniel Johnson: I will begin by setting out the purpose of including that provision. There is a scenario that many people who work behind shop counters recognise, in which a situation escalates from seemingly innocuous beginnings. Someone might be refused a sale because they cannot produce identification, or they refuse to do so. The situation does not start with violence; it does not even necessarily start with abuse. It starts with someone saying something such as, "I'm not moving from this spot," until they are sold a particular bottle or packet.

I was attempting to reflect the fact that, when shopworkers ask for proof of age, they are carrying out the serious and, indeed, solemn act of upholding the law. When a person interrupts, obstructs or hinders that process, they are doing something quite serious. I was also attempting to capture a set of behaviours that I think most people would agree are wrong and that can escalate to something much more serious. I wanted to draw a clear early line that shows where people trip over into doing something that is wrong and illegal.

In some ways, I was trying to reflect the fact that, for example, it is a crime to waste police time. When police are carrying out their investigations,

inquiries or other duties, wasting their time is a quite serious thing to do; I was attempting to apply a similar logic here. That said, I recognise that, as the provision is currently framed, it is quite broad. The obstructions that are set out apply to the broad duties of retail workers and not just to those that relate to age restrictions. Therefore, I recognise the issues that have been raised.

The issue that Mr Coffey raises is exactly the sort of issue that it would be extremely useful to examine at stage 2. I am very open to amending the provision in question, restricting its scope or otherwise altering it. I do not believe that that part of my bill is of central or critical importance. The really critical aspect is the statutory aggravation provision, which acknowledges and reflects the important legal role and duty that retail workers carry out in asking for proof of age.

I hope that that explains the purposes of that part of my bill and my position on it.

Willie Coffey: That is very welcome. I have no more questions.

Andy Wightman (Lothian) (Green): To follow on from Willie Coffey's question, you acknowledge that obstructing or hindering is part of the overall offence that is created in the bill and that it is not restricted or tied to the question of upholding statutory sale restrictions.

In paragraph 64 of the policy memorandum, you say that you do not think that a "physical element" should necessarily be

"present before an offence of 'obstruct or hinder' could be advanced".

However, a person

"refusing to move on in a queue"

might be caught by the offence. You then say:

"Another example might be where a retail worker is using equipment—for example, a shopping trolley—and a customer refuses to get out of the way."

In what world should obstructing a shopworker with a trolley mean a criminal conviction?

Daniel Johnson: The key point is that such obstruction would have to be accompanied by the clear intent of preventing someone from carrying out their duties as a retail worker or disrupting that work. Inadvertent or unintentional obstruction would not take someone over the threshold; there would need to be clear intent. That logic draws on the provisions in the Emergency Workers (Scotland) Act 2005 and section 90 of the Police and Fire Reform (Scotland) Act 2012 on obstructing someone from carrying out their duties.

I think that the issue of whether obstructing or hindering retail workers in carrying out their

broader duties, as opposed to carrying out their duties in relation to age restriction, is sufficiently serious to create a criminal offence is one for debate; there should be a focus on that at stage 2. I concede that that is an issue, and I accept that the relevant provisions are perhaps set out more broadly than I might have wished.

The resources that are available to members who want to introduce legislation are such that, while the non-Government bills unit does a fantastic job, it has to help a number of members simultaneously. If I were a minister who had the full resources of the Scottish Government at my disposal, I would have preferred to have a much broader set of proposals that recognised the seriousness of the legal obligations and duties that we place on retail workers with regard to upholding the law and ensuring that people comply with it. I proposed the obstructing offence because of the precedent that was there, but there are probably issues to examine, and I would be more than happy to do so at stages 2 and 3, if Parliament gives me the opportunity to do so.

Andy Wightman: There is no need to apologise. We are scrutinising the bill in the same way that we would scrutinise any bill. That answer was helpful. I think that you are right. The issue has been discussed and there is probably a way through.

I want to move on to section 3, which is on the defence to a charge of obstructing or hindering a retail worker. It says that there is a defence in situations in which the

"behaviour was, in the particular circumstances, reasonable."

Could you say how you anticipate "reasonable" being interpreted?

Daniel Johnson: Yes. I assume that you are also interested in why we introduced the "reasonable" defence for obstructing a retail worker but not the other aspect. Would you like me to explain that as well?

Andy Wightman: That is a question for the Scottish Government.

Daniel Johnson: When it comes to obstructing or hindering, we can well understand that there could be a situation in which somebody who put a trolley, or stood, in the way of a retail worker who was carrying out their duties—if, say, the worker was walking on a path that might have led them to fall through a trapdoor in the floor that they had not seen—would be acting in a very reasonable way that would not cause the retail worker immediate harm but would prevent them from coming to harm by, in this case, falling through the trapdoor. There are other scenarios in which obstructing or

hindering a person might prevent other harms and would therefore be reasonable.

Andy Wightman: You mentioned the question of the lack of a reasonableness defence with regard to abusing or threatening a retail worker, which the Scottish Government has raised. I do not have time to go into that now, but if there is time at the end of the meeting, I would like to do so.

Police Scotland has questioned the validity of the comparison that has been made between obstructing or hindering retail workers and obstructing or hindering emergency workers, given that, in many cases, emergency workers are trying to save lives, so obstructing them could be critical to life. Do you accept that the comparison is not as valid as you appear to have made out?

Daniel Johnson: I think that it is an important comparison. My bill draws fairly heavily on the logic of and measures in the emergency workers legislation.

The matters that emergency workers deal with are serious in that they often concern immediate matters of life and limb in a way that the duties of retail workers do not. However, by the same token, not everything that an emergency worker does will be concerned with such matters. In addition, the emergency workers legislation does not draw a distinction between when an emergency worker is dealing with immediate issues of life and limb and when they are carrying out other duties such as public information duties.

We should also consider the broader reasons for having age restrictions. Tobacco and alcohol are very significant causes of death in Scotland. We have age restrictions on those products because, ultimately, they save lives. Although upholding age restrictions is not the same as the immediate matters of life and limb that emergency workers deal with, it is wrong to say that it is not a matter of life and limb at all.

There is a discussion to be had as to whether obstructing a retail worker is as serious as obstructing an emergency worker. Although I fully accept that those two forms of obstruction are not necessarily of the same order of magnitude, it is clear that there is a parallel. Retail workers uphold the law, and upholding the law with regard to the age restrictions on certain products is important for protecting wellbeing in the broad sense. That is a valid argument to have. It is one that I hope that we can have at later stages of my bill and which I am happy to engage in.

Rhoda Grant (Highlands and Islands) (Lab): Good morning. The committee has had very clear evidence that enforcing legal restrictions on sales can trigger abusive behaviour. Indeed, I think that we have all witnessed that, especially more

recently when retail workers have been trying to enforce social distancing and to stop panic buying. How would an aggravation address that kind of behaviour?

Daniel Johnson: The aggravation does two things. First, and most important, it ensures that, when people are charged and found guilty of these offences, the sentencing reflects that. Secondly, it emphasises just how important it is that the enforcement of age restrictions is carried out by retail staff.

Indeed, one point that has been made to me by people working in the sector and by the trade unions is that, if nothing else, if the bill enabled there to be a very clear sign at the shop counter saying, "It is an offence to abuse or assault a retail worker," or, "There is a statutory aggravation if you abuse or assault me while I am carrying out my legal responsibilities and duties in relation to age restrictions," that would be useful. That is, having that clear law and being able to communicate that to customers would be useful in and of itself. The aggravation would make a real difference in relation to sentencing and in emphasising the seriousness of these issues and crimes.

Rhoda Grant: Your bill clearly covers age-restricted products and the like. However, as I said in my original question, we have all witnessed the abuse of retail workers in the current situation, when they are trying to keep everyone safe and make sure that there is enough stock for everybody to get what they need. Does your bill cover that kind of behaviour, or would it be possible to amend it to cover that kind of behaviour?

Daniel Johnson: The statutory offence that is created covers assault and abuse in broad terms; it is not specifically related to age-restricted items at all. In that sense, it would address, in part, that kind of behaviour. That important question has arisen in recent weeks and months. We have all seen retail workers enforcing social distancing in supermarkets. I have been struck by efforts in my local supermarket, where there are markings on the floor and retail workers are advising people where to stand and controlling the flow of customers into stores. Retail workers are carrying out a clear public health function that is required by the Government, if not necessarily by law.

10:15

By coincidence, my bill affords us the possibility of looking at whether there are further protections that can be applied in light of the current context. More broadly, there is an opportunity to reflect on protections in other instances where we ask retail workers to carry out particular functions and where the Government sets out regulations that retail

workers are required to uphold. Indeed, parliamentary procedure through stage 2 affords us the ability to take further evidence. Stage 2 and stage 3 proceedings would allow amendments to be lodged that may examine that in more detail, which I would welcome. I do not think that we can divorce my bill and the broad issues that it seeks to raise from the current circumstances in which we find ourselves.

Rhoda Grant: When you introduced the bill, you could not have possibly imagined the current circumstances, but it was right to look at protecting workers when they are in a difficult situation. The population as a whole would now applaud our retail workers: I am much more aware of the job that they do. We have talked about low-paid workers having to bear the brunt of the crisis. Do you think that the bill would send a clear signal to them that we value them and that we will take steps to protect them when they are on the front line?

Daniel Johnson: Yes, I think that it would send an important signal. In recent years, Governments of various hues and stripes have tended to think that public policy can be introduced through buttons on the till, most conspicuously with challenge 25 but also with other policies such as the plastic bag charge and the deposit return scheme. Although those are all useful and valuable propositions, there has been a sense that the Government can introduce such policies at no cost to it and they will be taken care of.

Retail workers are carrying out those policies, which are important public functions. It is important that we ensure that retail workers know that they are valued, and there is no better way of doing that than by recognising in law the age restriction and other duties that we ask them to carry out. Currently, a reassessment is being made of the value of all sorts of work; not just retail work, and it is important for us all to reflect on that.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I remind members that I am the convener of the cross-party group on independent convenience stores. I agree with Mr Johnson that we need a culture change, but we also need to ensure that any changes to the law are correct.

Colin Beattie has already highlighted that existing offences can be prosecuted under solemn procedure and may attract higher sentences. Rhoda Grant has suggested that the aggravation would make a real difference to sentencing, yet paragraph 53 of the policy memorandum says that the aggravation in the bill does not increase the level of sentence that is available to a summary court. What would the proposed aggravation add to existing provisions?

Daniel Johnson: A statutory aggravation does not necessarily increase the sentence that is available to the court, but it requires sentences to take the behaviours or circumstances set out in the statutory aggravation into account when sentences are being passed.

The other thing that I will add before I pass on to Andrew Mylne is that, as I have said before, we are talking about the same situation as exists when crimes are committed against emergency workers and the police. The relevant bits of legislation are carried out under summary procedure, although there might be crimes available to prosecutors that carry a heavier sentence. When prosecutors bring forward charges, they might choose to use other bits of legislation to prosecute people if that is deemed necessary.

I will bring in Andrew Mylne to provide further explanation on how statutory aggravations work and the comparisons with other areas of law.

Andrew Mylne: The way in which the bill works is based on a lot of precedent in existing legislation. When you create a criminal offence, you have to specify what the maximum penalty available to the court would be, but of course the average or typical sentence is well below the maximum. I do not have exact figures but, at least in some cases, there is evidence that the average sentence is roughly half the maximum. Obviously, if you increase the maximum sentence, you increase the average as well, but a court will always exercise discretion according to the facts and circumstances.

The point about an aggravation is to nudge the court to apply a higher penalty than it otherwise might do, because of a particular factor that featured in the case. Usually, there is plenty of headroom, because the sentence that the court would normally apply in such cases would in most circumstances be well below the maximum, so the court can add on a little because the offence is aggravated. By having an aggravation, the fact that you are not increasing the maximum penalty does not matter very much in most cases.

The way in which the bill sets out the procedure for aggravation is modelled on the existing statutory aggravation legislation that the Parliament has put in place over a number of years. For example, the feature of the bill that means that the court would not be required to increase the sentence but would have to justify not doing so is modelled on what happens under existing legislation in such circumstances. The bill simply adds another statutory aggravation in a way that is in line with what is already there.

I hope that that helps a little.

Gordon MacDonald: It does—thank you.

It has been suggested that, to move the bill forward and gain Government support, an alternative legislative approach would be to create a new statutory aggravation that was applied to existing offences. Is that a possible way forward, especially if it was focused on situations in which a retail worker was seeking to enforce an age restriction?

Daniel Johnson: I am happy to examine any alternative approaches, particularly if that secures Parliament's broad support. I will again bring in Andrew Mylne on that point, but it is important to point out that, in drafting the bill, we looked at that possible approach fairly thoroughly. The reason why we rejected it was to do with precision. As you will see, a reasonable amount of space in my bill is given to trying to define precisely what retail workers are. To take the approach that Mr MacDonald suggests, you would need to spend quite a lot of time deciding which offences to attach the aggravation to. Would you be saying that any offence committed against a retail worker could be aggravated in such a way, or would it be particular offences? That would become a fairly complex picture.

We felt that it is simpler to create a straightforward statutory offence so that we have clarity on precisely what the offence is and who it attaches to, and then to have an aggravation layered on top of that to reflect the seriousness of such offences when they are in connection with age restriction.

I will hand over to Andrew Mylne, who can probably provide a better technical explanation.

Andrew Mylne: Kenny Htet-Khin might be better placed to answer that particular question.

Kenny Htet-Khin: As the member says, we are keen to give clarity in the law. If the member wishes to consider it in the future, we can think about how we might apply an aggravation to more offences. We were trying to be as specific as possible about how people who are accused of offences can know what the offence is and what the sentence might be should they carry out that offence. We thought that the provisions would provide foreseeability and clarity as to what is expected of them in the law.

The Convener: If there are no further questions on that subject, we will move to Dean Lockhart.

Dean Lockhart (Mid Scotland and Fife) (Con): Good morning to Daniel Johnson and our other guests. In evidence given to the committee by representatives of the retail sector, we were told that the problems faced by retail workers here in Scotland are similar to those faced by—
[*Temporary loss of sound.*]

Daniel Johnson: The sound seems to be breaking up—I did not hear that question, and I do not know whether Dean Lockhart is still speaking.

The Convener: Are you still with us, Dean? We may have lost him.

Dean Lockhart: Good morning again, convener. I am sorry—I seem to have dropped out. [*Temporary loss of sound.*]

The Convener: We have lost Dean Lockhart temporarily.

Dean Lockhart: Apologies, convener. The system dropped out for a few seconds. I want to ask about the protection that is available to retail workers elsewhere in the United Kingdom. When the committee heard evidence from representatives of the retail sector, we heard that the problems faced by retail workers in Scotland are very similar to those that exist elsewhere in the UK, including those of threat. Have Daniel Johnson or the other witnesses considered the protection that is available in legislation elsewhere in the UK? Are additional enhanced protections available for retail workers elsewhere? If so, we could have a look at that legislation or additional protection measures and compare them to the proposed provisions in the bill before us.

Daniel Johnson: My understanding is that such issues are faced across the United Kingdom. As with the situation that is faced by retail workers in Scotland, retail workers do not enjoy any particular additional legal protections elsewhere.

I will bring in Kenny Htet-Khin on this point, as he may be able to provide some insight into whether there is other relevant legislation in the UK, but the issue arose in the previous Parliament at Westminster, with attempts by David Hanson to introduce amendments to the Offensive Weapons Bill—now the Offensive Weapons Act 2019—that would have provided, in part, the sort of distinctions that we have discussed. In response, the UK Government entered into a consultation process, which I believe finished at the end of last summer. The UK Government has those findings now, but it has not published them. The consultation looked into whether legal steps could be taken to provide further legal protections.

A private member's bill is being introduced at Westminster that would have a similar effect to mine. It likewise has a statutory aggravation that would apply to offences against retail workers in those situations. I do not believe that retail workers have any specific legal protections in other parts of the UK, but it is an apparent issue that is being discussed in other Parliaments in the UK. Does Kenny have any particular legal clarification to provide on what exists elsewhere?

10:30

Kenny Htet-Khin: I do not have anything. [*Temporary loss of sound.*]

The Convener: I lost the end of that, but I think that Kenny Htet-Khin said that he did not have anything great to add.

Dean Lockhart: I thank Daniel Johnson for that explanation of the protections that are available elsewhere in the UK. I will follow up on a couple of issues that were discussed before about the different views on the need for the bill and what form it should take if it goes ahead—for example, the need for the hindering and obstruction elements of the bill. What are Daniel Johnson's views on what elements of the bill could be stripped back from what is currently proposed without damaging the core protection for retail workers that he is trying to achieve?

Daniel Johnson: In my view, the most important element is the aggravation, which will reflect the seriousness of the responsibility that we place on retail workers for upholding age restrictions; ensure that sentencing takes that into account; and give us a better picture as to the extent of the problem of these crimes in society. By dint of that, having the statutory offence is important because it enables the statutory obligation and, for the reasons that we set out earlier, it is important and useful in terms of the precision that it affords. The other element of the statutory offence is that it provides a clear communication point.

Finally, the point about hindering and obstructing is important, but it is probably the least important of the three key provisions. It is important because it provides for an earlier threshold at which these situations could be nipped in the bud. As I illustrated earlier, a common scenario takes place when things start out as one thing and escalate to another; this is an attempt to stop that from happening. As I said earlier, I recognise the potential problems and the valid discussion about the comparability of the provision with the precedents that it is drawn from, so it is probably the least important element. I hope that that provides some clarity for the member.

Dean Lockhart: It does. Thank you very much.

The Convener: Andy Wightman wants to ask some questions and request clarification of some points.

Andy Wightman: I will follow on from Dean Lockhart's question. You implied that statutory aggravation is one of your principal concerns and in your opening remarks you made quite a lot of play of that. It almost sounds as though you created the offences so that there could be a

statutory aggravation. We have covered the question whether statutory aggravation could be applied to existing offences, so I do not want to look at that. However, rather than a statutory aggravation of offences that you create in the bill, an alternative approach would be to create a statutory offence of obstructing and hindering a retail worker in the course of upholding age restrictions. That would be a clear alternative. Could you respond to that?

Daniel Johnson: That is an interesting approach, which could be examined. When we looked at the matter, we had a range of possibilities for each of the different elements and we picked what we felt gave us the greatest precision and clarity.

I would not say that creating the statutory offence is purely to enable the aggravation; it is part of it. The point about clarity and communication is an important one. It is also about reflecting in law and indeed, in a sense, it borrows from the logic of the Emergency Workers (Scotland) Act 2005 and section 90 of the Police and Fire Reform (Scotland) Act 2012.

You have outlined an interesting approach in terms of creating that specific offence of hindering or obstructing in relation to age-restricted items, which it may or may not be possible to look at through stages 2 and 3 of the bill, if Parliament chooses to go down that route.

Andy Wightman: Thank you. One of the criticisms of your approach is that if prosecutors were to choose to prosecute someone who had abused a retail worker under the common law or, for example, under the Criminal Justice and Licensing (Scotland) Act 2010, the statutory aggravation would not be available. Given the statistics that we have on the use of the emergency workers statutory offences, it may be that most prosecutions are taken under other laws and one of your key objectives—the statutory aggravation—would not be available in those circumstances. Could you clarify that?

Daniel Johnson: I may bring in Andrew Mylne or Kenny Htet-Khin on the strict technical elements. I will say that there are lots of instances in the law where there are overlaps or even duplications between different statutes.

I believe that there were just under 200 prosecutions in 2017-18 under the Emergency Workers (Scotland) Act 2005. It is clear that the 2005 act is used and it has comparable penalties to those that I seek to introduce, so I do not think that there is any reason to believe that prosecutors would not use the legislation if it were enacted.

Does that mean that the numbers are comprehensive? Clearly not. I doubt that the 190 offences committed in 2017-18 represent the

totality of all the offences that were committed against emergency workers in that period either. This is not about statistical accuracy; it is about providing options. The numbers provide insight rather than precision in terms of the total number. Andrew Mylne may have something to add.

Andrew Mylne: The way that you characterise it, Mr Wightman, may get things slightly the wrong way round. I am not an expert in criminal law; I have certainly never been a prosecutor. However, my general understanding is that when prosecutors are deciding how to charge a particular offence, they often have choices. In this particular case, as we acknowledge, there is an overlap between the proposed new offence and existing common law and statutory offences.

My understanding is that prosecutors will generally favour a specific statutory offence rather than a general offence, whether that is common law or statute, where they have a choice.

If the bill is passed, the section 1 offence would become the default option for prosecuting offences of this nature. It is not so much that, if prosecutors chose a different option, the aggravation would not be available; the fact that the aggravation was available for the section 1 offence would be an additional reason to choose that option.

As we have acknowledged, there is still a small limitation. If a case is particularly serious and a prosecutor thinks that it would need to be prosecuted under solemn procedure, they will always have that option, but such cases would be very much at the top end of the scale.

I would look at it that way round. Aggravation, certainly in a case that relates to age-restricted sales and so forth, would be an additional reason to choose to prosecute under the new offence.

Andy Wightman: Thank you—that is very helpful indeed. I have one final question. Time is tight, so it may be helpful for you and for us if you were to write to the committee in fairly short order to elaborate on your response, because the matter is a bit complicated. I am talking about the Scottish Government's policy memorandum, which refers to the three elements that are necessary for an offence to be created under the Criminal Justice and Licensing (Scotland) Act 2010. The memorandum points out that the offence of abusing a retail worker as set out in Daniel Johnson's bill could be committed by conduct that is not, as section 38 of the 2010 act requires it to be,

"likely to cause a reasonable person to suffer fear or alarm".

It also points out that there is no reasonableness defence under the new offence in the bill, which

again can be contrasted with section 38 of the 2010 act.

A two or three-minute answer is probably not the best means of articulating your response to that challenge, as set out by the Scottish Government in quite some detail in its memorandum, which is published on the committee's website, but perhaps you can give a brief response now.

Daniel Johnson: I will take you up on your suggestion of writing to the committee, but the simple and short answer concerns intent and effect. In order for there to be threat or abuse, there has to be intent to cause fear or alarm. Whether that is ever reasonable, regardless of the circumstances, is questionable. It boils down to the question of what you are effectively saying. In a sense, it could be argued that you are saying that two wrongs can make a right.

There is potentially a problem in saying that, because these are lesser-order offences, it could be reasonable to respond to one offence with another offence. I am not convinced of that. As I said, in the end it comes down to intent.

I do not know whether Kenny Htet-Khin has any brief comments to add on the precise points that the Government has raised.

Kenny Htet-Khin: On the point about the defence of reasonable behaviour, that was something that we considered. It is clear that that defence exists elsewhere in legislation—[*Temporary loss of sound.*] However, although we considered the matter, we could not really think of a situation—[*Temporary loss of sound.*]—to threaten or abuse a retail worker, which is why we decided—[*Temporary loss of sound.*]

On Andy Wightman's second point, about the "reasonable person" test, we were not too sure what such a provision would add to the specific circumstances of the bill. There are other situations in which the "reasonable person" test is not adopted in law—[*Temporary loss of sound.*]

The Convener: We are having a few problems hearing you, Mr Htet-Khin.

Daniel Johnson: We can cover those points in correspondence. I will add one final point: if a "reasonable" defence is thought to be necessary, it would be very easy to add that to the bill through amendments at stage 2 or stage 3.

Andy Wightman: Thank you. It would be very useful for the committee to have from you a clear exposition in response to what is quite a detailed critique, or objection, from the Scottish Government. That would assist us hugely with our scrutiny.

The Convener: I echo that comment, Mr Johnson—it would apply to anything that arises during the discussion that you might want to elaborate on.

We have reached the end of our questions, but I want to raise one small point. Throughout this process, what has become absolutely clear is the fear that is often instilled in shopworkers when somebody behaves in a threatening manner, especially when it is somebody local who returns to the shop routinely. Shopworkers therefore often experience psychological damage rather than a physical assault. We have also heard throughout the process that it is about the response if somebody is called.

You said that, if nothing else, a sign at the till saying that it is an offence to assault, intimidate or harass a retail worker would be helpful. Why are such signs not up already? Although there is no specific offence, it is still an offence to do those things, so should retail workers put up those signs at the moment?

10:45

Daniel Johnson: I will deal with both of those important points. It is about providing clarity and precision by saying that such behaviour is an offence under a protection of workers act. If we talk about it being a common law offence, we start to get into the realms of legal terminology. Signs could and potentially should be put up, but the bill would send a much clearer signal. It is not just about that; there are also the other associated elements, such as the aggravation provision that the bill would provide.

The point that the convener started on is perhaps the most important. Crimes that are committed against retail workers are different, in part because of the legal obligations that we place on them, but also because someone who commits such a crime against a person who is at work and carrying out their legal duties is victimising them in a place to which they have to return. When someone is abused or assaulted at work, they have to go back to work the next day, which is extremely traumatic. That point needs to be taken much more seriously by us all, and I hope that my bill will enable us to address it in Parliament.

The Convener: Is there anything that you would like to add before I close the session?

Daniel Johnson: I simply reiterate my thanks to the committee, because I really appreciate the time that it is taking to consider my bill.

I add a word of thanks to Andrew Mylne, Kenny Htet-Khin and the other members of the non-Government bills unit. We are extremely lucky in the Scottish Parliament to have a system of

members' bills, which means that we have that resource available to us in a much more straightforward manner than is the case for other parliamentarians. I am thankful to them for all their efforts.

The Convener: I echo those comments. I thank Daniel Johnson and the officials, Andrew Mylne and Kenny Htet-Khin, for taking part in the meeting. I am sorry that we did not have very good communication with Kenny. We found it difficult to hear you; I would get on to your broadband supplier.

On behalf of the committee, I thank everyone who has contributed to the comprehensive evidence sessions on the bill. We will now consider our report, which I hope will reflect what we have heard over the past few weeks.

I take this opportunity to thank all our retail workers. Without a doubt, this has been a very unusual and difficult time, and retail workers in particular have had to step up to the plate. They have coped very well, and they continue to deliver what is an essential service to us all. We hope that we will do them justice in our consideration of this member's bill.

As agreed at the beginning of the meeting, we move into private session.

10:48

Meeting continued in private until 11:50.

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