The Scottish Parliament
Pàrlamaid na h-Alba

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Economy, Energy and Fair Work Committee

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Dear Michelle

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

I would like to take this opportunity to thank you and the Committee for undertaking the Evidence Sessions in what has been a turbulent and unprecedented past couple of months. I welcomed the constructive and thorough questions from Members and the opportunity to talk through the reasoning behind my bill.

I refer to my evidence session with the Economy, Energy and Fair Work Committee when I advised that I would follow up with further detail on a number of issues which were raised by members.

Threatening and abusive behaviour – no requirement for "reasonable person" to suffer fear or alarm

Andy Wightman made reference during the evidence sessions to the Scottish Government's memorandum in relation to the threatening and abusive behaviour elements of the Bill (section 2). The Bill requires only two of the three elements covered by the section 38 offence in the Criminal Justice and Licensing (Scotland) Act 2010, i.e.:

- a person behaves in a threatening or abusive manner (towards the retail worker), and

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- 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.

There is no requirement in the Bill for the behaviour to be likely to cause a reasonable person to suffer fear or alarm, and it was questioned why this is the case.

I would argue that the contexts of the Bill and the 2010 Act are quite different. The 2010 Act is designed to cover a very wide range of circumstances, while the Bill is aimed at much more specific circumstances. Under the Bill, it is only an offence to threaten or abuse a person if that person is a retail worker and is, at the time, engaged in retail work, and if those are things that the person doing the threatening or abusing knows or ought to know. In such a situation, we found it difficult to see what was added by a "reasonable person" test. In my view, the focus should be on the intention of the perpetrator (to cause fear or alarm) rather than on the reaction of the victim; such behaviour, in a retail context, is unacceptable even if most workers would not actually be frightened or alarmed by it.

I would also point out that there are examples of comparable offences in other legislation that can be committed without reliance on a "reasonable person" test. An example is section 50A of the Criminal Law (Consolidation) (Scotland) Act 1995, where the offence of racially-aggravated harassment can be committed by pursuing a course of conduct that is *either* intended to amount to harassment *or* that would appear to a reasonable person to amount to such harassment. (In other words, the offence can be committed on the basis of intent alone, even if the reasonable person test is not met.)

I am of the view that the offence under section 1 of my Bill is specific and clear enough not to require a "reasonable person" assessment. If someone threatens or abuses a retail worker, and in doing so intends to cause fear or alarm, that should be enough for an offence to be committed.

That being said, however, I would be receptive to further consideration of these issues at Stage 2.

<u>Defence of "reasonableness" for obstructing or hindering, but not for threatening or abusive behaviour</u>

There have also been concerns raised about the fact that the Bill provides a defence of "reasonableness" for obstructing or hindering (section 3), but not for threatening or abusive behaviour.

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As I indicated during the Committee session, it is possible to envisage circumstances where obstructing a retail worker could be inadvertent, for example, when sitting in a bar restaurant on a chair positioned on top of a cellar door – in such circumstances, it seems entirely appropriate to include a defence of reasonableness to avoid criminalising behaviour that was not motivated by any ill-will. However, I have difficulty envisioning a situation where it might ever be "reasonable" intentionally to threaten or abuse a retail worker.

Again, it is worth pointing out that there is precedent in existing legislation. For example, section 50A of the 1995 Act (mentioned above) does not allow a person accused of racially-aggravated harassment a defence on the basis that the harassment was "reasonable" in the circumstances.

Single source of evidence

The fact that the Bill requires only a single source of evidence has also been raised.

Section 1(4) allows evidence from a single source to be sufficient to establish that the person alleged to have been assaulted, threatened, abused, obstructed or hindered was a retail worker, or was at the time engaged in retail work. In this respect, there is precedent in the Emergency Workers (Scotland) Act 2005 – where (under section 4(6) of the Act), evidence from a single source is sufficient to establish that an emergency worker was acting in a particular capacity.

Under section 4(3) of the Bill, evidence from a single source is sufficient to establish that an offence occurred because of the enforcement of a statutory age restriction (and hence that the offence was aggravated). At the Committee's evidence session on 3 March 2020, Gillian Mawdsley of the Law Society of Scotland commented on this as follows: "The problem with an aggravation is that one can argue that one source of evidence might not be sufficient if the aggravation is a fundamental part of the crime, so there might be a need for corroboration".

Again, I would refer the Committee to other statutory aggravations where a single source of evidence is the norm, for example, in relation to racial prejudice, section 96 of the Crime and Disorder Act 1998; for religious prejudice, section 74 of the Criminal Justice (Scotland) Act 2003, or for disability prejudice, section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009.

All these existing statutes leave it to the court to assess the quality of the evidence presented, without the need for corroboration. I don't see why a

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different approach is needed in the context of the Bill. However, I would of course be receptive to further discussion on this point as the Bill progresses.

Aggravation in relation to enforcement of age restriction

Under section 4 of the Bill, an offence of assaulting, threatening, abusing, obstructing or hindering a retail worker can become an aggravated offence if any of those behaviours occurred because the retail worker was enforcing a statutory age restriction.

At the Committee's evidence session on 6 May 2020, Colin Beattie asked the Minister for Community Safety whether she agreed there should be additional protection for retail workers enforcing the laws on sales of age-restricted goods. I was encouraged to hear Ash Denham, the Minister, respond that: "… it might be worth considering the idea of some type of aggravator that would capture the behaviour that you are talking about".

Legislation in other parts of the UK

As an update to the information I provided at the Committee meeting, I am aware that a further Private Member's Bill Assaults on Retail Workers (Offences) Bill had its first reading in the House of Commons on 16 March. Second reading is scheduled for 26 June.

The analysis of the UK Government's consultation on violence and abuse toward shop staff, which closed in June 2019, still does not seem to be available.

In conclusion, I am heartened by the degree of support the Bill has received, including from a large range of affected stakeholder groups, and look forward to the Committee's Stage 1 report. In the meantime, I would ask the Committee to bear in mind that matters of detail can be amended at Stage 2 and that the general principles currently under consideration relate to the need to strengthen the protection given to retail workers facing increasing levels of unacceptable abuse encountered during the course of their employment.

Finally, I would again like to register my thanks again with you and the Committee and I look forward to working with you constructively in any way once your report is published.

Kind regards,

Daniel

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