

PE1727/D

Law Society of Scotland submission of 18 October 2019

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 welcomes the opportunity to consider and respond to the Scottish Parliament's Public Petitions Committee on Petition PE1727. The committee has the following comments to put forward for consideration.

General Comments

We refer to the Petition PE1727 (the Petition). The Petitioner refers to the victims of crime where they are unable to obtain justice when witnesses do not come forward to report the commission of an offence. The Petitioner requests that consideration is given to the introduction of legislation that would ensure all citizens in Scotland have a legal duty to report a crime that they have witnessed.

The Public Petitions Committee has requested that the Society provide its views in relation to:

- criminalising any failure to report a crime
- what this could mean in practice.

Criminalising any failure to report a crime

We understand the sentiments expressed in the intention lying behind the Petition. Though the concept may sound simple, as we outline below, we envisage that there would be considerable difficulties in trying to carry out that policy intention in legislation.

There is currently no general duty on anyone to report a crime under Scots law. There is also no general duty to come to anyone's aid no matter how great the issue is and however easy it may be in the circumstances to lend assistance without exposing themselves to danger.

The relevant common law crimes that might apply in these circumstances would include:

- the giving of false information to be prosecuted under the offence of wasting police time
- an attempt to defeat the ends of justice or
- an attempt to pervert the course of justice.

None of these would meet the circumstances envisaged by the Petitioner. Specific offences do exist in Scots law where a failure to do something can be a criminal offence. One such example is section 172 of the Road Traffic Act 1988.¹ This provides for a duty to give information as to the identity of a driver in certain circumstances. Conviction for the relevant offence carries the imposition of mandatory penalty points on a licence. That duty is specific and in no way can be described as a general duty to report an offence. The SPICe Briefing Note on Petition PE01727 sets out some other examples where such a duty is specifically imposed.

If criminalisation for any failure to report a crime were to be considered, this would require to be put in place by the creation of specific statutory provisions.

We recognise that there may be a moral argument that people should act or come forward when witnessing a crime. That is quite different from imposing a legally enforceable duty which could then render those accused liable to conviction for an offence and thereafter, in having a criminal record. That would have significant implications for them in their employment or potentially, in professional terms, for instance, if they were a teacher or a lawyer. Their conduct in failing to act, in effect, would be criminalised. The consequences would therefore be severe.

When would it be envisaged that such an offence would arise?

We consider that there would be significant difficulties in determining exactly when such an offence would arise.

There would be a debate as to what and when such behaviour would amount to criminal and would trigger the basis of a requirement to report. In some circumstances would be clear that a crime was being committed, such as an assault, but there may be other circumstances where the witness may not recognise the conduct in front of them as being criminal. Exactly what would amount to criminal in these circumstances would be hard to define. The implications of such a proactive duty could require the police to be wrongly deployed to matters that were not criminal as such activities had been misconstrued.

We would also suggest that there would be a risk that this type of offence may encourage malicious or ill-considered reporting. What if there is shouting heard from next door? That is not necessarily criminal, the witness does not know whether a crime is being committed. Crimes may be obvious, such as an assault in a street which is happening outside the house. Others, such as child neglect, are much harder to understand and to detect.

¹ <http://www.legislation.gov.uk/ukpga/1988/52/section/172>

In order to establish that any crime has arisen, there needs to be corroboration of the essential facts. That is what is required to prove the case against any accused under Scots Law. That means that there must be two separate sources of evidence before a case can proceed to trial. Corroborated evidence, however, does not necessarily mean that the second witness is an eyewitness - which the Petitioner would tend to imply by the suggestion that there should be a duty to report a crime.

Many crimes are committed without eyewitnesses, such as sexual offences and bogus workman type fraud, where there is a need to rely on other types of evidence for the purposes of corroboration. In many cases, the necessary corroboration will be provided by circumstantial, scientific and/or medical evidence. Each case will depend on the relevant facts and circumstances.

What is correct in the Petition is that an accused cannot be convicted on the word of one witness. It follows then that the aim of the Petition is to oblige people to come forward where they have witnessed a crime. The Petition could presumably apply only in cases which have eyewitnesses during the commission of the offence.

An example may serve to illustrate the issue:

A is the complainer in an assault. B is the eyewitness to the assault. These two witnesses would provide the necessary corroboration of the crime of assault.

What seems to be envisaged by the petitioner is that if B does not come forward to report the crime then, they could be guilty of a crime. Similarly C, who may have witnessed the assault, would also be required to report the it, irrespective of any involvement in the assault, knowledge of the exact circumstances or knowledge that the circumstances amounted to an assault. B and C would be potentially criminally liable for a failure to report the crime. How far would that obligation extend as far as reporting an offence is concerned? If there were a crowd of 50 witnessing the assault, would all of them be potentially guilty of an offence?

For any such crime to be proved, there would need similarly to be corroboration of the person's failure to report.

Though we have referred to eyewitnesses, what would happen in the circumstances where A is told about an offence- in other words hearsay evidence, which is only admissible in restricted circumstances. There is a great difference between a person who is told by a child that the child has been abused and the person who reads the lurid details of a completely fictitious allegation on a Facebook page. How would that distinction be drawn?

The circumstances in which the duty would arise

When considering the position of the potential accused, there seem to be circumstances where it may not be appropriate to require them to report. Examples may include the following:

- It may be unsafe for them to report a crime because of what they were doing at the time. They may be driving a car or looking after children
- Considerations as to their own safety if they report the offence

- They may not have a mobile phone, speak English or to know who to contact

Presumably there would need to be the concept of a reasonable excuse as to why they were not able to report a crime. How far would this duty extend in fulfilling any reporting requirement? Would they be required to justify their excuse in court, as their failure to report inevitably caused them to be prosecuted?

Conclusion

We would envisage that it would be very challenging to frame any offence precisely in order to impose a blanket duty on any person to report a crime. Evidentially too this offence would be hard to prove, as how would the accused be identified?

Furthermore, the police would need to spend valuable time in tracking the accused person which might be better used to investigate the criminal conduct though there may be an inevitable overlap in seeking out potential witnesses to any incident. That then raises the question of funding. The police and other services including COPFS would be involved in a significant number of reports as potentially, every offence could in theory involve several persons who have failed to report an offence. There would need to be a financial impact assessment prepared to ascertain the likely costs in bringing forward any such proposal for a new offence.

Consideration may also need to be given as to equalities issues as there may be cultural differences in when and what to report.

We would resist any mandatory reporting of crimes by individual citizens. We would suggest it might be relevant to consider how any duties arise in other jurisdictions, though these tend to relate more to the "Good Samaritan" rule, which requires the witness to actively provide assistance. Such duties do exist under the civil codes in certain European countries:

- In Germany², there were well-publicised convictions of several people who witnessed a person that had had a heart attack where they failed to contact anyone for help. The offence in Germany is referred to as the country's "Unterlassene Hilfeleistung" (failure to provide assistance). That however differs from the Petition, which refers to a specific issue of a failure to report an offence.
- In France, there is a requirement to stop and help someone in need of assistance if it does not endanger them. It goes further in that it does not seek to exonerate the rescuer of any liability in the event of rendering inappropriate help, but may punish the bystander who, directly witnessing a dangerous incident, does not intervene even though to do so would pose no risk to him or a third party.³

² <https://www.nytimes.com/2017/09/19/world/europe/germany-bank-pensioner.html>

³ Criminal Code Art 223-6- That would be followed by a question as to what circumstances would a report be made and to whom such a report should be made. Presumably, the Petitioner would envisage that the report should be made to the police.