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# Consultation Response

## Licensing (Scotland) Act 2005 – Section 142 – Draft Revised Guidance for Licensing Boards

12 June 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 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 Licensing Law sub-committee whose members represent all groups from the licensed trade including the local authorities, the licensed trade and the public welcomes the opportunity to consider and respond to the Scottish Government consultation: Licensing (Scotland) Act 2005 – Section 142 – Draft Revised Guidance for Licensing Boards (the consultation).

The consultation attaches draft Guidance at Annex A of the consultation that it is proposed to be issued under section 142 of the Licensing (Scotland) Act 2005 (2005 Act). The consultation requests comments on:

1. any areas within the draft revised guidance (which were found to be unclear including suggestions of alternative wording)
2. other issues which you believe should be taken into account within the draft revised guidance.

Our comments are included below using the numbering in the draft Guidance. There are significant substantive issues points to be addressed relating to:

- Paragraph 8 - the alleged duty to trade and
- Annex 6 - the section on clubs.

Additionally, we had responded previously<sup>1</sup> to an early version of the draft Guidance to the Scottish Government when we made various general observations regarding the issue of Guidance. Account appears to have been taken of some of these observations, but some seem not yet to have been factored in. We have included these administrative observations in our response.

<sup>1</sup> 22 January 2019

## General

The first guidance issued to the Licensing Boards was in April 2007 which provided guidance to Licensing Boards “on the effect of the complex areas of, and interactions between, the legislative provisions.”<sup>2</sup> Since then, primary and secondary legislation<sup>3</sup> has come into force and therefore, it does seem appropriate for the Guidance to be updated and amended to take account of such provisions.

When publishing the Guidance following the consultation, it would seem important to ensure that all references to the previous Guidance are removed, the Guidance is published on the Scottish Government website and takes account of the range and diversity of those<sup>4</sup> who may read the Guidance to ensure it is available in all relevant version and formats.

We note in paragraph 18 of the consultation that there is no reference to the public. We would consider that this fails to take account and to recognise that the public<sup>5</sup> also will also have an interest in reading and understanding the Guidance as part of their general knowledge and awareness.

## 1. Introduction

Should the reference in paragraph one include primary as well as secondary legislation?

## 2. The Licensing Objectives

Paragraph 2.5: The reference to offences could usefully include a reference to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which we would suggest would be one of the more commonly occurring offence.

Paragraph 2.8: Is this reference to Parliament to the UK or Scotland Parliament or to both? This should be made clear.

Paragraph 2.9: Since paragraph 12.20 talks about what are not offences in the context of supply by adults to children of alcohol, we would suggest that the reference should be to paragraphs 12.16- 12.20.

Paragraph 2.10: Should the reference not be consistent throughout the draft Guidance to Licensing Board and also use capitals? We refer to our suggestion that it would be helpful given the length of the draft

<sup>2</sup> Paragraph 7 of the consultation

<sup>3</sup> Paragraphs 1 and 3 of the consultation

<sup>4</sup> In accordance with the Equality Act 2010 and the relevant “protected characteristics.”

<sup>5</sup> The public includes Police Scotland, businesses, retailers, the justice associations as well as local Authorities.

Guidance to include a definitions section. This would include the use of the term Licensing Board and licensing objectives. Is there a missing word at the sentence “the **effect** the selling of alcohol in accordance with the premises licence is having on those objectives?”<sup>6</sup>

Paragraph 2.11: Should the reference not be to licensing objectives?

### 3. Licensing Boards

Paragraph 3.2: There is a punctuation error at the last sentence of paragraph 2.

Paragraph 3.3: Have you considered the future proofing of the Guidance? See :

“These powers are exercised from time to time and this Guidance refers to such secondary legislation where relevant. Operation of the licensing system is the responsibility of Licensing Boards.”

What happens in the case of future regulations and the Guidance if at variance?

Paragraph 3.5: Should schedule not use a capital?

### 4. Statements of Licensing Policy

Paragraph 4.1: This refer to background to this section which is inconsistent with the approach taken in other paragraphs:

“This Chapter provides Guidance on the development and preparation of statements of licensing policy.”

Paragraph 4.3: This does not seem to make sense in this context. Again, would this not be best to include in a definitions section?

Paragraph 4.11: See comment on Paragraph 3.5.

Paragraph 4.12: Use of a definitions section would avoid duplication of paragraphs in the Guidance. There is a difference between the specification of one of the licensing objectives in Chapter 2 and this paragraph. See:

“Protecting children and young persons from harm”

We refer to our previous comments with regard to the use of case law. There is the question of and for whom is the Guidance intended.

<sup>6</sup> Paragraph 2.10

References to case law may be relevant but case law changes and may render the Guidance out of date if it is not revised to take account of any changes. Whose responsibility is it to amend the Guidance?

This case itself refers to a number of Scottish and English authorities.<sup>7</sup>

Also, for non-lawyers, there may be no possibility of accessing the cases unless they have access to a legal webpage such as Westlaw. There are, as we referred to previously, other cases which may also be pertinent.

If an assessment is made that there should be reference to caselaw, there need to be links to copies of the cases within the Guidance.

This does repeat our question about the Guidance standing alone and being read by the public.

Reference should be to licensing objectives otherwise this is confusing:

**“Equally, consistency with policy maybe an indicator that an application is consistent with objectives.”**

Why is this in bold?

## 5. The Overprovision Assessment

Paragraph 5.1: We refer to our comment on paragraph 4.1. It is the same point.

Paragraph 5.28: There is inconsistency with regard to the reference to the Licensing Board.

Paragraphs 5.32/ 5.37: is to the “dependable causal link?” Again, to avoid confusion, a definitions section would help with terms that apply consistently with regard to the burden of proof in civil cases.

Paragraph 5.49: Please see comment in relation to paragraph 3.5.

## 6. Local Licensing Forums

Paragraph 6.3: There seems no need to include:

“Information in this Chapter of the Guidance is likely to be useful to councils to help them establish, support and sustain Local Licensing Forums”. Would it not be relevant to include an index? Also, the Guidance can

<sup>7</sup> ( *R. v. Torquay Licensing Justices, ex p. Brockman* ; *British Oxygen Co. Ltd. v. Board of Trade* ; *Sagnata Investments Ltd. v. Norwich Corporation* ; *R. v. Torbay Licensing Justices, ex p. White* ; *Holt v. Watson* ; *Inverness, Loch Ness and Nairn Tourist Board v. Highland Regional Council* \*312 per Lord Clyde; *Centralbite Ltd. v. Kincardine and Deeside Licensing Board* per Lord Dervaird).

be read by any member of the public as referred to earlier. There are inconsistencies in the Guidance to this Guidance or the Guidance.

Paragraphs 6.6/6.8/6.9/6.12: There should be consistency in the reference to Forum as it appears on its own and as the Local Licensing Forum.

Paragraph 6.14/6.17: Please see comment at Paragraph 3.5.

## 7. Licensing Standards Officers

Paragraph 7.3: Why is this in bold?

Paragraph 7.4: This seems to recognise the role and importance of the Guidance to the public.

Paragraph 7.18: The paragraph states:

*“Licensing Boards may wish to be aware of the existence of the National Licensing Standards Officers Group which engages with Licensing Standards Officers across the country to share issues and best practice.”*

There is nothing inherently wrong with this; however, aside from our members being aware of the existence of such a group, its membership, workings and deliberations are not generally known by the public. In the interests of transparency, if a Licensing Board is privy to, and takes cognisance of, the deliberations or conclusions of such a group (which is not a statutory body), it is important that any material which may influence the Licensing’s Board’s decision is made known to all stakeholders, in particular to applicants.

The reference should be to “Officers’ Group.”

## 8. Premises Licence

Paragraph 8.1: We refer to the same point as in paragraph 4.1. Why too is there a use of bold print?

Rather than a reference to “including among other things”, would it not be better to link with the wording in the legislation?

Paragraphs 8.5 and 8.6: Why is the reference to “Operating Plan” in capitals?

This section appears to be fully misconceived. It purports to provide “guidance” in terms of the consultation on the alleged duty to trade. There is no such duty. We have already commented<sup>8</sup> in our earlier response that:

*“It seems to be suggested that there is a duty to trade. We understood that the specious argument had been abandoned. A duty cannot be qualified: if it is, it becomes a permission.*

*The duty to trade argument turns on an interpretation of Schedule 3 paragraph 2(1) of the Act which provides that*

*“alcohol is to be sold on the premises only in accordance with the operating plan”.*

*Many commentators<sup>9</sup> point out that such an interpretation could result in absurdity. Leaving aside the odd notion that a licence holder could be prosecuted or have his licence revoked for **not** selling alcohol, that also suggests that it would be a breach of licence **not** to put on functions or entertainment during the times specified in the operating plan.*

*If, on the other hand, the interpretation is that Schedule 3, paragraph 2(1) [of the Act] grants permission, as opposed to imposing a duty, the legislation may be interpreted with no absurd consequences. If legislation is ambiguous, it must be assumed that the draftsman intended a sensible interpretation. We understand that no boards in Scotland believe there is a duty to trade.*

*This section appears to have been drafted by those who clearly believe there is a (qualified) duty to trade [who] are directly contradicted by section 9.22 of the guidance under Extension of licensed hours.*

*It must be borne in mind that, the current regime under the Act differs from that under the Licensing (Scotland) Act 1976. Under the 1976 Act, there were “permitted hours” and “extended hours”. The Act makes no distinction between the hours specified in the Operating Plan and any extended hours (see section 67(6) of the Act).*

*In section 9.22 of the Guidance referring to an extension granted under section 67 of the Act it is stated that “However, licensed premises are not obliged to remain open for the period of such an extension.”*

*We suggest that sections 8.5 and 8.6 should be rewritten to accept that there is no duty to trade.”*

Furthermore, having discussed the views with our members, we do not believe that there are members whether clerks or in private practice who believe that a duty to trade exists. We are concerned that our

<sup>8</sup> 22 January 2019

<sup>9</sup> Jack Cummins in *Licensing (Scotland) Act 2005* at section 153.02

earlier response regarding this important point appears not to have been considered or responded to. We would repeat that this section either needs rewritten to make it clear where any duty to trade exists or omitted in its entirety.

Paragraph 8.50: This section deals with the circumstances in which an application for transfer of a premises licence may be made by a person other than the licence holder. It omits the circumstance set out in section 34(3)(d), namely that such an application may be made where the business carried on in the licensed premises to which the licence relates is transferred (whether by sale or otherwise) to another person.

Paragraph 8.9: Should the reference not be to “premises” throughout?

Paragraph 8.10: Should the words “from its grant” not be added after the reference to 2 years as follows: “It has effect for such a period of not more than 2 years”

Paragraph 8.23: There is an additional apostrophe in “‘foreign’ offence.”

Paragraph 8.26: Schedule should have a capital for consistency.

Paragraph 8.32: Should this refer to licensing objectives?

Paragraph 8.33: There should be a specification included of the relevant Regulations. “section 19 of the 2005 Act” should refer to the Act. The reference should be to the “General Data Protection Regulation (EU) 2016/679.”

Paragraph 8.34: The relevant paragraphs should be specified when referring to “The use and limits of that power are described above.”

Paragraph 8.39: Some modification with regard to the sentence structure and the reference consistently to Licensing Board is required in relation to:

“Whereas the legislation does not set fees in respect of major variations. Fees payable in respect of major variations are to be determined by the relevant Licensing Board, and Boards are entitled to determine different fees in respect of different types of applications.

Paragraph 8.40: There is a reference to Regulations. If secondary legislation is to mean regulations, this should be consistent throughout the Guidance.

Paragraph 8.65: This reinforces our observations at paragraphs 8.5 and 8.6. In contrast to earlier licensing statutes, the Act does not distinguish between different types of licensing hours (in contrast, for example, with the Licensing (Scotland) Act 1976 which referred to “permitted hours” and “extended hours.”) If there



is no obligation to trade during the hours specified in paragraph 8.65, then, logically, there can be no duty to trade during any other hours provided for in the operating plan.

Paragraph 8.68: Should the reference to “policy objectives” not be to the licensing objectives.

Paragraph 8.69: Schedule should have a capital. The references to paragraphs should be specific.

Paragraph 8.74: Why are the words in bold?

Paragraph 8.76/8.78: There is no reference to a capital at schedule.

Paragraph 8.79 Why are Licensing Standards Officers now defined? This would be easier to include earlier in the Guidance.

Paragraphs 8.82/8.83: Schedule should appear in capitals.

Paragraph 8.84: We refer to our general comments at paragraphs 8.5 and 8.6 and the use of case law.

Paragraph 8.85: It would be helpful to spell out the use of any acronyms such as FIFA and UEFA.

## **9. Occasional Licence**

Paragraph 9.1: This refers to the same point as made at paragraph 4.1. Should the heading not read “occasional licences.”

Paragraph 9.3: The definitions section point would seem relevant here. Similarly, definitions may be relevant with regard to primary legislation where the relevant statute is going to be referred to more than once.

Paragraph 9.4: Is it not “section” or “paragraph” with regard to the mention of the Regulations? There is also repetition of the 2007 Regulation which could be avoided if there was a definitions section.

## **10. Personal Licence**

Paragraph 10.1: See the point made at paragraph 4.1. Should this chapter heading not refer to Personal Licences?

Paragraph 10.16: Again, why is there the use of bold? As we have indicated, this may tend to confuse.

Paragraph 10.34: This relates to endorsements on personal licences. In terms of section 85(2) of the Act, an endorsement “*expires at the end of the period of 5 years beginning with the date on which it is made.*” The draft Guidance states:

*“an endorsement remains on an individual's personal licence for five years at which point the licence holder can apply to have the endorsement removed.”*

This could infer that that an application to have the endorsement removed is essential to clear the licence. This should be clarified.

Paragraph 10.36: This section sets out duties which a Licensing Board has in connection with a personal licence. It omits the duty in terms of section 85(5) of the Act that specifies:

*“Where a Licensing Board receives an application under subsection (3) [i.e. a request to remove an expired endorsement from a personal licence] in relation to any personal licence, the Board must amend the licence so as to remove the endorsement from it.*

That duty should be added to the list in Paragraph 10.36.

## **11. Control of Order**

Paragraph 11.1: This is the point made in paragraph 4.1.

## **12. Sale and supply of alcohol to children and young persons**

Paragraph 12.1: This is the point in part made at paragraph 4.1.

Paragraph 12.3: The reference to legislation should be explicit. Does the sentence below add anything? The legislation says what it says.

*“The intention of the legislation is to ensure that licensed premises where children and young persons are to have access are safe and sensible environments where families can socialise safely together.”*

Paragraph 12.10: The reference to the PASS scheme should be explained where it first occurs.

Paragraph 12.18: Surely the defence is as stated regarding the age of the child and their appearance. The following sentence could be omitted or clarified. The use of exceptionally is not correct.

“The second limb of that defence would cover a case where the purchaser who was under 18 looked exceptionally old for their age.”

### **13. Other Offences**

Paragraph 13.1: This is the point referred to in paragraph 4.1.

### **14. Excluded and Exempt premises**

Paragraph 14.7: There is inconsistency with reference to the case law here. Would the term “jurisprudence” be relevant for those to whom the Guidance is directed?

## **Annex 6 – Guidance on members’ clubs**

This section should be reviewed. It fails to distinguish between:

(a) the benefits which certain clubs may enjoy if they comply with the Licensing (Clubs) (Scotland) Regulations 2007 (SSI 2007 No. 76) (“the Club Regulations”) and

(b) the licensing system within which clubs operate.

### **The licensing regime for clubs – Background**

All clubs are now licensed under the same regime as other licensed premises under the Licensing (Scotland) Act 2005 (2005 Act); however, those to which the Club Regulations apply enjoy certain relaxations under section 125 of the 2005 Act. (The most important of these is that they do not require to have a premises manager.) This is in contrast to the system under the Licensing (Scotland) Act 1976 Act where a members’ club was authorised to sell or supply alcohol through being registered by a Sheriff. To attain and maintain this registration, it was necessary for the constitution of such a club to comply with statutory requirements similar to those contained in the Club Regulations.

### **The licensing regime for clubs under the 2005 Act**

In order to be able to sell or supply alcohol, a members’ club is now under the same regime as other commercial licensed premises. In other words, a premises licence is required. The draft Guidance states:

*“If a club is considering making an application for a licence, then they should consider the most appropriate option, whether to apply for a full premises licence, or whether to apply for a members’ club licence under section 125 of the Act.”*

This is incorrect as there is no such thing as a *members’ club licence*. This section needs amended.

### **Operating Plans for clubs in practice**

During the transition period, when clubs were obtaining their premises licences, many assumed that the terms of a club’s existing constitution would be incorporated as conditions of its premises licence; however, with the exception of a few Licensing Board areas, this did not happen. If, therefore, a club holds a premises licence which does not restrict the sale of alcohol to members, or to guests of members, there is nothing to prevent a club selling to members of the public. While that would mean that club would no longer be complying with the Club Regulations, it would not be in breach of its operating plan. The draft Guidance does not appreciate that point and requires modification. We refer to the sections headed:

*Q - What about guests, will they be able to buy alcohol?*

*Q - Do guests need to be signed in at clubs?*

*Q - What happens if a club is hosting a wedding reception, do all guests still need to be signed in one by one or can arrangements be made in advance to allow quick entry to the club? and*

*Q - If a club wishes to host an event that involves tickets being sold to non-members, how do signing arrangements work under these circumstances?*

These are not technically accurate. In all cases, it will depend upon the terms of a club’s operating plan.

### **Q - Who will be licence holders?**

The answer states:

- *Premises licence – club itself or the committee*
- *Personal licence - premises manager or member of club committee or club – either is acceptable.*

The first bullet point is incorrect. Section 20 (1) of the 2005 Act specifies that an applicant for a premises licence may be;

*“Any person, other than an individual under the age of 18.”*

A committee is not a legal person.

**For further information, please contact:**

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