

# Institute of Licensing – Scottish Branch

---

## Minute of Meeting 2 November 2017 at TLT Offices Glasgow.

In attendance:

Council Members: Stephen McGowan (TLT Solicitors - Chair), Peter Clyde (West Dunbartonshire Council - Secretary), Sarah Graham (NHS), Inspector Susan Gillon & PC Gareth Griffiths, (Police Scotland), Douglas Campbell (Renfrewshire Council – Clerk), Morag Leck (Edinburgh Council – Clerk),

Also in attendance: Alex Kelly (Scottish Government), Denise Borrer (Scottish Government), Jim Sherval (NHS) Laura Mahon (AFS) Aidan Collins (AFS) and via conference call, Fiona Stewart (Aberdeenshire Council Clerk & SOLAR Chair).

Apologies: Mairi Millar, Neil Miller. Gordon Hunter (Edinburgh Council - Treasurer), Scott Blair (Advocate Terra Firma Chambers), Caroline Loudon (TLT Solicitors) , Janet Hood (Licensing Consultant)

### Welcome

Stephen welcomed everyone to the meeting and outlined the order of business. It was noted that the main aim of the meeting was to discuss the draft guidance section on overprovision.

### Previous Meeting

A discussion at the last meeting around the references in the previous guidance to 14 hours being a reasonable period of time for licensed premises to normally operate was continued.

*“In considering applications for licensed hours Boards may wish to consider applications for up to 14 hours as being reasonable ...”*

Many members of the group had enquired as to how this recommended 14 hour period had been arrived at. Stephen informed the group that this had first been noted within Sheriff Principle Gordon Nicholson’s evidence in relation to the Nicholson Report, which is the basis under which the Licensing (Scotland) 2005 Act was formed.

Given that there was no indication on the basis that this 14 hour reference had been arrived at, and having heard submissions on behalf of Police Scotland and also Aberdeenshire Licensing Board, the group decided to take no view on whether this reference should continue within the new guidance.

## Discussion on Draft Chapter 7 – Overprovision

Stephen reiterated how he proposed that the group considers its response to this consultation. It was agreed that we would follow the same procedure adopted the last time this group had met, to consider the draft section on Licensing Policy Statements; i.e. Stephen would lead the group through the comments and responses made and discussions on the salient points would be encouraged.

The group agreed with this approach.

### 7.1 The following changes are recommended:

- The spelling mistake in reference to the Town and Country Planning (Use Classes)(Scotland) Order 1997 is to be corrected.
- That there is no need for a general restatement of the law in relation to Overprovision.

There was then a debate regarding the use of the terms “exceptional cases” and whether an application for a premises licence which is located in an overprovision area should be refused outright under Section 23.

Following a debate on this matter there was a consensus that there was sufficient case law to support the view that an attempt to argue an exemption to the policy should be allowed, therefore the group would recommend that the reference to “exceptional cases” in this section should remain.

In response to comments from Aidan and others, there was a discussion on the impact of occasional licences in relation to the assessment of overprovision. Whilst the group noted the concerns in relation to the increase in the provision of alcohol via occasional licences, the Licensing Act does not allow for occasional licences to be considered in the overprovision assessment.

7.2 There was a discussion on paragraph 7.2, in particular the references to how a board might set their localities. Having heard from Jim Sherval and Peter Clyde the group gained a greater understanding of Data Zones (DZ) and Intermediate Data Zones (IDZ).

There then followed a discussion on how a board might identify certain localities that would be of interest to an assessment of overprovision, and a discussion on the role of the Chief Constable in this process.

Following this conversation, the group recommends that the reference to “hotspot(s)” is removed and replaced, where necessary with “areas”.

Laura raised the point that it is AFSs view that the identification of localities is key, and that Board Members are communicating to AFS that they are unclear on how to identify identities. Following a discussion on the benefits of a step by step guide the group comments that a step by step guide on how to identify localities is generally supported; however this guidance cannot be overly prescriptive.

7.3 In its consideration of paragraph 7.3, the group discussed the references under the heading “Other matters to be considered by the Licensing Board”. There was a divergence of views in relation to the references to the socio-economic makeup and the examples listed. The group noted that the listed examples were borrowed from the Gambling Act, however some in the group felt that

these references added no meaningful benefit to the consideration of overprovision, whilst others believed that these examples added something to the process. The group therefore notes the divergence of views and makes no recommendation on the inclusion of the listed bullet-points; however any examples listed should have relevance to the licensing objectives. Furthermore the group does recommend that the reference in this first sentence under this heading which starts “which the Board may deem fit ...” should be changed to reflect the language in the Act; i.e. “Board thinks fit ...”

In relation to the section of 7.3 which refers to capacity – the group recommends that the definitions of capacity which are found in Section 147 of the Act are included within this section.

7.4 Aidan raised a point in reference to the absence of certain parts of the old guidance which have been removed from the new draft, in particular, at Para 49 of the old guidance, under the heading “The Licensing Board should not take into account:” there was a sentence which read;

*“The need or demand for licensing premises in the locality. Commercial considerations are irrelevant to a policy which is designed to protect the wider public interest...”*

Following a discussion, it was agreed that it should be recommended that a form of wording should be re-inserted which reflects the above extract from the previous guidance.

7.5 The majority of the discussion on this section of the draft guidance related to the references to a dependable causal link in the previous guidance.

Having heard from Stephen, the group noted that the concept of a causal link is a legal principle which can be traced back to case law.

The group also considered the contents of a recent email from Scott Blair on the subject of a causal link, which is reproduced below for reference:

*“It is important to understand that any Act is interpreted by the Courts according to the principles of interpretation laid down in case law. In turn it is a legal principle that Parliament legislates knowing that the Courts will apply general legal principles to the legislation it passes. It is presumed, for example, that Parliament does not legislate contrary to established legal principles unless the Act clearly shows that intention. The 2005 Act makes no such provision.*

*I wholly agree with Janet. It has long been Scots licensing law and certainly before the 2005 Act that for a Board to make a finding that a harm will arise because of or in consequence of the sale of alcohol, there must exist a causal link between the alleged cause and the alleged harm. I have already provided many examples of this. There are many more.*

*The Courts have not departed from this approach under the 2005 Act and I would respectfully suggest that in line with my own views ( for what they may be worth), the Act has, unsurprisingly in light of the foregoing been interpreted by the Courts in line with the views I have expressed. You will not find the words "dependable causal link" in the Act but that is because Parliament legislates against the background of existing legal principle unless it states, in the Act, an express contrary view. I would add that the Act overrides Guidance and that is why as a matter of law the Courts will apply the causal link principle anyway whatever Guidance does or does not say.*

*Unless there is a causal link how can one rationally show that the sale of alcohol in premises in a locality causes harm A, B or C or all three? In the absence of such a link, decision making will be arbitrary and not rational (in the legal sense). Rationality in itself is a principle of interpretation and substantive law. The Courts will simply not countenance arbitrary decision making by public bodies. I would suggest that even if an Act was passed which appeared to permit decisions which lacked a rational basis you would almost certainly find the Courts looking at arguable breaches of the ECHR arising from the Act itself. A Scottish Act which breaches the ECHR is not law.*

*The criterion of dependability goes to the quality and nature of the evidence used to show the link. This injects a certain level ( amount, quality, credibility, reliability etc) of evidence before the link is shown. Causation must be per caselaw on a more than "but for" basis as licensing is a civil law matter, the proof of the link must be on a balance of probabilities , that is "more likely than not". Once you show that link and have policy based on it, then the policy becomes the evidential base for there being such a link in overprovision terms. Policy in itself becomes the "dependable causal link". The onus then falls on the applicant to show that their application should still be an exception.*

*I should also add that the Guidance is addressed to non -lawyers in the licensing process and who are not likely to know about the sort of legal material and concepts I have referenced. That is why it is important to set out in Guidance ideas which the law assumes lawyers will know, but not lay people. If the Guidance did not refer to dependable causal link the Courts will apply the principle anyway. However if is not stated in Guidance ( more likely to be read by lay people) many lay people would have no idea that it is a principle of our law and one which they will need to address if any claims of overprovision are to be evidenced and established on a legally sustainable basis and which would withstand scrutiny by the Courts.*

*I hope this is useful. I am sure it will be a productive day and am sorry I cannot be there in person- I will be there in "spirit."*

Following a fulsome discussion on the matter, the group agreed that the reference to causal link should remain. The group also advises that it may be advisable for the guidance to reflect the spirit of Scott's email, in particular the narration that where a policy is rational, lawful and evidential then the policy itself can become the dependable causal link. The group further recommends that the guidance should be carefully written to ensure that the principle of 'each application on its own merits' is clearly communicated, in order to manage the expectations of stakeholders.

The group then discussed the following paragraph;

***"it will not normally be appropriate** to arrive at a decision based on one particular factor alone; but rather consideration should be given as to whether aggregated information and evidence from a number of sources points compellingly towards a particular conclusion"*

It was felt that the words in bold should be reconsidered.

The group then went on to discuss the sentence "...need for sufficient nexus .." with the general view being that the removal of the word "nexus" be recommended.

7.6 in relation to the summary, the group recommends that the summary be reviewed to ensure that it is the best fit and that it is congruent and also the last 3 bullets of this section appear unnecessary. The group therefore recommends the removal of the final 3 bullets.