

## SPICe Briefing

# Air Weapons and Licensing (Scotland) Bill: Local Government Licensing

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This briefing deals with the local government licensing aspects of the Air Weapons and Licensing (Scotland) Bill. A separate SPICe briefing looks at the [licensing of air weapons](#).

The Bill proposes to make a number of changes to specific local authority licensing functions. The changes proposed to alcohol licensing under the Licensing (Scotland) Act 2005 include:

- criminalising the supply of alcohol to children and young people
- introducing a “fit and proper” test for licence applicants
- redefining “overprovision”

The Bill also proposes changes to some forms of licensing under the Civic Government (Scotland) Act. In relation to taxi and private hire car licensing, its provisions would harmonise, to a degree, the licensing regimes applying to these forms of transport by allowing licensing authorities to limit the number of private hire car licences and require testing of private hire car drivers. It proposes to remove the exemption from licensing for cars hired for 24 hours or more.

The Bill also contains provisions to tighten the regulation of scrap metal dealers to tackle metal theft. The key proposals are to ban cash payments for scrap metal and to remove the exemption from licensing currently enjoyed by businesses with a turnover exceeding £1 million.

In addition, the Bill would introduce a new licensing regime for sexual entertainment venues, based on the current framework applying to sex shops under the 1982 Act.



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## EXECUTIVE SUMMARY

The Air Weapons and Licensing (Scotland) Bill was introduced in the Scottish Parliament on 14 May 2014. Its provisions would create a new licensing regime for air weapons as well as reforming a number of local authorities' licensing functions. This briefing looks only at the parts of the Bill which deal with local authority licensing activities. A separate SPICe briefing considers the air weapons licensing proposals.

### Alcohol licensing

Licensing boards made up of local authority councillors carry out various alcohol licensing functions under the Licensing (Scotland) Act 2005. The 2005 Act contained a number of policy innovations, including:

- **licensing objectives** – section 4 of the 2005 Act sets down five specific objectives which are intended to guide all licensing decisions
- **licensing policy statements** – licensing boards are required to consult on and publish statements detailing their approach to their functions under the 2005 Act
- **mandatory conditions** – the Scottish Government can set mandatory conditions which apply to all alcohol licences. These can be used to take forward national policy priorities – for example, tackling irresponsible drinks promotions
- **overprovision** – licensing boards are required to assess whether there is “overprovision” of licenced premises in their areas. A finding of overprovision creates a presumption against issuing new licences
- **licensing standards officers** – this role is responsible for supervising compliance with the alcohol licensing regime and providing support to resolve complaints

The Bill proposes to make a number of changes to the current regime with the policy objectives of preserving public order, reducing crime and advancing public health. The key proposals are discussed below.

#### *Criminalising the supply of alcohol to children and young people*

While it is illegal to buy alcohol on behalf of a child, it is currently legal to buy alcohol to share with a child. The Bill proposes to close this loophole by making it an offence for a person aged 18 or over to share alcohol with a person under 18 in a public place (including private property which the drinkers have accessed illegally).

The proposal is designed to tackle outdoor drinking by groups of children and young people. However, it would also criminalise behaviour which some respondents to the Scottish Government's consultation (Scottish Government 2013a) characterised as “responsible”, such

as parents introducing children to alcohol at a family picnic. Other respondents called for the supply of alcohol to children to be illegal in any circumstances.

### *Introducing a “Fit and Proper” test*

The Bill would allow licensing boards to consider if an applicant (or those connected with an organisation) were “fit and proper” persons to hold an alcohol licence. The Policy Memorandum envisages that this would allow licensing boards to take into account a wider range of information about an applicant’s character when reaching a decision, including police intelligence. The proposals would also allow the consideration of spent convictions.

### *Changing the definition of “overprovision”*

The Bill would change the definition of overprovision to enable licensing boards to take into consideration licensed hours as well as the number and capacity of licensed premises. It would also clarify that the whole of a board’s area can be classed as a “locality” for the purposes of carrying out the assessment. A majority of those responding to the Scottish Government’s consultation (Scottish Government 2013a) welcomed these extensions: however, members of the licensed trade questioned their proportionality.

## **Licensing under the Civic Government (Scotland) Act 1982**

The Civic Government (Scotland) Act 1982 empowers “licensing authorities” (local authorities) to apply licensing regimes to subjects as diverse as taxis, window cleaners and knife dealers. The Bill makes a range of proposals specific to particular licensing regimes.

### *Taxi and private hire car licensing*

Licensing authorities are able to license both taxi and private hire cars as well as taxi and private hire car drivers. A taxi is a vehicle which can be hailed in the street whereas a private hire car must be pre-booked.

Similar licensing regimes apply to both types of transport, although the licensing requirements for taxis are more stringent. This reflects the greater risk to customers of making a decision on the spot to get into a taxi rather than being able to shop around for a private hire car. For example, licensing authorities are able to limit the number of taxi licences they issue (but only on the basis that there is no “unmet demand” for taxi services). They are also able to require taxi drivers to undergo training, including testing their knowledge of local road systems.

The policy objectives behind the Bill’s proposals are to improve consistency and reduce opportunities to circumvent the licensing regime. To take this forward, the Scottish Government proposes to harmonise, to a degree, certain aspects of the two regimes. It proposes to give licensing authorities a power to limit the number of private hire car licences issued (although on the basis of a different test – whether there is “overprovision of private hire car services in the locality”). It also proposes to enable local authorities to require private hire car drivers to undertake training.

Respondents to the Scottish Government’s consultation (Scottish Government 2013b) broadly supported these reforms. However, the responses in relation to limiting private hire car licences highlighted views which were more mixed, with some licensing authorities and some trade bodies supporting the proposal, while others opposed it.

The Bill's provisions would also remove what is known as the "contract exemption". This currently enables vehicles on hire for 24 hours or more to operate without a licence. Removing the exemption has the potential to bring a wide range of currently unlicensed services into the licensing regime, including hospital and school transport, chauffeur-driven cars, "party" buses and stretch limousines. Consultation respondents supported the removal of the exemption but a number of local authorities expressed concern about the impact of the proposal on the cost of contract services that they themselves used (e.g. to get children to school).

### *Scrap metal dealer licensing*

The 1982 Act also contains provisions to license scrap metal dealers. These include requirements for extensive record-keeping and for metal to be stored for 48 hours before it is "processed" (in other words, treated in a manner which would make it less identifiable). However, dealers with a turnover exceeding £1 million are currently exempt from the licensing regime. This exemption covers approximately half the dealers in Scotland.

The Scottish Government's key concern is to tackle metal theft. The provisions would ban scrap metal dealers from making payments in cash. It is argued that this will reduce the incentives to commit metal theft by removing a quick and anonymous way of generating money.

The provisions would also abolish the exemption system, remove the requirement to store metal for 48 hours and tighten record-keeping rules. The industry has argued (Scottish Government 2014d) that abolition of the exemption system must be coupled with removal of the metal storage requirements. This is because large dealers lack appropriate storage space and depend on a quick turnaround to ensure cashflow. The police and some licensing boards have argued for retention of the storage requirement in order to assist with the investigation of metal theft.

### *Theatre licensing*

Local authorities currently issue mandatory licences to theatres under the Theatres Act 1968. The Bill would repeal the licensing requirements in the 1968 Act and amend the 1982 Act to allow theatres to be given a public entertainment licence. The Scottish Government argues that this will improve consistency.

Public entertainment licences are part of the "optional" provisions of the 1982 Act. It will therefore be up to local authorities to decide whether they wish to license theatres. In addition, venues with an alcohol licence do not require a public entertainment licence for public entertainment taking place during licensed hours.

### *Sexual entertainment venue licensing*

Live sexual entertainment is not currently a licensed activity. The then Scottish Executive believed that it could be adequately regulated by attaching conditions to alcohol licences under the Licensing (Scotland) Act 2005. However, the judge in the "Brightcrew" court case<sup>1</sup> found that conditions attached under the 2005 Act could only be used to control matters relating to the sale of alcohol.

The Bill therefore contains proposals to create a licensing regime for live sexual entertainment based on the framework in place for sex shops under the 1982 Act. The Scottish Government considers this regime to have several advantages, including the ability for licensing authorities

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<sup>1</sup> This is discussed in more detail below.

to place a limit on the “appropriate” number of sexual entertainment venues in an area. That limit can be zero. However, traders have expressed concern that this provision may be used to close down what they consider to be legitimate businesses (Scottish Government 2014e).

The proposals are not intended to cover sexual entertainment provided without the knowledge of the premises “organiser”. Thus strip-o-gram type entertainment which has been organised independently by visitors to a venue will not be covered. An exemption from the licensing system is also proposed for venues hosting live sexual entertainment on not more than four occasions a year.

### *Miscellaneous provisions*

The Bill also contains provisions which are mainly designed to improve the regulatory environment for businesses. A key proposal is the creation of the role of “civic licensing standards officer” based on the job of “licensing standards officer” which appears in the Licensing (Scotland) Act 2005.

## INTRODUCTION

The Air Weapons and Licensing (Scotland) Bill is a Scottish Government bill, introduced in the Scottish Parliament on 14 May 2014 by Kenny MacAskill MSP. This briefing looks at the aspects of the Bill which deal with local authorities' licensing functions. A separate SPICe briefing considers the air weapons licensing proposals.

The Bill proposes changes to the way local authorities license alcohol, taxis and private hire vehicles, scrap metal dealers, theatres and venues hosting sexual entertainment. It also proposes reforms to the general licensing regime contained in the Civic Government (Scotland) Act 1982, which the Scottish Government argues will improve the regulatory environment for businesses.

The Scottish Parliament's Local Government and Regeneration Committee (henceforth the "Local Government Committee") has been designated the lead Committee at Stage 1. It issued a [call for evidence](#) on 1 July 2014 which has now closed. Responses are available on the [Committee's webpages](#).

## BACKGROUND

### LOCAL AUTHORITY LICENSING FUNCTIONS

Local authorities carry out a range of licensing functions under statutory powers. For example, the Civic Government (Scotland) Act 1982 gives local authorities powers to license street traders, window cleaners and late night caterers as well as a number of other activities. Local authorities also license dramatic performances under the Theatres Act 1968 and cinema performances under the Cinemas Act 1985.

One of local authorities' more high profile licensing functions is in relation to alcohol. Licensing boards are responsible for alcohol licensing decisions. They are made up of councillors who are appointed to sit on the board. Licensing boards are constituted as a separate legal entity to the local authority. Licensing boards also have licensing responsibilities under gambling legislation.

Local authorities are democratic bodies elected by local people. They are considered to bring a level of local control to the licensing systems they operate. Thus, the system is designed to allow one local authority to take a different view on a licensing issue from another local authority.

For example, the licensing of street traders is optional under the 1982 Act. It is therefore up to the local authority in question to decide whether a licensing regime would be beneficial in their area. Licensing boards can, through their licensing policy statements<sup>2</sup>, set local policy on the hours pubs open for and the number of licensed premises in a local area, as well as a number of other aspects of a licensed premises' operation. In doing so, the licensing board can reflect local views about the appropriate balance between the interests of pub users and local residents.

Local authorities are also responsible for coming to their own decisions about the nature of their legal responsibilities, or the interpretation of legislation in a particular area. Such decisions are open to legal challenge by other parties involved in the licensing system.

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<sup>2</sup> This is discussed in more detail below.

In this context, it is to be expected that different local authorities will reach different decisions. Rural local authorities will face different problems and pressures than urban local authorities. Local people in one area may be more concerned about the economic opportunities presented by a licensed activity while, in another area, people may be more concerned about the potential for a licensed activity to damage amenity. Providing for local authority control of licensing in certain areas is intended to provide a mechanism to deal with these tensions.

## **REGULATORY REFORM (SCOTLAND) ACT 2014**

The Regulatory Reform (Scotland) Act 2014 may impact on the licensing functions of local authorities. According to the Scottish Government, its purpose is to “improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment” (Policy Memorandum 2013, paragraph 2).

The 2014 Act gives the Scottish Government power to use subordinate legislation to encourage consistency in the exercise of a regulatory function (for example, by requiring compliance to be judged in the same way). The 2014 Act also creates a duty on regulators to exercise their functions in a manner designed to “contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so.”<sup>3</sup>

Local authorities are identified as “regulators” for the purposes of the 2014 Act. However, licensing boards are not. This means that the Act’s provisions can be applied to local authorities exercising licensing functions, for example, under the Civic Government (Scotland) Act 1982. The provisions are not currently relevant to the way alcohol licensing is operated.

In addition, the legislation empowers the Scottish Government to issue national codes of practice. The Scottish Government is in the process of developing a [Scottish Regulators’ Strategic Code of Practice](#). It provides guidance on how to interpret the sustainable economic growth duty. It also looks at the application of the “better regulation” principles of transparency, accountability, consistency, proportionality and regulation targeted only where needed.

## **ALCOHOL LICENSING**

### **THE CURRENT ALCOHOL LICENSING REGIME**

The Licensing (Scotland) Act 2005 created a new alcohol licensing system. The Criminal Justice and Licensing (Scotland) Act 2010 made minor amendments to the 2005 Act. The Alcohol etc. (Scotland) Act 2010 introduced a number of more substantive provisions.

The 2005 Act sets out licensing objectives, which form the basis of alcohol licensing decisions. They are laid out in section 4 of the 2005 Act as follows:

- preventing crime and disorder
- securing public safety
- preventing public nuisance
- protecting and improving public health

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<sup>3</sup> Regulatory Reform (Scotland) Act 2014, section 4.



- protecting children from harm

Licensing boards are responsible for setting policy and making decisions. In respect of a number of their functions, they must consult with local licensing forums representing those with an interest in licensing issues. Licensing standards officers are responsible for supervising compliance with the licensing regime in their local authority area.

The 2005 Act introduced a new system of licences: premises licences for any premises selling alcohol; personal licences for individuals authorising or supervising the sale of alcohol; and occasional licences for unlicensed premises where alcohol will be sold on a temporary basis. Examples of situations where occasional licences may be needed include a community hall being used as a wedding venue or a marquee at a local fair.

An application for a premises licence must contain an operating plan detailing how the premises will operate, including the hours during which alcohol will be sold. Anyone can object to the granting of a premises licence, and the chief constable has a specific role in providing reports in relation to criminal activity.

The 2005 Act permits venues which sell alcohol for consumption on the premises (such as pubs and nightclubs) to sell alcohol all day and night – i.e. for continuous periods of 24 hours or more. However, the legislation makes clear that a licence which would have such an effect should only be granted in “exceptional circumstances”<sup>4</sup>. In practice, it is rare for pubs to be licensed for more than 16 hours a day.

The 2005 Act only allows off-sales to be made between 10am and 10pm. Off-sales are sales of alcohol to be consumed off the premises, such as from supermarkets or delicatessens.

The 2005 Act contained a number of innovations in relation to licensing policy. These are discussed below.

## **Licensing policy statements**

Local licensing boards are currently required to produce statements every three years detailing how they will exercise their functions. Provisions contained in the Bill would change this to every five years. Licensing boards must consult local licensing forums and other interested parties in the preparation of such statements.

## **Overprovision**

The licensing policy statement must contain a statement as to whether there is “overprovision” of licensed premises in any locality within the licensing board’s area. Overprovision can relate to licensed premises generally or a particular type of premises (for instance late night opening premises). It is up to the licensing board to decide what constitutes a locality for the purposes of the assessment. Overprovision is one of the grounds on which a licensing board can refuse a licence.

The concept of overprovision existed in previous licensing legislation. However, decisions of the courts made it difficult for licensing boards to use their powers in any meaningful way. For example, they were only able to look at the number of licences issued rather than the way a premises was operating (e.g. no legal distinction was drawn between off sales at a specialist delicatessen and a large supermarket).

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<sup>4</sup> Licensing (Scotland) Act 2005, section 64.

## Antisocial behaviour reports

Under the 2005 Act, when an application for a new premises licence was received, the chief constable was required to provide reports detailing antisocial behaviour in the surrounding area. The Criminal Justice and Licensing (Scotland) Act 2010 amended this duty so that the chief constable was only required to provide a report where the licensing board requested it. The chief constable is still free to provide a report on his/her own initiative if s/he wishes to do so. Limiting the chief constable's duty in this manner was considered to be a better use of police resources.

## Mandatory conditions

The 2005 Act introduced the concept of national mandatory conditions which apply to all premises and occasional licences. These are set by Scottish Ministers and can be used to direct national policy on particular issues, such as requiring staff training or prohibiting irresponsible drinks promotions. Licensing boards may also attach local conditions to licences. These may be specific to the premises and/or may apply generally to a particular category of licence.

Where any conditions attached to a licence are breached, it is possible to apply for a review of the licence. This is carried out by the licensing board. The board can decide to vary, suspend or revoke the licence as a result of the review.

## Alcohol etc. (Scotland) Act 2010

The Alcohol etc. (Scotland) Act 2010 made further significant amendments to the licensing regime set out in the 2005 Act. These were primarily designed to tackle so called "irresponsible drinks promotions" which encouraged customers to purchase more alcohol than they may have initially intended. The provisions of the 2010 Act were generally implemented by additions to the mandatory licensing conditions.

The 2010 Act also empowered Scottish Ministers to set up a "social responsibility levy". This would be paid by certain licence holders (including public entertainment licence holders and late hours catering licence holders) to mitigate any negative impact their activities had on the licensing objectives.

The Scottish Government has since [announced](#) (Scottish Licensed Trade News 2012) that there are no plans to introduce a social responsibility levy until at least 2015. However, a "[public health supplement](#)" has been introduced. This increases the rateable value of large businesses (e.g. supermarkets) which sell both alcohol and tobacco products.

## Minimum pricing

"Minimum pricing" refers to the concept that alcohol cannot legally be sold below a certain price per unit. The possibility of using minimum pricing in Scotland was created by the Alcohol (Minimum Pricing) (Scotland) Act 2012. No minimum price per unit appears on the face of the legislation. Instead, Scottish Ministers are able to set a minimum unit price using subordinate legislation. The Scottish Government has stated that its preferred minimum unit price is 50p per unit (Scottish Government online).

The 2012 Act has yet to be brought fully into force. It is currently the subject of court action by the Scotch Whisky Association (among others). The Association alleges that the Act breaches European Union law on free trade between member states and is therefore outwith the competence of the Scottish Parliament. Scotland's senior court, the Court of Session, referred

the case to the European Court of Justice in May 2014. The European Court of Justice issues binding judgments on the interpretation of European Union law. Once the European Court of Justice has issued a preliminary ruling, the case will return to the Court of Session for a final decision. The timing of this is likely to be late 2015/early 2016 (Scottish Government 2014a).

## **Proposed Alcohol (Public Health and Criminal Justice) (Scotland) Bill**

Dr Richard Simpson MSP has secured the right to introduce a [members' bill](#) designed to tackle problem drinking. Proposals include: restrictions on price promotions and advertising; public education; community involvement in decisions to renew licences; and various criminal justice measures designed to deal more effectively with alcohol-fuelled crime.

## **ALCOHOL STATISTICS**

### **Societal costs of alcohol misuse**

As part of its strategy to change Scotland's relationship with alcohol, the Scottish Government commissioned research, published in 2007, to estimate the cost to society of alcohol misuse. The research took into account health, social care and crime costs as well as lost productivity and quality of life due to alcohol-related factors. It also considered what the researchers called "intangible costs" such as pain and grief. Given the difficulty in measuring all these factors, the final figure should be considered as indicative only. The researchers estimated the costs to society of alcohol misuse in Scotland to be between £2,883 million and £5,396 million per year (uprated to 2014/15 prices<sup>5</sup>).

### **Alcohol consumption**

The table below describes the volume of pure alcohol sold per adult (16 years or over) in Scotland between 2002 and 2012. The figures represent sales by most alcohol retailers in the period, although a small number of retailers do not provide data. Sales data are considered to be a more accurate source of information on alcohol consumption as survey respondents are thought to underestimate consumption when self-reporting.

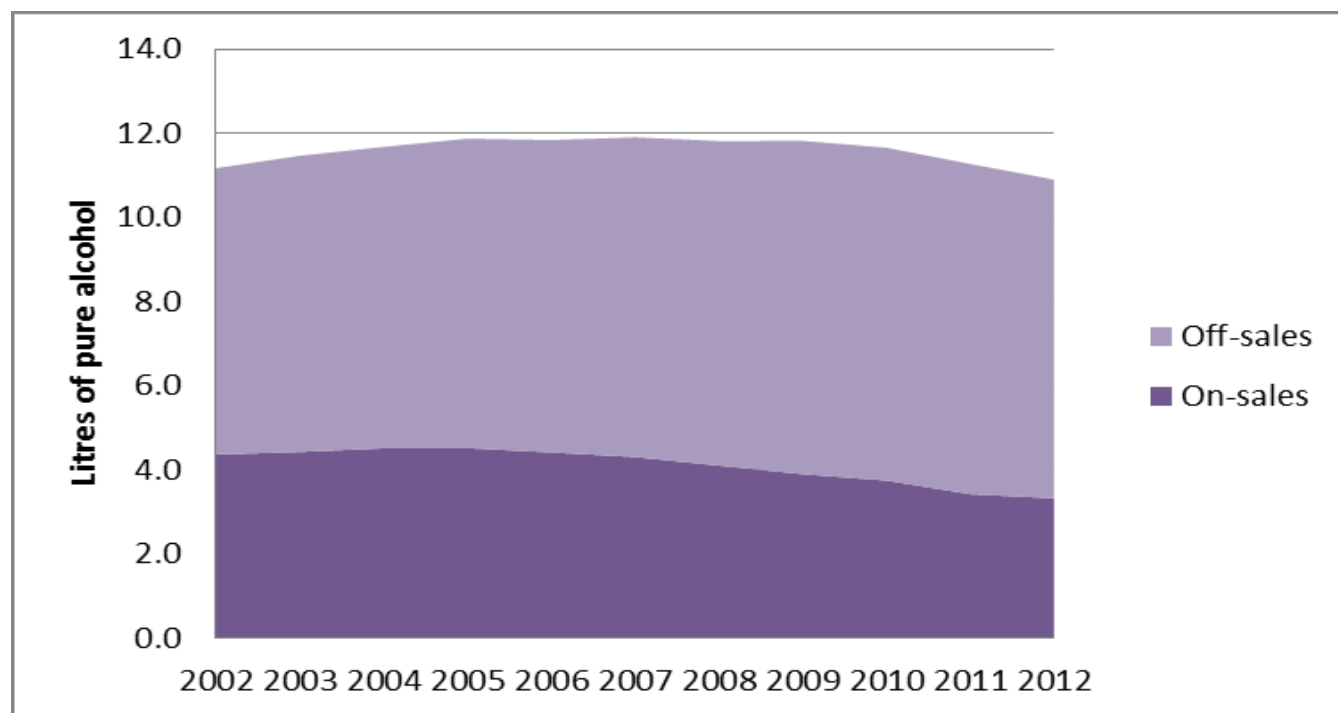
Most alcohol is purchased to be consumed off the premises ("off-sales") from places such as supermarkets and off-licences, rather than to be consumed on the premises ("on-sales") from places such as pubs and restaurants. There has been a downwards trend in the volume of alcohol sold in on-sales premises since 2006. The trend in off-sales purchases is more mixed.

It is worth highlighting that combined sales are still sufficient in each year for every adult in Scotland to consume more than the recommended weekly limit for a man (21 units) every week.

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<sup>5</sup> Real terms values are calculated using the latest GDP deflators produced by Her Majesty's Treasury – see <https://www.gov.uk/government/collections/gdp-deflators-at-market-prices-and-money-gdp>.

**Figure 1: Litres of pure alcohol sold by adult (16 years or over) in Scotland between 2002 and 2012**



Source: NHS Health Scotland 2013

## Licensing activity

The Scottish Government collects statistics on licensing activity, including how many alcohol-related licences are in place, how many new licences are applied for and the outcomes of licence reviews. These figures are summarised in the tables below. Note that on-sales licences may also permit off-sales, for example where a pub is able to sell bottles of wine to take away.

**Table 1: Alcohol licences in force 2012 and 2013**

	On 31 March 2012	On 31 March 2013
On sale licences	11,512	11,363
Off sale licence only	4,867	4,874
<b>TOTAL</b>	<b>16,379</b>	<b>16,237</b>

Source: Scottish Government 2014b, 2014c

**Table 2: Alcohol licence applications and outcome in 2011-12 and 2012-13**

	Applications received:	
	During 2011-12	During 2012-13
On sale	234	219
Off sale only	207	172
<b>TOTAL</b>	<b>441</b>	<b>391</b>
Applications refused	21	12
Applications granted	347	332
<b>TOTAL</b>	<b>368</b>	<b>344</b>

Source: Scottish Government 2014b, 2014c

**Table 3: Outcomes of applications for review of premises licences in 2011-12 and 2012-13**

Outcomes of applications for reviews of premises licences received:		
	During 2011-12	During 2012-13
Written warning	121	137
Variation	56	44
Suspension	113	80
Revocation	40	47
No action	113	120
<b>TOTAL</b>	<b>443</b>	<b>428</b>

Source: Scottish Government 2014b, 2014c

## THE PROPOSALS IN THE BILL

The Scottish Government [consulted](#) on proposed changes to alcohol licensing legislation in 2012 (2012a). A [summary of the consultation responses](#) was published in 2013 (2013a). Individual responses are not yet available on the Scottish Government's website.

Not all the proposals consulted on have been included in the Bill (although, broadly speaking, those with clear support have been taken forward). In particular, the following suggestions have been dropped:

- proposals to enable closure of licenced premises around places of anticipated disorder, such as particular football fixtures
- proposals to tighten the licensing regime which applies to members' clubs. Members clubs (such as local sports clubs and other community organisations) currently enjoy a more lenient licensing regime which some mainstream premises argue gives them an unfair advantage
- proposals to clamp down on sales dispatched from England (primarily internet sales) which do not comply with Scottish licensing law (e.g. in relation to price promotions on alcohol)

In addition, not all the provisions which appear in the Bill were included in the consultation. However, in most cases, the new provisions originated from additional suggestions made by consultation respondents.

The Scottish Government considers the Bill's proposals in relation to alcohol licensing to pursue the policy objectives of reducing crime and preserving public order, as well as advancing public health. It also considers that the proposals improve the business environment by reducing unnecessary regulation (PM, paragraphs 2 and 3). The key proposal is to criminalise the supply of alcohol to those under the age of 18 who are drinking in a public place. The other changes are technical and are designed to improve the regulatory process (PM paragraph 8).

## **Criminalising the supply of alcohol to children and young people**

The law as it currently stands makes it a criminal offence for a child (under 16 years old) or a young person (16 and 17 years old) to buy or attempt to buy alcohol. It is also an offence to buy alcohol on behalf of a child or young person, or to supply alcohol to a child or young person in a licensed premises. However, it is still within the law for an adult to buy alcohol for themselves and then to share it with children and young people, as long as the alcohol is not consumed on licensed premises.

This might happen when, for example, parents share alcohol with children or young people at a family gathering (e.g. a private barbeque or birthday party). It can also happen when groups gather to drink in public places. Where the ages of those in the group include those who are 18 or over and those who are under 18, it is possible for the adults to purchase alcohol and share it with the younger members of the group.

Police have powers under the Crime and Punishment (Scotland) Act 1997 to confiscate alcohol from those under the age of 18 where they are drinking in a public place. They also have the power to confiscate alcohol from those who are 18 or over in the same circumstances, where it is suspected that they are sharing alcohol with under 18s. Nevertheless, it is currently legal for those in the group who are 18 or over to purchase more alcohol in these circumstances. The police argue that this undermines their attempts to deal with the situation.

It should also be noted that many local authorities have passed bylaws that make it illegal to drink in public places, regardless of age. However, the Scottish Government argues that "these do not apply across all of Scotland and they operate differently in different areas" (PM paragraph 128).

Section 52 of the Bill proposes to create new offences of supplying alcohol to a child or young person. The offences do not apply to alcohol consumed other than in a public place, or for the purposes of religious worship. This means that it will still be possible for an adult to share alcohol with a child or young person in private, such as in the family home.

A public place is defined in the Bill as:

- any premises on which alcohol is sold
- any place to which the public have access at the time (including places where an entry fee is charged)
- any place to which the public do not have access, but to which the child or young person has unlawfully gained access

## *Consultation*

This proposal received widespread support during the Scottish Government's consultation, with 94 responses in favour, compared with six against and 22 providing no response or an equivocal response. Those against the proposal considered it to be over-zealous, and the risk of discouraging responsible drinking was highlighted (Scottish Government 2013).

### **“Fit and proper” test**

The Bill proposes to introduce a “fit and proper” test (see sections 43 to 48). This allows licensing boards to decide to refuse a premise or personal licence where it does not consider the applicant to be a “fit and proper person” to be the holder of such a licence. Where the applicant is a business or other organisation, the test applies to those connected with the organisation.

A fit and proper test existed in the Licensing (Scotland) Act 1976 but was not brought into the Licensing (Scotland) Act 2005. Fit and proper tests also exist in other licensing regimes, including those under the Civic Government (Scotland) Act 1982.

The test will apply to:

- **premises licence applications** – note that the applicant could be the owner or an employee. The applicant could also be an individual, partnership or company
- **premises licence transfers** – such as where a licensed premises is sold and a new person applies to take over the licence
- **premises licence reviews** – where the licence holder has been referred to the licensing board for breach of licensing conditions or concerns have been raised on other grounds relevant to the licensing objectives
- **personal licence applications and renewals**
- **reconsideration of personal licences due to notification of a criminal conviction**
- **personal licence reviews** – where a finding has been made in a hearing relating to a premises licence review that a personal licence holder has “acted in a manner inconsistent with the licensing objectives”

The policy rationale behind introducing a fit and proper test to so many aspects of the 2005 Act is to ensure that, at every point where suitability to hold a licence is being considered, the fit and proper person test can be applied.

Where a licensing board refuses to grant or renew a licence (or revokes one), the applicant can appeal to the sheriff court.

## *Police intelligence*

Importantly, the provisions also propose to introduce new sources of information which a licensing board can consider when deciding whether an applicant is fit and proper. At present, a licensing board is able to look at “relevant” and “foreign” convictions when considering an application. The board can also consider whether granting the application would be consistent with the licensing objectives. Relevant offences are specific offences prescribed in subordinate

legislation and generally require violent or dishonest behaviour. Foreign offences are similarly grave offences committed in foreign countries.

Under the Bill's proposals, a licensing board will also be able to consider information which "the chief constable considers may be relevant to consideration by the Board of the application". The Policy Memorandum envisages that this may include police intelligence and information on associations with people deemed to be unsuitable. Unlike convictions, such allegations would not have been evidenced to a standard accepted by the courts.

### *Information from licensing standards officers*

In addition, the Bill proposes to allow licensing standards officers to receive notification of all personal licence applications. The Licensing Standard Officer is then empowered to respond to the licensing board with any information they consider relevant to the application. This could include information about a person's previous employers or performance.

### *Spent convictions*

Currently, a licensing board is only able to consider relevant or foreign convictions which are not "spent" for the purposes of the Rehabilitation of Offenders Act 1974. Under the 1974 Act, convictions can be considered spent after a certain amount of time has passed since conviction. More serious offences (those where an individual was sentenced a term exceeding two and half years in prison) are never spent. Where a conviction is spent, a person would not usually have to reveal it if asked about their criminal record.

Certain jobs, such as lawyers, police, healthcare workers and teachers, are exempt from the provisions of the 1974 Act, meaning that people applying for those roles do have to declare convictions which would otherwise be considered spent. Applicants for taxi, private hire car and gambling licences are also exempt from the provisions of the 1974 Act.

Section 51 of the Bill proposes to remove the restriction on licensing boards considering spent relevant or foreign convictions when deciding on licence applications. The Scottish Government argues that such a change is necessary in order to prevent unsuitable people from working in licensed premises (Policy Memorandum, paragraph 140). The Scottish Government also notes that further changes to subordinate legislation will be necessary to make this proposal effective (Policy Memorandum, paragraph 141)

### *Consultation*

More than two thirds of respondents to the Scottish Government's consultation agreed that a fit and proper person test should be re-introduced (Scottish Government 2013). However, there were concerns that new powers in this area could lead to licensing boards refusing licences on the basis of poor quality evidence.

## **Overprovision**

As noted above, overprovision is a tool by which a licensing board can prevent new licensed premises opening in areas where it considers there to be too many licensed premises already in operation. This can be useful from a public order perspective, in that rowdy behaviour, noise and other nuisances can be linked to areas where there is a high density of outlets selling alcohol (e.g. disturbances at pub closing time). It is also useful from a public health perspective, in that easy access to alcohol can be associated with increased levels of alcohol-related harm.



Overprovision is not defined in detail in the 2005 Act. Instead, licensing boards must have regard to the number and capacity of premises in the locality and must consult health boards and the chief constable when assessing overprovision. The lack of definition arguably gives licensing boards freedom to develop their approach. However, it may also create uncertainty and a fear that licensing board decisions will be overturned by the courts.

As part of its “Monitoring and Evaluating Scotland’s Alcohol Strategy”, NHS Scotland commissioned a three year evaluation of the impact of the Licensing (Scotland) Act 2005 (MacGregor A. et al 2013). The researchers carried out a baseline survey in 2010 and a follow-up survey in 2013. Licensing boards’ approach to overprovision was one of the areas studied.

The research highlighted that boards found the concepts of overprovision and capacity difficult to define and measure. There was also a tension between health considerations (i.e. a desire to limit access to alcohol due to concerns about its impact on health) and economic considerations (i.e. a desire to provide economic opportunities in an area by approving licence applications which would generate jobs). Researchers recommended that the Scottish Government provides more guidance and support in relation to overprovision<sup>6</sup>.

Researchers also found a general view among licensing standards officers and board members that overprovision was not a significant issue. This was thought to relate in part to the impact of economic downturn, which had resulted in a number of licensed premises closing down<sup>7</sup>. However, it is important to note that the research looked at attitudes not long after the 2005 Act had been implemented (implementation was in September 2009). It may be that the most recent round of alcohol policy statements (from September 2013) have looked at the issue in more detail.

Section 54 of the Bill proposes to add to the matters that licensing boards may have regard to when considering overprovision. Under the proposal, the licensing hours of licensed premises (i.e. the times during which alcohol can be sold) may form part of licensing boards’ considerations, alongside the number and capacity of licensed premises. This list is not intended to be prescriptive.

Currently, licensing boards are required to consider whether there is overprovision in any “locality” in their area. The proposed section 54 would also clarify that a licensing board can determine that the whole of the board’s area is a “locality” for the purpose of determining overprovision.

### *Consultation*

A majority of respondents (Scottish Government 2013a) supported both the proposal to further define overprovision and the proposal to clarify the meaning of locality. However, concern was expressed that small changes to capacity would be blocked on the basis of overprovision if an extended definition was adopted. This, in turn, could discourage investment.

A key consideration for those supporting clarification of the meaning of “locality” was that health-related data were generally available on a local authority-wide basis so it made sense to look at overprovision at this level. Those in opposition argued that it was not possible to give meaningful consideration to overprovision over such a large area.

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<sup>6</sup> See MacGregor A. et al 2013, 3.5.1.

<sup>7</sup> Ibid.

## Other proposals

The other proposals make technical changes to the Licensing (Scotland) Act 2005. The Scottish Government argues that a number of them will improve the regulatory environment by reducing the burdens on business. Such proposals include:

- enabling licensing boards to decide whether it is appropriate to hold a hearing when they are notified of a relevant or foreign offence in relation to a personal licence (sections 49 and 50)
- requiring licensing boards to produce annual reports detailing their expenditure on alcohol licensing functions as well as the income raised from licensing fees (section 55)
- extending the period available to a personal licence holder to renew their licence before the expiry of the previous licence (section 57)

The Bill also proposes to require licensing boards to acknowledge applications and process them within nine months (of the date a complete application is received). Where a licensing board fails to process an application within nine months, section 58 would require that the licence is deemed to be granted, unless the sheriff has extended the time period available for consideration.

## LICENSING UNDER THE CIVIC GOVERNMENT (SCOTLAND) ACT 1982

### BACKGROUND

The remaining licensing provisions in the Bill deal with licensing under the Civic Government (Scotland) Act 1982. The 1982 Act contains licensing regimes applying to subjects as diverse as taxis, window cleaners and knife dealers.

Schedule 1 to the 1982 Act sets down the general administrative requirements applying to licences. Schedule 1 also contains what is known as the “fit and proper” test. Licensing authorities (local authorities) are instructed not to issue licences to anyone who “is not a fit and proper person to be the holder of the licence”. This gives licensing authorities wide discretion to exclude unsuitable people, although the extent of this discretion has been limited by case law (decisions made by judges in particular cases).

Licensing authorities can attach standard or specific conditions to the licences they issue under the 1982 Act. In addition, Scottish Ministers can, by regulation, set “mandatory conditions” which apply to all licences of a particular type.

The provisions covering taxi/private hire car licensing and public entertainment licensing are part of what are known as the “optional provisions” of the 1982 Act. This is because a local authority must “opt-in” to these licensing regimes by passing a resolution before they can have effect. A resolution can clarify the scope of the licensed activity and offer exemptions and exceptions, creating wide local discretion. If a positive decision to license is not made by the local authority, then the activity will remain unregulated.

# TAXI AND PRIVATE HIRE CAR LICENSING

## The current taxi and private hire car licensing regime

### *Definitions*

A taxi is a vehicle which is available for hire on a “then and there” basis (i.e. it can be hailed in the street). It often takes the form of a “black cab” or “Hackney cab” rather than a normal car. A private hire car must be pre-booked. The phrase “hire car” is used in this briefing when discussing issues which affect both taxis and private hire cars.

It used to be that taxis were considered to have a significant business advantage by being able to accept then and there bookings. However, this advantage has been eroded by the widespread use of mobile phones. It is now thought that most journeys (including journeys by taxi) are in fact pre-booked.

### *Hire car licensing*

The main requirements of the 1982 Act in relation to taxi/private hire car licensing are discussed below. The Scottish Government has issued [best practice guidance](#) (2012b) to licensing authorities regarding their taxi and private hire car licensing functions.

The current licensing regime defines a hire car as “motor vehicle with a driver [...] which is, with a view to profit, available for hire by the public for personal conveyance” (section 23(2) of the 1982 Act). Vehicles which can carry more than eight people are defined as public service vehicles (e.g. buses) and covered by separate legislation.

The definition can cause problems in relation to more recent developments in the hire car market. For example, pedicabs (cycle rickshaws) are not covered. There are also arguments around the most appropriate way to licence special event vehicles (e.g. stretch limousines or party fire engines). Some licensing authorities cover these under their private hire car regimes. However, others are reluctant to do so due to the difficulty in agreeing appropriate safety and testing requirements. Where alcohol is made available as part of the hire, an alcohol premises licence will be needed.

Technological developments in relation to mobile phone booking applications (“apps”) may also create future challenges for the licensing regime. These can allow customers to bypass a requirement to physically hail a taxi in the street or to make a telephone booking, thus blurring the boundaries between the two types of service. Some may also work to provide a fare calculated by distance for the journey without the need for a traditional taxi-meter.

### *Taxi/private hire car licences*

Any vehicle being operated as a taxi must have a “taxi licence” issued by the licensing authority. Such a vehicle must be suitable in design for use as a taxi, must meet safety requirements and must be appropriately insured. Similarly, private hire cars must have a “private hire car licence” issued by the licensing authority. Parallel requirements in relation to design, safety and insurance exist.

The 1982 Act gives licensing authorities the express power to limit the number of licences issued for taxis, but only if “they are satisfied that there is no significant demand for the services of taxis in their area which is unmet”. There are currently no powers to limit the number of

private hire car licences which are issued, although the Bill proposes to change this. Note that local authorities have discretion in this area so that they can choose not to impose a limit if they feel that this is the best way to meet local needs.

The power to limit the number of licences issued for taxis has been controversial. It was the subject of an [Office of Fair Trading investigation](#) in 2003, which recommended its abolition on the basis that it was a constraint to business which limited the service available to the public. However, this was not accepted by the [Westminster Parliament](#) (House of Commons Transport Committee 2003) or the then [Scottish Executive](#) (Scottish Executive 2004). Both organisations criticised the data on which the Office of Fair Trading based its findings.

Scottish Government guidance (2012b) on hire car licensing offers advice on how a licensing authority should assess whether there is unmet demand. It highlights the importance of measuring different types of demand, including waiting times on the street, waiting times for telephone bookings and the views of those who do not use taxis. It also argues that peak time demand (e.g. at pub closing time or morning rush hour) is a relevant consideration. It recommends consulting with those with a wider interest in taxi availability, such as local businesses.

### *Taxi/private hire car driver's licences*

The driver of a taxi must also hold a "taxi driver's licence". In order to qualify the driver must have held a driver's licence for the 12 months immediately previously and may also be required to undergo a medical examination. Drivers of private hire cars must also hold a "private hire car driver's licence" and meet the same requirements. In addition, holders of taxi drivers' licences may also be required to take other tests relating to the operation of taxis, including a test on their knowledge of the road systems in the local area. Again, the local authority has discretion as to whether to apply these tests.

The holder of a taxi driver's licence does not need a private hire car driver's licence to operate a private hire car. However, the holder of a private hire car driver's licence is not automatically able to drive a taxi.

### *Fares*

The 1982 Act regulates the fares which may be charged by taxis. There is no fare regulation for private hire vehicles, except where private hire cars are fitted with a taximeter. These fares must be within the scales set by the licensing authority. Licensing authorities must set fare scales, and these represent the **maximum** charges a taxi can make for the journey. Licensing authorities must review fare scales at least every 18 months and must consult with taxi drivers and/or organisations which represent them. After fixing scales, the licensing authority must give notice to taxi operators in its area. It must also advertise the scale more generally.

Taxi operators or their representative organisations may appeal to the Traffic Commissioner in relation to the fare scales. This has the effect of suspending the fare scale until the appeal is concluded.

### **Licensing of taxi/private hire car booking offices**

The Civic Government (Scotland) Act 1982 (Licensing of Booking Offices) Order 2009 (SSI 2009/145) requires the licensing of offices used to take bookings for taxis and/or private hire cars. Those operating booking offices are required to keep a record of each booking, including the registration number of the vehicle and the name of the driver undertaking the journey.

It is a mandatory condition of the booking office licence to take all reasonable steps to ensure that any bookings received use only licenced drivers and vehicles. In addition to the mandatory licensing conditions, licensing authorities may attach, to any grant or renewal of a licence, such reasonable conditions as it considers appropriate.

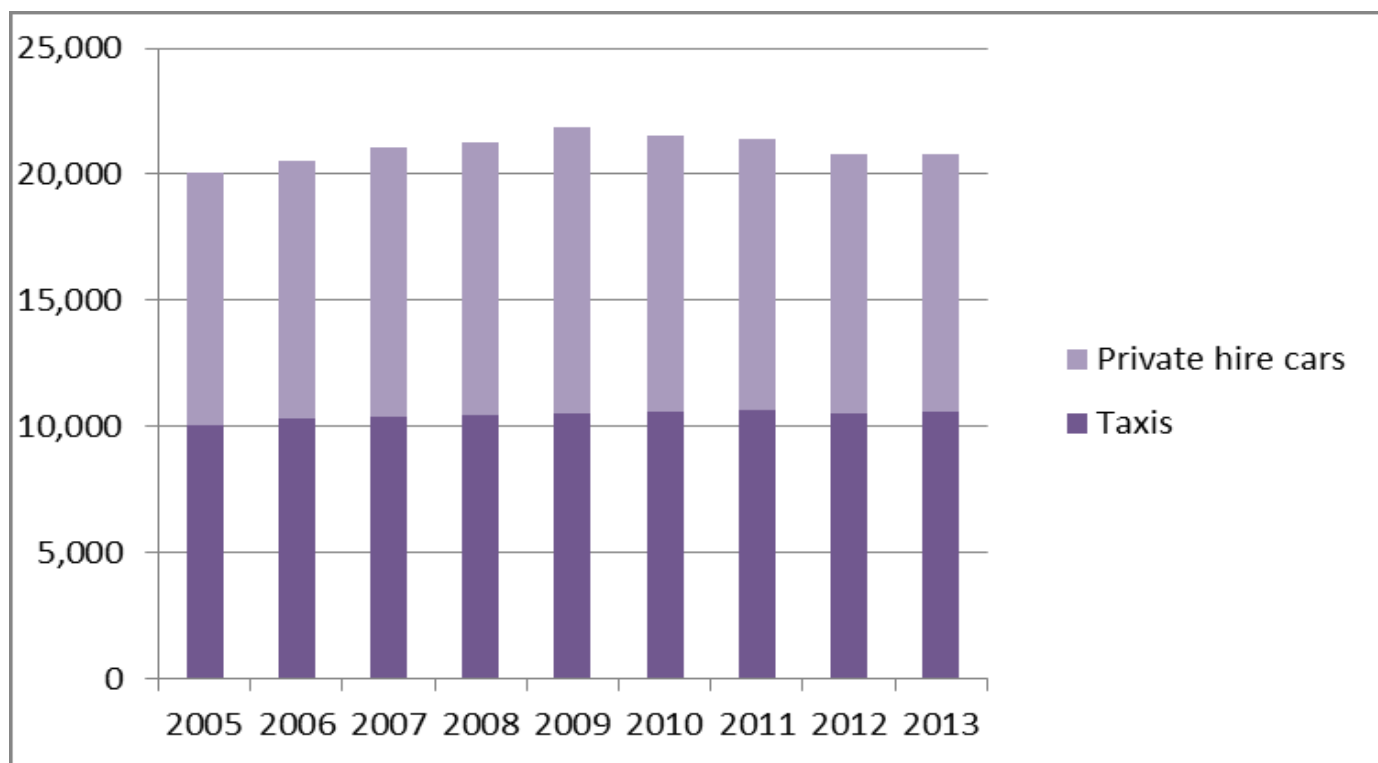
The requirements do not apply to booking offices dealing with three or fewer vehicles. In addition, only those booking offices operating from physical premises are covered.

The Scottish Government believes that regulation is necessary in order to tackle “serious organised crime”. More information is available from the press release “[Rogue taxi owner clampdown](#)” (Scottish Government 2009).

## Hire car statistics

Figure 2 provides information on the number of taxi and private car hire licences in Scotland from 2005 to 2013. The number of taxi licences has remained broadly steady. There were slight increases between 2005 and 2011, followed by a slight decrease in 2012. The number of private car hire licences show a more mixed picture, with numbers peaking in 2009 and then tailing off again.

**Figure 2: Numbers of taxi and private hire car licences in Scotland 2005-2013**



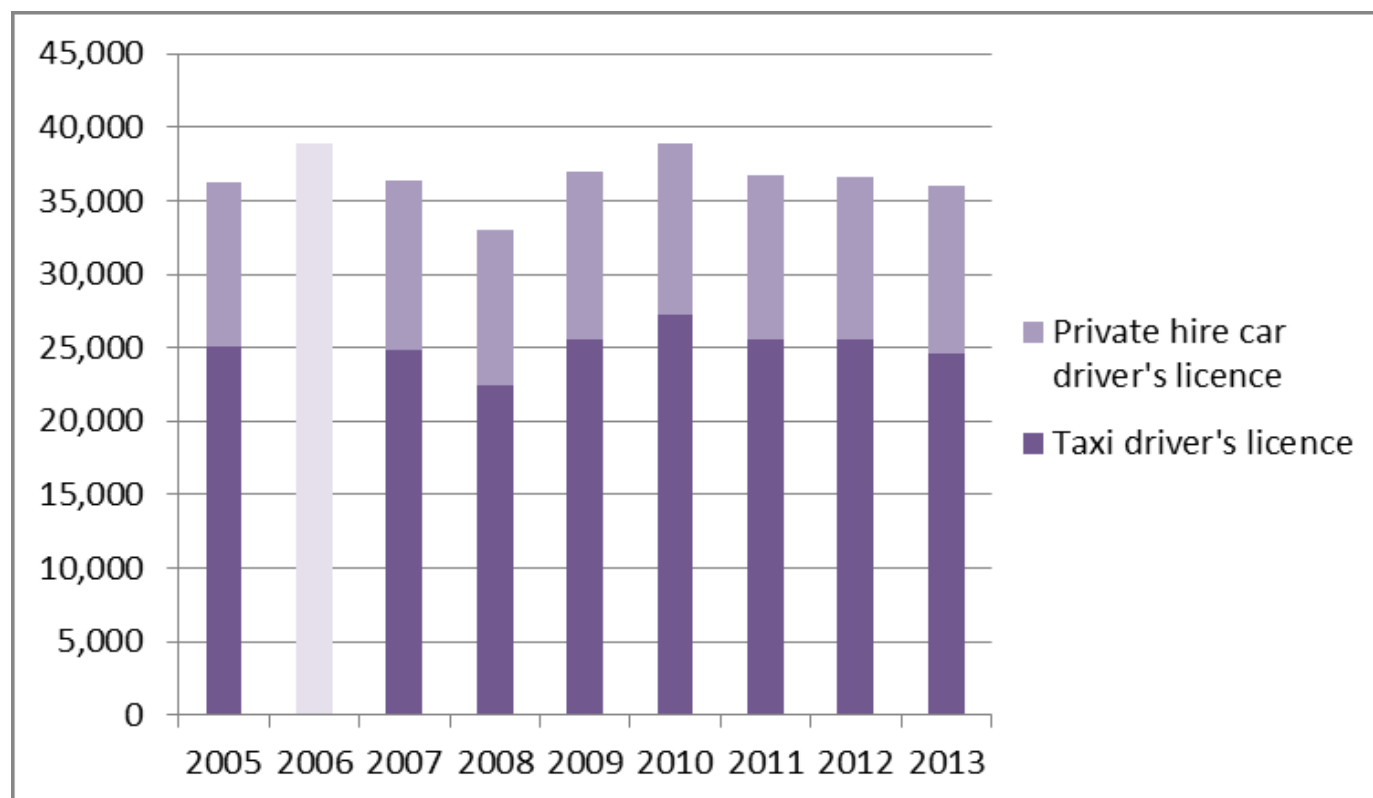
Source: Transport Scotland 2010-2013; Scottish Government 2005-2009

Figure 3 provides information on the number of taxi and private hire car driver’s licences in place in Scotland between 2005 and 2013. Note that some local authorities were unable to provide a breakdown between taxi drivers’ licences and private hire car drivers’ licences in 2006. Therefore, only the total number of licences can be provided for this year.

There is a mixed picture for the number of both types of licence over the years considered, although both peak in 2010. There are roughly twice as many taxi drivers’ licences in place as private hire car drivers’ licences. In addition, there are slightly less than double the number of

drivers in comparison to hire cars available. In 2013, the precise ratio of drivers to cars was 1.7 to 1.

**Figure 3: Numbers of taxi and private hire car driver's licences in Scotland 2005-2013**



Source: Transport Scotland 2010-2013; Scottish Government 2005-2009

\*Note that some local authorities were not able to provide a breakdown between taxi and private hire car driver's licences in 2006, so only the total figure is provided.

## The proposals in the Bill

The Scottish Government [consulted](#) on the proposals contained in the Bill in 2012 (2012c). A [summary of consultation responses](#) was published in 2013 (2013b). The information provided by those who responded (where permission was given to publish this) is also available on the Scottish Government's [website](#).

The Scottish Government states that the proposals in the Bill were driven by two key concerns (Policy Memorandum, paragraphs 192 and 193):

- addressing variability in licence administration (although the importance of flexibility to address local concerns is also emphasised)
- tightening regulation so that opportunities for circumventing the licensing regime are reduced

The Scottish Government also rejected from the outset (Scottish Government, 2012c, paragraphs 18-20) the idea of harmonising taxi and private hire car licensing so that one regime applied to both types of hire car. This was primarily due to logistical concerns that such a huge influx of vehicles able to be hailed on the street would put an unmanageable strain on licensing services and road infrastructure. There could also be impacts on the accessibility of vehicles (for disabled passengers) and prices.

The proposals in the Bill are part of a wider package of work that includes consideration of new mandatory conditions for all hire car licences and updated guidance. Changes to the booking office licensing regime are also planned, including exploring options to extend the regime to include more booking offices and consideration of expanding the existing mandatory conditions (Scottish Government 2014a). These will be taken forward without the need for primary legislation.

### *Limiting the number of private hire vehicles*

Section 60 of the Bill would give licensing authorities the power to limit the number of private hire car licences issued in their area. As with the existing power for taxis, licensing authorities have discretion as to whether to use it.

Licensing authorities can choose to limit the number of licences issued where there is “overprovision of private hire car services in the locality”. The terminology mirrors that used in alcohol licensing. Licensing authorities can treat a particular part of their area – or the whole licensing area – as a locality.

The Scottish Government has chosen not to replicate the requirement to show that there is no significant unmet demand before limiting private hire car licences. The Scottish Government argues that the tests used to measure unmet demand would not be suitable for private hire cars (Scottish Government 2014a). Respondents to the consultation also noted that surveys measuring unmet demand for taxis can be complex and expensive (Scottish Government 2013b).

Instead, the licensing authority must be satisfied that there will be overprovision, having regard to:

- the number of private hire cars operating in the locality, and
- the demand for private hire car services in the locality

The Scottish Government argues that providing for a power to limit the number of private hire car licences improves consistency between the two hire car regimes. However, it should be noted that the test put in place for private hire cars is different to the test which applies to taxis and is, arguably, easier to satisfy.

A majority of respondents to the Scottish Government consultation (2013b) supported introducing a power to limit the number of private hire car licences. However, views were mixed across licensing authorities and trade respondents, with representatives in each area supporting and opposing the proposal.

Those supporting the proposal tended to argue that that it would improve consistency between the two licensing regimes. It was also thought that tackling oversupply could be a means to raise standards in the industry.

Those opposing the proposal argued that creating a barrier to entry by limiting licences was unnecessary. There were also concerns that this would put a value on private hire car licences (as is already the case for taxi licences). The main issues cited were that protecting the interests of those already operating in the industry could reduce competition and drive down standards, and that preventing legitimate entry to the market could lead to illegal operations.

### *Testing private hire car drivers*

As noted above, both taxi drivers and private hire car drivers can be required to undergo medical examinations to demonstrate that they are fit to drive hire cars. However, only taxi drivers can be required to take tests of their knowledge of local road networks or “such other matters relating to the operation of a taxi as the authority considers desirable” (section 13(5) of the 1982 Act).

Licensing authorities have discretion as to how they apply these provisions. It is possible to require no compulsory training, while some take in matters such as driving skills and customer service. Some respondents to the Scottish Government’s consultation (2013b) suggested that training requirements could already be applied to private hire car drivers using conditions attached to the licence.

Section 61 of the Bill would alter the law to apply the testing provisions in section 13(5) of the 1982 Act equally to taxi and private hire car drivers. Licensing authorities would retain discretion in relation to what, if any, testing was required.

Respondents to the Scottish Government consultation (2013b) supported a compulsory training requirement on private hire car drivers. However, there was disagreement about whether knowledge of the local roads network was an important area, given the advent of satnav.

### *Removing the contract exemption*

Section 22 of the 1982 Act currently exempts from the hire car licensing requirements any vehicle which has been exclusively hired for a period of 24 hours or more. Wedding and funeral cars are also exempt, as are vehicles doing work across licensing area borders, as long as they are not made available for hire outwith their area.

The exemption for hires of 24 hours or more is often referred to as the “contract exemption” and can apply to a wide range of circumstances, for example:

- vehicles contracted by public authorities e.g. to take children to school or patients to hospital
- vehicles used for community transport initiatives and transport of disabled people
- chauffeur services

In its initial consultation (2012c), the Scottish Government highlighted concerns that the contract exemption has been used to circumvent the controls applied to hire cars and drivers, allowing some operators to undercut licensed services. Section 62 of the Bill therefore proposes to remove the contract exemption (while maintaining the other exemptions described above).

As noted above, hire car licensing applies to vehicles made available “with a view to profit” (section 23 of the 1982 Act). This is thought to exclude charitable and community initiatives which are run as social services rather than for profit, even if a charge is made for the service. Thus the Scottish Government considers that such services will remain exempt from the licensing regime even after the contract exemption is removed (Scottish Government 2012c, paragraph 24).

A similar provision (although the exemption in English legislation applied to vehicles under contract for seven or more days) was removed in England in 2008. The Department for Transport commissioned [research](#) into the impact of the repeal (In House Policy Consultancy 2009). A key finding was that the change had impacted on a lot more drivers and vehicles than



previously considered, creating significant additional work for licensing authorities (as well as delays for those applying for licences). The research also noted that licensing authorities had taken different approaches to the application of the legislation, so that some services required to be licensed in one area but not in another. There remained a number of “grey areas”.

The Scottish Government has included an order-making power in the proposed section 62 of the Bill. The Scottish Government’s intention is that regulations can be laid to create further specific exemptions from the hire car licensing regime if this should prove necessary as a result of removing the general contract exemption.

In addition, the Policy Memorandum states (paragraph 202):

“The Scottish Government will use the time before this provision comes into effect to ensure all individuals and businesses that will be affected have an opportunity to clarify their own position and local authorities have an opportunity to develop appropriate policies and conditions to incorporate the new licence holders successfully.”

There was wide support for the removal of the contract exemption in the Scottish Government’s consultation (Scottish Government 2013b). It was thought that passengers would benefit from an equal level of regulation across all services. However, a number of concerns were also noted, including the impact of the change on the cost of procuring council services (such as transport to school) and the fear that new barriers would further reduce the service available in rural areas. It was also noted that this change, coupled with a limit on the number of private hire licences issued by a licensing authority, could result in it not being possible to get the licences necessary to supply a new service.

Respondents to the Local Government Committee’s call for evidence raised similar concerns.

## **SCRAP METAL DEALER LICENSING**

### **The current scrap metal dealer licensing regime**

#### *Definitions*

Metal dealing is defined as carrying out a business consisting partly or wholly of the buying and selling of used or partly manufactured metal. Businesses which buy metal to manufacture other articles do not require a metal dealing licence, even if metal is sold as a bi-product or where surplus to requirements.

A particular licence – known as an “itinerant metal dealer’s licence” – is required where someone travels from place to place buying and selling metal without storing it at specific premises. An itinerant metal dealer’s licence has less onerous requirements attached to it – but records of purchases and sales must still be kept. Where someone carries out a business as both a metal dealer and an itinerant metal dealer, both types of licence are required.

Scrap metal dealers will also generally need a waste management licence from the Scottish Environmental Protection Agency (SEPA). This is designed to ensure that waste is disposed of or recycled in a manner which protects the environment.

It is also possible that scrap metal dealers could need a “second-hand dealers” licence, also issued under the Civic Government (Scotland) Act 1982 Act. The licensing of second-hand dealers is part of the optional provisions of the 1982 Act. It is therefore up to licensing authorities whether, and what specific types of second hand dealing, they licence.

## *Key requirements of metal dealer's licence*

Anyone who carries out a business as a scrap metal dealer needs a licence (although provision is made for certain businesses to hold an exemption warrant instead). This will state the specific activity (or activities) for which they are licensed and any premises from which they operate.

However, a business can apply for an "exemption warrant" exempting them completely from the metal dealer licensing requirements. The Scottish Government believes that there are approximately 150 metal dealing businesses in Scotland, with around half exempt from the licensing requirements.

Exemption is possible where the business has a turnover which exceeds a prescribed amount, currently £1 million. Where the requirements are met, a licensing authority must issue the exemption. It is also possible to apply for a temporary exemption warrant which would usually remain in place until an application for a full exemption warrant has been decided

Those holding a metal dealer's licence are required to keep detailed records of their business activities, including: the name, address and vehicle registration number of anyone from whom they purchase metal; the weight, value and description of any metal they purchase; the name and address of anyone they dispose of metal to; and the value of any metal disposed of.

Holders of metal dealer's licences are required to hold onto any metal they acquire for at least 48 hours before processing or disposing of it (except on Saturdays and Sundays). A licensing authority, after consultation with the chief constable, can waive this requirement. Where a metal dealer is convicted of an offence of dishonesty, this period can be extended to seven days

## **Scrap metal statistics**

The British Metals Recycling Association, which represents the scrap metal industry, states that metals recycling is a £5.6 billion industry across the UK and employs over 8,000 people.

## **Proposals in the Bill**

The Scottish Government has carried out two consultations in relation to scrap metal dealers' licensing. The [first consultation](#) (2011) resulted in the turnover required to qualify for an exemption warrant being increased from £100,000 to £1 million. Further issues were identified through this consultation, which resulted in a [second consultation](#) (Scottish Government 2013c).

The subject matter of the second consultation forms the basis of proposals in the Bill. An [analysis of responses](#) to this consultation is also available (Scottish Government 2014d). Individual responses (from those respondents who gave permission for them to be published) are available on the Scottish Government's [website](#).

The Scottish Government's key concern in taking forward the proposals is to tackle metal theft. The Association of Chief Police Officers in Scotland estimated the value of stolen metal to be just under £11 million between 2011 and 2013, although other estimates have provided much higher amounts (Policy Memorandum, paragraph 217). This figure does not include indirect costs, such as replacement and disruption to services, which can be considerable. In 2012, the Association of British Insurers stated insurance companies were paying out more than £1 million per week across the UK to compensate for metal theft (BBC 2012).

The UK Government has also taken action in this area. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced a ban on cash payments for scrap metal. However, it was considered that further regulation (e.g. in relation to record-keeping) was

needed. In addition, the 2012 Act was criticised for allowing itinerant metal dealers and vehicle dismantlers to continue to pay in cash, creating loopholes. The Scrap Metal Dealers Act 2013 was brought forward to address these concerns.

### *Abolition of cash payments*

The Scottish Government's headline proposal to tackle metal theft is to remove the option of scrap metal dealers paying cash for any metal received. At present, individuals can turn in small and large quantities of metal and receive payment in cash. Preventing this practice is thought to deal with metal theft on two grounds. Firstly, it removes the incentive of a quick cash payment for opportunistic thefts (which can be worth small sums but cause large amounts of damage). Secondly, it removes the anonymity associated with a cash payment. This will make it easier to track the person who received payment for any metal which is later identified as stolen.

Under the proposals in section 65 of the Bill, it will only be possible for a scrap metal dealer to pay for metal by non-transferable cheque (i.e. a cheque which must be paid into the bank account of the person or business to which it is made out) or electronic transfer. Electronic transfer must be to an account in the name of the person receiving payment (so that, for example, transfer to anonymous electronic vouchers would not be acceptable). A scrap metal dealer who pays for metal in any other way would commit an offence.

Scottish Ministers will have the power, by regulation, to alter or remove the acceptable methods of payment.

The Scottish Government does not quantify how many respondents to their consultation (2014d) supported this proposal. The analysis does note support from dealers for a minimum sum below which it would still be lawful to pay by cash. This has not been taken forward in the Bill. There is also concern that the definition of scrap metal dealer should be wide enough to include all those who potentially buy scrap metal, including vehicle dismantlers and other middlemen.

### *Removal of exemptions*

Section 63 of the Bill proposes to remove the exemption warrant system, whereby scrap metal dealers with a turnover exceeding £1 million. Those who hold an exemption warrant do not have to comply with any of the scrap metal dealers' licence provisions in the 1982 Act.

The effect of the proposed section 63 would be to ensure that all scrap metal dealers have to comply with the licensing provisions. This was supported by the vast majority of respondents to the Scottish Government's consultation (Scottish Government 2014d).

### *Abolition of requirement to store metal for 48 hours*

The removal of the exemption warrant system has a knock-on effect on the storage of metal. Under the 1982 Act, scrap metal dealers are usually required to store metal for 48 hours before processing (treating the metal in a way that makes it less easy to identify - e.g. melting down). Large dealers would struggle to meet this requirement. However, they are currently exempt from the system.

Difficulties arise partly because storage space (which meets environmental protection requirements) is not available. It is also claimed (Scottish Government 2014d) that the business models of a number of scrap metal dealers requires quick processing. Thus, the Bill's proposed section 64 abolishes the storage requirement.

Abolition of the storage requirement was supported by the scrap metal dealers who responded to the Scottish Government consultation (Scottish Government 2014d). This was seen as a necessary corollary to the removal of the exemption warrant scheme. Licensing authorities and the police were more evenly split. It was argued that the storage requirement should be retained in order to make the identification of stolen metal easier. Those who supported abolition argued that good record keeping could do the same job.

### *Record keeping*

Section 66 of the Bill proposes to enact new record-keeping requirements for scrap metal dealers. These are broadly similar to the existing requirements. The key differences are:

- the record-keeping requirements apply equally to metal dealers and itinerant metal dealers whereas, under the current law, a less stringent regime applies to itinerant metal dealers
- scrap metal dealers must verify the name and address of customers and keep a record of the documents supplied as verification
- scrap metal dealers must keep a record of the means of payment for the metal

Respondents to the Scottish Government's consultation (Scottish Government 2014d) were supportive of record-keeping requirements which applied equally to metal dealers and itinerant metal dealers. It was felt that differences may be exploited by metal thieves. There was also support for the requirement to verify a customer's name and address. Concerns were raised about how to treat customers who were acting on behalf of an employer (and therefore could not usefully get payment in their own name).

## **THEATRE LICENSING**

### **The current licensing regime**

Theatres currently require a licence issued under the Theatres Act 1968. The 1968 Act is primarily concerned with balancing the principle of freedom of expression against a desire to continue to control material considered obscene. The 1968 Act specifically prevents licensing authorities from attaching conditions to a theatre licence designed to control the types of plays which may be performed.

A theatre licence is required for the public performance of dramatic pieces (whether conveyed through speech, singing or action) and ballets. A theatre licence is required regardless of whether an alcohol licence is also in place at the venue. The application process involves notification to the licensing authority and the police. Local authorities may grant licences subject to general or specific conditions.

### **Proposals in the Bill**

The Scottish Government has not consulted on proposals contained in the Bill. Its intention in bringing forward the proposals is to allow greater flexibility by moving theatre licensing from a mandatory to an optional regime. The Scottish Government also states that consistency will be enhanced as theatre licensing will be brought into the same regime as other forms of public entertainment (Policy Memorandum paragraphs 234 and 235).

Under the Bill's proposals (section 67), the licensing requirements of the Theatres Act 1968 will be repealed. Other parts of the 1968 Act (for example, dealing with obscenity offences and public records of scripts) would remain in force. The Civic Government (Scotland) Act 1982 would also be amended to remove the current prohibition on licensing authorities requiring theatres to have public entertainment licences. This would allow theatres to be licensed under the 1982 Act.

A theatre licence is currently a mandatory requirement. However, public entertainment licences are covered under the optional provisions of the 1982 Act. It would therefore be up to licensing authorities to decide whether or how they wished to licence theatres. Some licensing authorities may choose not to licence theatres at all.

Licensing authorities which decided to license would also have to pass a new resolution dealing with their revised intentions. Under section 9 of the 1982 Act, they are required to allow at least nine months between the passing of a resolution and the coming into force of any new licensing requirements.

In addition, premises with an alcohol licence are not required to have a public entertainment licence if the entertainment in question takes place during licensed hours. This means that theatre venues which currently have an alcohol licence would, in many circumstances, not require to be licensed under the public entertainment provisions.

# SEXUAL ENTERTAINMENT VENUE LICENSING

## The current licensing regime

Live sexual entertainment is not currently an activity which is licensed of its own accord. When developing the Licensing (Scotland) Act 2005, the then Scottish Executive considered that attaching conditions to alcohol licences would be sufficient to regulate this type of business. This was because it was considered that all known live sexual entertainment venues had an alcohol licence (and, indeed, would be unlikely to operate successfully without one). Such an approach would also avoid the bureaucracy and duplication sometimes involved when an activity is regulated under more than one licensing regime.

At the same time as the Licensing (Scotland) Bill was being introduced, the Scottish Executive set up a working group to look into the regulation of sexual entertainment. The report of the [Adult Entertainment Working Group](#) (Scottish Executive 2006) recommended that sexual entertainment should be regulated regardless of where it occurred, necessitating a specific regime. This was not taken forward.

It made a range of other recommendations, including a requirement for all performances to take place in public and improved conditions for performers. A number of licensing boards incorporated the Working Group's recommendations into conditions which they applied to the premises licences of venues offering sexual entertainment.

However, a 2011 court case has since cast significant doubt on licensing boards' ability to control sexual entertainment through alcohol licensing. In the case of [Brightcrew Ltd<sup>8</sup>. v The City of Glasgow Licensing Board<sup>9</sup>](#), the Court of Session (Scotland's superior court) held that a licensing board is only permitted to consider the licensing objectives as they relate to the sale of alcohol rather than in relation to more general considerations. The case involved Glasgow licensing board's refusal to renew an alcohol licence on the basis of evidence that the licensing conditions it had applied to the venue had been breached. The venue was used for sexual entertainment. The breaches included contact between customers and performers. The court held that it was beyond the licensing board's powers to try to regulate matters which did not relate to the sale of alcohol.

## Sexual entertainment venue statistics

The Scottish Government believes there are around 20 venues offering live sexual entertainment in Scotland (Policy Memorandum, paragraph 250). This refers to "lap-dancing" type venues. There are other forms of sexual entertainment – for example – "strip-o-grams" and fetish clubs – which are not included in these figures.

There are no official figures giving an indication of the size of the wider industry. However, the Adult Entertainment Working Group looked at the informal adult entertainment industry and concluded that "one-off" strip shows in pubs, members' clubs or private venues were not uncommon in the major cities. The Group identified at least 20 mobile adult entertainment services operating in Scotland (Scottish Executive 2006, page 51).

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<sup>8</sup> Formerly known as Spearmint Rhino.

<sup>9</sup> [2011] CSIH 46.

## Proposals in the Bill

The Scottish Government has [consulted](#) on the proposals contained in the Bill (Scottish Government 2013d). An [analysis of responses](#) has also been published (Scottish Government 2014e). Individual responses (from those respondents who agreed to their responses being published) are also available on the Scottish Government's [website](#).

The Scottish Government considers that a specific licensing regime is needed for sexual entertainment venues. It argues that this will deal with the uncertainty created by the Brightcrew case as well as allowing licensing authorities to develop approaches which match local concerns (Policy Memorandum, paragraph 250).

### *Other licensing proposals*

A licensing regime for sexual entertainment venues was proposed by Sandra White MSP as an amendment to the Criminal Justice and Licensing (Scotland) Bill (which became the 2010 Act). It took the same form as the system proposed in the current Bill. Her amendment was supported by the Scottish Government at Stage 3 but was defeated in the chamber. The reasons for opposing her amendment were, broadly, that dual licensing was undesirable<sup>10</sup> and that insufficient consideration had been given to the proposal to rule out unintended consequences.

The Policing and Crime Act 2009 introduced sexual entertainment venue licensing in England and Wales. The arrangements are very similar to those proposed in the Bill. One key exception is that, in England and Wales, venues can host sexual entertainment up to 11 times in one year without requiring a licence.

### *Sex shop licensing*

The Bill proposes to introduce a licensing regime for sexual entertainment venues based on the current system in place for sex shops. Sex shops are licensed under the Civic Government (Scotland) Act 1982. The provisions are not part of the general licensing regime discussed above. Instead, there is a bespoke regime in place for sex shops. However, its requirements mirror, broadly, those in the general regime.

The key features of the licensing regime for sex shops are:

- that a licensing authority can take “relevant” objections into consideration when deciding whether to issue a licence. Objections are relevant if they are in writing, signed, made within the required time frame and state specific grounds of objection
- that any applicant for a licence must be deemed by the local authority to be suitable before a licence can be granted
- that the character of the premises can be taken into consideration when deciding whether to grant an application. This includes consideration of the physical layout of the premises, as well as the character of the area in which it is to be situated and the type of activities which are carried out nearby
- that a licensing authority may attach conditions to a licence and may revoke the licence if those conditions are not adhered to

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<sup>10</sup> The amendment was considered before the Brightcrew decision so that regulation under alcohol licensing legislation was still the preferred option.

- that a licensing authority may set an “appropriate” number of sex shops for a locality and may refuse an application if that number would be exceeded. The appropriate number can be zero

The fact that licensing authorities can limit the number of sexual entertainment venues is seen as important. Equality groups and local authorities responding to the Scottish Government’s consultation (2014e) welcomed this. However, providers of sexual entertainment called for protection for existing venues citing concerns that licensing authorities would use this power to shut down what they considered to be legitimate businesses.

### *Definitions*

The Bill proposes a number of fairly complicated definitions in order to capture the sort of activities which it is intended to licence. The main definitions are:

- **sexual entertainment venue** – “any premises at which sexual entertainment is provided before a live audience for (or with a view to) the financial gain of the organiser”
- **sexual entertainment** – “any live performance or any live display of nudity which is of such a nature that, ignoring financial gain, it must reasonably be assumed to be provided solely or principally for the purpose of sexually stimulating any member of the audience (whether by verbal or other means)”

The Bill’s proposals only attempt to license sexual entertainment taking place on premises. This leaves out sexual entertainment taking place in private property and may also exclude other types of performance. In addition, sexual entertainment must be provided by or on behalf of the “organiser” (the controller of the venue or the sexual entertainment). This means that sexual entertainment provided without the knowledge of the organiser (e.g. a strip-o-gram booked to attend a group in a pub) is not included.

Those responding to the consultation (Scottish Government 2014e) were generally supportive of these definitions. There were concerns that the definition did not adequately protect artistic performance, with some arguing for a specific exemption. There were also concerns that the interaction between sexual entertainment and exotic or burlesque dancing was not clear. It was highlighted that this could lead to significant local variation in what required a licence.

### *Exemptions*

The Bill’s proposals create an exemption from the requirement to have a sexual entertainment licence if the premises has hosted sexual entertainment on not more than four occasions in the past 12 months. This is less than the exemption in England (described above), which allows sexual entertainment to be provided on 11 occasions before a licence is required.

The Scottish Government argues (2013d) that this avoids bringing into the licensing regime premises which do not have sexual entertainment as a regular activity. However, respondents to the Scottish Government consultation (2014e) felt that, if an activity needed to be licenced, it did not matter whether it only occurred occasionally. One trade respondent was concerned that pubs and clubs could offer occasional sexual entertainment without a licence, thus providing unfair competition.



## MISCELLANEOUS MATTERS

The Bill contains additional proposals which would impact on the way the Civic Government (Scotland) Act 1982 operates. The Scottish Government argues that they will provide greater consistency and clarity across the licensing regime (Policy Memorandum, paragraph 265). They could also be argued to improve the regulatory environment for businesses.

The Scottish Government has not specifically consulted on these proposals, although aspects have been covered in the other consultation exercises highlighted in this briefing.

The proposals include:

- deemed grant of licences and variation requests where the licensing authority has failed to process the application within nine months. The licensing authority can apply to the sheriff for an extension to this time period. The proposals apply to general licences under the 1982 Act as well as licences issued under the specific regime for sexual entertainment venues and sex shops (section 69)
- regulation-making powers for Scottish Ministers to set standard requirements, if considered necessary, for licensing hearings under the 1982 Act (section 70)
- the ability for Scottish Ministers to set mandatory conditions applying to sexual entertainment venue or sex shop licences. Such conditions can apply to all such licences or specific types of licence (section 71)
- the ability for licensing authorities to set standard conditions applying to sexual entertainment venue or sex shop licences. As above, such conditions can apply to all such licences or specific types of licence (section 71)
- the creation of a mandatory job of civic licensing standards officer, modelled on licensing standards officers under the Licensing (Scotland) Act 2005 (section 72). This is discussed in more detail below
- clarification of the law to ensure that applications can be made and dealt with using electronic means (section 73)

### *Civic licensing standards officers*

The Bill proposes to make it mandatory for local authorities to have in place at least one “civic licensing standards officer”. The proposed general functions of the role are set out in the Bill and include:

- providing information and guidance on licensing under the 1982 Act
- supervising compliance with the 1982 Act’s provisions
- providing mediation in disputes between licence holders and other parties (e.g. customers or neighbours)

The job is modelled on the role of licensing standards officer in the Licensing (Scotland) Act 2005. This is considered to be one of the more successful innovations of the 2005 Act. Research commissioned by NHS Scotland (MacGregor A. et al 2013) into the implementation of

the 2005 Act found that both licensing standards officers and other stakeholders viewed the role positively.

It was generally considered that licensing standards officers had built up good working relationships with the licensed trade as well as with licensing boards, the police and the wider community. Taking a proactive approach to resolving issues was also considered to be a factor in the role's success.

However, the research also highlighted a desire for greater support, especially in interpreting legislation and in dealing with the licensed trade, as well as a call for more resources. Some licensing standards officers reported that their perceived association with the licensing board made relationships with the licensed trade more difficult.

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