MEMORANDUM BY THE SCOTTISH GOVERNMENT TO THE HEALTH AND SPORT COMMITTEE

Introduction

1. This memorandum has been prepared by the Scottish Government to assist consideration by the Health and Sport Committee of the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill (“the Bill”), which was introduced by Dr Richard Simpson MSP on 1 April 2015.

Background

2. Dr Simpson originally lodged his proposal for a Members’ Bill in March 2012, with a consultation, Shifting the Culture, running until 31 July 2012. There were 55 responses to the consultation and these informed the Bill that was introduced on 1 April 2015. The Health and Sport Committee issued a Call for Evidence which ran from 14 May 2015 to 24 June 2015 which attracted over fifty responses.

3. The Bill includes a series of provisions aimed at reducing and dealing with the abuse of alcohol, including provisions in relation to the minimum pricing of packages containing more than one alcoholic product; alcoholic drinks containing caffeine; consultation and publicity in relation to applications and variation of premises licences; restrictions on alcohol advertising; alcohol education policy statements and drinking banning orders.

4. The lead committee for the Bill is the Health and Sports Committee.

(a) MINIMUM PRICE OF PACKAGES

5. The Bill aims to tighten the current discount ban. Section 1 would prevent the sale of larger multipacks at a lower price per individual product than the price per individual product in smaller multipacks for the same alcoholic product, irrespective of whether an individual product is for sale at the premises. For example: a 24 pack of beer must cost the same or more as 2x12 packs of beer, or as 3x8 packs of beer.

6. The Licensing (Scotland) Act 2005 has already been amended a number of times, and we are concerned that any positive impact from this amendment would be relatively slight. Any restriction on promotions would be more effective if minimum unit pricing was in place as a minimum price sets a floor price for all alcoholic products, including multi-packs. The Scottish Government remains committed to introducing minimum unit pricing.

7. For the above reasons, we do not support this measure at this time.

(b) ALCOHOLIC DRINKS WITH CAFFEINE

8. The Bill does not propose a total ban on premixed caffeinated alcoholic drinks; rather it bans ready mixed alcoholic drinks containing caffeine at a level greater than a limit set by Ministers in Regulations.
9. This proposal would appear to be targeted at certain specific products. However, it is the increasing availability, affordability and excessive consumption of a variety of high-strength drinks which causes problems in Scotland, focusing on only one product misses the real problem of excessive consumption of alcohol. Furthermore, as a number of responses to the Call for Evidence have highlighted, it wouldn't prevent consumers mixing their own caffeine-rich drinks.

10. Any restrictions relating to the mixing of alcohol and caffeine would have to be based on evidence of harm. There is little evidence that mixing alcohol and caffeine causes particular health problems or that it causes aggression.

11. The European Food Safety Authority issued its opinion on the safety of caffeine in May. It found that alcohol consumption at doses up to about 0.65 g/kg body weight, leading to a blood alcohol content of about 0.08% (approximately eight or more drinks (male) or six or more drinks (female)), would not affect the safety of single doses of caffeine up to 200 mg from any dietary source, including “energy drinks”.

12. Banning caffeinated alcohol products or limiting the amount of caffeine in alcohol products may require to be notified under the EU Technical Standards Directive. It also may interfere in EU rules on the free movement of goods unless there is sufficient evidence to justify interference on grounds such as the protection of public health. The Scottish Government is not aware of such evidence at the present time and as such does not support this proposal.

(c) BAN ANY AGE LIMIT FOR OFF SALES BY SG OR BOARDS

13. The Bill would prevent Licensing Boards from imposing a licensing condition preventing the sale of alcohol, for consumption off premises, to those aged 18 or over but under the age of 21a specified age. The Bill also prevents Scottish Ministers from adding such a condition to the list of mandatory conditions or discretionary conditions applicable to a premises or occasional licence. Subsection 6(3A) of the Licensing (Scotland) Act 2005 stops a Licensing Board from including in their Licensing Policy Statement an indication that they will introduce by the imposition of conditions, or the variation of conditions, a prohibition on the sale of alcohol for consumption off the premises to persons aged 18 or over but under 21, which applies to all premises in an area or premises or premises in a particular part of its area or of a particular description. Further section 27(A) of the 2005 Act stops Scottish Ministers from prescribing the age at which persons over 18 may purchase alcohol as a matter which the licence conditions may be varied under that section.

14. Imposing a licensing condition preventing the sale of alcohol from an off sales to those over the age of 18 but under the age of 21a specified age is currently a decision for individual licensing boards. We believe that it is right that powers exist to ensure that restrictions can be applied limiting off sales at outlets with particular problems or who have been found guilty of an infraction of the law. This does not mean that a blanket condition such as this would exist for an entire local authority area. As such, the Scottish Government does not support this proposal.
**BOTTLE MARKING ON REQUEST OF POLICE**

15. The Bill would allow Licensing Boards to impose a licence condition regarding container marking (commonly known as ‘bottle marking’) on off-sale premises. The Bill proposes allowing the police to request that Licensing Boards make off-sales premises participation in a bottle marking scheme, a licence condition. Boards would have considerable discretion on how they target premises intended to be subject to the new condition. It is envisaged that a bottle marking scheme could be used to gather evidence on both under-age drinking and proxy purchasing.

16. There are already measures in place to discourage underage drinking, the Challenge 25 scheme where retailers are required to see proof of age where someone appears to be under the age of 25, an offence in relation to buying alcohol on behalf of someone who is underage (proxy purchasing) and the recent Air Weapons and Licensing (Scotland) Act 2015 which will introduce an offence of supplying drink to someone underage in a public place. The Call for Evidence response by Alcohol Focus Scotland raised concerns about this proposal and reported the SALSUS findings that only 8% of 15 year olds report buying alcohol from a shop, it is more common for alcohol to be obtained from family and friends. We are aware that bottle marking has been carried out voluntarily by some licensed premises in some areas.

17. The Scottish Government is concerned that while bottle marking would impose considerable burdens on the trade, for example one response from a national retailer to the Call for Evidence suggested a cost of £3.3 Million per annum to comply with mandatory bottle marking, it would not provide evidence of an offence having been committed.

18. We are therefore concerned that widespread use of bottle marking would be disproportionate and we therefore remain to be convinced that national legislation is currently required in this area. As such, the Scottish Government does not support this proposal at this time.

**NEIGHBOUR NOTIFICATION EXPAND FROM 4m TO 50m, WHERE THERE IS NO ACTIVE COMMUNITY COUNCIL, AND DOUBLE PERIOD FOR NOTIFICATION**

19. The Bill would expand the distance for neighbour notification where there is no active community council from 4 to 50m and double the time period for the Board to provide notification of the application for new premises and major variations, the applicant to provide site notification of the application and the period in which objections and applications can be made regarding the application, from 21 days to 42 days.

20. This amendment was lodged as a Stage 2 amendment to the Air Weapons and Licensing (Scotland) Act 2015. At the time the Scottish Government noted that the relevant provisions are included within secondary legislation, namely the Licensing Procedure (Scotland) Regulations 2007. Updating these requirements does not therefore require primary legislation, they can be updated at any time via secondary legislation. The Procedure Regulations have not been updated since they
were introduced in 2008 and there are a number of areas within them that require review and potentially updating. We note that a variety of views were expressed in response to the Call for Evidence, for example one respondent indicated that the revised distance would require a fivefold increase in neighbour notification for urban premises.

21. We are committed to reviewing the Regulations, including carrying out a consultation to properly evaluate the likely costs and benefits of any change to neighbour notification requirements. The Procedure Regulations can then be updated to best reflect modern needs and practice. We do not therefore support this provision.

(f) **RESTRICTIONS ON ADVERTISING NEAR SCHOOLS**

(g) **ADVERTISING AT SPORTING OR CULTURAL EVENTS**

22. The Bill aims to restrict the advertising of alcoholic drinks, particularly in contexts where they are likely to be seen by children. It would create an offence of displaying an alcohol advert within 200 metres of school premises, nursery, crèche or playgrounds, and an offence of displaying an alcohol advert within premises being used as the venue for a cultural event (other than a film show) or sporting event, where the majority of participants are under 18.

23. There is good evidence of the impact of advertising on children and young people's alcohol consumption and as a number of responses to the Call for Evidence have highlighted, current practice in the marketing and promotion of alcohol does not adequately protect children and young people from exposure to alcohol advertising.

24. The control of advertising is in part reserved to Westminster (e.g. television and radio broadcasting) and certain controls can raise cross-border issues e.g. a ban on adverts in printed publications in Scotland which otherwise circulate freely across the UK. The result is we cannot tackle advertising fully on our own and we continue to urge the UK Government to develop with us an approach to advertising which unequivocally protects children from exposure to alcohol advertising. In the absence of such co-operation we must carefully consider the extent to which we can control advertising in Scotland in order to be as effective and comprehensive as possible and ensure controls are proportionate. We will be examining this issue further during the development of the next phase of our alcohol strategy. So whilst the Scottish Government is sympathetic to the aims of these measures, they are too limited and present enforcement difficulties, which means the Bill may do little to protect children and young people from exposure to alcohol advertising. Accordingly, we do not support these measures but we will examine what can be done on a broader basis through the development of the next phase of the Alcohol Strategy.

(h) **ADVERTISING IN LICENSED PREMISES**

25. The Bill proposes to create an offence for displaying an alcohol advert in retail premises outwith the area designated for alcohol sales.
26. There are already provisions within paragraph 13 of Schedule 3 to the 2005 Act to restrict the location of alcohol ‘drinks promotions’ to certain areas within a licensed premise. Paragraph 13 of Schedule 3 provides that any ‘drinks promotion’ undertaken in connection with the premises, in respect of off-sales of alcohol on the premises, may take place only in the alcohol display areas or in a testing room. The Scottish Government is concerned that the proposals in the Bill do not add anything to the existing restrictions on promotions.

27. The Scottish Government is also concerned that the provision also has the potential to create difficulties for Licensing Boards and Licensing Standards Officers who would be able to offer advice on the mandatory condition but not in relation to any additional offence. As such, the Scottish Government does not support this proposal at the current time.

(i) ALCOHOL POLICY EDUCATION STATEMENTS

28. The Bill proposes that the Scottish Ministers be required to produce statements of their policy on the provision of public information and education about the consumption of alcohol and to review the effectiveness of that policy and its implementation.

29. The rationale for requiring Ministers to report to Parliament is unclear; while the Scottish Government will continue to conduct its own campaigns on an annual or biennial basis, there is a plethora of information provided by non-Scottish Government parties in local areas and across many national agencies and stakeholders. A statement to Parliament about Scottish Government activity would therefore be far from comprehensive.

30. Our alcohol strategy is evaluated through the NHS Health Scotland Monitoring and Evaluating Scotland’s Alcohol Strategy programme. Education and information campaigns are only two components of our alcohol strategy and whilst important as part of a comprehensive package of measures, there is little evidence to show that education and information programmes on their own lead to sustained changes in behaviour, as a number of responses to the Call for Evidence have highlighted. It would be disproportionate to require statutory reporting for these elements of our alcohol strategy.

31. Accordingly the Scottish Government does not support this proposal, which appears to only increase bureaucracy and wouldn’t constitute any meaningful contribution towards reducing alcohol-related harm.

(j) DRINKING BANNING ORDERS (DBOs)

32. The Bill proposes that courts could impose drinking banning orders to be used for any person who has engaged in criminal or disorderly conduct while under the influence of alcohol. This could, amongst other things, prohibit the person from entering all licensed premises, specific licensed premises or a group of licensed premises. DBOs may be reduced if the individual completes an approved course relating to alcohol education.
33. The Antisocial Behaviour etc. (Scotland) Act 2004 already provides a variety of relevant enforcement tools as do local authority bye-laws prohibiting the consumption of alcohol in public places. The trade initiative Pubwatch also serves a similar purpose.

34. Section 94 of the Licensing (Scotland) Act 2005, already provides for exclusion orders in relation to alcohol licensing. This allows a court to ‘bar’ a person convicted of a violent offence, committed on or in the immediate vicinity of a licensed premises, from said licenced premises for a period between three months and two years. However the power would appear to be little used.

35. While there is not sufficient detail currently to assess the resource implications for this proposal, there is the potential that these could be significant. Consultation responses also raised concerns about the potential for an adverse impact on already vulnerable individuals and limited evidence of their effectiveness in England. The Scottish Courts and Tribunal Service in their response to the Call for Evidence suggested that there might be additional costs of £376k per annum that were not captured in the Financial Memo.

36. Community Payback Orders (CPOs), as provided in s.227A of the Criminal Procedure (Scotland) Act 1995, already provide options for the court to impose community disposals which both address alcohol dependency and which can restrict access to certain premises. The Alcohol Treatment Requirement within a CPO provides the court with the option to require an individual with an alcohol dependency to undertake alcohol treatment. Furthermore, the Conduct Requirement within a CPO can place a restriction on an individual from entering a specific premises.

37. The purpose of a CPO is to require an offender to make reparation for the crimes they have committed. The CPO also provides opportunities for offenders to address the underlying causes of their offending behaviour. This can include access to treatment and support for alcohol misuse. For one-off or low tariff offences we believe the current system of antisocial behaviour fixed penalties is adequate, although the idea of engagement with voluntary treatment should not be ruled out in cases where it might be appropriate.

38. It is therefore not clear what additional benefit the proposed Drinking Banning Orders would have. As such, the Scottish Government does not support this proposal at the current time.

(k) ALCOHOL AWARENESS TRAINING AS AN ALTERNATIVE TO FIXED PENALTY NOTICES (FPN)

39. The Bill proposes alcohol awareness training might be offered as an alternative to fixed penalty notices, issued under the Antisocial Behaviour etc. (Scotland) Act 2004, for offences involving alcohol. This follows on from a pilot scheme in Fife. The Bill specifies that the Scottish Government will carry out and evaluate a further pilot. Thereafter the Bill provides that Scottish Ministers must lay before Parliament and publish a report containing an evaluation and recommendations from an independent person on the pilot scheme. If this report
contains a recommendation that alcohol awareness training schemes should be made available throughout Scotland, the Bill provides that Scottish Ministers must make provision for this to occur within three years of the report being laid before Parliament.

40. The Scottish Government have already delivered over 479,690,000 ABIs (Alcohol Brief Interventions) which are an evidence based and cost effective preventative intervention which have been proven to be effective in reducing alcohol consumption in harmful and hazardous drinkers.

41. Since 2003 the Scottish Government has provided funding to local authorities for the provision of advice and assistance to arrested persons who appear to the local authority to have dependency problems in relation to alcohol (or other substances).

42. Arrest referral schemes provided via this funding offer offenders an opportunity, at or near the point of arrest, to engage with treatment services with a view to reducing their reoffending. Engagement in such services is voluntary on the part of the individual.

43. FPNs under the Antisocial Behaviour (Scotland) Act 2004, are intended for situations where police officers are dealing with behaviour which might be felt to require more than a verbal warning but less than a criminal prosecution report. They allow the police to issue 'on the spot' fines of £40 for a list of specified offences:

- Riotous behaviour while drunk in licensed premises
- Refusing to leave licensed premises on being requested to do so
- Urinating or defecating in circumstances causing annoyance to others
- Being drunk and incapable in a public place
- Being drunk in a public place in charge of a child
- Persisting, to the annoyance of others, in playing musical instruments, singing, playing radios etc. on being required to stop
- Vandalism
- Consuming alcoholic liquor in a public place
- Breach of the peace
- Malicious mischief
- Offensive behaviour at regulated football matches

44. If the offender accepts and pays the fine no further action is taken and it is not recorded as a criminal conviction. There are quite a few FPN offences that relate to alcohol but even those that don’t specifically mention alcohol could be as a result of somebody being intoxicated.

45. As FPNs are intended for more minor offences that don’t merit criminal prosecution. The Scottish Government is concerned that this proposal would create an obligation on Scottish Ministers, to make provision in future for alcohol awareness training available throughout Scotland, as an alternative to a fixed penalty notice issued under the Antisocial Behaviour etc. (Scotland) Act 2004. However, the making of future legislation is ultimately a matter for the Scottish Parliament. Should
the Scottish Parliament, for whatever reason, not be content to make legislation for this purpose, Scottish Ministers could be held to be breaching their statutory duty as provided in this Bill. The Scottish Government is also concerned that the offering of alcohol awareness training, in the manner provided in this Bill, could prove very resource intensive and it is unclear what additional value they would offer. As such the Scottish Government does not support this proposal.

(I) OFFENCES INVOLVING ALCOHOL; NOTIFICATION TO OFFENDERS GP

46. The Bill proposes that a court which convicts a person of an offence in which (in the court’s opinion) the person was voluntarily under the influence of alcohol and alcohol was a significant contributory factor, should notify the person’s GP accordingly. This would only apply to offenders aged over 16 years of age and normally residing in Scotland.

47. This was opposed in the initial consultation responses and in the more recent Call for Evidence. BMA Scotland had significant concerns about the proposal, and recommended that the Committee remove the section entirely. They were not convinced that the provisions would offer any benefit in most occasions as the GP will already be aware when a patient has an established drinking problem. Their response referenced the existing scheme of ABIs and felt that this proposal added little. They also raised concerns about criminal conviction details being recorded on a person’s medical record. Their view was that medical records should only contain information that was relevant to the clinical care and treatment of the patient.

48. The Scottish Courts and Tribunals Service highlighted the cost implications and practical problems about ensuring that the correct GP was identified and notified. They estimate an annual cost of at least £150k per annum with an additional one off IT cost of £10k. However these costs were based on sending notification by post, and only providing basic details of the offence. It was pointed out that creating a secure data link between the Courts and GPs and/or providing fuller details would entail substantial additional costs.

49. There was widespread opposition from other respondents, including the General Medical Council, Alcohol Focus Scotland and Scottish Health Action on Alcohol Problems.

50. Concerns have also been expressed whether it is appropriate for those aged 16 and 17 to be included in the notification. It is also unclear what use, if any, GPs are expected to make of this information. It is accordingly difficult to assess whether the proposal is proportionate.

51. In these circumstances the Scottish Government is not currently convinced that requiring compulsory notification of alcohol related offences to GPs is a proportionate or appropriate measure.
Financial Impact

52. An initial review of the Financial Memo raises concerns that costs may be understated while benefits may be overstated. We would be interested in the findings of the Finance Committee.

53. The proposals could impose substantial costs on other groups. The licensed trade remains concerned at the more widespread use of bottle marking, which would impose substantial cost burdens on retailers. One retailer estimated their costs would come to £3.3m per annum. Restrictions on advertising and pre-caffeinated drinks would affect established industry practice and products.

54. Increasing community involvement in licensing decisions would entail substantial additional work for local Licensing Boards, in part this might be recovered through raising the fees charged to the trade.

55. The Scottish Courts and Tribunals Service raised concerns about various costings, flagging up the potential for costs additional to those in the Financial Memo in relation to the proposal in relation to GP notification and Drinking Banning Orders, the latter additional costs being estimated at £376k per annum.

56. The Financial Memorandum for the Bill sets out Scottish Administration costs of £98k for startup, and £445k per annum, and for other public sector bodies startup costs of £87k and up to £810k per annum. The potential savings are largely unquantified apart from an estimate of up to £1.74m per annum savings arising from the amendment to multipack discounting. The proposed savings in relation to multipack discounting appear to be based on a misunderstanding. The bulk of the remaining gap between the potential and actual savings from limiting promotions would most likely result from banning promotions or discounts, this is not something that Dr Simpson is proposing. The impact of the amendment that Dr Simpson is proposing would be far less, and some retailers might even respond by reducing certain prices rather than increasing them.

Scottish Government’s Position

57. The Scottish Government has a continued commitment to a broadly based approach to address alcohol misuse. This is demonstrated via the comprehensive package of measures included in Changing Scotland’s Relationship with Alcohol: A Framework for Action and most recently the alcohol related provisions of the recent Air Weapons and Licensing (Scotland) Act 2015. The Scottish Government has also undertaken to review and update the current Licensing (Procedure) (Scotland) Regulations 2007/453 to ensure that they best reflect needs and practice in relation to neighbour notification and periods for notification.

58. Although the Scottish Government does not support the Bill, there are issues within the Bill of merit and which will be taken into consideration within the review of the Alcohol Framework. As noted during the Parliamentary debate on alcohol on 4 June the Scottish Government is committed to a refresh of the Framework and to working across political parties and with all those interested in reducing harm from alcohol to develop the next phase of the strategy. This will build on the work
achieved by the Framework to date and consider the specific themes of reducing consumptions (including tackling price and availability of alcohol), supporting families and communities, encouraging positive attitudes and choices (including consideration of alcohol advertising) and improving treatment and support. It is anticipated that the next phase of the Framework will be ready in 2016. The Scottish Government also continues to support Alcohol and Drug Partnerships to invest in local prevention, treatment and recovery services.

Consultation

59. The Scottish Government is grateful for the work undertaken by Dr Simpson and the Health and Sports Committee in seeking wider views and has studied these with interest.

Conclusion

60. In conclusion, this is a broadly based Bill, and although the Scottish Government welcomes the intent to address the issue of alcohol misuse, on balance, we consider that some provisions are unnecessary at this time and significant detailed work is required to explore whether others could be made workable and proportionate. We believe that the issues it raises would be better addressed via the review of the Alcohol Framework. On this basis the Scottish Government does not support the Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill progressing to Stage 2.

Criminal Justice Division
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