

Air Weapons and Licensing (Scotland) Bill: Introductory Questions



The Scottish Parliament
Pàrlamaid na h-Alba

Thank you for responding to the Local Government and Regeneration Committee's Call for Evidence on the Air Weapons and Licensing (Scotland) Bill. All submissions will be examined and considered as part of the Committee's scrutiny of the Bill.

Please be aware that questions marked with an asterisk (*) require an answer before you can submit the form.

Follow the Local Government and Regeneration Committee's Twitter feed - all Committee tweets on this Bill will have the hashtag #aw&lbill.

*1. Please supply your name and contact details:

Name:

William O'Brien

Organisation:

North Ayrshire Council and
North Ayrshire Licensing

Address 1:

Address 2:

City/Town:

Postcode:

Country:

Email address (if no email leave blank):

Phone Number:

FOR OFFICE USE
ONLY
SUBMISSION ID
NUMBER

118

*** 2. Please confirm that you have read and understood the Scottish Parliaments [“Policy on the treatment of written evidence by subject and mandatory committees”](#):**

Yes

*** 3 Please confirm whether you are content for your name to be published with your submission:**

Yes

No

*** 4. Which of the three categories below best describes your interest in the Bill (please tick only one)?**

Personal

Professional

Commercial

*** 5. Do you wish your email to be added to the Committee’s distribution list for updates on progress of the Bill:**

Yes

No

*** 6. Invitations to give oral evidence to the Committee on the Bill will be based on the submissions received. If you wish your submission to be included amongst those considered for possible invitation to give oral evidence, please indicate here.**

Yes

No

*** 7. You may answer questions on the entire Bill, or on any part of the Bill. Please indicate which parts of the Bill you are responding to? (You may select as many options that apply).**

All of the Bill

Equalities, climate change and other Scottish Government objectives

Air Weapons

General licensing issues

Alcohol licensing

Civic licensing – taxi/private hire car licensing

Civic licensing – scrap metal dealers

Civic licensing – theatre licensing

Civic licensing – sexual entertainment venues

North Ayrshire Council and

Name/Organisation:

6. Civic Licensing – Sexual Entertainment Venues

You may respond to all questions or only those you have a specific interest in. (Text boxes have no word limit, they will increase in size accordingly).

50. What are the consequences of operating the new licensing regime using the definitions set out at section 68 of the Bill?

- 'sexual entertainment venue'
- 'audience'
- 'financial gain'
- 'organiser'
- 'premises'
- 'sexual entertainment', and
- 'display of nudity'

See comments below on Clause 68.

51. The Bill specifies that a venue hosting sexual entertainment on three occasions or less within a 12 month period would not be treated as a sexual entertainment venue: does this have any unintended consequences?

See comments below on Clause 68, para. (f).

52. Local licensing authorities will be able to set the number of sexual entertainment venues in their area to below the existing level, or zero: are there any advantages or disadvantages to this approach?

See comments below on Clause 68, para. (i).

53. The Bill relies mainly on the existing licensing regime for sex shops as set out in

section 44 and Schedule 2 of the Civic Government (Scotland) Act 1982 (application, notification, objections and representations, revocation of licences etc., enforcement and appeals): is this mechanism adequate for the licensing of sexual entertainment venues - if not, please explain why?

There has not been a recent occasion to use the existing provisions in North Ayrshire, but they appear to be adequate.

54. Are there any barriers to licensing authorities operating the new licensing regime?

No

55. Civic Licensing

Do you have any other comments to make on the civic licensing aspects of the Bill?

See paper apart.

Paper Apart
North Ayrshire Council & North Ayrshire Licensing Board
Response to Consultation on Air Weapons and Licensing (Scotland) Bill
[Bill as introduced on 14 May 2014]

This response relates only to the Licensing Parts:

2. Alcohol Licensing [41-59]
3. Civic Licensing [60-73]

and not to Part 1 on Air Weapons [1-40].

General Comment

1. Although there are some good points in the Bill, there is an opportunity to do more. The Bill fails to address matters which have previously been brought to the Scottish Government's attention. This Bill follows:

Licensing (Scotland) Act 2005 (asp 16)
Criminal Justice and Licensing (Scotland) Act 2010 (asp 13)
Alcohol etc. (Scotland) Act 2010 (asp 18)
Alcohol (Minimum Pricing) (Scotland) Act 2012 (asp 4)

i.e. it is the fifth piece of legislation affecting licensing in ten years. It is disappointing that these matters are again overlooked. Some of the comments made regarding the present Bill are much the same as the comments made in response to consultation about earlier proposals (e.g. the proposed new system to license 'Sexual Entertainment Venues'), yet the Bill appears little different from those earlier proposals and does not appear to have taken account of the earlier comments.

2. The Bill fails to introduce a statutory ouster clause for challenges to Licensing Policy Statements, meaning that such policies are always open to challenge based on the limited set of facts of a particular case, ignoring the wider policy objectives.

3. The 2005 Act should be amended so as to address the issues raised by Brightcrew Ltd. v The City of Glasgow Licensing Board, [2011] CSIH 46 (e.g. by repealing [27(7)(c)], which presently prohibits Boards from imposing any licensing condition which "relates to a matter (such as planning, building control or food hygiene) which is regulated under another enactment", and which appears to overlap with [27(9)(b)]). The list of 'relevant' offences to which Boards are required to consider include many enactments which have no or little relevance to the sale of alcohol.

Part 2 - Alcohol Licensing [41-59]

Cl. 41 - extension of the 'protecting children' L.O. from under-16s to under-18s.

A good change. In general, the distinction between 'children' and 'young people' is confusing for laymen, who often use 'children' to describe everyone under 18.

Is a corresponding extension of the Forum proposed (Sch. 2, Para. 2(6)(d))?

Cl. 42 LPS periods

It is desirable to link the LPS to the life of Councils. Even if there is some change of membership after an election, there are likely to be some 'old' members, so the Policy is not inevitably irrelevant. The 'new' Board can introduce a Supplementary LPS, at least to address some points (it is unlikely that the new Board will want to replace the whole LPS).

Cl. 43 - fit and proper

(a) Why is this not being extended to ask whether an applicant for an Occasional Licence is 'fit and proper'?

(b) Is the addition of the word 'otherwise' sufficient to remove the duplication caused by the introduction of 'fit and proper' and the retention of 'inconsistency with the Crime and Disorder licensing objective' as a potential ground for refusal?

Cl. 44 - 'fit and proper' in transfer

(a) If the Police can give "any information in relation to [the Transferee or a Connected Person] that the Chief Constable considers may be relevant", what is the point of the distinction between those offences which are 'relevant' and those which are not?

(b) Sch. 1, Para. 10(2)(e) should be corrected - the fitness of the Applicant is not the issue in a [33] Transfer. It is the fitness of the proposed Transferee that matters.

Cl. 45(4)(b) - referring to a 'fit and proper' review

Introduces [39(2A)]:

"Where, at a review hearing in relation to any premises licence, the Licensing Board are satisfied that the ground for review specified in section 36(3)(za) is established, the Board must revoke the licence."

This provision is unnecessary. It is already the case that if a Review is upheld the Board may (not 'must') take certain 'steps' under [39].

In a Review, there are 2 stages:

1. is a 'Ground for Review' in [36(3)] established?
2. If not, that is the end of the Review. If so, the Board goes on to consider what 'steps' should follow (revocation etc.). The existing [39(1)] is "...as the Board considers necessary or appropriate for the purposes of any of the Licensing Objectives." It is the Board's opinion that counts, not anyone else's - why should 'fit and proper' be different?

The word 'must':

(a) is not consistent with the view that there is a discretion to take no action. Suppose that the Police make a Review Application because the PLH or PM is not 'fit and proper', but by the time the case reaches the Board there has been a change of personnel or the licence has been transferred. The Review would not be likely to be dismissed as frivolous under [36(6)], but there would be no 'steps' either;

(b) is unnecessary - in the more common case where the person in question is still involved with the Premises, it's hardly likely that a Board would say "he is not 'fit and proper', but we won't do anything about it."

If the person complained about was the PM the Board might vary the licence so as to remove him, or suspend the licence. In both variation and suspension the Board has a power under [40] to recall the earlier order - if the Board imposed variation/suspension but the problem identified by the Police was later remedied by a change in personnel, the PLH might invite the Board to lift the order. If the licence had been revoked the Board could do nothing - the PLH would have to re-apply for a licence, and his Premises would be closed until the next meeting of the Board.

Cl. 46 - 'fit and proper' and Personal Licences

Similar issue with to Cl. 44 ('fit and proper' in transfers)

Cl. 46(3) - Notification of Personal Licence application to Licensing Standards Officer

What is this provision intended to achieve? What is the LSO supposed to do when she gets Notice?

The introduction by the Bill of 'fit and proper' suggests that the LSO is to do what the Police used to do under the previous legislation - interview prospective Licensees or Nominees (managers). However, the analogy is false: there are many more Personal Licences under the 2005 Act than there were Licensees or Section 11 Nominees under the 1976 Act (e.g. we have around 400 Premises but 1,755 Personal Licence Holders).

Whoever asks, the questions would be related to what the Applicant said he proposed to do, e.g. "what experience do you have in the licensed trade? Are you planning to manage Premises yourself?". There are different expectations of Premises Managers, e.g., if two Applicants say:

1. "I've never worked in a pub before, but I'll only be working shifts as part of the bar staff"
2. "I've never worked in a pub before, but I want to be the Manager of [Premises]".

they will both get a 10 year licence, renewable forever. Under the 1976 Act, the 'fit and proper' status of the person could be reviewed every 3 years. Is it proposed that the Board should review every Personal Licence every 10 years? (Cl. 46(5) involves the LSO in renewal as well as grant).

Issues:

(a) What if the Applicant is assessed today as 'fit and proper', on the basis of what he says are his immediate plans, but later a Premises Licence is varied to show that he is the Premises Manager? His 'fit and proper' would not automatically be re-assessed, as the nomination is effected as a 'Minor Variation', so the Board is legally obliged to grant it without inquiry (this could happen any time - the vetting is only supposed to be repeated at 10-year intervals, as Cl. 46(5) extends the new [73A] to a Personal Licence Renewal Application):

(i) If he is nominated for Premises in the same area where his Personal Licence was granted, the Board might know how his 'fit and proper' status was previously assessed, but

(ii) a lot of people with 'foreign' Personal Licences work in our area - how would we know what was the basis of his 'home' Licensing Board's assessment that he was 'fit and proper'?

It might be said that it would be for the Police, later, to act if they discovered that Premises were in charge of a person who was not 'fit and proper', and seek a Review, but that is not an instant procedure and there would be no guarantee that an unfit person could not run a pub: is prevention not better than cure?

(b) What if such experience as he has is running a shop, and the LSO concludes that is indeed suitable to be a Premises Manager of an off-sales, but he later wants to run a pub? He couldn't be questioned then, because he would already have a Personal Licence;

(c) Is his experience to be taken into account in judging whether or not his Licensing Qualification is 'appropriate' ? (2005 Act, Sch. 1, Para. 4(1)(d)). The terms 'appropriate licensing qualification' is defined in Para. 4(2), but only in relation to Premises Managers. For Personal Licences generally, all that applicants require is a 'licensing qualification', and it does not matter, at the time of application, whether it refers to 'on-sales' or 'off-sales';

(d) What record is to be kept of a 'fit and proper' assessment? There is no National Personal Licence Database. Is the assessment to be endorsed on the Licence? Can a future employer learn it?

Is there to be any way of the Licence-Holder challenging it? Say the Applicant seeks a Personal Licence and is assessed today as 'fit and proper' to work behind a bar, but years later he fails to get a new job as a Premises Manager, because in his perception:

(i) he has now acquired years of experience and is well-suited to the job; but

(ii) the Board has effectively granted him a second-class licence.

Would he have any redress? Could he demand that the LSO re-assess him?

(e) is the Board to have the power to refuse a Minor Variation? If so, the existing [31], giving PM variations immediate effect, would have to be qualified.

2005 Act [72(1)]:

"Any individual aged 18 years or more may apply for a Personal Licence to—

(a) if the individual is ordinarily resident in the area of any Licensing Board, that Board, or

(b) in any other case, any Licensing Board."

The Scottish Government has instructed that all Boards can deal with Applications regardless of residence, although if that had been Parliament's intention then the provision would be different - if it was intended that a person in Scotland could apply to any Board he pleased, [72(1)] would be much shorter because it would not refer to ordinary residence at all - it would omit the whole of (a) and most of (b).

The phrase "in any other case" means that there is a distinction between (a) and not-(a):

(a) If a person lives in Scotland, he must apply to his local Board.

(b) If he lives outside Scotland, he doesn't have a local Board, so he can apply to any Board.

Whoever asks 'fit and proper' questions (either the LSO or local Police), he is being asked to comment on people who might have no intention to manage premises. If it is to remain the case that a person can apply to whichever Board he pleases, it means that someone will have to comment on Applications relating to Premises in other Board areas (for example, about 13% of our Premises Managers hold Personal Licences granted elsewhere in Scotland - major supermarkets and other retailers move their managers about the country - How would we know what assessment had been made elsewhere, and conversely how would another Board know what assessment was made of a North Ayrshire licence-holder?

If there is to be a 'fit and proper' assessment, it should apply only to prospective new Premises Managers, and not to Personal Licence Holders generally.

If the workload of Boards is to be substantially increased, could the £50 prescribed fee be reviewed?

There is no equivalent vetting for Transferees. Who, if anyone, is expected to interview Transferees to assess their 'fit and proper'?

Cl. 49 - re procedure where Licensing Board receive notice of conviction in relation to a premises licence

This is a welcome change but it does not go far enough.

The Bill might be:

“(7A) If both -

(a) the Licensing Board receive from the Chief Constable a notice under subsection (4)(b) which does not include a recommendation under subsection (5), and

(b) any one or more of the circumstances in Sub-section (7B) exist,

the Licensing Board must decide -

(a) to make a Premises Licence Review Proposal in respect of the Premises Licence, or

(b) to take no further action in relation to the Notice.

(7B) the conditions referred to in Subsection (7A) are -

(a) any offence confirmed by the Notice relates to Licensed Premises within the Board's area; or

(b) any offence confirmed by the Notice relates to a person working or who has worked in Licensed Premises within the Board's area; or

(c) any conviction confirmed by the Notice was imposed by a Court having jurisdiction within any part of the Board's area."

In (b) "a person working or who has worked": it would not be enough to use the present tense "working", as this would suggest that a conviction is only significant if the person remains in employment on the day of the Board Meeting - a PLH might avoid Board scrutiny by simply dismissing the employee before the Board has occasion to make a decision.

In (c) - "a Court having jurisdiction": there are in fact no longer any criminal courts within North Ayrshire, as both the Sheriff Court and the Justice of the Peace Court sit at Kilmarnock (East Ayrshire). The phrase would cover the High Court, so a conviction which was serious enough to merit prosecution in the High Court would be significant, regardless of the location of the Premises.

Cl. 50- re procedure where Licensing Board receive notice of conviction in relation to a Personal Licence

See note for Cl.49.

Cl. 51 - Relevant offences and foreign offences: spent convictions

(a) A welcome change. The Board might be surprised to be told by their adviser that they could not do now, as a Licensing Board, what they were able to do last week as the Licensing Committee.

Boards are supposed to honour the Licensing Objectives, but the original Act removed from the Board a source of information which:

- (a) it had under the 1976 Act, and
- (b) still has in every other licensing scheme.

Prior to the 2005 Act a Board could look at 'spent' convictions if satisfied that 'justice cannot be done' otherwise (Rehabilitation of Offenders Act 1974 [7(3)]).

For the avoidance of doubt add:

"The proceedings of a Licensing Board are "Proceedings Before A Judicial Authority" for the purposes of the Rehabilitation of Offenders Act 1974."

(this express enactment might not be necessary, given that the definition in 1974 Act [4(6)] might well cover the Board anyway, but it would do no harm to express it).

(b) Why not dis-apply ROA altogether, so the Licensing Authority can look at old convictions without even thinking about the 'justice cannot be done' question (ROA [7(3)])?

This has already been done for Drivers of Taxis and PHCs, and Landlord Registration - The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, No. 50. This consolidates amendments previously made by Scottish Ministers - why expand the scope in one context (LR: S.S.I. 2006-194) but narrow it in another (the original 2005 Act)? Is the public interest in regulating the sale of alcohol not as important as it is with hire-car drivers and landlords? If exceptions were thought appropriate in some licensing, why not all of them?

Cl. 52 - Offences of supplying alcohol to a child or young person

(a) Why do these offences apply only to people of 18 or over? By granting under-18s immunity, drinkers would engage youngsters to buy drink for them, knowing that the youngsters could not be charged.

(b) the recipient in [104A] is a 'child'. If the only difference for 'Young person' recipients is be an exception for meals, is there a need for a separate [104B]?

(c) In the North Ayrshire Licensing Board response to the "Further Options" consultation, in answer to Q.2 ("Do you agree that it should be illegal for adults to supply alcohol to an under 18 for consumption in a public place?") North Ayrshire Licensing Board replied:

"The prohibition should not simply be against adults. If an under-18 has already acquired alcohol – perhaps no 'agency' sale has taken place – he might have obtained alcohol at home – he might in fact supply it to another under-18. Consider the situation where a group are passing round a bottle – why should it be criminal if the oldest gives the bottle to the youngest, but not vice versa?"

(d) The definition of "public place" has part (c) ("any place to which the public do not have access but to which the young person unlawfully gains access"). This should be extended to include trespassing children.

(e) The position of 'knowingly' in the new [104B....] renders the word redundant. The question is not whether the buyer 'knows' of the purchase (who accidentally buys something?). The target of the provision is surely the buyer who knows or has reasonable belief that the drink he is buying is likely to be supplied to or consumed by someone under-age?

Cl. 53 - Meaning of "alcohol": inclusion of angostura bitters

No comments.

Cl. 54 - Overprovision

There is no objection to Cl. 54(2)(a) but Cl. 54(2)(b) should not be enacted:

(a) The extension of the Assessment to "Licensed Hours" would not achieve anything significant. Given that nearly all comparable premises have policy hours, so are open for much the same length of time, what would be the point of collecting hours data? The most common deviation from Policy concerns shorter, not longer, hours. This is a legacy of the Transition. To preserve 'grandfather rights' some small off-sales did not ask for the full 10.00 am. to 10.00 p.m. on Sunday (although both [65] and North Ayrshire Licensing Board Policy would allow

this), so their Sunday licensed hours reflect the 1976 Act Permitted Hours. There are few Premises like this now, since most have varied their hours to seek the full period, and of course newer Premises were never troubled by 'grandfather rights' considerations, so sought the full period from the start.

(b) this would be a huge data-capture task. It would require every single Operating Plan to be checked.

Cl. 55 - Duty of Licensing Boards to produce annual financial report

(a) This creates additional work for a Board and Council Finance Departments. The same staff, whether legally-qualified or not, deal with all licensing - both alcohol licensing and every other kind of licence (e.g. under the Civic Government (Scotland) Act 1982). Income and expenditure is not separately accounted for, so any financial statement would depend on estimates.

(b) Cl. 55(3)(b) is objectionable for the same reason as [146(3)] in the original Act - "Henry VIII Clauses". The executive should not be entitled to alter primary legislation. There is not even affirmative resolution procedure, so unless the Parliament itself takes the initiative to annul the Minister's order, the Act itself can be amended.

Cl. 56 - Interested parties

The 2005 Act provision was inserted by the CJL(S)A 2010, never commenced, and is now to be repealed.

According to Para. 109 of the Policy Memorandum, the Bill effects:

"Removal of the requirement for a premises licence holder to notify a change in interested parties and removal a premises manager from the definition of interested party;"

However, the Bill does not achieve this. The Explanatory Notes are closer to the Bill:

"169. It also amends the definition of an interested party at section 147(5) by permitting that a premises manager can be an interested party. This has the effect of allowing the premises manager to be subject to vicarious liability for offences under s141B."

The 2005 Act's interpretation provision currently includes [147(5)]:

“(5) For the purposes of this Act, a person is an Interested Party in relation to Licensed Premises if the person is not the Holder of the Premises Licence nor the Premises Manager in respect of the Premises but—

(a) has an interest in the Premises as an owner or tenant, or

(b) has management and control over the Premises or the business carried on on the Premises.”

Clause 56(5) of the Bill is:

“In section 147(5) (interpretation), in the opening words, the words “nor the premises manager” are repealed.”

A PM would be a person having "management and control over the Premises", so would still be an "Interested Party". Is the intention to make the PM an Interested Party or not?

Cl. 57(2) - removal of 5-year bar after revocation caused by lack of training

(a) If enacted, 2005 Act [74(3)(c)] will read:

“(c) no Personal Licence previously held by the Applicant has been Revoked under any provision of this Act other than section 87(3) within the period of 5 years ending with the day on which the Application was received.”

So it might mean that holders who had lost their Licences in December 2014 (after failing to meet the refresher training deadline) might re-apply much earlier than the 5 years.

One of the situations where a person might miss the deadline is where he has booked a place on the refresher course in good time, but for some reason (e.g. illness) misses the scheduled sitting. He might in fact sit the course shortly before the 3 month period expires, and not have a Certificate until after the period has expired. He might have sat the course and obtained a Certificate, but simply overlooked the need to show the Board his Certificate until he was too late.

If the Clause is enacted and then commenced by Order, he might re-apply immediately. Should the Board accept a 'refresher' certificate instead of the usual 'grant' certificate? Following the rules strictly it should not, but is that consistent with the presumed purpose of the training?

In relation to "Scottish Certificate for Personal Licence Holders at SCQF Level 6" the SCPLH website states that

"as of the 1st August 2013 ... only certificates presented with the above codes are based upon the new National Standard."

The strictly-correct response might come as a surprise to someone who has done what the Personal Licence (Training) (Scotland) Regulations 2013-261 required, having obtained a "Scottish Certificate for Personal Licence Holders (Refresher) at SCQF Level 6". Is the content of the 'refresher' course so significantly different from the course that people seeking 'grants' usually take? The trade press frequently comments adversely on the utility of refresher training anyway, but how would it look if someone actually gets a recent qualification but is then told "it's not good enough" ?

(b) The provision should also state "regardless of the date of that Revocation and whether or not it occurred before the commencement of this Sub-section"

Otherwise this new provision might not help those people who lost their licences in 2014. The provision would not be commenced before 2015, and it would not be presumed to have retroactive effect.

Cl. 57(3) - renewal warning period

The proposal is to extend the period prior to expiry that the Board has to give warning from 3 months to 9 months.

Of itself, this is a good change. If there is to be a warning period then a longer period is better than a shorter period, to minimise the defects in the 2005 Act which were highlighted in the North Ayrshire Licensing Board response to the 'Further Options' Consultation in February 2013 (Q. 52 "further suggestions", responses (7) to (10)) but which the Bill fails to address (see comments on Cl. 57(4) below).

However, the point of the Board needing to alert a Holder could be questioned - it is his Licence, so he has responsibility for keeping it safe, not the Board - why should Boards spend time and money to tell him what he should do anyway? Recorded Delivery letters cost £1.50 postage, hundreds of letters would be needed, and we have found from the recent 'training refresher' alerts under [87(2)] that some letters sent out are in fact returned undelivered because Licence-Holders have failed in their legal duty to update the Board when changing address.

Cl. 57(4) - Personal Licence Renewal procedure

The legislation has always used the terms 'grant', 'issue' and 'have effect' indifferently. They are not the same thing, and the difference is particularly obvious because of the way that the 2005 was commenced: hundreds of Personal

Licences came 'into effect' on Transition Day in 2009, but they were not in fact 'issued' until weeks or months later. Hundreds of Personal Licences in our Board area alone are treated as dated from 1 September 2009, and the same aggregation will occur around September 2019 and in 10-year intervals after.

At present, Holders who wish to renew must lodge their renewal applications in the period of 2 months beginning 3 months before the expiry date of the Licence. The Bill proposes to extend the 'window' to a period of 9 months, starting 12 months before expiry. That amendment is better than nothing, but fails to address the real problem.

The 2005 Act continues to omit a 'deemed continuation' provision (unlike the legislation for Taxis, PHCs and many other activities: Civic Government (Scotland) Act 1982, Sch. 1, Paras. 8(5,6)). Experience of the 1982 Act shows that many people leave it until a day or two before their licences are due to expire that they apply for renewal. They are safe to do that, but a Personal Licence Holder who does that will still become unlicensed, because he would have missed the 'window'. If a Personal Licence holder tendered a Renewal Application a day before expiry, the Board would have to refuse even to accept it for processing - if it was outside the window, it would be incompetent - even if he had a recent training certificate and his application was otherwise in order. There are likely to be the sort of concerns in 2019 which happened about refresher training in 2014.

Since there is no 'deemed continuation' provision, even a Personal Licence Holder who lodges his renewal application within the 'window' faces becoming unlicensed. Under the Bill, he can lodge up to 3 months before expiry. What if he lodges in good time but there are adverse comments from the Police (or, under the Bill, about 'fit and proper'), so the case is put on a Board agenda, and the next available Board is not until after the Licence has expired?

Why not abolish the 'window' altogether? If a person chooses to lodge before expiry, and risk effectively losing the period of overlap if his new Licence happens to be granted before the old one is due to expire, why can't he?

If a Premises Manager loses his Personal Licence, there is a breach of the Mandatory Condition in 2005 Act, Sch. 3, Para. 4(1)(b). The '6 week period of grace' allowed by [54] is not available to the Premises, since the expiry of the Personal Licence is not any of the 'events' listed in [54(2)]:

(a) "the Premises Manager ceases to work at the Premises"

This has not happened. It might be a condition of employment that the employee actually have a Personal Licence, but if the employer dismisses him

Should there not be an addition so as to read “the Premises Manager ceases to work at the Premises in that capacity”? An employer faced with the difficulty of his employee X ceasing to hold a Personal Licence, and hence being unable to continue acting as PM, might appoint another employee who held a live Personal Licence, Y, but meanwhile X would probably continue to work on the Premises, albeit no longer as PM.

(b) “the Premises Manager becomes incapable for any reason of acting as Premises Manager”

He has not become 'incapable', if that is construed as a reference to the Adults with Incapacity (S) Act - compare 'event' (c)(ii) in [28] re individuals who hold Premises Licences and become 'incapable'.

The alternative view depends on accepting that the same word has different meanings in different parts of the Act. Accepting that a lack of a Personal Licence leads to a breach of a Mandatory Condition, he is not 'incapable' of acting as PM - the PLH is in breach of a condition of his Licence, but the PM could only be said to be doing something wrong if, while he continues to act as PM, the Premises sell alcohol. The [1(1)] offence is committed, because although the sale is “under” a Licence, the sale is not “in accordance with” it. However, if the PLH acknowledges that the PM is no longer in a position to authorise sales, the PM would not face prosecution unless he personally had conducted the sale. Since he would remain capable of doing everything else the Premises did apart from selling alcohol (e.g. in a restaurant, taking orders and serving food) he could not be described as 'incapable'.

(c) “the Premises Manager dies”

He's not dead.

(d) “the Personal Licence held by the Premises Manager is Revoked or Suspended”

The Personal Licence has been neither Revoked nor Suspended: it has expired naturally, due to the passage of time.

Even if one of the 'events' had occurred, it would not be enough for the PLH to lodge a Variation seeking to re-appoint the same person as PM, since the Variation Application which should follow should seek “to substitute another individual as the Premises Manager” [54(4)(b)].

If the proposed new PM does not already hold a Personal Licence, there is a substantial chance that the Variation Application would not be granted, since there

would be no guarantee that he would in fact have a Personal Licence at the point where the Board would be in a position to determine the Variation Application (if the proposed new PM does not already have a Personal Licence, an 'immediate effect' Variation under [31] would not be entertained).

Many Personal Licences are dealt with under delegated powers, so the Application for the new Licence might well be processed only a few weeks after the old Licence expired, but what if a Board Hearing was necessary (e.g. if there is a Conviction or if the Board has information suggesting that the Applicant might not be 'fit and proper')?

Suggested amendment

The legislation should be amended to state that the date of grant is the date of the Board decision, and the decision should have effect from then, regardless of the date of issue of any licence, decision notice or other document. This suggestion applies to Premises Licences as well as Personal Licences.

The difference has been recognised in one context. The Scottish Executive recognised that not all Personal Licences would in fact be 'issued' before Transition Day, as the Licensing (Scotland) Act 2005 (Transitional Provisions) Order 2009 No. 277 was not made until 23 July 2009, only 5 weeks before Transition Day, creating the 2-month "Deemed Personal Licence" for Premises Managers. The Order went to the Subordinate Legislation Committee on Transition Day itself, 1 September 2009.

The Licensing (Transitional and Saving Provisions) (Scotland) Order 2007 No. 454, Article 23 stated that all Personal Licences 'issued' before 1st September 2009 were deemed to commence then. No provision was made at all for Licences issued later, although in fact many Licences were issued afterwards.

The TSO referred only to the duration provision of the 2005 Act - [77] (the date from which the 10 year life of the Licence is counted) - and said nothing at all about the separate provisions as to refresher training - [87].

The practice of all Boards involved with the Northgate computer system is to count every Personal Licence from 1 September 2009, regardless of date of issue. This was a pragmatic approach - around Transition every Board was concentrating on getting Premises Licences and Premises Managers' Personal Licences granted and issued, so some Personal Licences were not in fact 'issued' until months after the Transition.

When in 2014 the Board sent out training reminder letters (showing the Board's belief that certain dates applied) no licence-holder responded to dispute the dates, but (because of the way that the legislation is expressed) the possibility cannot be

excluded that someone whose Licence has been revoked due to lack of training might then say:

"my Licence was not issued until November 2009, so the deadline was altered accordingly, so the Board was wrong to tell the Police that my Licence had been revoked"

He might have to accept that his Licence commenced in November 2009, so that he himself had acted illegally before then, but he could admit that with impunity since there would be no chance of him being prosecuted for something 10 years before:

- (a) the prosecution would be time-barred - the 'trafficking' offence (2005 Act, [1(4)]) can only be prosecuted summarily, and therefore the 6-month time-bar applies (Criminal Procedure (Scotland) Act 1995, [136]).
- (b) how would the Procurator Fiscal prove in 2014 that the licence-holder sold alcohol in 2009?

Cl. 58(2) - new duties to acknowledge applications etc.

These provisions are unnecessary and would require the Board to generate more paperwork.

(a) New [134ZA] "Duty to acknowledge applications" - Applicants already get a covering letter or a receipt for their payment. Our www already gives the dates of Boards and 'last-lodging' dates. The staff at the counter tell people that either the case is delegated or it will go to the next Board. Why do they need to do anything else?

(b) The new [134ZA(4)] is also unnecessary. The Bill would oblige Boards to issue a notice that an application fails to meet the prescribed requirements. More needless paperwork. What already happens is that the office staff telephone, email or write to the Applicant saying what is needed. If the failure is not remedied, the whole Application is returned and the Applicant is told it is being rejected as incompetent. This system works, so why change it?

(c) New [134ZB] "Period for determination of applications" - North Ayrshire has no need for a deemed grant period: Applications are either:

- (i) granted as soon as possible, after any relevant period for objections etc. has expired (under a wide-ranging Scheme of Delegations) or

- (ii) placed before the earliest available Board meeting.

I doubt if any Application has ever taken as long as three months to be determined, let alone nine, except in the cases where the Board has continued a case until a future meeting.

- (d) New [134ZC] "Deemed grant of applications"

(5): "The thing applied for is to have effect for the duration of the period stated in the application (subject to any limits imposed by this Act)."

How can this be applied to Applications for Premises Licences and many other 'relevant applications' which do not state a proposed duration - the Applicant doubtless will want a permanent grant, transfer or variation?

Cl. 59 ("Form etc. of communications under the 2005 Act")

Is there something missing here, perhaps a reference to electronic communications?

Part 3 - Civic Licensing [60-73]

Cl. 60 ("Refusal to grant private hire car licences on grounds of overprovision")

- (a) What is the need for this?

The number of PHCs has fallen in recent years: in North Ayrshire

Date	PHCs
Feb 2010	65
April 2011	62
Oct 2012	55
Feb 2013	53
July 2014	55

The criterion is 'overprovision'. It is not 'unmet demand' as in the existing limit for Taxis - [10(3)].

We have never had any representations from the public that "there are too many PHCs". It is hard to envisage North Ayrshire Council ever using the proposed power.

(b) What are the Objectives which OVP is supposed to promote?

In the alcohol licensing system, the OVP concept is related to the 'protecting and improving public health' Licensing Objective, one of five objectives in the Licensing (Scotland) Act 2005, [4].

In contrast, the CG(S)A 1982 has no formal 'objectives'. Something might be derived from the existing grounds for refusal (Sch. 1, Para. 5(3)):

- (a) the licence-holder or manager is not a 'fit and proper person', or
- (b) the vehicle or premises is not suitable for the proposed use.

In alcohol licensing, if the Scottish Parliament was asked how it had enabled Boards to promote the PHLO, it could point to the provisions about:

Overprovision (a potential reason for refusing a new Premises Licence)

The Mandatory Licence Conditions on "Irresponsible Drinks Promotions" and price variations.

If a similar question was asked about the CG(S)A, Parliament would point to the existing provisions for vetting of applicants and vehicles.

If 'fit and proper' and suitability are indeed CG(S)A 'objectives', then the question might be asked "how is a limit on PHCs supposed to promote them?"

The creation of overprovision, without first creating objectives, puts the cart before the horse.

(c) How would 'overprovision' be assessed?

PHCs are mobile. At the moment each vehicle can operate throughout the length and breadth of the Council area. Although the Licensing (Scotland) Act 2005 has a similar provision to the Bill's 1982 Act [3B], allowing the Council to determine 'localities', the 2005 Act removes this discretion from Boards with "Moving Premises": the OVP "locality" is deemed to be the whole Board area: [126(8)(9)]. The existing Taxi limit is based on dividing the Council area into Zones, and restricting a specific vehicle to only one Zone. Although the Bill's [3B] allows a 'whole area' approach, that is not consistent with the 2005 Act.

When Boards reviewed their Licensing Policy Statements, the Health Board was able to provide a vast amount of statistical evidence as to the perceived links

between the consumption of alcohol and a wide range of adverse health indicators (such as alcohol-related hospital admissions). The Police and Fire Authorities could also provide data on the link between alcohol consumption and crime or the incidence of fire-related injury. Therefore the Licensing Board, when conducting the mandatory 'Overprovision Assessment', could make a rational decision on where in its area there was OVP.

(d) Overprovision is anti-competitive

In alcohol licensing, Overprovision can be invoked by health bodies and Community Councils, but it might also be invoked by a trade competitor to prevent another trader entering the market. One Council's [10(3)] policy led to a cycle of appeals, in which the Council was involved in a three-way dispute between a would-be operator and a Taxi trade body, which was eventually described by one Inner House judge as "a sorry saga" (Renfrewshire Council v. (1) Davies and (2) Paisley and Glasgow Airport Taxis Ltd., [2005] CSIH 17).

Why should Councils be embroiled in competition disputes about PHCs?

The Bill should provide that if a Licensing Authority does not found on either the Taxi or the PHC limit, or having adopted one later ceases to apply it, its failure to have one should not be open to court question. Otherwise there could be judicial review at the instance of existing operators.

(e) Overprovision is not consistent with the EU Services Directive

The Directive is implemented by "The Provision of Services Regulations" S.I. 2009-2999. Reg. 22 prohibits a "Competent Authority" from making access to, or the exercise of, a Service activity subject to certain requirements, unless specified conditions are met.

One of the prohibited requirements is:

"quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between persons providing the Service" (Reg. 22(2)(a)).

The conditions for restrictions include:

- (a) necessity (an overriding reason relating to the public interest) and
- (b) proportionality (the requirements must not go beyond what is necessary to attain the objective).

What is the "overriding reason relating to the public interest" ? What "objective" is being attained, so that "proportionality" can be assessed? At present, PHCs can operate freely throughout the Council's area: how would the public interest be promoted if this changed, and they were restricted to Zones? There are few Taxi Stances in rural areas. At the moment, a member of the public who lives outside one of the urban areas phones for a PHC. How would his transport choices be increased if the PHCs he used to call were not tied to a single zone?

(f) Overprovision would create an unregulated market

Experience with the existing limit on Taxi numbers suggests a problem might arise if a similar limit was applied to PHCs.

There is a restricted supply of Taxi Licences, and so Licences have a value (Councils are not told 'officially', but we understand that 'plates' change hands for thousands of pounds).

The 1982 Act contains no provision for transfer. There is therefore a difference between the form and the substance:

In form: a licence-holder (X) goes into partnership with a person (Y), and produces a *pro forma* document to evidence it. He requests the Council to amend his licence to show that it is now held by the partnership. After a year, X resigns, leaving the licence with the remaining partner Y.

In substance: X has sold his licence to Y. Within a year, and possibly immediately, Y alone will operate the taxi.

This procedure is unregulated. While no doubt there are many perfectly legitimate commercial transactions, the possibility of money-laundering cannot be excluded. Since there is no formal transfer, the Police are not automatically involved. The Police would only be informed if Y was not already a licence-holder himself.

At present, there is no limit on the number of PHCs, so the Licences have no value. A person wanting to join the trade does not have to find someone with one of the scarce licences and raise the funds to buy the licence (where do the funds come from?).

Whereas the Services Directive prevents a Council from being discriminatory in issuing licences (Reg. 22(3)(a), there is no such protection for a party to a private transaction.

(g) who would pay?

The current cost of a [10(3)] survey for Taxis is about £13,000. Councils can pass this cost on to the trade, on the basis that it is in their interest to pay about £60 per licence for evidence to maintain their monopoly.

Could Councils do the same with PHC-OVP Assessment surveys, or would they have to bear the cost themselves? Unless trade bodies are prepared to accept that the proposed policy is protectionist, the Council would be left with the bill.

(h) Unification

Not a matter raised in the present Bill, but the possibility of replacing the present Taxi/PHC division with a single type of hire car has been mooted. If that ever happens, the time and money expended on separate limits for Taxis and PHCs will have been wasted.

Cl. 61 - Testing of private hire car drivers

North Ayrshire Council would be unlikely to use this new power - North Ayrshire Council does not even have a 'knowledge' test for Taxi Drivers, so why have one for PHC Drivers?

Cl. 62 - Exemptions from requirements of sections 10 to 21 of 1982 Act

(a) Repealing the '24-hour contract hire' exemption would be a good move as it could be used to facilitate avoidance. Local operators provide vehicles and drivers (both of which might be unlicensed) for contracts carrying patients to and from hospitals, or moving hospital staff between sites. These vehicles are carrying the public, but the Council might not have checked that they are roadworthy and properly insured. If a car is stopped carrying a passenger, and the driver asserts that he is simply fulfilling a contract, there is no quick way for the Police or the Council officer to verify that.

(b) What application of the new Regulation-making power is envisaged? What are the issues in England and Wales referred to by Delegated Powers Memorandum, Para. 36?

Para. 37 is:

"An example would be where a service is providing some kind of transport as an ancillary part of the wider service where the transport aspect is not the main focus."

What is meant by this?

Cls. 63-66 (various provisions re metal dealers)

The Council has no comment crime-prevention measures, except to point out that the repeal of the Metal Dealers' Exemption Warrants has the advantage that it removes the need for the Council to deal with an Auditor's Certificate every 3 years and issue a Warrant. Since the trader does not have a Licence, there is no fee, so this work is done for free.

Cl. 67 - Licensing of theatres

The move from the Theatres Act 1968 to the 1982 Act is welcome.

Cl. 68 - Licensing of sexual entertainment venues

(a) The definition of 'sexual entertainment' (1982 Act [45A(3)]) covers the same ground that the alcohol licensing legislation already covers:

“ ‘adult entertainment’ means any form of entertainment which–

(a) involves a person performing an act of an erotic or sexually explicit nature; and

(b) is provided wholly or mainly for the sexual gratification or titillation of the audience.”

(The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007, No. 336.) Those Regulations apply extra mandatory conditions to Premises Licences for late night venues.

There is no point in duplicating definitions given that the same Premises might both sell alcohol and provide SE.

The proposed amendment to the 1982 Act might simply refer to Adult Entertainment as defined in the Regulations. The Regulations might in turn be amended so that (b) in the definition might refer to ‘the audience or any part of the audience, including a single person’.

The 1982 Act should make clear that the provision of SE at any time is covered, lest there be any suggestion that, since the Regulations themselves are directed after 1.00 a.m., the SE rules also apply only to late night Premises.

(b) If the above definition is adopted, there would be no need for a separate definition of "display of nudity". [45A(4)] defines this separately for "woman" and "man", the latter excluding nipples. Instead of separately providing for men and women, allow for the fact that some people are Transgendered. The person who employed a male-to-female transsexual to display her nipples might claim that the performer was "really a man", especially if she had not registered a new gender under the Gender Recognition Act 2004

(c) The new [45A(5)] is "Sexual entertainment is provided if (and only if) it is provided (or allowed to be provided) by or on behalf of the organiser." What if the owner of the venue tries to distance himself from the event by saying that all he is doing is providing a venue where customers may act (like 'karaoke') or supposedly 'self-employed' performers operate?

(d) The new [45A(7)(b)] entitles Scottish Ministers to exclude specified places from being SEV. Suppose that the Council has already decided that the appropriate number of SEVs is nil. By re-classifying, the Ministers have overruled the Council. Suppose the Council has already dealt with an Application for specific Premises, and has refused it. If an Order is then made reclassifying them (e.g. saying that the activities are not SE after all), the Premises can operate even though local Members have said they should not. The Delegated Powers Memorandum, Para. 49 indicates that the power would be used to exempt Premises which Ministers thought should not be covered by the new system. If local Members have already applied their minds to a specific proposal, why should Ministers be able to overrule them?

(e) The same comment applies to the further Order-making power in the new [45A(11)].

(f) The new [45A(9)] allows the unlicensed use of Premises for up to 3 times in a year. Exemptions are inconsistent with the idea that the Council can resolve, in advance, that there should be no SE in any locality. If there was an exemption, the public and Councillors might discover that, despite the Council having prohibited SE, it was happening anyway.

(g) The new [45B] allows the Council to Resolve to adopt SE licensing. However, the mere fact that the Council is considering such a Resolution - even it is likely that there will be a NIL limit - might attract Press coverage saying that the Council is 'allowing lap-dancing'. Would it not be better to have the Act provide that all SE is prohibited unless the individual Council has resolved to adopt a licensing

scheme, in which case particular Premises may only operate under and in accordance with a Licence specifically granted by the Council?

(h) At present, the grounds for refusal of a Sex Shop (Sch. 2, Para. 9(5)) are (briefly)

- (a) *the Applicant is unsuitable;*
- (b) *the business would be carried on for someone who would himself be refused;*
- (c) *the number of Sex Shops in the locality is equal to or exceeds the number which the Council consider is appropriate for that locality (which could be nil – Para. 9(6))*
- (d) *the Licence would be inappropriate having regard to the locality's character.*

The proposed 1982 Act, Sch. 2, Para. 9(5A) renders it difficult for a Council to rely on (c). The new provision is:

"For the purposes of sub-paragraph (5)(c), a local authority must—

(a) from time to time determine the appropriate number of sexual entertainment venues for their area and for each relevant locality, and

(b) publicise the determination in such manner as they consider appropriate."

Therefore, if the Council adopted a licensing scheme, it would also have to carry out a survey (like the 'overprovision assessment' from the Licensing (Scotland) Act 2005) and review it. How would residents of a locality be likely to react if they were told:

"The Council has decided that your area is suitable for a SEV. There's no application yet, and there may never be, but if there is the Council will probably grant it (assuming the Applicant is suitable)" ?

Is there not an overlap between the locality provision in (c) and the character provision in (d)?

If the Council has already Resolved under [45] to allow such licensing, it could be said that the issue of principle has been dealt with already. However, while the broad issue of principle

'there might be sex shops somewhere in the Council area'

has been decided, it is still for the Committee to consider the particular locality; the Committee could still be consistent with the 'somewhere' Resolution by saying

'there will be no sex shop/SEV here.'

(i) 'relevant locality': Unlike other 'locality' provisions, where the Board or Council can determine for itself what localities there should be, the 1982 Act excludes discretion, as Para. 9(7) is:

"In this Paragraph "the relevant locality" means—

- (a) in relation to premises, the locality where they are situated; and*
- (b) in relation to a vehicle, vessel or stall, any locality where it is desired to use it as a sex shop."*

What should be the sequence of events? - The locality depends on the particular application, but localities must also be assessed prior to there being any application.

Cl. 69 - Deemed grant of applications

The new [3(4B)] is:

"A variation of the terms of a licence deemed to have been granted under subsection (4) is to have effect for the remaining period of the licence."

The 1982 Act allows for three alterations to a Licence, not one:

- (a) Notification of material change (including change of Day-to-Day Manager): Para. 9(1) and 9(3)
- (b) Consent for Alterations: Para. 9(2) (called in North Ayrshire Council 'Amendment')
- (c) Variation (Para. 10)

The word "variation" only covers (c). The list in (5B) would have to include (b).

Similarly the list in [45C(9)] would have to include Sch. 2, Para. 14(2).

Cl. 70.- Procedure for hearings

This is all unnecessary. Licensing Authorities have been holding hearings under the 1982 Act without the need for external instruction for 30 years, and the Courts have not been flooded with Appellants alleging 'breach of natural justice'.

The 'Further Options' Consultation asked (Q.31):

"Should the Scottish Government provide additional guidance or regulation for Licensing Boards on the conduct of hearings and why?"

North Ayrshire Licensing Board replied:

"No. Each Board has its own priorities, so it would be impossible to lay down a single procedure. Provided that all Boards afford all parties a fair hearing, the details should be left to the Boards."

Comments on the new Sch. 1, Para. 18A (similar comments can be made of the new Sch. 2, Para 24A re Sex Shops and SEVs):

(a) (notices): The Act already specifies that certain notice must be given to Applicants etc..

(b) ("rules of evidence"): In licensing it makes no sense to talk of "rules of evidence". Committees are not Courts, and do not put witnesses on oath:

"7. The scope of the discretion conferred on the Committee by para 11 of Schedule 1 to the 1982 Act is wide. They are entitled to proceed on any type of material which has a bearing on the question which they have to decide, and it is for them to decide on its sufficiency and quality, and the appropriate weight to be given to it. Accordingly, it was for the Committee to decide whether to proceed on the basis of the information provided by the Chief Constable's representative. The fact that the information included hearsay evidence did not impinge on that discretion."

Inner House in Ferguson v Dundee City Council [2006] ScotCS CSIH 51
(emphasis added)

The Bill's phrase looks as though it was copied from the unused enabling power in Licensing (S) Act 2005 [133(3)(b)]. That power has never been used and probably never will be, given that the reason for it (the Stated Case Appeal procedure) was abandoned.

It is very rare for a Board to hear 'evidence', in the sense of testimony - Boards deal with ex parte statements. This 2005 Act provision can be explained by the appeal system originally envisaged by the 2005 Act (Stated Case) which was based on the model of an appeal from a summary criminal Court. It was superseded by CJL(S)A 2010, which returned to a Summary Application procedure as used in the 1976 Act and other licensing legislation. The Summary Application Rules do not prescribe forms of evidence to be used in court (and would not be expected to, given that procedural rules would not be expected to alter the general law of evidence).

(c) (representation): the Convenor can already make a decision as to whether or not the person who attends the hearing, if not the party, is suitably authorised.

(d) (timing): The Act already specifies a schedule.

(e) (expenses): Licensing Authorities have never had the power to award expenses, except that the Licensing (Scotland) Act 2005 entitled a Board to award expenses against an Objector or Review Applicant whose complaint was deemed "frivolous or vexatious" [22(6)-(8), 36(6)-(8)], although neither provision states how the fees are to be calculated - the tables of fees for court actions or solicitors have no application. How would these new fees be assessed?

Cl. 71 - Conditions for Part 3 licences

(Part 3 means Sex Shops and SEVs). No comment.

Cl. 72 - Civic licensing standards officers

There is no objection to this, but the question can be asked "What does this provision add to the existing law?"

Many Councils already have an officer who can exercise the existing powers of an "Authorised Officer of the Licensing Authority" under [5, 11]. The existing officer will already, as part of his job, mediate, supply information, and endeavour to secure compliance with licence conditions - much as a "Licensing Standards Officer" under the Licensing (Scotland) Act 2005 would do. If there is a case to bring to the Committee, he can already bring it. If it is not envisaged that the new CLSO should be a different person from the existing AALO, what is the point of this provision?

Cl. 73 - Electronic communications under the 1982 Act

A welcome provision.

(a) See comment to Cl. 69: the list in Para. 16A(1) omits applications under Paras. 9(2) and 10.

(b) There should be a provision that if a person has used electronic communication to make an Application etc., then he is deemed to have consented to the Licensing Authority also using such means to communicate with him at any time thereafter at the same email address.

(c) Delete (4)(b). Requests for Statements of Reasons are either made orally at the time or by email, neither indicating the consent of the party to receive S/R by email. I send S/R by email saying 'I would not propose to send a hard copy, but will do so if you say you cannot read it.' No-one has asked for a hard copy. If (4)(b) is enacted I'd have to go back to old-fashioned letters.

(d) The proposed presumption of delivery in Para. 16A(7) is the second working day after the day on which it was sent. Why not assume that electronic communications arrive on the same day? e.g. Ordinary Cause Rule 15.2(3)(a)(i) says that personal intimation or fax transmission of a Motion is effective "on the day of transmission or delivery where it is given before 5.00 p.m. on any day".

Cls. 74-79

Part 4 (General) - no comments.

- - -

Other Matters

Other matters might be considered for inclusion in the Bill. Some of these suggestions were made in the response to the 'Further Options' Consultation but were not progressed.

1. The training requirements for Board Members

The Parliament might consider repealing the requirement for repeated training in Sch. 1, Para. 11(2)(b):

"(b) if the member is re-elected, the period of 3 months beginning with the day on which the member is re-elected."

Why should a Member who has already been trained be re-trained just because he is re-elected? At present, Members who were on the Board before the Local Government election must be re-trained, even if:

- (a) they have been on the Board for years, or
- (b) they were trained after the last significant amendment to Licensing Law (1st October 2011), (having been elected to fill a vacancy).

Repeated training is unnecessary and is a waste of time and money.

The Parliament might consider removing the obligation of re-training where the Member was part of the previous Board. If 'old' Members are to be retrained, perhaps the requirement might be linked to the individual dates of their election: the newest Member of the North Ayrshire Board had been trained in early 2010: what advantage was there in him being unable to sit after the 2012 election (given that he and the other Members were properly trained the day before the election of the new Board but none of them could act the day after the election).

After the local elections in May 2012, all the Boards in Scotland were elected in accordance with 2005 Act, Sch. 1, Para. 2. On the election of the new Board, the previous Board ceased to exist: Para. 4(1)(a)(ii). Each member required to be trained within 3 months, whether he was truly a new Member or he was on the previous Board (Para. 11(2)), and he was not to take part in any proceedings of the Board until he had produced to the Clerk evidence of training: Para. 11(3).

This meant that the new Board could not transact any business until a quorum of Members were trained. Since every Board in Scotland would be seeking training places at much the same time, there was a possibility that there might be some Boards unable to transact the non-delegable Para. 10(2) business for a period of time.

This absence of a Board would have undesirable consequences:

- (a) Licence Applicants might be unable to get the grant or Major Variation of Premises Licences, or where hearings were necessary, the grant of Transfers, Occasional Licences, Extended Hours, or Personal Licences;
- (b) Review Applicants would be unable to have hearings;
- (c) the Police would be unable to seek a Closure Order under [97].

Also, given Para. 11(4), Members, whether newly-elected or re-elected, would cease to part of the Board three months after election. There is the possibility that a Member might not acquire the qualification in time, e.g. because he might have to resit an examination or a training course cannot be arranged in time. The North Ayrshire Board has 10 Members so it could have found after 3 months of existence that it failed to have the quorum of 5 prescribed by Para. 12(1), and there would be no point in the untrained Members then being trained since they would require to re-elected by the Council, and their training would only count if it post-dated their re-election.

Would it be possible to allow a temporary Board to operate for (say) 6 months after the election of the new Board, consisting of such Members who had been on the 'old' Board and were therefore suitably qualified, or for the quorum for all meetings happening in the first 6 months of the 'new' Board to be lower than would otherwise be expected?

This issue was raised by the 'Further Options' Consultation (Q.50) and North Ayrshire Licensing Board replied:

"No. We were aware of the risk but fortunately all our Members obtained training qualifications at the first sitting, so we had no quorum problem. Had this not happened hardship could have occurred. The 'new' Board was elected at the Council's First Statutory Meeting on 16 May 2012. Until such time as a quorum was qualified, it could not transact business.

The 'old' Board was of course no longer available, so even though those Members had been qualified, they could not sit.

Since all 'new' Members were qualified, the next Board dealt with:

(a) 6 Review Applications (4 from the Police making various crime and disorder complaints, one a noise complaint from a neighbour, and a Section 44 Review following a conviction),

(b) 7 non-minor-variations

(c) 3 Premises Licence Grants (2 'full', 1 provisional)

(d) 1 Personal Licence Application

(e) 1 Occasional Licence Application.

Had there been no Board, none of this could have been dealt with for weeks or months. If the Police had wanted a Closure Order there would have been no Board to grant it.

Our Board has 10 members. The quorum is 5. 3 of the 10 were Members of the pre-election Board. 7 were newly-elected.

It might have helped if Members who had been on the pre-election Board did not have to requalify. They were qualified on 15 May but not 16 May, so they could not transact business – how was the public interest served?

It also cost the Council money in paying for training people who were already trained."

2. Supplementary Licensing Policy Statement

Amend the requirement to re-publicise fully any proposal for a Supplementary LPS.

The existing structure is cumbersome and has never been used in North Ayrshire. Therefore the only changes to LPS are at the 3-yearly review. If the life of a LPS is to be increased to 4 years to match Council elections, there might be more occasions to draft a Supplementary LPS in the interval.

At present, when the Board intends to make any change to its LPS, no matter how minor, the whole consultation process must be repeated, e.g. for its current LPS North Ayrshire consulted with numerous bodies:

- (a) Local Licensing Forum
- (b) NHS Ayrshire & Arran
- (c) Chief Constable
- (d) Fire & Rescue
- (e) All Community Councils in North Ayrshire
- (f) Community Justice Authority
- (g) Alcohol and Drug Partnership
- (h) The Council's Senior Manager Building Standards
- (i) The Council's Senior Environmental Health & Trading Standards Manager

In addition, a Public Notice summarising the purpose of the LPS and inviting comments was published on the Board's website. The Board had few representations, all from bodies and none from the general public.

Would it not be sufficient if the Board published, on its website, a notice:

- (a) setting out the proposed changes,
- (b) stating a period for representations, and
- (c) stating that if there were no representations within that period the LPS would be held as so modified (it would then be re-published on the

website), but if there were any representations these would be considered at a Meeting and the Board would then decide what modification, if any, was appropriate to its LPS.

3. Errors

(a) Correct typo: "identified" is spelled "indentified" in both of the Criminal Justice and Licensing (Scotland) Act's ASB provisions [22(2A), 24A(1)];

(b) Correct typo: "ground for review" is rendered as "ground of review" in [2005 Act 36(5)(b), 37(4)(b)];

(c) Amend [29(4)]. The intent was to apply some of the procedures for Granting Premises Licences to 'Major' Variations (there is no formal title for these, and they are simply not 'Minor Variations'). The provisions applied are:

[21(1)] - Board to notify neighbours etc.

[21(2)] - Board must supply copy Application to those persons.

[22] - Objections and Representations

However CJL(S)A 2010 [183(2)] amended the 2005 Act in two ways:

(1) the Police were entitled to make ASB representations - new [22(2A)];

(2) the Board was also given a power itself to request an ASB Report from the Chief Constable - [24A].

However, power (2) relates only to the original Premises Licence application, and not a later Variation application.

4. Private Proceedings

Amend 2005 Act, Sch. 1, Para. 12 so as to increase the number of situations where the Board may act in private:

(a) where a party to the proceedings requests a private hearing;

(b) where the Board resolves otherwise, using procedures similar to Schedule 7A to the Local Government (Scotland) Act 1973

(c) where the Board carries out the preliminary consideration of whether or not to make a [37] Proposal (If a Proposal is made, the later hearing will of course be in public).

The Further Options Consultation asked (Q.33)

"Should Board meetings be held in public, in their entirety?"

North Ayrshire Licensing Board replied:

"No. In most cases the situation should remain that proceedings, other than deliberation, should be in public, but an exception might be made:

(a) where a party to the proceedings requests a private hearing;

(b) where the Board resolves otherwise, using procedures similar to Schedule 7A to the Local Government (Scotland) Act 1973.

Examples:

(a) the Police brought a review against Premises and narrated numerous incidents. This was followed by a newspaper story with the headline 'Pub was worst in Ayrshire'. The Licence-holder contended that many of the complaints had nothing to do with her, e.g. she herself was the victim of vandalism and racial abuse. While the Board did impose sanctions, it recognised that while the Police had concerns (the headline summarised their view), it did not follow that the licence-holder was wholly at fault. Therefore the sanctions were not as serious as a reader of the newspaper headline might expect.

(b) An applicant for a Personal Licence had a conviction for a sexual offence involving his daughters. His lawyer requested a private hearing, and when it was explained that this was not possible he withdrew the Application rather than publicise the conviction. If he had not done so, not only would he be identified, but there would be a risk the victims would be identified.

In both cases, a public hearing could be freely reported in the Press."

Suggestion (c) arises from later experience. The preliminary discussion takes place in public, at a meeting of the Board, but our practice is deliberately to omit a Report from the Agenda and instead ask the Convenor to introduce as 'Any Other Business' a Briefing Note which is handed out to Members only. The Briefing Note sets out the information which the Clerk thinks may lead to the conclusions that a "ground for review" exists, and that a public Review hearing should later take place. That way the Members know what the circumstances are but the Press do

not: if the Report was public from the start, the Board might decide to take no action, but nonetheless the alleged circumstances might be reported.

5. Amend the Premises Licence 'terminating events' [28]

Include among the terminating events the PLH's loss of the right to occupy the Premises. Although it is clear that this would have been the consequence under earlier legislation, the argument has been advanced that the 2005 Act provides a comprehensive code and that the earlier caselaw has been superseded.

6. Vice-Convenor

The 2005 Act does not recognise the office of Vice-Convenor, but many Boards have one. Amend Sch. 1, Para. 6 so that the Vice-Convenor can act in the absence of the Convenor, without a Para. 6(5) election.

7. Consolidation

This is a general comment about the style of legislation, not only in the licensing field, where piece-meal changes are repeatedly made.

One of the criticisms of the 1976 Act was that it had accumulated so many amendments that it was difficult to follow. The 1976 Act lasted 30 years, and the 2005 Act's complexity has surpassed that in under 10 years.

It is not easy to comment on Bills. If practitioners who use the legislation daily have difficulty following the law, what hope have the general public?

For example:

(a) Cl. 46(4):

"In section 74 (determination of personal licence application)—

(a) in subsection (2), after paragraph (c) insert—

"(ca) no information has been provided under section 73(5) or 73A(2),"

(b) subsection (5A) insert—

"(5AA) If— ..."

Why repeatedly amend an Act - why not repeal and re-enact? The original subsection (5) was in the 2005 Act. Subsections (5A) and (5B) were inserted by CJL(S)A 2010. The Bill inserts (5AA) between them.

(b) Bill, Schedule 2, Para. 4(2):

"4(2) In Schedule 1 (licensing: further provisions as to the general system)—

(a) in paragraph 5—

(i) the sub-paragraph (2A) which was inserted by section 172(6)(d) of the Criminal Justice and Licensing (Scotland) Act 2010 is renumbered as sub-paragraph (2ZA),"

This is an amendment of an amendment.

8. Transfer

One of the 'trigger' events for [34] transfer of a Premises Licence is where:

"the Premises Licence Holder, being an individual— ... becomes incapable within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)," [34(3)(a)(ii)]

This provision is unworkable and should be repealed.

The person who can apply is (see The Licence Transfer (Prescribed Persons) (Scotland) Regulations 2007 No. 34, Reg. 4.):

(a) any person with Power of Attorney by the Licence Holder; or

(b) any person authorised to act on behalf of the Licence Holder by virtue of the 2000 Act.

(1) It is not stated whether (b) means only a "Financial Guardian" or includes "Welfare Guardian", or even a hospital manager (The Reg: simply says "any person authorised to act on behalf of the Licence Holder by virtue of the [Act]");

(2) In practice the Guardian/Manager would rarely be able to apply: the 28 day period available for Transfer runs from when the Licence Holder became incapable, and so that period will have expired long before the Guardianship proceedings are concluded with an appointment. It would be necessary for the Applicant for Guardianship to seek an early interim appointment, and even then

the 28 days is likely to have expired long before anyone even lodges the Guardianship application with the Court, since it would not be lodged until the Applicant has obtained suitable medical evidence.

9. Disabled Access and Facilities Statement

In the 2005 Act [20(6)] was introduced by C JL(S)A 2010 but has never been commenced. An Applicant for a Premises Licence would be required to lodge a DAFS.

- (a) is the provision ever likely to be commenced?
- (b) if so, what if anything should a Board do with a DAFS:
 - (i) if the Applicant says 'I do not comply with the DDA and never will' ?
 - (ii) if the Applicant said, at Application, that he would provide such-and-such facilities within 3 months, but then failed to do so.

The Scottish Government said in correspondence:

“There are no further provisions in the 2005 Act detailing what a Licensing Board should do with such a statement or what impact the statement should have on the determination of the application. ...

The statement is intended to inform the public as to the nature of the disabled facilities at the Premises - it has no bearing on the obligations of the applicant under the Equality Act 2010.

The amended section 20(2) does not require an applicant to confirm whether or not they are in compliance with disability discrimination legislation. There is no requirement in the amended section 20(2) for an applicant to make any commitment to provide disabled facilities at some point in the future. I would remind you that under section 27(7)(c) Licensing Boards may not impose conditions that relate to a matter which is regulated under another enactment.”

So what is the provision for?

10. Relevant Offences

The suggestion that it would be too difficult to remove the concept of 'relevant' convictions from the Licensing (Scotland) Act 2005 is mistaken. On the contrary, it

would be simple. Apart from replacing the many uses of the phrase, the S.S.I. could be revoked.

(a) The 2005 Act's approach has been rendered redundant by the introduction of 'fit and proper': if any information is relevant to the 'fit and proper' question, why should it matter whether a conviction is 'relevant' or not?

(b) Even under the existing law if a conviction is not 'relevant' it might still be the basis of a "Refusal Recommendation":

Premises Licence Application - [24(8)] (although there is a narrow 'window')

Transfer Application - [33(7)]

Personal Licence Application - [73(4)]

There is no Refusal Recommendation available where the Police confirm a conviction under [44]: if the conviction was 'relevant' their notice will be followed by a [37] Review Proposal, so the absence of a specific recommendation power would not be a serious omission, but if the offence is not 'relevant' in the first place then there will be no notice.

(c) The concentration on convictions means that the Board does not have access to the information which a Licensing Committee would have. For example, where there has been a non-court disposal. Suppose the Procurator Fiscal tells a suspected offender:

"I am satisfied that the circumstances reported merit prosecution, but I am giving you the opportunity to discharge your liability to prosecution if you pay £x" (a 'Fiscal Fine' or Conditional Offer under Criminal Procedure (S) Act 1995 [302]), and the offender pays £x.

That is not a conviction, yet a Licensing Authority under CG(S)A 1982 would be quite entitled to infer that the allegation had been admitted and proved. Why can't the Board do this?

(d) See comments above about the possibility of 'rules of evidence' and the reference to the Ferguson case (re Bill Clause 70).

Once it is accepted that any information, even uncorroborated hearsay from an anonymous witness, has the potential to carry weight, then it ceases to be a matter for any Court: the attribution of weight to factors for and against is for the Licensing Authority. There are many cases supporting this view, e.g.

Ranachan v Renfrew District Council, 1991 SLT 625 [2D]

Latif v Motherwell District Licensing Board, 1994 SLT 414 [1D]
Middleton v Dundee City Council, 2001 SLT 287 [ED]
Mejury v Renfrewshire Council, 2001 SC 426 [ED]

It might well be commented that uncorroborated hearsay from an anonymous witness should carry little weight, but that is a question for the Licensing Authority. The question of law "is this conviction 'relevant' ?" should be unimportant.

(e) The Scottish Parliament itself has already accepted the idea that uncorroborated hearsay from an anonymous witness can be taken into account. See Licensing (S) Act 2005, [22(2A)]:

“The appropriate Chief Constable may, under subsection (1)(b), make representations concerning a Premises Licence application by giving to the Licensing Board a report detailing—

(a) any cases of antisocial behaviour identified by constables as having taken place on, or in the vicinity of, the Premises,

(b) any complaints or other representations made to constables concerning antisocial behaviour on, or in the vicinity of, the Premises.”

The Board in (b) would be hearing information given to Police officers by unidentified members of the public - for all the officers knew, the "complaints or other representations" might be made maliciously, and there would be no way of the Board determining who made the representations or of assessing their credibility and reliability. The same might be said of the informants who give the Police 'intelligence'.

(f) Although the licence-holder and the convicting court are obliged to report convictions to the Board, the Police do not even have the right to do so, although they are the most reliable source of information for Boards, both:

(1) because they are likely to do it at all, and

(2) when they do their information will probably be accurate.

Licence-holders often fail to report convictions, whether due to ignorance or intentionally, and Courts almost never do (the only occasion when North Ayrshire received notice was in a case where it happened that the Assessor in the Court was himself a former Board solicitor).

(g) The Act's approach rests on a Scottish Statutory Instrument from 2007 which has never been updated: The Licensing (Relevant Offences) (Scotland)

Regulations 2007 No. 513. It would always be difficult to compile and maintain a comprehensive list of enactments, since new ones are made all the time, but this difficult task has not been attempted and the deficiencies of the existing SSI are simply increasing with time. The Police in practice report everything as 'relevant' anyway. The SSI consists of a seemingly random sample of statutes with inexplicable inconsistencies and omissions. Sometimes whole Acts are included as 'relevant', sometimes only a few sections (omitting other provisions).

Examples:

(1) Offences against the Police

Offences of assaulting or obstructing officers were prosecuted under the Police (S) Act 1967 [41], and are now charged under the Police and Fire Reform (Scotland) Act 2012 ([90(1)] assault Police or staff; [90(2)] resist, obstruct or hinder Police or staff). Neither is listed as 'relevant'.

(2) Statutory Offences based on Common Law crimes

If a statutory offence appears in the Regs. and that statute has since been repealed and replaced, then on ordinary interpretation rules the 'new' offence would also be 'relevant'.

However, this does not apply when a common law crime is duplicated by a statute, e.g. Breach of the Peace at common law is 'relevant' (Schedule, Para. 48(a)). Circumstances which would once have led to a BOP charge are now often prosecuted under Criminal Justice and Licensing (Scotland) Act 2010 [38] ("Threatening or abusive behaviour"). The statutory offence is not 'relevant' - the Regs. have not been amended to cover the 2010 Act.

Reg. 2(b) does not help. This only applies to a statutory offence where the statute has since been repealed. A statutory offence would only be relevant if

- (i) imprisonment followed (Reg. 2(d)), or
- (ii) it was an offence "inferring personal violence" (Para. 1) - maybe Police assault would count, but resisting arrest is doubtful.
- (iii) it was a "sexual offence" (Para. 2). Some things which might have once have been charged as common law "Breach of the Peace" are now specific statutory offences, and are defined as 'sexual offences', e.g. the 'peeping tom' in Raffaelli v. Heatly, 1949 S.L.T. 284; 1949 J.C. 101 might now be prosecuted under Sexual Offences (Scotland) Act 2009, [9] (voyeurism), [26] (voyeurism towards a young child), or [36] (voyeurism towards an older child).

(3) Breach of Bail and other offences against 'administration of justice'

Although some common law 'administration of justice' offences are listed in Para. 47,:

- (c) attempting to pervert the course of justice;
- (d) attempting to defeat the ends of justice;
- (f) contempt of court;

there are no references to the comparable statutes:

- failing to answer an undertaking given to Police on release from custody (commonly used for minor crimes - effectively a promise to attend Court) - Criminal Procedure (S) Act 1995 [22]; and
- breaking bail by not appearing in Court, e.g. Bail (S) Act 1980 [3(1)(a)], replaced by Criminal Procedure (S) Act 1995 [27(1)(a)],

Since these are not 'relevant offences', the equivalent in England and Wales ("Failure to surrender to custody at appointed time") would not be admissible as 'foreign offences'.

Particular provisions of the Schedule to the SSI

"6. An offence under section 1 of the Trade Descriptions Act 1968 (c. 29) (false trade description of goods) in circumstances where the goods in question are or include alcohol."

- (a) Wouldn't offences not involving alcohol be equally concerning to a Board? Put shortly, the conviction shows the person is dishonest. What he was selling does not matter. Why should he not be regarded as 'not fit and proper' ?
- (b) How would a Board know what the 'goods in question' were, as this would not be noted on an ordinary schedule of previous convictions? The Police letter might repeat the details of the Charge, but even that is not guaranteed. If the Police themselves institute proceedings, e.g. by charging assault, they will probably have a record of the particulars - who, where, when, what - but sometimes the Police themselves cannot say due to the lapse in time.

With many offences the Police themselves are not the Reporting Authority so they might have no information beyond the bare S.C.R.O. details.

Without details, how can anyone determine that the case related to alcohol (Paras. 6, 30, 32) or (Para. 19(a)) Public Entertainment Licence? Surely the Licensee would have to be given the benefit of the doubt?

(c) Not listed are breaches of Regs made under the Food Safety Act 1990: The General Food Regulations 2004/3279; see Regulation (EC) No. 178/2002. Art. 18 of the EC Regs. makes it illegal to refill a lot-marked bottle (as this prevents traceability: all bottles are lot-marked).

"19. An offence under any of the following provisions of the Civic Government (Scotland) Act 1982 (c. 45)–

(a) section 7 (offences), so far as relating to public entertainment licences under section 41;"

Why only PELs? Similar comment to Para. 6.

"19(g) section 57 (being in or on buildings etc. with intent to commit theft);"

Section 58 (so-called 'KT' or the old 'Powers' offence - 'known thief in possession of tools') is omitted, yet it is even greater evidence of dishonesty than Section 57: the person is a repeat offender.

"28. An offence under any of the following provisions of the Road Traffic Act 1988 (c. 52)–

(a) section 3A (causing death by careless driving while under the influence of drink or drugs);

(b) section 4 (driving etc. a vehicle when under the influence of drink or drugs);

(c) section 5 (driving etc. a vehicle with alcohol concentration above prescribed limit);

(d) section 178 (taking motor vehicle without authority, etc.)."

Omissions:

1. Dangerous and careless driving [1 - 3] - should Boards overlook serious criminal offences such as causing death by careless driving because the offender was not drunk?
2. Refusing to give a drinking and driving specimen [6-7] is perhaps more serious than actually being over the limit - typically being committed by drivers who are both over the limit and who are trying to obstruct the Police by refusing a test (common law 'attempting to pervert' is relevant, but the statutory equivalent is not).
3. failure to have MOT, licence or insurance [47, 87, 143]; and
4. failing to report accidents [170] (although 'attempting to pervert' is relevant)

Are many of these not an indication that the offender is dishonest and regards compliance with the law as of little consequence? Where a Licensing Authority formed such a conclusion, and accordingly held that a Taxi Driver was not 'fit and proper', the Inner House did not interfere (Middleton v Dundee City Council, 2001 SLT 287).

30. *An offence under either of the following provisions of the Food Safety Act 1990 (c. 16) in circumstances where the food in question is or includes alcohol–*

(a) section 14 (selling food or drink not of the nature, substance or quality demanded);

(b) section 15 (falsely describing or presenting food or drink).

See comments (a) & (b) re Para. 6.

32. *An offence under section 92(1) or (2) of the Trade Marks Act 1994 (c. 26) (unauthorised use of trade mark, etc. in relation to goods) in circumstances where the goods in question are or include alcohol.*

See comments (a) & (b) re Para. 6.

33. *An offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39)–*

(d) section 47 (prohibition of the carrying of offensive weapons);

(e) section 49 (offence of having in public place article with blade or point);

(f) section 49A (offence of having article with blade or point (or offensive weapon) on school premises).

What about obstructing a Police search for such weapons - surely as objectionable as the possession offence itself? The offence of obstructing a drugs search is considered 'relevant': [23] MDA 1971 (listed in Paragraph 9(f)).

43. An offence under section 46 of the Gambling Act 2005 (c. 19) (invitation to gamble).

[46] creates various offence of causing or permitting a child or young person to gamble, or sending him info or adverts about gambling. However the principal unlicensed gambling offences in [33] and [37] of the GA 2005 are not 'relevant'.

47. [Common Law crimes] (g) prison breaking.

Is this ever prosecuted at Common Law? The offence under the Prisons Act 1952 [49] (being 'unlawfully at large') is not listed.