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Clerk
Local Government & Regeneration Committee
Scottish Parliament



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Our ref:
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Dear David

Thank you for your letter of 19 January asking for clarification of a number of points in relation to the Air Weapons and Licensing (Scotland) Bill. I take your questions in turn.

Air Weapons

- **“Notwithstanding paragraph 51 of the Policy Memorandum, additional clarification is sought of the Scottish Government’s rationale for 14 – 17 year olds being subject to special requirements and conditions and also whether there are any statutory impediments to setting the age limit lower? The Committee are somewhat exercised generally around age limits compounded by prospective changes to the voting age.”**

Section 7 of the Bill places additional requirements on 14 to 17 year olds granted an air weapon certificate. Specifically, under-18s are prohibited from buying or otherwise owning an air weapon, and can only be granted an air weapon certificate for a limited range of purposes. This is consistent with the existing Firearms Act 1968, which prevents under-18s from buying any firearm (including shotguns and air weapons), and restricts the reasons for which an under-18 may be granted a firearm or shotgun certificate. The 1968 Act in turn follows the EU Weapons Directive 91/477/EEC, which states that member states should not allow under-18s to buy firearms, or to acquire them except for a limited range of purposes. The list of conditions at section 7(5) of the Bill is broadly consistent with the purposes authorised by the Directive.

The EU Directive does not apply to air weapons and there is therefore no statutory impediment to setting a lower age limit for air weapon certificates. However, the Scottish Government believes that, where potentially lethal firearms are concerned, it is appropriate to maintain consistency with the approach in Great Britain and the

wider EU. The Bill as currently drafted allows a range of options for under-18s to use air weapons. In addition to the young person's air weapon certificate for 14-17 year olds, the Bill allows supervised shooting from any age on private land or at an approved air weapon club.

Alcohol

- **“A number of those supplying information to the Committee have suggested that the express link to the licensing objectives in the proposals for a fit and proper test will limit information a licensing board can take into account. Does the Scottish Government agree? And is the intention that information (perhaps of criminal conduct) should be ignored if it does not relate to the licensing objectives?”**

The overall scope of the Licensing (Scotland) Act 2005 is to make provision for regulating the sale of alcohol, and for regulating licensed premises and other premises on which alcohol is sold; and for connected purposes.

As the Committee has highlighted, the fit and proper test is considered with regard to the licensing objectives. The licensing objectives are provided in s.4 of the 2005 Act with the intention of enshrining in statute guiding principles for Licensing Boards in the exercise of their functions in relation to that Act. The licensing objectives are: preventing crime and disorder; securing public safety; preventing public nuisance; protecting and improving public health and protecting children from harm.

As can be seen, these objectives are broadly drafted and they underpin the 2005 Act as a whole. It is not therefore anticipated that demonstrating the ground for refusal having regards to the licensing objectives should impose an undue burden on Boards. The linking of the fit and proper person test to the licensing objectives ensures that decisions made by Licensing Boards are firmly grounded within the actual legislation. In practice, decisions made by Licensing Boards must always operate within the context of the legislation and focus primarily on the licensing of alcohol, any decisions that were not soundly based on the licensing of alcohol would most likely be overturned on appeal.

It is not the policy intention to offer a definition of a 'fit and proper person', nor would it be the intention to provide a list of factors that should be considered when assessing an applicant / licence holder. This approach is in accordance with various other Acts that use the test or a similar test, such as the Civic Government (Scotland) Act 1982. It is our view that any such definition or prescription, could limit the range of matters to be considered by the Licensing Boards or restrict the information provided to the Boards by relevant persons. It will be for Boards to consider the material that is placed before them, and whether it provides sufficient grounds to refuse an application or revoke a licence. If such action is taken then will then be open to the applicant to appeal.

The current lack of a 'fit and proper person' test has been criticised by the police, Licensing Boards and those within the alcohol trade.

- **The Policy Memorandum envisages that licensing boards may be able to consider police intelligence when applying the fit and proper test. The Committee has been told that licensing boards must operate according to the**

principles of natural justice – which would include giving an applicant/licensee the opportunity to see and respond to any evidence, and may require information to be rejected if it does not meet certain evidential standards. Does the Scottish Government agree with this position? Can you provide examples of the types of police intelligence the Scottish Government envisages licensing boards will be able to take into account?”

The Scottish Government would agree with the view that a Licensing Board must operate according to the principles of natural justice. It would be the view of the Scottish Government that the existing legislation is compliant with the principles of natural justice and the amendments proposed in the Bill do not alter this. For example, the consideration of premises licence must be determined at a hearing and such a hearing must take place at a meeting of a Licensing Board. Where the police make representations concerning a premises licence application, the Board must give a copy to the applicant (s.22(3)(a)). Thereafter, at the hearing, the applicant or their legal representative will have the opportunity to dispute any of the information provided to the Board as they see fit. Similarly, where there is to be a review hearing of a premises licence, s.38(3) provides that the Board must provide the licence holder with notice of the hearing and a copy of the premises licence review proposal or application. As per the previous example, at the review hearing the applicant or their legal representative will have the opportunity to dispute any of the information provided to the Board as they see fit.

It is for the Board to determine the weight that it places upon the evidence placed before it and their decision would be open to appeal.

The term police intelligence is broad and potentially misleading. It can, for example, include incidents witnessed by a police officer or reports received in an area. We understand that the police are currently considering best practice in relation to the presentation of intelligence to Boards. This process will be informed by Board practice and case law.

Metal Dealers

- **“The Committee understands that only a person (“a metal dealer) who ‘buys and sells’ metal would require to be licensed under the Bill and that this would allow itinerant dealers who collect metal without paying for it and then sell it, to operate without a licence. It would also exclude other people who deal in scrap metal, such as demolition contractors who sell on metal recovered from their building work. Could you explain the thinking behind the decision taken to define a metal dealer in this way and what might the Scottish Government position be on widening the definition to someone who ‘buys or sells’ metal?”**

The Bill currently before the Committee does not define metal dealers or itinerant metal dealers. In both circumstances the definition, and thereby those regulated by the licensing regime, is provided in s.37 of the Civic Government (Scotland) Act 1982. Instead the provision in the Bill, with regards to metal dealers, are intended to modernise and strengthen the regulatory regime of those currently defined as metal dealers or itinerant metal dealers.

That said, the Scottish Government is aware of the arguments that expanding the definition of a dealer to include those at the periphery who come into possession of

metal and then sell it, may assist enforcement. We are considering the implications of widening the definition of metal dealers and itinerant metal dealers. We are conscious that a wider definition may give rise to a new risk that the licensing requirement is wider than envisaged and may inadvertently capture people who are not in any sense scrap metal dealers e.g. a plumber who acquires metal when replacing piping and then sells it. Finally, it is perhaps worth noting that demolition contractors and mobile collectors who do not offer payment (i.e. they sell but do not buy metal) do not seem obvious outlets for stolen metal.

- **“The Committee has heard that itinerant dealers currently evade the requirement for a metal dealer’s licence on the basis they have a waste carriers or a waste management licence. Can you respond to this suggestion and clarify the differences between the scrap metal and waste licensing requirements?”**

Metal dealers operate under a dual licensing requirement, with two licences that run in parallel with separate objectives. The metal dealers licence is aimed at classically civic licensing objectives i.e. preventing crime and disorder, preventing nuisance, protecting public safety. The waste carriers licence is geared toward environmental protection and safe carriage and disposal of waste. If an individual is conducting activities that fall within the licensable activity under both licences then they require two licences. It would not be permissible for an individual with only a waste carrier’s licence to buy and sell metal by arguing that the metal was only waste.

- **“The Committee has been advised it can be difficult for licensing authorities to maintain oversight of itinerant dealers that are licensed by that authority but operate elsewhere across Scotland. Presumably, the system would also allow itinerants to bypass any additional requirements imposed by a single licensing authority and still operate in other areas. The Committee notes that itinerant dealers operating in England and Wales are required to hold a licence from each local authority in which they operate. How does the Scottish Government respond to the points above, how does it anticipate local authorities will monitor the operation of itinerant dealers when working outwith the local area and would it consider changing the current arrangements to require itinerants to hold a licence for each authority area in which they operate? Or to obtain a national licence?”**

Any licensing system balances effective regulation against disproportionate administrative burden. In the case of itinerant metal dealers, the Parliament, in passing the Civic Government (Scotland) Act 1982, felt that the balance fell in allowing an itinerant dealer to work nationally as opposed to having to seek up to 32 different licences to operate across local authority boundaries.

We accept that enforcement may be strengthened by limiting the scope of a licence. That said, we would not regard it as an insuperable problem. If an individual comes to the attention of either a licensing authority or the Police then they can check the position with the issuing authority.

- **“A number of organisations have suggested the Bill should require metal dealers to display their licence, which would assist enforcement. Such a provision is included in the 2013 UK Act. Why has the Scottish Government not included such a provision in the Bill and would it consider doing so?”**

We are considering the merits of this suggestion. However, it is currently the view of the Scottish Government that such a requirement could be delivered by existing secondary powers and does not require provision to be made for this in the Bill.

- **“Metal dealers have indicated that the requirement to record the date when scrap metal is processed could be problematic. This is because metal is sorted and consolidated with other similar material. How does the Scottish Government respond to these comments?”**

The Scottish Government sees the force of these arguments and will consider bringing forward an amendment at Stage 2.

Public Entertainment Venues

- **“Concerns have been raised about the amount of time necessary before a local government resolution in relation to a public entertainment licence can come into force. Does the Scottish Government consider there is a case for reducing the current requirements from nine months?”**

The Scottish Government is open to suggestions for an alternative period. Nevertheless, we are conscious that that a period of reasonable duration is required between a decision to expand a licensing requirement and the requirement coming into force. In some circumstances it would be the case that a business would be licensed for the first time and it is reasonable that they have time to apply for a licence and also to make any changes to their operations that may be required as a condition of the licence.

Sexual Entertainment Venues

- **“There is concern some venues may claim that, as the performers are self-employed, there is no financial gain to the venue. This even although the Bill provides for a sexual entertainment venue licence to be required where there is direct or indirect financial gain. Local authorities have raised concern that the requirement for any sort of financial gain could lead to protracted legal action. Does the Scottish Government consider the definition currently takes this into account?”**

Yes. The Scottish Government notes the evidence offered to the Committee in Oral evidence on 14 January from Professor Hubbard. He said,

‘The provisions clearly refer to direct or indirect financial gain. There has been no case in England in which anybody has challenged the idea that somebody providing free striptease entertainment may not be benefiting indirectly from increased patronage, which results in increased alcohol sales. I think that the definition is adequate in that sense.’

The Scottish Government shares that view and is also of the view that the same principle of ‘indirect gain’ would apply to someone facilitating self-employed performers.

“There is confusion amongst stakeholders as to what sort of venue might be captured by the definition of a sexual entertainment venue, in particular, private members’ clubs, massage parlours, gay saunas etc. Is it the Scottish Government’s intention to include these premises within the licensing regime and if not which premises does it intend to exclude under inserted 45A(7)(b)?”

The Scottish Government has no specific list of premises that would be excluded under 45A(7)(b) but it is conscious that such a power may be necessary if the concerns raised in evidence by the Federation of Scottish Theatre arose i.e. theatrical performances found themselves subject to licensing.

In respect of the types of venue raised in the question, if they meet the licensing definition in terms of the activities conducted on the premises and the need for financial gain, then the Scottish Government is content for them to be licensed. We note that nothing in the licensing regime would serve to permit or mitigate illegal activity if offences are being committed e.g. brothel keeping, trading in prostitution or use of premises for unlawful intercourse.

“What is the Scottish Government’s rationale behind setting the age of 18 years under which a person should not undertake employed duties at a time when sexual entertainment is being provided?”

The Scottish Government believes there is a clear public interest in young people not working within the premises of a sexual entertainment venue when sexual entertainment is being provided. The age limit seemed appropriate given the nature of the entertainment. This is in line with age limits in respect of related activity such as the age when alcohol can be purchased or sold unsupervised.

“What is the Scottish Government’s view on whether Licensing Boards or Licensing Committees are best placed to implement the sexual entertainment venues licensing regime and the reasons to support the view expressed?”

We consider that the Local Authority (Licensing Committee) is best placed to regulate sexual entertainment venues as the licence is a civic licence regulated under the Civic Government (Scotland) Act 1982. Licensing Boards are responsible for alcohol licensing under the Licensing (Scotland) Act 2005. In terms of the regime set out in the Bill, sexual entertainment venues would be in a position comparable to theatres, cinemas, concert venues and others who may find themselves needing both an alcohol premises licence as well as a civic licence.

Wider licensing matters

- **“The Brightcrew case – arguably – prevents licensing boards exerting control over types of entertainment beyond sexual entertainment which might appear in a licensed premises’ operating plan – e.g. music and, if the Bill becomes law, theatre. Why should the law be strengthened in relation to sexual and theatre entertainment but not in these other areas?”**

The Brightcrew case arguably does not create any new legal principles but rather restates the principles set out in the Licensing (Scotland) Act 2005. The Act permits a Licensing Board to regulate the sale of alcohol and premises on which the alcohol is sold and any other purpose connected to the sale of alcohol. This provides some of

the rationale for establishing a new licensing regime for sexual entertainment venues (indeed the Brightcrew case highlighted the limitations faced by Licensing Boards in this area). That said, we believe that a Board can adequately deal with a variety of matters that are conducted on the premises that can more closely be held to be connected to the sale of alcohol and it would not be helpful to Boards or licence holders to create a raft of new licences.

- **“On a similar vein could the Scottish Government comment on suggestions that the use of occasional licenses can in some circumstances avoid more stringent tests being applied.”**

As the Committee is aware, the Licensing (Scotland) Act 2005 sets out the legislative process for applying for an occasional licence. The occasional licence is a licence which covers a premises other than a premises that holds a premises licence, and can be made by a premises licence holder, a personal licence holder or a voluntary organisation. It can only have a period of not more than 14 days. There are limits on the number of occasional licences that a voluntary organisation may apply for. The 2005 Act also lays down conditions to attach to occasional licences. Generally speaking, the conditions replicate those for full premises licences.

The licence is for covering events that, by their very nature, could be infrequent and last for only a short space of time.

The Committee will wish to be aware that upon receipt of an occasional licence application the Licensing Board must give notice of it to the appropriate Chief Constable and the LSO. Any person may object to the occasional licence application. Grounds for refusal are effectively the same as that for premises licences, with the exception of overprovision.

- **“Has the Scottish Government given any consideration to the consolidation of licences more generally, for example, cinema licences with public entertainment licences?”**

Sections 1 to 3 and 5 to 16 of the Cinemas Act 1985 are reserved under B5 of the Schedule of the Scotland Act 1998. It would be outwith the competence of the Scottish Parliament to legislate on the contents of these sections, which are primarily relating to the licensing of premises for the use of film exhibition.

We would consider it desirable for greater consolidation of licensing to occur where appropriate. In the case of theatre licensing there was considerable feeling from theatrical groups that regulation was burdensome which is why the Bill proposes that the licensing of theatres should be carried out under the public entertainment licensing provisions of the Civic Government (Scotland) Act 1982.

- **“Is there consistency across the various licensing regimes as to what is considered minor and major variations to licences and how these are dealt with by the licensing authorities?”**

Under the alcohol licensing regime set out in the Licensing (Scotland) Act 2005, as amended, the premises licence includes a large volume of information. This includes the application form, as well as the operating plan and layout plan. It is an offence to trade not in accordance with the premises licence. Therefore, if the licence holder intends to operate in a manner which deviates from the details originally approved,

then a variation is required. Such variations can be classed as either minor or major variations.

Variations which are considered minor are set out at section 29(6) of the 2005 Act, and further minor variations are provided for in The Licensing (Minor Variations) (Scotland) Regulations 2011. Minor variations must be granted by the Licensing Board for a small fee. If a variation is not a minor variation then it will be a major variation. Major variations are subject to section 21(1), 21(2) and section 22, that is the requirement to notify neighbours, health board and police, with it being open to anyone to lodge an objection. All major variations must be considered by the Board at a hearing.

There are separate arrangements under the civic licensing regimes within the Civic Government (Scotland) Act 1982. For Part II licences, Schedule 1, para 9 covers the notification of changes and alterations, and para 10 covers the variation and suspension of licences. Sex shops are contained with Part III of the Act and Schedule 2, paras 14 and 15 refer.

There are no existing plans for reform in this area either in respect of alcohol or civic licensing. There are no existing plans for reform in this area, although we would particularly welcome views from stakeholders about the current list of specified minor variations if they are concerned that issues that should be subject to a full hearing under the alcohol licensing regime are being treated as minor variations.

I hope this assists the Committee's deliberations and I apologise for missing your deadline for responding.

Quentin Fisher
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