

## **Written submission from the Law Society**

### **Introduction**

The Law Society of Scotland (the Society) aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members, but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society Committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Society welcomes the opportunity to respond to the call for evidence on enquiry on Fixed-odds Betting Terminals launched by the Scottish Parliament's Local Government and Regeneration Committee on 8 July 2015 and has the following general comments to make.

### **General Comments**

The Society has also made a written submission to the Scottish Parliament's Devolution (Further Powers) Committee's call for written evidence entitled "Implementing the Smith Agreement - The UK Government's Scotland Bill" and has also proposed amendments to Clause 45 of the Scotland Bill which were tabled in advance of Committee Stage in the House of Commons on 6 July 2015.

In essence, these amendments proposed to provide for the Scottish Parliament to have the power to regulate the number of gaming machines authorised under a betting premises licence irrespective of the value of the maximum charge and also to allow for the Scottish Parliament and Scottish Ministers to vary the number of gaming machines, irrespective of when the betting premises licence was granted.

There are different views in the profession as to how the Scottish Parliament should exercise any of the powers devolved by Clause 45 of the Scotland Bill, but there is a consensus that, as currently proposed, it is an undesirable outcome for some aspects of the Gambling Act 2005 (which is a UK Statute) and aspects of any future Scottish Parliament legislation to apply to the same betting premises and that it is more desirable for the law relating to the variation of the number of gaming machines authorised by a betting premises licence to be made in one legislature rather than two .

With particular reference to the questions contained within the Call for Evidence, we should like to respond as follows.

**Question 1. What would be the benefits and disadvantages for you as a consequence of the UK Government's proposed provision in the Scotland Bill 2015?**

We question whether Clause 45 of the Scotland Bill gives proper effect to Paragraph 74 of the Smith Commission Report which stated "the Scottish Parliament will have the power to prevent the proliferation of Fixed-odds Betting Terminals".

We note that the term "Fixed-odds Betting Terminals" as referred to in the Smith Commission Report does not reflect the legislative definition and therefore suggest that any exception to Section B9 in Part 2 of Schedule 5 to the Scotland Act 1998 takes into account the Categories of Gaming Machine Regulations 2007 which can be found at <http://www.legislation.gov.uk/ukxi/2007/2158/contents/made>

In particular, Regulation 5 defines Category B Gaming Machines. In terms of Regulation 5 (5) as amended by the Gaming Machine (Circumstances of Use) (Amendment) Regulations 2015 which came into force on 6 April 2015, an individual must not be able to pay more than £50 as a charge for use of a Sub-Category B2 Game Machine which is made available for use other than in a casino.

We also note that the Gambling (Categorisation and Use of B2 Gaming Machines) Bill which was introduced into the House of Lords on 4 June 2015 by Lord Clement-Jones seeks to replace the maximum charge for use of a Sub-Category B2 machine from being no more than £100 to being no more than £2.

In all the circumstances, we believe that no account has been taken of the current regulations.

We question how the £10 figure referred to in Clause 45 of the bill was arrived at as it does not match any of the current maximum charges in terms of the categories of Gaming Machine Regulations.

We also highlight an enforcement difficulty for licensing authorities, Police Scotland and Gambling Commission compliance officers. One licensed betting premises will be governed by law made in two separate legislatures. This will undoubtedly cause confusion for regulators and authorities as well as the trade.

**Question 2. What would be the benefits and disadvantages for you as a consequence of the proposed alternative provision suggested by the Scottish Government?**

While there are differing views in the profession as to how the Scottish Parliament should exercise any of the powers to be devolved to it, we believe that it is much better for the law in this area to be made in one legislature rather than two.

Also, the Scottish Government's proposed Clause 45 is entitled "Gaming Machines on Licensed Betting Premises", but seeks to except Gaming Machines for which the maximum charge for use is more than £10 in respect of all "premises licences under the Gambling Act 2005."

Premises Licences would include not just traditional betting shops, but also casinos, Unlike the UK Government's Clause 45, the Scottish Government's draft Clause 45 will apply to existing premises licences.

Devolution to the Scottish Parliament of the law regulating certain categories of gaming machines will raise in the future the issue of what legislation the Scottish Parliament will want to enact. This will be a matter for a future Scottish Government to consult upon and implement.

We note, however, that it is unlawful for a public authority to act in a way which is incompatible with a convention right in terms of Section 6 (1) of the Human Rights Act 1998.

Accordingly, if a licensing authority, being a public authority for these purposes decided to limit existing licence entitlements, then this may be contrary to Article 1 Protocol 1 of the European Convention on Human Rights (Right to peaceful enjoyment of property).

In the case of Tre Trektorer Aktiebolag v Sweden (1989) 13 EHRR 309 the European Court of Human Rights determined that an existing licence is a property right and a possession. While such a possession may be interfered with by a public authority by way of restriction and deprivation on the basis of an overriding requirement in the public interest, no evidence was presented in the Smith Commission Report, Scotland Bill or other consultations which demonstrate that limiting the numbers of gaming machines in betting licence premises or indeed in any other premises is in the public interest or that an interference is necessary, justified or proportionate, in such a way as to overcome adherence to Article 1.

We believe that the test here for the lawfulness of interference with a premises licence granted under the Gambling act 2005 would be one of proportionality.

In order to establish a fair basis for a limitation of a licence there would have to be evidence that a policy of restriction or deprivation of licences is proportionate and that there is no "less restrictive" alternative available.

**Question 3. Which of these approaches do you prefer, and why?**

We would prefer an approach that will give clarity to both the trade and licensing boards.

**Question 4. Are there any changes in this area of law that you would like to see which are not covered by either proposal, and why?**

Yes.

We previously raised concerns with the Gambling Commission about whether a Licensing Standards Officer appointed in terms of Section 14 of the Licensing (Scotland) Act 2005 has any power to carry out any of the enforcement activities under Part 15 of the Gambling Act 2005, both in respect of alcohol licensed premises and gambling licensed premises.

Unlike in England and Wales, the licensing authority in Scotland is the Licensing Board which has no officers or employees. Licensing Standard Officers are officers of the local authority, not of the Licensing Board.

Amendments were lodged by Ian Murray MP to Clause 45 of the Scotland Bill at Committee Stage which would have allowed the Scottish Parliament to legislate for Licensing Standard Officers (LSO's) in Scotland to be authorised persons who may exercise inspection and enforcement functions.

We believe this to be a sensible change in this area of law which we would like to see implemented to ensure that enforcement powers open to authorised local authority officers in England and Wales will be extended to Scotland.

**Question 5, Please make any further comments you feel that is relevant to Committee's Enquiry into FOBT's**

The principles to be applied by a licensing authority in terms of Section 153 of the Gambling Act 2005 are that licensing authorities shall aim to permit the use of premises for gambling subject to the provisions of Section 153 (1) (a) (b) (c) and (d) of the Act.

Moreover, we note that, in terms of Section 153 (2) of the Act, in determining whether to grant a premises licence a licensing authority may not have regard to the expected demand for the facilities which it is proposed to provide.

We note that this is a departure from previous legislation where a licensing authority could refuse a premises licence on the basis of demand already being met.

Accordingly in order to implement Recommendation 74 of the Smith Commission Report we suggest that a full review of the impact of the irresponsible gambling activities could be undertaken prior to any legislative change.