

Local Government and Communities Committee
The Scottish Parliament
Edinburgh EH99 1SP

Via email

LocalGovernmentandCommunities@parliament.scot

17 May 2019

Dear Mr Dornan

Thank you for the letter dated 9 April 2019 from the Local Government and Communities Committee (the Committee) addressed to the secretary of the Society's Licensing Law sub-committee concerning the theme of licensing and the local communities.

Your letter refers to two evidence sessions with:

- Minister for Community Safety, Ash Denham MSP dated 27 March 2019
- Stakeholders on 23 May 2018

We also note the terms of the Minister's response to the Committee dated 1 May 2019 clarifying the nature of the cross-portfolio alcohol brief (https://www.parliament.scot/S5_Local_Gov/General%20Documents/20190501_MinisterCSToConvener.pdf)¹

Our Licensing Law sub-committee is made of solicitors who are clerks to the Licensing Boards and those representing trade clients.

We are pleased to have the opportunity to respond to the issues raised under the following headings:

Legal obstacles (if any) to delivering public health objectives via the licensing system

Question 1: The Committee queried if the Licensing Boards felt confident to pursue public health objectives, and to mitigate public health risks, via the licensing system. In particular, the Committee noted that there were varying views as to whether current laws and policies empower the Licensing Board, in appropriate cases, to refuse applications on grounds of overprovision (and the negative public health consequences associated with that), or whether they feel constrained in doing so because the law is insufficiently robust or clear on this point.

Current Law

It is useful to set out the current law and the existing powers of the Licensing Boards. Licensing Boards can refuse an application for a new licence or a major variation of an existing licence on the ground of overprovision. Licensing Boards, in this context, require to assess the issue of overprovision.

There have been changes (which came into force on 30 September 2016) to the definition of overprovision as included in the Air Weapons and Licensing (Scotland) Act 2015 (2015 Act). These meant that:

- (1) a Licensing Board can identify its whole jurisdiction as an overprovision zone
- (2) the refusal of a licence could be based on premises of “same or similar description” which changed the previous wording which was “that description.”

In effect, the power to refuse an application for a new licence or a major variation of a licence on the ground of overprovision has been widened. Licensing Boards have been given wider powers in assessing overprovision by adding to their assessment of overprovision that they:

“may have regard to such other matters as the Board thinks fit including, in particular, the licensed hours of licensed premises in the locality.” (Section 55(3) (b) of the 2015 Act).

The concept of overprovision is not new and is well understood by the Licensing Boards. They are aware of the relevant case law as well as local knowledge of their area.

Conclusion

In the light of the recent changes to the current law, we have carefully considered whether we consider that any legal obstacles exist. The Licensing (Scotland) Act 2005 has now been in force for nearly a decade. Licensing Boards therefore have a great deal of experience in implementing the law as well as assistance in interpretation from the courts in respect of decided caselaw.

The ethos of Scottish licensing law is that issues are dealt with at a local level. Each Licensing Board is deemed to know its own area and to be able to deal with local problems.

A Licensing Board may, if it sees fit, design its whole area as an area of overprovision. Each Licensing Board is required on a regular basis to update its policy, in particular its views on overprovision, and all Licensing Boards have recently completed this exercise and may have reached a view in their area that there may be no overprovision. Such a decision is not binding on them on a case by case basis. That means that there is no evidence for them to consider overprovision related harms. In coming to that view, they will have had the benefit of input from a wide range of stakeholders, including the Health Boards, Community Councils and the Alcohol and Drug Partnerships. These groups are also represented on the Local Licensing Forums.

From the evidence session on 29 March 2019, some concerns were expressed that in some areas that there may be little interest in the Local Licensing Forums. It may be worth reminding the Committee of the role of the Local Licensing Forums which is not to provide evidence of overprovision. They are the current legislative conduit for wider community concerns to be raised with the local Licensing Board though some of the Local Licensing Forums may be less active than others (Peter Reid 29 March 2019) which given the localised nature of licensing seems to us somewhat inevitable.

As indicated, the Licensing Boards can refuse an application for a new licence or a major variation of an existing licence on the ground of overprovision. There is, we would suggest, no evidence to indicate that refusals of any new licence are not occurring because of any such “legal obstacles.” Licensing Boards make decisions based on the evidence provided. If the evidence does not support a decision to refuse an application on the grounds of overprovision, then that ground of refusal would not apply.

We therefore consider that the Licensing Boards who take the view that an application ought to be refused on the grounds of overprovision are able to do so without constraint, provided they act in accordance with the law and with the full knowledge of the facts. The current licensing system allows anyone with an interest to make representations.

We would also remind the Committee of the purpose of licensing law which is to provide a regulatory framework as the 2015 Act refers:

“to make provision for the licensing and regulation of air weapons; to amend the Licensing (Scotland) Act 2005 [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] ; to amend and extend the licensing provisions of the Civic Government (Scotland) Act 1982; and for connected purposes.”

That sets out the context in which Licensing Boards make their decisions based on the regulatory system in place. Any impression given that there are indeed legal obstacles preventing the delivery of the public health objectives may be based on disquiet that the Licensing Boards are granting too many licences, otherwise there would be successful delivery of the public health objective. That seems to confuse the difference between alcohol policy and licensing policy. The licensing system should not be viewed simply as a means to secure public health. A Licensing Board should not seek to refuse licences or establish overprovision under a policy unless there is clear evidence so to do.

We would also highlight that the grant of applications for new licences or renewals should be seen against the backdrop of a very modest flux in the number of licences at a national level. We understand that there has been a fall in the number of licences in existence on 1 September 2009 from 22,500 licences to 16,696 licences in 2018. (<https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubLiquor>)

We are therefore of the view that no change in the law is required at the present time.

Overprovision and Alcohol Related Harm

Regarding the issue of the causal link between overprovision and alcohol related harm, we note that Alcohol Focus Scotland believe that there is a causal link between the number of alcohol outlets and alcohol related harm, stating that:

“over 50 studies show the association between availability and harm.”

(<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11557&mode=pdf>
Laura Mahon Chief Executive Alcohol Focus Scotland)

All of their conclusions stem from a report which they commissioned, the CRESH Report (Report dated 2 October 2014 entitled Alcohol-related illness and death in Scottish neighbourhoods: is there a relationship with the number of alcohol outlets? Richardson, Shortt and Mitchell, Centre for Research on Environment, Society and Health <https://www.alcohol-focus-scotland.org.uk/media/65042/Alcohol-outlet-density-and-harm-report.pdf>).

While it is not the role of this committee to comment on a piece of allegedly scientific research, the members have commented on a few issues arising from it. Firstly, although it concluded that the major problems stemmed from off-sale premises, it considered only the number of licences in the area and not the capacity of these premises. That Report and others have found a clear link between social deprivation and alcohol related harm. However, secondly, it also conceded that:

“our study was cross-sectional – it looked at a single point in time– hence while it suggested significant associations between outlet availability and alcohol-related harm we cannot conclude that the relationship is causal.”

(Page 10 of the Report dated 2 October 2014 entitled Alcohol-related illness and death in Scottish neighbourhoods: is there a relationship with the number of alcohol outlets? Richardson, Shortt and Mitchell, Centre for Research on Environment, Society and Health <https://www.alcohol-focus-scotland.org.uk/media/65042/Alcohol-outlet-density-and-harm-report.pdf>)

There is clear evidence linking areas of social deprivation and alcohol related harm; however, given the conclusions of the CRESH Report, the Committee is not convinced that a causal link between numbers of licences and alcohol related harm has been established

Community planning and licensing

Question 2: The Committee would welcome views from the Sub-Committee as to whether current law and practice enables local communities to play a full role in helping set local licensing priorities and advance the licensing objectives. If not, the Committee would welcome views on how the system could be improved. An area of interest is whether Boards could participate in Community Planning Partnerships as a mechanism for better understanding community priorities.

Current Processes

The 2005 Act has greatly extended the scope for community and public involvement in the licensing process. The regular review of Licensing Board policies involves community input, as does the work of Local Licensing Forums. Community and public engagement can be illustrated as follows:

- The Licensing Boards who have just assessed their over-arching policies, taking on the views of the community as well as other stakeholders. That engagement took the form of public evidence sessions, seminars, consultations online, emails and responses from individual members of the public and community organisations, including the community councils and local residents' associations.
- Local community groups being invited to sit on the Local Licensing Forums across the country. The Licensing Boards are required to place such weight on those concerns as they see fit. As indicated above, the level of input varies from place to place which is inevitable.

In dealing with an application for a premises licence, the whole process involves community input. This begins at the planning stage. Any application for a premises licence must first have received planning permission. Community issues are therefore relevant under the Town and Country Planning (Scotland) legislation. The next opportunity for community involvement begins when the premises licence application is lodged. It requires to be advertised in various ways under the 2005 Act including site notices, letters to local residents and information published online. Any person can object to a new licence, any major variation of a licence or an occasional licence.

Community Councils regularly attend Licensing Boards to speak against proposals which cause community concerns. The amenity of the local community is a clear and important criterion in considering any planning application. Anyone is entitled to object or make representations to a Licensing Board when they are considering such an application.

Our experience is that objections and representations are regularly made to planning applications by, amongst others, Community Councils, the Health Boards, Alcohol and Drug Partnerships and members of the public.

The current system works well in practice, in engaging the communities and the public. There should be no suggestion that the Licensing Boards are not listening to the views of the community as this demonstrates a number of ways in which the community is and can be engaged.

Licensing Boards could participate in Community Planning Partnerships as a mechanism for better understanding community priorities.

There seems no need for more change with yet more amendments to the licensing law, especially, in relation to the Community Planning Partnerships (CPP) when there

is currently a structure in place through the Local Licensing Forums. The CPPs are made up of a variety of council officers, charitable and voluntary organisations, and businesses. They have local action plans and can be involved in projects, as required. If Board members were to be involved and deciding or voting on matters, conflict of interest, either actual or perceived, may well arise. The CPP has the right to make representations at present as “any person” in any event.

We refer to the Convener’s comments when he stated that:

“the licensing boards sit outwith the councils’ community planning and strategic planning frameworks. That helps them to remain independent, but it makes it difficult to connect alcohol licensing to other community initiatives.” (27 March 2019)

We would be concerned about any change to the law which might be seen as jeopardising that independence of a Licensing Board since alcohol licensing is not connected to other community matters. Licensing Boards have to be independent. It is especially important to understand that the Licensing Board is not a committee of the council. The Licensing Board may have regard to community initiatives or related information if it wishes and attach such weight to those matters as it sees fit, but it cannot be bound by them nor should it be structurally or legislatively connected to them, otherwise, this would fetter its properly understood role and independent quasi-judicial body.

Since the 2005 Act, there has been a range of:

- Primary legislation including the Alcohol etc (Scotland) Act 2010, Criminal Justice and Licensing (Scotland) Act 2010, the 2015 Act and the Alcohol (Minimum Pricing) (Scotland) Act 2012.
- Secondary legislation including The Immigration (Alcohol Licensing and Late Hours Catering) (Scotland) Regulations 2018 that have been published but are not yet in force as well as 40+ sets of regulations.

Every time the law changes, there are consequences. Retraining of licensees and staff is required in addition the amendment and republication of training materials. Local authorities are equally affected as far as their staff are concerned.

What we would support would be the much-needed consolidation of the existing licensing law which is well overdue. That would make the statute law clearer, shorter and more accessible.

Consolidation has real practical benefits for those who work with the law for those working in the law such as the clerks to the Licensing Boards and in advising clients, those considering future legislative provisions and for those who need to access or use it such as the public and businesses.

Otherwise, we do not consider that any clear need has been demonstrated for any other changes.

We would be happy to discuss any matters from our response.

Regards

Archie MacIver Convenor
Licensing Law Sub-committee
Law Society of Scotland