

Licensing (Scotland) Act 2005

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Background to the 2005 Act

Since 1976 liquor licensing law in Scotland has been regulated by the Licensing (Scotland) Act 1976. Concern over the age of that Act, changes in drinking culture, and a strong health and anti-social behaviour lobby, caused the Scottish Executive to appoint a senior Scottish Judge, Sheriff Principal Nicholson, to set up a committee to review the Act. Most but not all of the recommendations of his report have found their way into the Licensing (Scotland) Act 2005 which received Royal Assent on 21 December 2005.

The Act is influenced by the Licensing Act 2003 for England and Wales although there are many differences. There are many regulations made under the Act.

All the licences under the new system and most of the provisions of the 2005 Act will take effect at 0500 am on 1 September 2009. Transition started on 1 February 2008. It will last until the end of August 2009. During transition 1976 Act licences will continue to run until 1 September 2009 when they will terminate automatically. In this period 1976 licences will be deemed to automatically be extended. I will look a little more at transition later in this article paper but having set the scene I want to look at some of the key features of the Act.

The Licensing Objectives

Section 4 establishes five "licensing objectives". These are preventing crime and disorder, securing public safety, preventing public nuisance, protecting and improving public health, and protecting children from harm.

These represent the values on which the Scottish licensing system will be based. The 1976 Act was criticised by judges for lacking a clear and coherent philosophy. The 2005 Act attempts to remedy that. Advisers will need to assess in what way a particular proposal promotes or is inconsistent with the objectives. Inconsistency with a licensing objective is a ground for refusing an application for a premises licence.

In England and Wales the Licensing Act 2003 has all of these objectives apart from the health objective. What the promotion of health means in the context of the sale of alcohol has been the subject of debate.

Licensing Boards

Licensing Boards composed of local authority councillors remain. The Boards are though separate legal entities from the local authority. There are 32 Boards for all of Scotland. Their area of authority is based on local authority boundaries.

Boards have always been a feature of the Scottish system. However the system of quarterly Board meetings in January, March, June and October will go. Boards will now meet to process business as and when required.

The work of Boards will be assisted by Licensing Standards Officers who have the remit of enforcing compliance with licensing law and licence conditions. These officials are an innovation.

Boards have power to take action against licence holders who breach the licensing objectives or the conditions of their licence. Action can be directed at both the premises licence and the personal licence. Action can include revocation of the licence or suspension of the licence, and in addition in the case of personal licences, the possibility of endorsement of the licence.

Boards must issue policy statements every three years as to how they will approach their functions. The statement should offer guidance and clarity in key areas like opening times, extension of hours and children in premises. Some Board policies are enormously long - the Glasgow policy is longer than the Act. Others like the Highland policy are commendably brief. Boards are also under a new duty to assess over provision of licensed premises.

Many, but not all of the decisions of Boards are capable of appeal on specified grounds to the local Sheriff Court. Appeal from that court lies on a point of law to the Supreme Scottish civil court which is the Court of Session in Edinburgh. Decisions which are not open to appeal will be susceptible to judicial review in the Court of Session.

The Premises Licence

The 2005 Act abandons the seven fixed types of licence of the 1976 Act of public house licence, entertainment licence, off sales licence, hotel licence, restricted hotel licence, restaurant licence and refreshment licence.

Modern licensed premises had difficulty in fitting their operation into a particular category of licence. A department store selling alcohol for consumption off the premises but which had sales in the in-store restaurant could only operate under a public house licence. Boards and practitioners were also well aware of the problems under the 1976 Act where “entertainment licensed premises” would be little more than pubs with very little entertainment on offer. The view came to be that the law had failed to keep in step with the ways in which alcohol has increasingly come to be sold. Not all have welcomed the change. Some operators see this “level playing field” as causing at a stroke mass overprovision.

The new premises licence will provide both the trade and Boards with vastly increased flexibility as the licence should be tailored to reflect the specific operation.

It is also fair to say that the premises licence will provide Boards with greatly enhanced powers over licensed premises.

Applying for a premises licence

An application for a premises licence can be made by any person (and this includes companies) over the age of 18 and must be accompanied by an operating plan in a prescribed form, certificates of suitability from the local authority as to planning, building control and, where appropriate, food hygiene matters, and a layout plan. The forms of operating and layout plans are as prescribed by the Premises Licence (Scotland) Regulations 2007.

The operating plan must set out the proposals of the operator for the sale of alcohol for consumption on and off the premises and any arrangements for admission of children and the proposed hours of operation.

There is debate as to whether Boards can insist on applicants lodging risk assessments. The Scottish Beer and Pub Association (a branch of the British Beer and Pub Association) has reminded Boards of the decision of the High Court in *British Beer & Pub Association v. Canterbury City Council* [2004] EWHC Admin 1318 on Board policy under the Licensing Act 2003. There a risk assessment policy was held to be unlawful because the policy appeared to mandate compliance rather than to simply state what the authority considered to be desirable. A Scottish policy which imposed extra-statutory mandatory requirements on an applicant might therefore be unlawful.

The application must be considered at a Board hearing. Unless a ground of refusal is made out, it must be granted. The grounds for refusal in section 23 are that the premises are “excluded premises”- that is premises at motorway service stations or subject to limited exceptions, those used as a garage; prior refusal within a year of a previous grant unless the Board is minded to the contrary; grant of the application would lead to the continuous sale of alcohol for 24 hours in the absence of exceptional circumstances; the application would amount to an off sales outwith the permitted hours for off sales (on which more later); the grant would be inconsistent with one or more of the licensing objectives; the premises are unsuitable having regard to the nature of the proposed activities, their location, character or condition or persons likely to resort to the premises and finally, grant of the application would lead to overprovision in the locality of the same or similar description as the application premises. In relation to the latter in a reversal of the 1976 Act position, capacity as well as the number of existing premises can be taken into account.

Garage/petrol station forecourt shop premises which presently hold a licence will be treated as premises excluded from holding a licence, unless the Board decides they fall under section 123(5) of the 2005 Act, which will allow premises which serves a wider local function or is a required community resource to continue to hold an alcohol licence. It follows that garage/ petrol station forecourt shops which do not fall within this definition will no longer be able to sell alcohol from 1 September 2009. The Scottish Parliament considers that a negative message is sent out on the drink-driving campaign when alcohol can be sold alongside petrol.

Objection can be made by any person, save that somewhat controversially, the Chief Constable can only object where the applicant has a relevant foreign offence or where the applicant or any “connected person” has been involved in serious organised crime. Under the 1976 Act, the Chief Constable could object on the vaguer basis that the applicant was not a “fit and proper person.”

Whether or not he objects, the Chief Constable is obliged to provide a report on all cases of “anti-social behaviour” within the preceding 12 months which took place on or in the vicinity of the premises.

A premises licence once granted has indefinite effect but can be suspended, revoked or varied by the Board. It can be transferred to another party on application to the Board by the holder or sometimes a third party. Under the 1976 Act a licence had to be renewed every three years.

Premises must have a premises manager although during transition none need be specified. The premises manager specified in the premises licence must also be a personal licence holder. There can be more than one personal licence holder working in the same premises. The issue of whether there must always be a personal licence holder on the premises when alcohol is sold is not free from doubt. It is likely that the point will require to be litigated.

Conditions

All premises licences are subject to the mandatory conditions in Schedule 3 to the Act. The aim of these conditions is to promote national consistency. This heralds a new approach in Scotland. With limited exceptions under the 1976 Act the Board could not impose a condition on a licence.

Under section 27 there are four types of conditions. These are Schedule 3 mandatory conditions; late opening conditions; pool conditions and local conditions. Local conditions allow Boards to deal with local issues. Breach of any condition can lead to enforcement action, including revocation of the licence.

Many Schedule 3 conditions aim to stamp out irresponsible drinks promotions such as happy hours or “buy one, get another half price”. Some conditions lack clarity. It is unclear whether Schedule 3 imposes a duty to trade or a duty to have a personal licence holder on the premises at all times.

The Scottish Ministers can add further national mandatory or discretionary conditions if they think they are needed under the five licensing objectives. The discretionary conditions are called pool conditions as Boards can pick and choose which conditions they will apply from this additional pool.

There are already two sets of further mandatory conditions in the Licensing (Mandatory Conditions) (Scotland) Regulations 2007 and the Licensing (Mandatory Conditions No. 2) (Scotland) Regulations 2007. The latter imposes conditions on the display of alcohol in off-sales to which I will come.

The Licensing Conditions (Late Opening Premises) (Scotland) Regulations 2007 deals with conditions for adult entertainment premises or late night entertainment premises. These conditions are onerous. If the premises open beyond 1am then they are caught and some conditions apply, such as the need for a first-aider on site. If the premises also have a capacity of 250 people or over or plays music beyond 85 decibels or provides dancing or adult entertainment or when fully occupied, is likely to have more persons standing than seated, then all of the late opening conditions apply. These include a requirement that there must be working CCTV, that there must be persons responsible for the checking of toilet facilities, and that there must be Security Industry Authority licensed personnel at every entrance after 1am.

Section 27(6) gives power to Boards to impose additional local licence conditions. A Board can only impose these if they do not run counter to the effect of national conditions, or do not attempt to alter or add to those conditions to make them more onerous or restrictive and cannot duplicate control under other regimes. It is arguable that many Board policies on local conditions are unlawful. Some policies seem to add to national conditions. Some policies appear to deal with matters which are already covered by other regulatory schemes such as building control or food hygiene.

Licensed Hours

Section 62 sets up the new regime of licensing hours. This is a move away from the system of "permitted hours" of the 1976 Act. There each licence had specified permitted hours laid down in the 1976 Act. Thereafter those hours, could in the discretion of the Board be extended on a regular or occasional basis under section 64 of the 1976 Act if local conditions justified an extension.

The Act ends the practice of giving extensions to statutorily permitted hours in favour of clarity up front about acceptable hours. Regular extensions will become history but under section 59 there remains scope for occasional extensions to cater for special events.

Licence holders are required to spell out their hours in their operating plans. Applicants need to know Board policy on hours and be prepared to argue why they need hours "outwith policy."

Section 64 of the 2005 Act creates a presumption against 24 hour opening. Under the 1976 Act 24 hour opening is competent but as far as I know it has never happened. Boards are entitled to agree to exceptions to that general presumption but only if satisfied that there are exceptional circumstances justifying it. National guidance will set out national guidelines on the policy that should be adopted by Licensing Boards in relation to circumstances that might merit 24 hour opening.

Off Sales

A controversial last minute amendment to the Bill re-introduced a system of permitted hours for off sales. This has been widely criticised as contrary to the philosophy of the Act. These hours are 10am to 10pm. Where an application is made which would have the effect of permitting the sale of alcohol between the hours of 10.00 pm and

10.00 am on an off sales basis, then the Board must refuse the application. These hours represent a net reduction in the hours available to off sales under the 1976 Act and are based on the view that the control of off sales should be seen as part of a wider strategy to control anti-social behaviour and problem drinking.

The view of the Scottish Executive is that the buying public needs to be reminded that alcohol is not an ordinary commodity to be casually purchased along with milk and bread. There is talk of separate till points for alcohol as a possible next move. For now the Licensing (Mandatory Conditions No 2) (Scotland) Regulations just added a new mandatory condition to Schedule 3. Alcohol which is for sale off the premises must be displayed in one or both of a single area of the premises agreed between the Board and the holder of the licence or in a single area of the premises which is inaccessible to the public. There will be no exceptions for seasonal displays or special occasions.

This means that these areas are going to have to be marked out on the layout plan and Boards will need to make a decision on whether the layout is acceptable. In the case of an “agreed” area, a product other than alcohol may only be displayed if it is a non-alcoholic drink or packaged with, and may be purchased only along with alcohol. It also means no more cheese placed next to wine, barbecue foods next to beer, or for those of a more romantic leaning, chocolates next to champagne. Unless the food is packaged along with the alcohol such as the boxed cheese and port sets found at Christmas such a display will not be allowed. It also means that the alcohol cannot now be displayed at different points around the store.

Personal Licences

In terms of the mandatory conditions the premises manager will also have to hold a personal licence. Other personal licence holders could be employed on the premises to help the premises manager. A personal licence is a permission which allows that person to lawfully supervise and in general authorise the sale of alcohol on the relevant premises and under section 72 any person over the age of 18 who has a prescribed licensing qualification can apply. Application for a personal licence is made to a Board which need not be the Board which granted the premises licence. Unless a basis for refusal exists the application must be granted. Refusal would have to be based on the crime prevention ground or that the applicant lacks a prescribed licensing qualification. A personal licence can be lost through enforcement action. A licence must be renewed each ten years.

Transition

For the dry detail have a look at the Licensing (Transitional and Savings Provisions) (Scotland) Order 2007 and the Licensing (Appointed Day and Transitional Provisions) (Scotland) Order 2007.

During transition to promote fairness for licensees and reduce administrative complications, the following will happen:

- No 1976 Act renewals - existing licences due to expire during transition and which would require renewal under the 1976 Act will be automatically extended to run until the end of the transition period.
- 1976 Act regular extensions - such regular (annual) extensions as have been granted under section 64 of the 1976 Act when transition begins should be automatically extended to run until the end of the transition period.
- There will no longer be set quarterly meetings. The last quarterly meetings were held in January 2008.
- Boards will be required to use delegated powers/duty to delegate to clerks the remaining business of the 1976 Act, such as licence transfers. However Clerks are required to refer a case to a Board where they consider this to be necessary or expedient.

To ensure a controlled flow of applications all existing licensees are required to apply for their new licence during one of the following periods, according to the month of the quarterly Board meeting in which their existing 1976 Act licence is due to expire (the year of expiry being irrelevant):

- March expiries - must apply by the last lodging date of 7 March 2008
- June expiries - must apply by the last lodging date of 6 June 2008
- October expiries - must apply by the last lodging date of 3 October 2008
- January expiries - must apply by the last lodging date of 9 January 2009

However there is nothing stopping any applicant lodging their application early and applications can be lodged from 1 February 2008 regardless of the expiry date of their existing licence.

Boards have at least 119 days to decide premises licence applications during transition. Should a licence holder fail to apply by the set lodging date, the licence holder loses their “Grandfather Rights” and the application will be treated as an entirely new application when received.

The following partial Grandfather rights are applicable to existing 1976 Act licensees as they transfer into the regime of the 2005 Act:

- Exemption from the consequences of the overprovision assessment and from the overprovision ground for refusal of a licence where there is no change to the size, capacity or activities taking place on the premises.
- Exemption from the need to provide building standards, planning and food hygiene certificates where transfer is on a like for like basis.
- Where transfer is on a like for like basis but the licensing board considers that they would nevertheless be minded to refuse the licence on the grounds of the "location, character or condition of the premises", but that suitable modifications can be made to address this, the licence must be granted and the licensee given a period of 12 months to make the necessary modifications. If the modifications are not made within this period the licence would be revoked.

No other Grandfather rights are available and all other aspects of the new legislation will be applied.

During transition personal licence applicants can apply by the following times:

- Those disassociated with a premises licence application - at any time during transition
- Those associated with a premises licence application i.e. as named premises managers.
- Where a premises has not identified a premises manager at time of application, it is acceptable to allow this name to be provided at any time prior to a determined date before the end of the transition period. If no name was provided by this date the premises licence will fall.

New licences will continue to be a need to grant 1976 Act licences during the transition period if an applicant required a provisional licence (used where premises are being constructed) or wished to operate during transition. This will be achieved through a “hybrid” application process whereby either a current licence is granted which comes into effect immediately to allow the licensed premises to operate or, there is a provisional grant of licence in order to allow premises to be completed and a new premises licence or provisional premises licence is granted which will not take effect until the appointed day.

Offences and Test Purchasing

The Act also modernises the criminal law as it relates to licensing and introduces new offences and makes sense of some of the problems arising under the 1976 Act. The law relating to children on licensed premises under that Act was particularly complex and often little understood. The new Act simplifies the law on where and when children can be on licensed premises.

Section 105 introduces an innovation in Scottish terms with the introduction of test purchasing by the police in an attempt to catch careless or unscrupulous operators who sell to under age persons. For the first time the police will be entitled to use agents who are under the age of 18 to try to buy alcohol. A failed test purchase can lead to prosecution and/or enforcement action by the Board. Section 105 is now in force.

Conclusion

The 2005 Act looks likely to be here for a generation. It brings a desirable modernisation to Scottish licensing law. Compared to the 1976 Act it is a far more complex system with a lot more paperwork for practitioners and Boards to produce and understand. It clearly introduces a far greater degree of regulation of the trade. Whether by 30 years time the five licensing objectives will have been met remains to be seen.

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